HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

24th Report of Session 2013-14

Draft Commons (Town and Village Greens) (Trigger and Terminating Events) Order 2013

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

Enterprise Act 2002 (Part 8 EU Infringements) Order 2013

Correspondence:

REACH Enforcement (Amendment) Regulations 2013

Includes 8 Information Paragraphs on 11 instruments

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

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a "sifting" mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012-3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

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.

Members

Lord Bichard
Lord Blackwell
Lord Eames
Rt Hon. Lord Goodlad *(Chairman)*
Baroness Hamwee
Lord Methuen
Rt Hon. Baroness Morris of Yardley
Lord Norton of Louth
Lord Plant of Highfield
Rt Hon. Lord Scott of Foscote
Lord Woolmer of Leeds

Registered interests

Information about interests of Committee Members can be found in Appendix 4.

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's work, 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.

Twenty Fourth 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 on the ground specified.

A. Draft Commons (Town and Village Greens) (Trigger and Terminating Events) Order 2013

Date laid: 9 December

Parliamentary Procedure: affirmative

Summary: The Order proposes a time limit, in respect of draft plans, after which the right to apply for town or village green registration will resume. It also proposes to extend the protection from such registration to development proposed or permitted by Local Development Orders, Neighbourhood Development Orders and orders under the Transport and Works Act 1992. We have pressed the Department for Communities and Local Government to explain its decision to hold consultation over a six-week period, from 5 July to 19 August 2013, spanning much of the August holiday period.

We draw this Order to the special attention of the House on the ground 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 this draft Order, with an Explanatory Memorandum (EM). By way of background, DCLG states that applications for town or village green registration can cut across development that is proposed or has received planning permission, resulting in delay, uncertainty and costs. It comments that this undermines the Government's objective that decisions on the use and development of land should be taken through the planning system, where all material considerations can be taken into account; and that overlapping consent regimes should be addressed.

2. Through provisions in the Growth and Infrastructure Act 2013 ("the 2013 Act"), the Government reformed the system for making applications to register land as a new town or village green. The effect is that the right to apply for such registration of land is excluded if any of a number of specified "trigger events" in the planning system occur; and that the right to apply resumes if and when one of a number of specified "terminating events" occurs. DCLG states that the 2013 Act covered what are considered to be the main planning processes, namely, applications for planning permission, local and neighbourhood plans, and nationally significant infrastructure projects.

3. This draft Order proposes a time limit, in respect of draft plans, after which the right to apply for town or village green registration will resume. It also proposes to extend the protection from such registration to development proposed or permitted by Local Development Orders, Neighbourhood

Development Orders and orders under the Transport and Works Act 1992 ("T&W Orders").

4. On 30 January 2013, during Committee stage of the Growth and Infrastructure Bill, Baroness Hanham undertook that the Government would consult on setting additional trigger and terminating events. DCLG carried out that consultation over a six-week period, from 5 July to 19 August 2013. It published an analysis of consultation responses in December 2013.[1]

5. In the EM, DCLG states that 37 responses were received from a range of bodies including district, borough and county councils; parish town and community councils; developers and their representative bodies; professional bodies; and the environment and charity sector. At paragraphs 8.3 to 8.5 of the EM, DCLG sets out details of the responses on the different provisions in the draft Order. In each case, a majority supported the principle of extending the regime to Local Development Orders, Neighbourhood Development Orders and T&W Orders.

6. The draft Order includes additional catch-all terminating events in relation to draft local and neighbourhood development plans. The effect is that, if a local plan is not adopted or a neighbourhood plan is not made by the end of the period of two years from the day on which a draft is published for consultation by the local planning authority, the right to make an application for town or village green application may resume. DCLG acknowledges disagreement among respondents over whether two years was an appropriate period, but comments that setting a longer period would undermine the Government's wider priority of ensuring that up-to-date development plan coverage is achieved.

7. We sought further information from DCLG about the timing of the consultation process. We have previously made clear our view that six weeks should be regarded as the minimum feasible consultation period, and that holiday periods should be avoided. The consultation process in this case included some three weeks in August. We are publishing DCLG's responses at Appendix 1. We note that the Department states that it ensured that those likely to be interested were directly made aware of the proposed consultation, and that no respondents expressed concern about the length or timing of the consultation. While this is welcome, it does not change our view: **putting proposals out to consultation must allow for the possibility that potential respondents not previously identified by the Department are able to offer comments, and consulting over a holiday period cuts across this possibility**.

[1] See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263972/Consultation_on_registration_of_new_town_or_village_greens_-_Proposed_amendments_to_Schedule_1A_Exclusion_of_Right_under_section_15_to_the_Commons_Act_2006_.pdf

B. Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)

Enterprise Act 2002 (Part 8 EU Infringements) Order 2013 (SI 2013/3168)

Date laid: 13 December

Parliamentary Procedure: negative

Summary: These instruments implement most provisions of the EU Consumer Rights Directive, which is intended to encourage growth and consumer confidence through harmonising rules in a limited number of areas, so that traders and consumers face only one set of requirements wherever they sell or buy in the EU. In deciding on implementation options, the Government have chosen to go beyond the minimum requirements of the Directive in several respects. The Department for Business, Innovation and Skills has offered a well-considered case for doing so.

We draw these instruments to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

8. In the Explanatory Memorandum (EM) to SI 2013/3134, the Department for Business, Innovation and Skills (BIS) says that the Regulations implement most provisions of the EU Consumer Rights Directive ("the CRD"),[2] and will ensure that consumers and traders are clear about the bargain they are making in three main areas: information which traders should provide to consumers; cancellation rights and responsibilities; and measures to prevent hidden costs.

9. BIS states that fragmentation of national laws regulating consumer transactions across the EU has meant that businesses have been reluctant to explore export opportunities offered in trading across the EU, primarily because of the additional costs of compliance when trading cross-border; and that consumers are also reluctant to take part in cross-border shopping, demonstrating lower levels of confidence. The aim of the CRD is to encourage growth and consumer confidence through the harmonisation of rules in a limited number of areas, so that traders and consumers face only one set of requirements wherever they sell or buy in the EU.

10. BIS has provided a Transposition Note (TN) and an Impact Assessment (IA). In the TN, the Department says that, while the Government are determined to prevent unnecessary gold-plating of EU legislation, in this case they see justification for going beyond the minimum requirements of the Directive in the following respects: applying the provisions to social services and to healthcare services provided by professionals (where these are off-premises or at a distance), so as to maintain the current level of protection of vulnerable consumers and prevent distortion of competition; applying the "hidden costs" provisions to off-premises contracts below £42, so as to

[2] 2011/83/EU. Other provisions were implemented in the Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110), about which the Committee published information in its 23rd Report of 2012-13 (HL Paper 101).

ensure fairness and transparency;[3] and applying the "basic rate" provision to contracts for passenger transport services.[4]

11. More information about the background to these implementation decisions is given in the IA, at paragraphs 23 to 31. BIS says that selling direct to the consumer is expected to expand significantly in the healthcare and social care sectors, as a result of changes to the way that care and support services are paid for, by providing individuals who are eligible for publicly funded care with a personal budget. Applying information and cancellation provisions to services in these sectors will help to ensure that consumers, who are more likely to be within the vulnerable consumer category, will continue to have cancellation rights when buying these services. As regards the "hidden costs" provisions, BIS states that it is important that these transparency measures apply irrespective of value, not least to prevent traders offering an artificially low price for the main contract to avoid CRD protections, but then adding high subsequent costs by way of surcharges and additional payments. On the "basic rate" provision, BIS explains that higher-rate helplines have been particularly prevalent in the passenger transport sector, and that high telephone costs are often not obvious to consumers and mean that they can be surcharged though they may not actively choose to incur extra expense.

12. The remit for our Committee requires us to reflect on whether statutory instruments may inappropriately implement EU legislation. **In our view, BIS has offered a well-considered case for going beyond the minimum requirements of the CRD in framing these Regulations**.

13. In the EM to SI 2013/3168, BIS states that the Order adds SI 2013/3134 to the list of consumer protection measures that may be enforced within the framework of Part 8 of the Enterprise Act 2002, which gives enforcement bodies powers to obtain court orders against businesses that do not comply with their legal obligations to consumers.

CORRESPONDENCE

REACH Enforcement (Amendment) Regulations 2013 (SI 2013/2919)

14. In its 21st Report of this Session,[5] the Committee criticised DEFRA's approach to consultation in relation to these Regulations: a four-week period, including the first two weeks of August; and a failure to consult a leading professional body, the Institute of Occupational Safety and Health (IOSH). The Committee subsequently wrote to the Secretary of State, Rt Hon. Owen Paterson MP; the Committee's letter and the Minister's reply are published in Appendix 2.

[3] The term "hidden costs" refers to the provision (in Regulation 40) that a consumer is not required to make payments in addition to those agreed for a trader's main obligation, unless the consumer gave express consent before conclusion of the contract.

[4] The term "basic rate" refers to the provision (in Regulation 41) that, where a trader operates a telephone line for consumers to make contact about a contract entered into with the trader, the consumer must not be bound to pay more than the basic rate for such telephone calls.

[5] HL Paper 97.

OTHER INSTRUMENTS OF INTEREST

Rail Vehicle Accessibility (Non-Interoperable Rail System) (London Underground Victoria Line 09TS Vehicles) Exemption Order 2013 (SI 2013/3031)

15. The Order exempts specified rail vehicles operated by London Underground Limited (LUL) from three requirements, under the Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010 (which are aimed at ensuring access to public transport for disabled persons). The Order extends indefinitely certain previous exemptions that were due to expire on 31 December 2013. However one of the exemptions which relates to the length of the audible door closure warning on tube trains has only been granted a short-term exemption because LUL has failed to conduct the comparative trials and provide the evidence that it undertook to do when the original exemption was granted.

16. When the exemption Order that the current instrument replaces[6] was put forward in 2008 there were two different types of train running on the Victoria line and there was concern that having two different lengths of audible door closure warnings would cause confusion. An exemption was granted until the older, 67TS trains, which could only produce the non-compliant 1.75 second warning, were phased out. As part of its 2008 application for an exemption LUL gave an undertaking to "conduct a trial using a 3 second warning to obtain accurate information about the impact of using a 3 second audible door closure warning on the operation of the Victoria line and any changes to the safety and behaviour of the passengers." (the full text is quoted in the Office of the Rail Regulator Letter at page 30 of the EM). The end date of the original exemption Order, 31 December 2013, was deliberately set for some time after the last old style train had been withdrawn to give LUL enough time to undertake and evaluate the trial.

17. LUL is now seeking to have the exemption made permanent. In its application the arguments are mainly financial and operational (see pages 9-12 and page 23 of the EM) although some safety data is provided it only covers reported incidents. These arguments do not convince the experts at the Office of Rail Regulation who object to the extension of that exemption on that basis although they approve of the other exemptions in the Order (see pages 30-31 of the EM). Similarly the Safety Advisor at London TravelWatch expresses the need for the impact of the exemptions to be monitored (see page 32 of the EM).

18. In consequence, the Secretary of State has only granted a limited exemption on audible warnings until 31 May 2015 with the expectation that LUL will use that time to undertake trials to establish the practical impact of providing the required 3 second warning. It is fair to assume that the requirement for 3 second duration of the audible door closure warning required by the Rail Vehicle Accessibility Regulations was based on evidence that this was what those with visual and mobility impairments actually need. Should LUL wish to differ from that requirement it needs to provide a more convincing argument. It should also be noted that similar exemptions on other tube lines

[6] Rail Vehicle Accessibility (London Underground Victoria Line 09ts Vehicles) Exemption Order 2008 (SI 2008/ 2969)

will also expire in May 2015. LUL is currently using a circular argument that to avoid confusion the audible warnings on all tube trains should be 1.75 seconds. While there are obvious benefits from consistency, LUL has not provided adequate evidence why the trains should not all conform to the 3 seconds required by disability legislation.

19. The House will wish to note that clause 23 in the draft Deregulation Bill on which pre-scrutiny was completed just prior to Christmas included a proposal to convert the granting of this type of exemption to an administrative process, that is, to remove the current element of parliamentary scrutiny offered by using statutory instruments. The House may therefore wish to be aware of the current issue when reflecting on that provision in the proposed Bill.

School Organisation (Establishment and Discontinuance of Schools) Regulations 2013 (SI 2013/3109) *and* ***School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 (SI 2013/3110)***

20. These Regulations have been laid by the Department for Education (DfE) with an Explanatory Memorandum (EM). In the EM, DfE states that "school organisation" is the term applied to the opening, closing and alteration of maintained schools, and that these two sets of Regulations provide for modified systems of school organisation in place of those currently applied by school organisation regulations made in 2007.[7] The Department explains that the background policy intention is to streamline the relevant legislative requirements, so as to allow maintained schools to be more autonomous in relation to the alterations that they can make.

21. SI 2013/3109 sets out the process for publishing and determining proposals for the opening and closing of schools in England. SI 2013/3110 prescribes the process to be followed for maintained schools and local authorities to propose and implement changes to the size and characteristics of their schools.

22. The requirement for schools to follow a statutory process has been removed for three changes: altering their age range by up to three years (provided that this does not add a sixth form); expanding their premises (provided that relevant planning permissions and funding have been sought); and adding boarding provision (provided that they meet the required standards). DfE says that the removal of the statutory process for these changes will allow popular schools to make their own decisions about size.

23. A prescribed procedure has been retained for certain alterations which, as explained by DfE, have wider financial implications, or equate to the removal of places from the system. These are adding or removing a sixth form; removing boarding provision; adding, removing, or altering SEN provision; changing a single sex school to a co-educational one, and vice versa; transferring to a new site; closure of one site in a split-site school; and changes of category (e.g. community to voluntary-aided school). However, the statutory processes for these changes have been slimmed down: the formal requirement to consult before publishing proposals (usually four to six

[7] The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2007 (SI 2007/1288), as amended.

weeks hitherto) has been removed, and the statutory representation period has been reduced from six to four weeks.

24. DfE explains that a six-week public consultation was conducted between 12 September and 24 October 2013. 102 responses were received: the majority were from local authorities, with some from individual schools, academies, and national representative groups. The Department says that there was strong support for slimming down the statutory processes, provided that parents and other members of the community had sufficient opportunity to feed in their views.[8]

25. We are interested to see the Department's approach to consultation in this case. As regards the timescale which it fixed for interested parties to comment on its proposals in the autumn of 2013, we consider that it was reasonable for the Department to allow six weeks which were not affected by holiday periods. **As a matter of general principle, however, we do not regard a consultation period of less than six weeks as appropriate; given this view, we question whether by reducing statutory representation periods from six to four weeks these Regulations will indeed afford adequate opportunity to parents and others to make their views known in good time when alterations are proposed by schools.**

Civil Procedure (Amendment No.8) Rules 2013 (SI 2013/3112)

26. Section 11 of the Defamation Act 2013 removed the presumption of trial by jury for slander or libel cases. This instrument puts that into Civil Procedure Rules to guide the courts. The only gloss that the new Rule 26.11(2) adds is that should either party wish to argue for having a jury, they must do so at the first case management conference. For all other claims the timetable is 28 days, set by Rule 26.11(1) (which is not a new provision).

Capital Requirements Regulations 2013 (SI 2013/3115)

Financial Services and Markets Act 2000 (Qualifying EU Provisions) (No. 2) Order 2013 (SI 2013/3116)

Capital Requirements (Country-by-Country Reporting) Regulations 2013 (SI 2013/3118)

27. In the Explanatory Memorandum to these Regulations, HM Treasury (HMT) says that the financial crisis highlighted problems in banks' risk management practices and the regulatory framework which ultimately led to the breakdown in the ability of banks to carry out their critical economic activities, constraining growth. In June 2013, the EU adopted legislation known as the Capital Requirements Directive 4 package ("CRD4") which provides the framework for the authorisation and prudential supervision of banks in the EU. HMT says that the CRD4 package is the EU's main response to the risk management and regulatory issues raised by the financial crisis. The CRD4 package comprises the capital requirements directive and

[8] DfE has published an analysis of the consultation responses: www.gov.uk/government/consultations/changes-to-thesystem-of-school-organisation.

the capital requirements regulation: it must be transposed into UK law by 31 December 2013 and applied from 1 January 2014.

28. HMT explains that, altogether, the CRD4 package is being transposed into UK law by the Capital Requirements Regulations 2013; the Financial Services and Markets Act 2000 (Qualifying EU Provisions) (No. 2) Order 2013**,** which permits the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) to use their powers[9] to supervise and enforce the capital requirements regulation and any directly applicable regulations made under CRD4; the Capital Requirements (Country-by-Country Reporting) Regulations 2013; and rules made by the PRA and the FCA.

29. HMT says that, as regards country-by-country reporting, the provisions of CRD4 require each institution in scope to disclose annually: their name, nature of activities and geographic location; number of employees; and their turnover, on a consolidated basis, by country where they have an establishment. Global systemically important institutions are additionally required to disclose to the European Commission on a confidential basis their pre-tax profit or loss, their taxes paid and any public subsidies received. In transposing these provisions, HMT has taken an approach which it believes to be the most proportionate and has attempted to ensure that it is consistent with the approach adopted by other Member States and other tax transparency initiatives.

Financial Services and Markets Act 2000 (Designated Consumer Bodies) Order 2013 (SI 2013/3191)

30. The Financial Services Act 2012 provided for the reform of financial regulation in the UK. In the place of the Financial Services Authority (FSA), it established a new system of financial services regulators comprising: the Financial Policy Committee (FPC), as a macro-prudential authority; the Prudential Regulation Authority (PRA), as a micro-prudential regulator; and the Financial Conduct Authority (FCA), as a conduct of business regulator, whose role has been described by HM Treasury (HMT) as being to ensure that business across financial services and markets is conducted in a way that advances the interests of all users and participants.

31. This Order, laid by HMT with an Explanatory Memorandum (EM), designates consumer bodies that may bring "super-complaints" to the FCA on behalf of consumers of financial services. HMT states that these are complaints brought by a representative body that a financial services market in the UK appears to be significantly damaging the interests of consumers; and that such complaints benefit from a "fast track" procedure, under which the FCA must publish a response within 90 days, stating how it proposes to deal with the complaint and the reasons for its proposals. HMT explains that previously complaints by representative bodies about financial services could only be brought to the Office of Fair Trading (OFT). In April 2014 the OFT and the Competition Commission will be replaced by the Competition and Markets Authority; the arrangements made by this Order fit into the wider context of institutional changes.

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[9] Under the Financial Services and Markets Act 2000.

32. In March 2013, HMT invited applications from bodies that wished to be designated to make super-complaints, and received applications from the National Association of Citizens Advice Bureaux, the Consumers' Association, the General Consumer Council for Northern Ireland and the National Federation of Self Employed and Small Businesses. All four bodies are designated under this Order.

33. In the EM, HMT explains that, through the Order, for the first time complaints can be brought by representative bodies directly to the FCA; and also that the status of super-complainant is awarded for the first time to a representative of small and medium-sized enterprises (SMEs). HMT acknowledges that, in its consultation process in late 2012, views were divided over enabling representatives of SMEs to be designated as super-complainants.[10] In response, the Government have provided safeguards to ensure that the super-complaint process is not misused by SME representatives. These include requirements that any super-complaint submitted to the FCA demonstrates that detriment to consumers arises from the matter to which it relates; and that candidates to be super-complainants show that they are managed and controlled in such a way that they can be expected to act with independence, impartiality, and integrity.

Civil Legal Aid (Merits Criteria) (Amendment) (No. 3) Regulations 2013 (SI 2013/3195)

34. When someone applies for Civil Legal Aid in the UK, the Director of Legal Aid Casework must determine whether an applicant qualifies using "merits" criteria set out in Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[11] These Regulations introduce a specific merits test to be applied to applications for civil legal services in respect of challenges to certain asylum decisions made under Regulation (EU) No. 604/2013 (referred to as Dublin III).[12] Where it is determined that a Member State, other than the one in which the asylum seeker is present, must take responsibility for examining the asylum application, the asylum seeker can be transferred to that Member State. In England and Wales, the asylum seeker can seek to challenge the transfer decision by judicial review. Dublin III replaces previous agreements[13] and introduces certain new provisions: for example, Dublin III establishes an explicit right of access to Civil Legal Aid for individuals seeking to challenge a transfer decision made under Dublin III but also introduces a merits test, which requires an individual case to have better than 'no tangible prospect of success' in order to qualify for publicly funded legal aid.

35. The instrument is accompanied by an urgency statement which allows it to be implemented by the made affirmative procedure (that is, the legislation takes effect from 1 January but will still need to be debated in both Houses, within 120 days, to be confirmed). The urgency is apparently due to an

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[10] HM Treasury has published a summary of consultation responses:
www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-draft-secondary-legislation

[11] Legislation has recently been laid proposing to change the Prospects of Success Test for domestic law cases set out in regulation 5 of SI 2013/104 to exclude "borderline" cases from the merits criteria. See this Committee's 21st report of session 2013-14 on the Draft Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013, published 12 December 2013, HL Paper 97.

[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF

[13] For example, Council Regulations (EC) No 343/2003 of 18 February 2003, referred to as Dublin II.

administrative failure to notice the differences between the merits test set out under the new Dublin III agreement and the one in the domestic regime. Because the current UK merits criteria are more stringent, these Regulations are required to ensure that applications for civil legal aid to challenge transfer decisions made under Dublin III are appropriately assessed.

Jobseeker's Allowance (Habitual Residence) Amendment Regulations 2013 (SI 2013/3196)

36. This instrument was laid on 18 December to introduce a three-month residence qualification to be served by people recently arrived in the UK who seek to claim Jobseeker's Allowance. It took urgent effect on 1 January 2014. The Department for Work and Pensions states that this policy is being introduced to protect the benefit system by providing a tighter definition for the existing Habitual Residence test. The effect of the amendment is that claimants, regardless of nationality, must have been living in the UK, Channel Islands, Isle of Man or Republic of Ireland for three months. This could include a UK citizen who has been working abroad for some time. However there are certain claimants who do not have to satisfy this requirement, for example, a European Economic Area (EEA) worker or their family member, an EEA self employed national or their family member, an EEA national who has acquired a permanent right of residence (by virtue of Article 17 of Directive 2004/38), a Croatian national who is an authorised worker in authorised employment, and persons who have been given refugee status or discretionary leave to remain for some reason.

Postal Administration Rules 2013 (SI 2013/3208)

37. The Department for Business, Innovation and Skills (BIS) has laid these Rules with an Explanatory Memorandum (EM).

38. BIS says that the Postal Services Act 2011 ("the 2011 Act") introduced a range of measures to secure the provision of the universal postal service in the UK.[14] These included lifting restrictions on ownership of Royal Mail shares to permit sale of shares to third parties; Government taking on Royal Mail's historic pension deficit; and establishing a new regulatory regime which imposes a duty on OFCOM to carry out its functions in relation to postal services so as to secure the provision of a universal postal service.

39. The Department explains that Part 4 of the 2011 Act contained provision for a postal administration regime designed to ensure the continuance of the universal postal service in the event that a company providing that service (a designated universal service provider) was at risk of entering insolvency proceedings. BIS states that, under the standard administration process, the primary focus would be on obtaining the best possible recovery for creditors, but that, under a postal administration regime, the objective would be to secure the continued provision of the universal postal service. These Rules provide the procedure to underpin the regime.[15] BIS has provided additional

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[14] BIS explains this as the "one price goes anywhere in the UK; 6 days a week" service.

[15] The Rules refer (for example, in Part 2) to "the court" without being more specific. The Rules are made under the Postal Services Act 2011 and the Insolvency Act 1986. This means that (under section 11 of the Interpretation Act 1978) defined terms and expressions which are used in these "parent" Acts will also apply in relation to the Rules (unless the contrary is stated). Section 85(1) of the Postal Services Act 2011 says that in relation the postal administration regime, the term "court" means "the court having jurisdiction to wind up the company". Section 117 of the Insolvency Act 1986 then explains which courts have

information about the provisions in the 2011 Act on the designation of universal service providers. We are publishing this information in Appendix 3.

jurisdiction to wind up a company in England and Wales. It states that the High Court has jurisdiction, and also the county court (of the district in which the company is registered) if the company's paid up share capital does not exceed the specified amount.

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 affirmative approval

County Court Jurisdiction Order 2014

District Electoral Areas (Northern Ireland) Order 2014

Immigration and Nationality (fees) (Amendment) Order 2014

National Minimum Wage (Amendment) Regulations 2014

Road Safety (Financial Penalty Deposit) (Appropriate Amount) (Amendment) Order 2014

Scottish Parliament (Constituencies and Regions) Order 2014

Draft instruments subject to negative procedure

East Dorset (Electoral Changes) Order 2014

Lancaster (Electoral Changes) Order 2014

Instruments subject to negative procedure

HC 887	Statement of Changes in Immigration Rules
HC 938	Statement of Changes in Immigration Rules
SI 2013/3023	Railways (Interoperability) (Amendment) Regulations 2013
SI 2013/3036	European Qualifications (Health Care Professions) (Croatia Accession Amendment) Regulations 2013
SI 2013/3031	Rail Vehicle Accessibility (Non-Interoperable Rail System) (London Underground Victoria Line 09TS Vehicles) Exemption Order 2013
SI 2013/3042	Merchant Shipping (Prevention of Pollution) (Limits) (Revocation) Regulations 2013
SI 2013/3050	Plant Health (Fees) (England) (Amendment) Regulations 2013
SI 2013/3074	Port Security (Port of Barrow) Designation Order 2013
SI 2013/3075	Port Security (Port of Cromarty Firth) Designation Order 2013
SI 2013/3076	Port Security (Port of Fowey) Designation Order 2013
SI 2013/3077	Port Security (Port of Glasgow) Designation Order 2013
SI 2013/3078	Port Security (Port of Great Yarmouth) Designation Order 2013
SI 2013/3079	Port Security (Port of Peterhead) Designation Order 2013
SI 2013/3080	Port Security (Port of Troon) Designation Order 2013
SI 2013/3081	Port Security (Port of Tyne) Designation Order 2013

SI 2013/3109 School Organisation (Establishment and Discontinuance of Schools) Regulations 2013

SI 2013/3110 Schools Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013

SI 2013/3112 Civil Procedure (Amendment No.8) Rules 2013

SI 2013/3113 Waste Electrical and Electronic Equipment Regulations 2013

SI 2013/3115 Capital Requirements Regulations 2013

SI 2013/3116 Financial Services and Markets Act 2000 (Qualifying EU Provisions) (No. 2) Order 2013

SI 2013/3118 Capital Requirements (Country-by-Country Reporting) Regulations 2013

SI 2013/3128 Financial Services and Markets Act 2000 (Consumer Credit) (Transitional Provisions) Order 2013

SI 2013/3133 Feed (Hygiene and Enforcement) and the Animal Feed (England) (Amendment) Regulations 2013

SI 2013/3135 Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013

SI 2013/3161 Exclusive Economic Zone Order 2013

SI 2013/3165 Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) (Amendment) Regulations 2013

SI 2013/3166 M25 Motorway (Junctions 27 to 30) (Variable Speed Limits) Regulations 2013

SI 2013/3167 M25 Motorway (Junctions 16 to 23) (Variable Speed Limits) Regulations 2013

SI 2013/3174 Land Registration Fee Order 2013

SI 2013/3176 Crime and Courts Act 2013 (Commencement No. 7 and Saving and Consequential Provisions) Order 2013

SI 2013/3180 Port Security (Ports of Cardiff, Barry and Newport) Designation Order 2013

SI 2013/3182 Export Control (North Korea and Ivory Coast Sanctions and Syria Amendment) Order 2013

SI 2013/3183 Criminal Procedure (Amendment No. 2) Rules 2013

SI 2013/3184 Port Security (Port of Belfast) Designation Order 2013

SI 2013/3185 Port Security (Port of Shoreham) Designation Order 2013

SI 2013/3187 Government Resources and Accounts Act 2000 (Estimates and Accounts) (Amendment) Order 2013

SI 2013/3191 Financial Services and Markets Act 2000 (Designated Consumer Bodies) Order 2013

SI 2013/3195 Civil Legal Aid (Merits Criteria) (Amendment) (No. 3) Regulations 2013

SI 2013/3196 Jobseekers' Allowance (Habitual Residence) Amendment Regulations 2013

SI 2013/3208 Postal Administration Rules 2013

APPENDIX 1: DRAFT COMMONS (TOWN AND VILLAGE GREENS) (TRIGGER AND TERMINATING EVENTS) ORDER 2013

Information from Department for Communities and Local Government

Q1: In the Explanatory Memorandum, at paragraph 8.6, the Department says: "A detailed analysis of the consultation responses will be published on the GOV.UK website at https://www.gov.uk/government/publications". This is at odds with the Committee's guidance on EMs. That analysis needs to be published at the same time as the SI is laid before Parliament, and a specific web-link to it included in the EM.

A1: The Summary of Consultation Responses and Government Response was published on the same day the Regulations were laid (9 December). The Department e-mailed the Committee Adviser to the House of Lords Secondary Legislation Scrutiny Committee on 10 December with the link to the document, which is set out below. The document was published and available on the same day as the regulations were laid.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263972/Consultation_on_registration_of_new_town_or_village_greens_-_Proposed_amendments_to_Schedule_1A__Exclusion_of_Right_under_section_15__to_the_Commons_Act_2006_.pdf

Q2: Also in the EM, you say: "8.1 Consultation on the draft Order ran for 6 weeks, from 5 July to 19 August 2013. A six week period was considered to be proportionate and adequate, as the matter is relatively limited in scope, the underlying principles are established in the Growth and Infrastructure Act 2013 and we are building upon existing provisions." The Committee has made known its views on consultation practice in reports it has published – see for example its 17th Report of this Session, in which it made clear its concern that six weeks should be regarded as minimum feasible consultation period, and that holiday periods should be avoided. The consultation process in this case included some three weeks in August, which is recognised by the Cabinet Office as a holiday period. Why did DCLG choose to run a consultation process in a holiday periods; did any consultation respondents raise concerns about this timing?

A2: The consultation ran for six weeks from 5 July-19 August. The Growth and Infrastructure Act 2013 introduced the principle of preventing applications to apply for town and village green registration, whilst development proposals were under consideration, or approved. The measures are considered important for growth. Given that the Government had announced in January (during the passage of the Growth and Infrastructure Bill) that there would be a consultation on additional trigger and terminating events for development brought forward through development orders, as well as an additional terminating event for development plans, it was considered important to publish the consultation promptly, to reduce uncertainty for interested parties on the scope of the further proposals.

http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130130-0003.htm

(see Column 1630).

In addition to this the Government had indicated the measures would come into force before the end of the year, which gave further impetus to consulting well before the end of the year, to enable consultation responses to be fully considered and inform the final detail of the proposals.

(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211535/Sixth_Statement_of_New_Regulation.pdf)

The proposed Order deals with 2 matters:

1. Adding new terminating events to Schedule 1A of the Commons Act, to ensure that the exclusion on applications for town and village green registration covers all outcomes of plan making. In particular, this is to ensure that the exclusion is not open-ended if there is no longer an extant development proposal in a draft plan. During the passage of the Growth and Infrastructure Bill this was recognised as a situation that, although unlikely to be common, may arise in plan-making and the Government committed to consultation on proposals to address this.

2. Extending the exclusion on town and village green registration to protect development proposed and/or permitted by virtue of three matters not already included in Schedule 1: Local Development Orders, Neighbourhood Development Orders and applications for deemed planning permission in respect of Orders under the Transport and Works Act 1992.

Taking into account revised Cabinet Office guidelines, we consider the length of time needed for consultation on a case by case basis, taking into account the nature and impact of the proposal. We considered that 6 weeks was reasonable and proportionate in this case because the changes that are proposed are an extension of measures consulted on and debated in Parliament during the passage of the Growth and Infrastructure Bill, shortly before the consultation commenced. The measures extend the provisions to matters that are not as frequently used, compared to the main planning processes (of development plan making and determination of planning applications) covered by the provisions in the Growth and Infrastructure Act. Furthermore, the measures are of a technical nature, of primary interest to professional, environmental and local authority bodies, as evidenced by the consultation responses.

We ensured that those likely to be interested were directly made aware of the proposed consultation. Prior to issuing the consultation document, we identified a list of interested parties to whom we sent an email on the first day of the consultation period with a link to the document and notification of the closing date. No respondents expressed concern about the length or timing of the consultation.

Taking into account the prior commitments made by the Government about consultation on further reforms, the nature of the proposals and the groups likely to be interested, and the steps we took to ensure interested parties were made aware, we considered that the consultation period and timing was sufficient in this case.

16 December 2013

APPENDIX 2: REACH ENFORCEMENT (AMENDMENT) REGULATIONS 2013 (SI 2013/2919)

Letter from Lord Goodlad, Chair of Secondary Legislation Scrutiny Committee, to Rt Hon Owen Paterson MP, Secretary of State, DEFRA

The Secondary Legislation Scrutiny Committee agreed at its meeting this week to bring these Regulations to the special attention of the House, and also that I should write to you about them.

The Regulations allow second-hand articles containing asbestos to be placed on the market, under conditions that protect human health. In so doing, the instrument implements a derogation agreed under the European "REACH" Regulation.

The Committee does not question whether the policy objective is likely to be achieved through the instrument. However, we are concerned that the public consultation process which your Department carried out before finalising the Regulations was badly timed and insufficiently transparent.

We have carried out an inquiry into the consultation principles which were announced by the Cabinet Office in July 2012. In our report on the Government's review of those principles (17th Report of the current Session), we made clear our view that six weeks should be seen as the minimum feasible consultation period, save in very exceptional cases; and that holiday periods should be avoided altogether.

The public consultation which your Department conducted on whether the UK should adopt the "REACH" derogation ran over a four-week period from 18 July to 15 August 2013. Consulting for only four weeks, at least two of which fell into the August holiday season, suggests that your Department gave more weight to administrative convenience than to the interests of potential respondents. This impression is strengthened by information received from your officials, that the earlier intention had been to consult during July, but that there was some delay due to the need for clearance from the Devolved Administrations, with some associated procedural complexities, as well as from the UK Government. In other words, the delay was caused by Government, but the price of catching up was paid by outside interests.

We are also concerned that your Department took an overly selective approach to notifying interested parties about the foreshortened consultation period. We have established that Defra did not consult the Institution of Occupational Safety and Health (IOSH), but the information from your officials has not satisfactorily explained why. IOSH itself has told us that it sees your Department's failure to consult it as "unfortunate because with 43,000 individual members across the world we have access to experts in every field of health and safety, including in dealing with asbestos."

I repeat that we do not question whether the underlying policy objective is likely to be achieved effectively through the Regulations. However, we are concerned that the inadequacies in the public consultation process described above may potentially have deprived Defra's policy-makers of valuable insights from interested parties who were denied an adequate opportunity to contribute.

10 December 2013

Letter from Rt Hon Owen Paterson MP to Lord Goodlad

Thank you for your letter of 10 December following the Secondary Legislation Scrutiny Committee's consideration of the REACH Enforcement (Amendment) Regulations 2013.

It may be helpful if I first explain the narrow scope of these Regulations. A restriction under REACH can apply to the manufacture of a chemical substance or its placing on the market (e.g. sale or leasing) or its use. However, in this case the Regulations apply *only* to the marketing of second-hand articles and not to their continued used, which is already permitted under REACH. In addition, the Regulations have no impact on the legal requirements on the safe management of asbestos in the workplace. There is also no impact on the health and safety duties of employers and other dutyholders, as set down in the Control of Asbestos Regulations 2012.

The Government considered that a four week consultation would be feasible and acceptable because Defra and the Health and Safety Executive had previously informally consulted the main sectors affected during the preparation of the Impact Assessment. These sectors were those concerned with railways (national and heritage), motor vehicles, acetylene cylinders, the chemical industry, and museums. In addition, the Regulations do not represent a new policy regarding the management of asbestos. They represent a narrowly-focussed legal process to reverse an unintended change in the scope of the existing restriction. This was a consequence of some of the definitions in REACH, in particular the definition of "placing on the market".

In addition, stakeholders had previously been made aware of Defra's intentions through the announcement in March 2012 of the Red Tape Challenge commitment to apply the derogation and the detailed Challenge Implementation Plan published in September 2012. The UK Chemicals Stakeholder Forum, which is our regular vehicle for ensuring that a wide range of interested parties are fully aware of developments regarding REACH, met two working days after the consultation was launched. This provided a timely opportunity to make sure that stakeholders were properly briefed.

However, it is regrettable that due to pressures both before and after the consultation, the consultation period itself was allowed to fall into August. I will certainly ensure that my Department takes clear account of the Committee's comments in the future.

With regard to the Institution of Occupational Safety and Health (IOSH) I am pleased to see that the Institution concurs with the Government's views on the safe management of asbestos where it is in good condition and will not be disturbed. However, I am not convinced that IOSH was a necessary consultee given the particular, narrow focus of the Regulations. As I have said, the Regulations apply only to the marketing of second-hand articles. For example whether they can be bought and sold, and have no effect on the occupational management of asbestos, which I understand to be the focus of IOSH's professional expertise.

19 December 2013

APPENDIX 3: POSTAL ADMINISTRATION RULES 2013 (SI 2013/3208)

Further information from BIS

The Government have not made a specific statement on the designation of other universal service providers other than what is said in the Postal Services Act 2011 ("the 2011 Act"). In the Prospectus document which was published in October 2013 as part of the Royal Mail share sale the Secretary of State stated that he has no current intention to propose any changes to the legislative framework for postal services set out in the 2011 Act.

The 2011 Act put in place the framework under which Ofcom can designate a postal operator as the universal service provider and the circumstances under which there could be more than one universal service provider.

Section 35 of the 2011 Act sets out that Ofcom can only designate more than one postal operator as the universal service provider in two specific instances. These are:

- Ofcom has determined under s45 of the 2011 Act that the financial burden of providing the service is too much for the designated operator and that others should be procured to provide the service and the Secretary of State has agreed with this recommendation; or
- a postal administration order has been made under section 4 of the 2011 Act.

In the first instance referred to above, Ofcom would have had to carry out a review of the costs of Royal Mail complying with its universal service obligations (under s44 of the 2011 Act) and concluded that it is unfair for one provider to bear these costs. Ofcom cannot carry out such a review before 1 October 2016 unless directed by the Secretary of State. Following such a review, Ofcom can recommend in its determination under s45 of the 2011 Act that other postal operators should be procured to provide universal postal services. It would be for the Secretary of State, based on Ofcom's report and recommendations, to determine and direct Ofcom to take the action needed to deal with the burden on the single universal service provider. The Act provides that the Secretary of State cannot issue such a direction before 1 October 2021 (unless the universal service provider has agreed to the making of the determination).

In the second instance, Ofcom could only designate other universal service providers if a postal administration order had been made and Ofcom consider it appropriate for the number of providers to be more than one in order to ensure that the universal postal service is maintained.

So the scope in the 2011 Act to designate other universal service providers is limited and this could only happen in the scenarios set out above.

9 January 2014

APPENDIX 4: 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 14 January 2014 Members declared the following interests:

Financial Services and Markets Act 2000 (Designated Consumer Bodies) Order 2013 (SI 2013/3191)

Lord Bichard, as spouse of a member of the Citizens Advice Bureau.

Attendance:

The meeting was attended by Lord Bichard, Lord Goodlad, Lord Methuen, Baroness Morris of Yardley, Lord Norton of Louth, Lord Scott of Foscote and Lord Woolmer of Leeds.