HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

32nd Report of Session 2016–17

# Draft Electricity Supplier Obligations (Amendment and Excluded Electricity) (Amendment) Regulations 2017

## Work of the Committee in Session 2016–17

Includes 3 Information Paragraphs on 3 Instruments

Ordered to be printed 25 April 2017 and published 27 April 2017

HL Paper 161

## *Secondary Legislation Scrutiny Committee*

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to 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 these specified grounds:

> (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;
>
> (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;
>
> (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

## *Members*

| | | |
|---|---|---|
| Baroness Andrews | Lord Hodgson of Astley Abbots | Lord Rowlands |
| Lord Bowness | Baroness Humphreys | Baroness Stern |
| Lord Goddard of Stockport | Rt Hon. Lord Janvrin | Rt Hon. Lord Trefgarne *(Chairman)* |
| Lord Haskel | Baroness O'Loan | |

## *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

## *Publications*

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

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

## *Information and Contacts*

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

# Thirty Second Report

## INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

### Draft Electricity Supplier Obligations (Amendment and Excluded Electricity) (Amendment) Regulations 2017

***Date laid: 28 March 2017***

***Parliamentary procedure: affirmative***

*Regulations laid in 2015 exempted eligible Electricity-Intensive Industries (EIIs) from the Electricity Supplier Obligations levy, with the intention of ensuring that the most electricity-intensive businesses were not made uncompetitive due to the impacts of renewable and decarbonisation policies on electricity prices. The latest Regulations make some technical changes to the earlier instrument, but they also remove the provisions that allowed the exemption to be claimed by direct competitors of eligible EIIs which were not in themselves eligible.*

*The Department for Business, Energy and Industrial Strategy allowed only five weeks, over the summer holiday period, for the formal consultation, and took six months to publish its own consultation response. It has said that it was not able to publish the Government response earlier because of the complexity of the Regulations. This complexity should not have come as a surprise to the Department, and might reasonably have prompted it to allow longer for consultation responses, and to take a more realistic view of when the Regulations could be finalised and laid before Parliament.*

*Given the original intention that non-eligible direct competitors should be entitled to receive the exemption, we question whether the reversal of this intention will go unchallenged, and whether the haste with which BEIS is pressing ahead with the exemption for the most electricity-intensive businesses may mean less speed in settling the overall policy context.*

**We draw these Regulations 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.**

*Background—the 2015 Regulations*

1. The Government's electricity market reform programme includes, as one of its key elements, Contracts for Difference (CFDs) which are contracts between a low carbon electricity generator and a Government-owned company, the CFD Counterparty. Under a CFD, the CFD Counterparty pays the generator the difference between a fixed "strike price" and a market reference price (or, if the reference price is higher than the strike price, the generator will pay the difference back to the CFD Counterparty), in order to provide long-term price stabilisation to low carbon plant. The CFD Counterparty raises the money to fund CFD payments through a compulsory levy on electricity suppliers in Great Britain (the electricity supplier obligation—ESO—levy).

2. The Electricity Supplier Obligations (Amendment and Excluded Electricity) Regulations 2015 (SI 2015/721: "the 2015 Regulations") introduced an exemption from the ESO levy for eligible Electricity Intensive Industries (EIIs), with the intention of ensuring that the most electricity-intensive businesses were not made uncompetitive due to the impacts of renewable and decarbonisation policies on electricity prices. These businesses, which play an important role in the UK economy, are in sectors such as steel, paper and glass. Through the 2015 Regulations, the Government allowed the suppliers of EIIs to be exempt from CFD costs on up to 85% of electricity consumed by the eligible EII. In the Explanatory Memorandum (EM) to the 2015 Regulations, the Government said that eligible EIIs would benefit from a resulting reduction of 6.7% in the price they paid for electricity (saving an eligible company almost £700,000 in 2020). Conversely, the impact on domestic consumers was expected to be an 0.3% increase in electricity bills (£1.80) in 2020; and for medium-size non-exempt industrial consumers, the exemption was expected to add 0.4% (£5,600) to their electricity bills in 2020.

### *The latest Regulations*

3. In amending the 2015 Regulations, the draft Electricity Supplier Obligations (Amendment and Excluded Electricity) (Amendment) Regulations 2017 make a number of technical changes. These include allowing new businesses to claim the benefit of the exemption, requiring EIIs to notify the Government in certain circumstances to ensure that businesses receive the exemption to the correct level and only if they are eligible, and allowing an EII to apply for the exemption if it does not obtain electricity directly from a licensed electricity supplier.

4. The Regulations were laid by the Department for Business, Energy and Industrial Strategy (BEIS), with an EM and Impact Assessment. BEIS explains that a consultation took place for five weeks from 22 July to 26 August; that 46 responses were received, primarily from EIIs, energy suppliers and trade associations; and that the majority of consultation responses supported the proposed amendments.[1]

### *Non-eligible direct competitors to eligible Electricity Intensive Industries*

5. BEIS also highlights a change made by the latest Regulations which is not technical, namely to remove the provisions in the 2015 Regulations that allowed the CFD exemption to be claimed by direct competitors of eligible EIIs which were not in themselves eligible. Eligibility is determined by the intensity of electricity use by individual businesses in the sectors specified in the Schedule to the Regulations: while some businesses, e.g. in the glass-making sector, may fall below the qualifying threshold for electricity intensity, they may well be in direct competition with other businesses in that sector which exceed the threshold. The Department explains that it notified to the European Commission, for approval as State aid, its original proposal that non-eligible direct competitors should be entitled to receive the exemption; and that, since the proposal has not been approved, BEIS is currently unable to extend the CFD exemption to these businesses. BEIS says:

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1 The Government response to the consultation was published in March 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593191/eiis-exemption-from-indirect-costs-cfd-government-response-to-consultation.pdf

> "Some responses to the consultation raised concerns about proceeding with the CFD exemption whilst excluding direct competitors. Specifically, concern was raised that eligible businesses will receive the benefit of the CFD exemption whilst their non-eligible direct competitors will not, and the latter will face higher energy bills to fund the CFD exemption".

It adds that it understands these concerns and is continuing to seek a resolution to the issue.

*Conclusions*

6. We put a number of questions to BEIS, and we are publishing the answers that we have received at Appendix 1.

7. As regards consultation, we have previously expressed the view that six weeks should generally be the minimum period allowed. We regard it as bad practice to schedule a consultation process over a holiday period, as BEIS did in this case. The Department has told us that a relatively short period was set for the formal consultation because, in July 2016, the intention was to consider responses and subsequently lay the amended Regulations to a tight timetable that would allow the Regulations to come into force by the end of February 2017. In the event, the Government consultation response was published only in March 2017, six months after the end of a five-week consultation; and the Regulations were laid only at the end of March 2017. BEIS has said that "the reason we were not able to publish the Government response earlier is due to the complexity of the Regulations". **We would comment that this complexity should not have come as a surprise to the Department, and might reasonably have prompted it to allow longer for consultation responses, and to take a more realistic view of when the Regulations could be finalised and laid before Parliament.**

8. As regards the position of direct competitors of eligible EIIs which will not now be able to claim the CFD exemption, BEIS has said that it considers it "unlikely that our policy for the CFD exemption will have a significant effect on competition within the UK", adding that this view is based on competition assessments for energy intensive industries, which it says are internal BEIS assessments, containing commercially sensitive material, that have not been published. It has also told us that it does not consider that the policy will be open to successful legal challenge. **We have no special insight into the competitive position of the sectors concerned. However, given that BEIS' original intention was that non-eligible direct competitors should in fact be entitled to receive the exemption, we question whether the reversal of this intention will go unchallenged, and whether the haste with which BEIS is pressing ahead with the exemption for the most electricity-intensive businesses may mean less speed in settling the overall policy context.**

## INSTRUMENTS OF INTEREST

### School Governance (Constitution and Federations) (England) (Amendment) Regulations 2017 (SI 2017/487)

9. In the Explanatory Memorandum (EM), the Department for Education (DfE) explains that these Regulations amend existing instruments on the constitution of governing bodies of maintained schools in England, to include a power for them to remove elected governors. DfE says that this brings elected governors into line with every other category of governor for which there are already powers of removal. It explains that it held a targeted consultation with the members of its Advisory Group on Governance (AGOG) over six weeks from 12 January to 28 February 2017, and that AGOG members were overwhelmingly in favour of giving governing bodies the power to remove an elected governor. In the EM, DfE says that guidance on the exercise of the power to remove elected governors will be added at the earliest opportunity to statutory guidance on the constitution of governing bodies and to the Governance Handbook.

10. We asked the Department how governing bodies could be expected to understand these changes if the guidance had not been revised, and received this reply:

> "We will publish updated statutory guidance in the summer term once we have consulted AGOG organisations on a draft, which will be well in advance of the new power becoming available for use by governing bodies from September. We expect AGOG members to start alerting and explaining the change to their members straight away, now that the amending regulations are laid, and we are confident that sufficient information will be available to governing bodies to understand the changes well before the new power comes into force".

11. **As we have said before, we see it as good practice to publish relevant guidance at the same time as Regulations are placed before Parliament. Since these Regulations were laid, a General Election has been called. It would be regrettable if this meant any further delay in publishing the guidance on removing elected governors, a risk which underlines the need to produce such material as soon as possible.**

### Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 (SI 2017/500)

12. HM Treasury (HMT) has laid this Order with an Explanatory Memorandum (EM) and Impact Assessment. HMT says that, in amending an earlier instrument (the Regulated Activities Order: "RAO"),[2] this Order allows regulated firms to provide more help and guidance to customers without inadvertently crossing the boundary into regulated financial advice.

13. In August 2015, the Government launched the Financial Advice Market Review (FAMR), a joint review between HMT and the Financial Conduct Authority (FCA), to explore how financial advice could work better for consumers. Firms which responded to the FAMR raised concerns about a

2 Specifically, by amending article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544).

lack of clarity regarding the point at which, under the current RAO definition, more general forms of consumer support become regulated advice. They referred to the definition of advice as a "personal recommendation" under the EU Markets in Financial Instruments Directive ("MiFID II"),[3] and said that this was clearer than the RAO definition and much easier for them to build into their compliance processes.

14. The Government consulted on amending the definition of regulated advice to bring it into line with MiFID over an eight-week period from September to November 2016: there were 63 responses. HMT says that respondents were supportive of changing the definition of advice for regulated firms. However, they voiced concern that fraudsters would attempt to deliver advice that stopped short of a personal recommendation, but was nevertheless intended to persuade an individual to purchase risky investment products: the FCA might not then be able to take action against these fraudsters, as it would be unable to take enforcement action in relation to activities that it did not regulate. HMT has therefore changed the definition of financial advice only for regulated persons with authorisation to carry out a regulated activity which is not advising on investments and is not agreeing to advise on investments. This means the majority of regulated firms will only be giving regulated advice when they provide a personal recommendation.

15. **In our view, HMT's approach to this issue and to amending existing secondary legislation demonstrates good practice in consulting interested parties, considering concerns expressed, and settling policy in a timely and readily understood manner.**

### Immigration and Nationality Fees Regulations (SI 2017/515)

16. This instrument is the result of the annual review of immigration fees and specifies which have been frozen, which increased, and the circumstances in which certain fees might be waived or reduced. In line with the Government's 2015 Spending Review, which requires the Border, Immigration and Citizenship system to become self-funded by 2019–20, there have been a number of above-cost increases in the settlement and residence routes (18–23%) but some increases, particularly those related to workers, visitors and full-time students, have been limited to 2%.[4] Overall the increases are intended to raise an additional £130 million which means the system should raise about 75% of its costs in 2017–18 through fees. Given that this is a multiyear programme we are disappointed that the Home Office has not improved its planning since it breached the 21 day rule with the 2015 Regulations. **These Regulations were only laid before the House three days before they came into effect which we regard as poor practice.**

3 2014/65/EU.

4 Details of the fees changes can be found at: https://www.gov.uk/government/publications/visa-regulations-revised-table

## INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

### Instruments subject to annulment

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| SI 2017/472 | Town and Country Planning (Blight Provisions) (England) Order 2017 |
| SI 2017/487 | School Governance (Constitution and Federations) (England) (Amendment) Regulations 2017 |
| SI 2017/493 | Electricity and Gas (Internal Markets) Regulations 2017 |
| SI 2017/500 | Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 |
| SI 2017/515 | Immigration and Nationality (Fees) Regulations 2017 |
| SI 2017/516 | Statutory Auditors and Third Country Auditors Regulations 2017 |
| SI 2017/520 | Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017 |
| SI 2017/521 | Gangmasters and Labour Abuse Authority (Complaints and Misconduct) Regulations 2017 |
| SI 2017/537 | Criminal Justice Act 2003 (Alcohol Abstinence and Monitoring Requirement) (Prescription of Arrangement for Monitoring) Order 2017 |
| SR 2017/69 | Personal Independence Payment (Amendment) Regulations (Northern Ireland) 2017 |
| SR 2017/70 | Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations (Northern Ireland) 2017 |

## WORK OF THE COMMITTEE IN SESSION 2016–17

### Number of instruments received

17. This report sets out a statistical summary of the Committee's activity in the 2016–17 Session.[5] The below-average number of statutory instruments (SIs) laid before Parliament in the last session (712) has continued and in this session we have scrutinised only 659 instruments. This may be attributable to the impact of the 2016 referendum on the work of Government. However, the number of instruments laid picked up again at the end of 2016, with over 40% (266) of this session's SIs being laid between 1 January and 6 April 2017. The proportion of affirmative instruments within that total has remained high (23%). The number of corrections again rose markedly in the annual rush towards the end of the session and as a result exceeded the 5% benchmark figure (see paragraph 35 below).

18. The Department for Work and Pensions (DWP), unusually, laid the largest proportion of SIs in the session (14.6%). This can be put down to the fact that the Department has been producing social security benefit legislation for Northern Ireland under a special arrangement. The Department for Business, Energy and Industrial Strategy (11.8%), the Ministry of Justice (11.1%) and the Department for Communities and Local Government (DCLG) (10.2%) laid a third of all instruments between them (see Chart 3). Benefits, justice matters, transport and pubs attracted most correspondence from the public. Submissions that provided added insight into how an instrument would operate in practice have been published on our webpage.[6] The Committee is grateful to all those who have made contributions, they offer a different perspective and help us in holding the Government to account.

### Analysis of grounds for report

19. On average, the Committee draws about 7% of the instruments it sees to the special attention of the House. In 2015–16, that proportion rose to 9.4% (67 of 712) which we attributed to the number of SIs identified as having deficient Explanatory Memoranda (EMs). In the current session, we have reported 7.7% (51 of 659), four of which were reported on the especially critical ground that they may imperfectly achieve their policy objective. These concerned the Warm Home Discount (6th Report[7]), the Barnsley, Doncaster etc. Mayoral Election (26th Report[8]) and two regulations setting out exceptions to the two child limit for social security and Child Tax Credits (30th Report[9]). In each case we felt that the policy was ill thought-through and that key operational issues had not been resolved before the instrument was laid.

### Guidance

20. A change in the use of guidance has also suggested to us that Departments are, on occasion, failing to work out fully the ramifications of a piece of secondary legislation prior to laying. With increasing frequency, we have

5 The Committee considers almost all instruments subject to procedure, for example, statutory Codes, Treaties and Immigration Rules but the term "statutory instruments" is used here as short hand for all the instruments within our remit.
6 In the right hand bar on our publications page.
7 6th Report, Session 2016–17 (HL Paper 31).
8 26th Report, Session 2016–17 (HL Paper 120).
9 30th Report, Session 2016–17 (HL Paper 148).

been asking to see guidance which will dictate how the legislation will operate, and it has not always been available to us. Two linked problems have emerged in relation to Departments' use of guidance: timing and content.

*Timing*

21. In order for the Committee to undertake its scrutiny work effectively and promptly, it is essential that all relevant documentation is made available at the time an instrument is laid. On a number of recent occasions Departments have not been able to provide us with relevant guidance, even in draft, during the scrutiny period available to the Committee. The Home Office's Immigration Rules were a particularly egregious example, where guidance for officials on how to decide whether someone should be deported was published three months after the legislation was laid before Parliament.[10] This is unacceptable. **Details of how a piece of secondary legislation will work in practice should be decided before it is laid and all relevant documentation, including operational guidance—even if in draft—should be made available to Parliament to enable effective and fully-informed scrutiny**.

*Content*

22. The problem of timing has sometimes been compounded by a change in the character of the guidance. We have observed a developing trend for Departments to leave to guidance material that dictates how a piece of secondary legislation will operate in practice. We have found, for example, key definitions,[11] statements of who is in scope of the legislation[12] and the basis for decisions affecting a person's career,[13] benefits[14] or even eligibility to stay in this country[15] being put into guidance. Given its significance, it is essential that such operational guidance is made available to the Committee and to Parliament in order to understand the scope or intention of a piece of legislation. It would also be preferable for such issues to be set out clearly in the legislation itself.

23. We wrote to the Rt Hon. Ben Gummer MP, Minister for the Cabinet Office, drawing attention to a number of our recent reports on these matters.[16] Mr Gummer replied that they would be addressed in training given to civil servants and that a reduced incidence of the Committee making similar reports in the future would be considered a measure of success.

24. **We also have a fundamental concern that this sort of significant operational guidance could subsequently be changed without being subject to Parliamentary scrutiny**. In his review following votes on Tax Credits Regulations in 2015, Lord Strathclyde, in the context of his proposal for a new procedure relating to secondary legislation, said that "it would be

10 Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), 14th Report, and correspondence, 17th Report, Session 2016–17 (HL Papers 67 and 75).
11 Draft Coasting Schools (England) Regulations 2016, 12th Report, Session 2016–17 (HL Paper 62).
12 A group of regulations on Trade Union ballots in public services, BEIS needed guidance "to clarify which workers we expect to be captured" 20th Report, Session 2016–17) (HL Paper 91).
13 Draft Nursing and Midwifery (Amendment) Order 2017, 22nd Report, Session 2016–17 (HL Paper 101).
14 Universal Credit (Housing Costs Element for Claimants Aged 18 to 21) (Amendment) Regulations 2017 (SI 2017/252), 28th Report, Session 2016–17 (HL Paper 131).
15 As above: Immigration (European Economic Area) Regulations 2016 (SI 2016/1052), 14th Report, and correspondence, 17th Report, Session 2016–17 (HL Papers 67 and 75).
16 Correspondence published in 31st Report, Session 2016–17 (HL Paper 154).

appropriate for the Government to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument".[17] **We believe that the distinction between what is appropriate to secondary legislation and to guidance should also be properly maintained. For example, definitions and statements about who is within a target group and who is not should be set out in secondary legislation, subject to Parliamentary scrutiny, and with sufficient clarity to avoid the need for interpretative guidance.**

## Orders devolving powers to cities in England

25. During the 2016–17 Session, 18 Orders were laid by the DCLG relating to the devolution of powers and budgets to cities in England. The model followed was the Combined Authority, bringing several councils together in an institution to be headed by an elected Mayor. The first election of the Combined Authority Mayors will be in May 2017. We brought seven of these Orders to the attention of the House, and published information about seven others.

26. We had cause to comment on the consultations carried out by the Combined Authorities to test opinion about proposals for their future roles, which often showed that local residents were less enthusiastic about the advent of elected Mayors than the councils concerned, a concern echoed in the House.[18] In one case, the Sheffield City Region Combined Authority, a judicial review found that the relevant consultation was insufficient, and DCLG laid an amending Order to put back the date for the election of the Mayor to May 2018.[19] In another, the Cambridgeshire and Peterborough Combined Authority, we found that DCLG's EM gave an incomplete picture of local views; in consequence we wrote to the Minister to stress the need for explanatory material to be full and accurate.[20] **We have previously referred to the far-reaching impact of the changes to local government structures which are being taken forward through orders of this kind.[21] This makes it all the more important that consultation is effective, and is properly explained when the relevant secondary legislation is laid before Parliament.**

## Consultation

27. In recent sessions, the Committee has taken a particular interest in the Government's approach to consultation on secondary legislation. In his role as Minister for Government Policy in the Cabinet Office, the Rt Hon. Sir Oliver Letwin MP engaged closely with the Committee and, by modifying the Government's *Consultation Principles*,[22] gradual improvement was made. We welcomed, in particular, Sir Oliver's commitment to publish, in January 2017, the first in a series of annual reports on consultations carried out by Departments. Regrettably, the document sent in early 2017 by his successor, Mr Gummer, proved disappointing. We commented: "While the report

17 Strathclyde Review: Secondary legislation and the primacy of the House of Commons
18 See: Debate on the Cambridge and Peterborough Combined Authority Order 2017, Lords Report, 2 March 2017, cols 962-5 referring to our 26th Report, Session 2016–17 (HL Paper 120).
19 The draft Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (Election of Mayor) (Amendment) Order 2017, 26th Report, Session 2016–17 (HL Paper 120).
20 See correspondence in 25th Report, Session 2016–17 (HL Paper 114).
21 See: 35th Report, Session 2015–16 (HL Paper 147) drawing to the House's attention the draft West Midlands Combined Authority Order 2016.
22 Consultation Principles

contains details of initiatives taken by the Cabinet Office, we note with disappointment that its purpose does not match the prospectus held out for it by Mr Gummer's predecessor …".[23]

28. Although, in this session, we have reported only two instruments on the ground of inadequate consultation, we have often found that poor consultation or poor presentation of the results of a consultation has been an issue with a number of instruments which we have reported on other grounds. The most stark example was the Civil Procedure (Amendment) Rules 2017 (SI 2017/95)[24] where the EM simply said that 289 people had responded to the consultation without reference to the fact that about 98% of respondents were strongly against the policy contained in the instrument.

## Impact assessment

29. In the last few sessions, we have commented on our difficulty, on occasion, in obtaining a reasonable assessment of the impact of proposed legislation, whether this appears as a broad brush summary in section 10 of the EM or as a full Impact Assessment (IA) for more substantial changes. Although the improvement has not been uniform, the standard of information provided has been better and most Departments are now providing the House with basic information such as the number of people who might be affected by an instrument, to what degree, and what costs or savings will result. There have however been a few examples—such as the Draft Telecommunications Restriction Orders (Custodial Institutions) (England and Wales) Regulations 2016[25] or the Draft Public Guardian (Fees etc.) (Amendment) Regulations 2017[26]—where the information about impact has still not been adequate or available at the time the instrument was laid.

## Quality of Explanatory Memoranda in general—oral evidence

30. EMs are crucial to Parliament's scrutiny of secondary legislation. This was clearly acknowledged in a debate in October 2016:

> "As Her Majesty's Opposition, we cannot provide the necessary scrutiny if Explanatory Memorandums are as scarce in detail as the one in question today … We in the Opposition are totally dependent on the clarity of Explanatory Memorandums in order to apply scrutiny, but I must say that the memorandum for this order hits something of a new low … "[27]

31. In the last few sessions, however, we have identified persistent issues relating to the quality of EMs. As a result, we invited Elizabeth Gardiner CB, First Parliamentary Counsel and Permanent Secretary of the Government in Parliament Group, Jonathan Jones, Treasury Solicitor, and Chris Wormald, Head of the Civil Service Policy Profession, to attend the Committee to give evidence which they did on 12 July 2016. We are grateful to them for their clear acknowledgment of the problem. Chris Wormald, for example, conceded:

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23 See: 26th Report, Session 2016–17 (HL Paper 120), para 23.
24 25th Report and correspondence, 26th Report, Session 2016–17 (HL Papers 114 and 120).
25 3rd Report, Session 2016–17 (HL Paper 11).
26 26th Report, Session 2016–17 (HL Paper 120), para 27.
27 Grand Committee on 18 October 2016, col 234 - Draft Financial Services and Markets Act 2000 (Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions) (Amendment) Order 2016.

> "In preparation for this hearing, we discussed what we do in relation to Explanatory Memoranda and I will put on record straightaway that we concluded that it is not enough. I do not think there will be a disagreement between us and the Committee that more needs to be done across government to get the kind of consistency in Explanatory Memoranda and other supporting documentation that we seek."[28]

32. The evidence session resulted in a seven-point plan for improvement with a particular focus on training for civil servants,[29] to which our staff have contributed. Mrs Gardiner, Mr Jones and Mr Wormald have agreed to return to give us a progress report in July 2017.

33. Regrettably the rate of improvement in EMs has not been as marked as that for impact assessments.[30] Although we have only reported seven instruments on the ground of "insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation", the number of deficient EMs that have been replaced remains high at 47 or 7.1% of instruments considered by the Committee (see Chart 4). This compares with 39 EMs, 5.5%, replaced in the last session.

34. **Given the importance of EMs in assisting Parliament in understanding secondary legislation, it is essential that issues relating to their quality are addressed effectively.** This will be all the more important in the context of legislation implementing the decision to withdrawal from the EU which will, in due course, involve a significant increase in the number of statutory instruments laid before Parliament**. We recommend that civil servants across all grades, particularly those senior officials charged with approving EMs, should be trained in producing high quality EMs.** We will return to this issue at the July evidence session mentioned above.

## Corrections

35. In 2014, the error rate for SIs reached almost 10% and was proving a significant barrier to effective scrutiny. We published a report in January 2015[31] and the Government responded positively by requiring Departments to improve their final checks and by setting up a specialist team within the Cabinet Office, the Statutory Instruments Hub, to improve the drafting of secondary legislation. In the 2015–16 Session, the error rate reduced to 4.9%. It has, however, recently crept back up to 5.3% (see Chart 4 below). Our sample figures only include instruments that have an italicised heading to indicate that they are replacing another SI free of charge, these should be seen as the tip of the iceberg, since many unmarked instruments also include lesser corrections. **We regard 5% as the absolute maximum acceptable and are disappointed that the error rate has not been reduced**.

36. Half of the correcting instruments laid in the current session were laid in the period 1 January to 31 March. This, coupled with the annual surge of SIs laid in this quarter, underpins our concern that insufficient time appears to

28 Oral evidence to SLSC, 12 July 2016.
29 Letter published in our 9th Report, Session 2016–17 (HL Paper 46).
30 Although there have been some good examples —see Protection of Wrecks (Designation) (England) Order 2016 (SI 2016/685) or Draft Road Traffic Offenders Act 1988 (Penalty Points) (Amendment) Order 2016, 15th Report, Session 2016–17 (HL Paper 69).
31 *Number of Corrections to Statutory Instruments in 2014*, 20th Report, Session 2014–15 (HL Paper 93).

be allocated to the planning stage of individual instruments or to managing the flow of instruments more generally. This leads to large numbers of SIs being prepared towards the end of the financial year and, under pressure, lawyers and policy officials make avoidable mistakes.[32] Given the number of instruments likely to flow from the decision to withdraw from the EU, if these problems are not addressed soon, we anticipate they will get much worse. **Once again, we recommend that the Cabinet Office should take more effective steps to ensure that the flow of secondary legislation is managed in a way that mitigates the sorts of surges that our experience demonstrates tend to increase errors and, consequentially, the number of correcting instruments and overall workload**.

## Public Bodies Orders

37. No further Public Bodies Orders were laid in this session and the original Schedules to the Public Bodies Act 2011 ("the 2011 Act") have now lapsed. Our response to the five year evaluation of the 2011 Act, which we published on 1 February 2017, concluded that the Government had demonstrated "an unacceptably cavalier approach to the use of Parliament's time", but also suggested ways in which some benefit could be salvaged by linking the Public Bodies Order procedure to the outcome of Triennial Reviews. The full text of our commentary is published on the PBO section of our webpage.[33]

## Further Response to the Strathclyde Review

38. We published our response to the Strathclyde Review on 14 April 2016.[34] The Government subsequently announced, on 17 November 2016, that they had no plans to introduce legislation in the current session to implement Lord Strathclyde's recommendation to reduce the powers of the House of Lords to reject secondary legislation.[35] The statement continued that the Government were therefore "reliant on the discipline and self-regulation that the House [of Lords] imposes on itself" and warned that "should that break down, [the Government] would have to reflect on this decision".

39. A joint letter from this Committee, the Constitution Committee and the Delegated Powers and Regulatory Reform Committee, dated 19 December 2016, expressed regret that the Government's response had adopted a minatory tone, drew attention to the Government's failure to address the recommendations of the three Committees, in particular issues relating to the boundary between primary and secondary legislation, and reiterated the nature of the fundamental error underlying the Government's response that the events giving rise to the Strathclyde Review were about the relationship between the two Houses rather than the relationship between Parliament and the Executive.

## Statistical Analysis

40. We met 30 times in 2016–17 Session and published 33 reports on a total of 659 instruments (150 affirmatives and 509 negatives). We drew 29 affirmatives and 22 negatives (51 in total) to the special attention of the

32 For example the Draft European Organization for Astronomical Research in the Southern Hemisphere (Immunities and Privileges) (Amendment) Order 2017 which had to be re-laid twice due to errors and was itself a correction of an earlier instrument.

33 Our post-legislative evaluation of the 2011 Act.

34 *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation*. 32nd Report, Session 15–16 (HL Paper 128).

35 Statement 17 November 2016, cols 1538–48.

House: an overall reporting rate of 7.7 % (19% for affirmatives and 4.3% for negative instruments). We held one oral evidence session, and have published a number of written submissions from members of the public and organisations which have greatly broadened our understanding of the impact of those SIs.

41. The grounds on which we drew the 51 instruments to the special attention of the House in this session were (see also Chart 3):

- 40 instruments (78% of those reported) on the ground of political importance or public policy interest;
- 4 (7.8%) on the ground of imperfectly achieving its policy objective;
- 7 (13.7%) on the ground that the explanatory material laid in support provides insufficient information;
- 2 (3.9%) on the ground that there appear to be inadequacies in the consultation process.[36]

42. In line with our previous practice we have limited the instruments we draw to the special attention of the House to those on which we believe the House may wish to take action. We alert the House to other instruments which appear to be of interest, are topical or follow an unusual process, by means of short information paragraphs that act as a kind of "news service". In this session, we included 93 such paragraphs covering 104 (15.6%) of the total number of instruments, a similar proportion to last year. (See Chart 5.)

36 Two instruments were reported on more than one ground.

**Chart 1: The number of SIs laid in Session 2016–17**

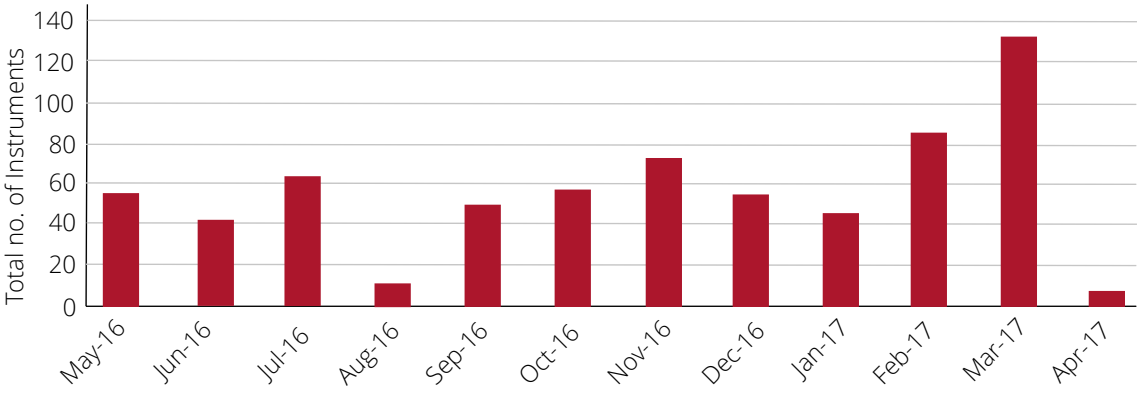
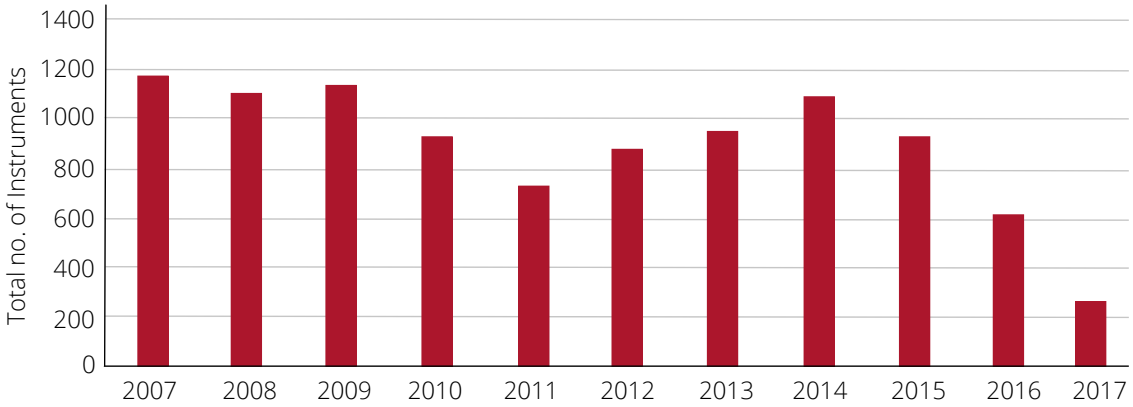



**Chart 2: The total number of instruments laid each calendar year since 2007**



## Chart 3: Breakdown of instruments laid by department and grounds for report

| Department | Total | Percentage of Total | Reported negative | Reported affirmative | Ground for Report[37] | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | a | b | c | d | e | f |
| Cabinet Office | 12 | 1.8 | 1 | 1 | 2 | 0 | 0 | 0 | 0 | 0 |
| BEIS* | 105 | 15.9 | 4 | 11 | 12 | 0 | 0 | 1 | 1 | 2 |
| DCLG | 67 | 10.2 | 3 | 8 | 9 | 0 | 0 | 1 | 1 | 0 |
| DCMS | 17 | 2.6 | 0 | 2 | 2 | 0 | 0 | 0 | 0 | 0 |
| DEFRA | 31 | 4.7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| DIT | 4 | 0.6 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| DExEU | 1 | 0.2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| DWP** | 96 | 14.6 | 4 | 0 | 3 | 0 | 0 | 1 | 0 | 0 |
| Education | 33 | 5.0 | 4 | 2 | 5 | 0 | 0 | 0 | 2 | 0 |
| FCO | 23 | 3.5 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Health*** | 37 | 5.6 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| Home Office | 52 | 7.9 | 1 | 2 | 2 | 0 | 0 | 0 | 1 | 0 |
| Defence | 7 | 1.1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Justice | 73 | 11.1 | 4 | 1 | 4 | 0 | 0 | 0 | 1 | 0 |
| NI Office | 2 | 0.3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Privy Council | 1 | 0.2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Scotland | 12 | 1.9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Transport | 32 | 4.9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| HMRC | 6 | 0.9 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Treasury | 46 | 7.1 | 1 | 1 | 1 | 0 | 0 | 1 | 0 | 0 |
| Wales | 1 | 0.2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **TOTAL** | **659** | | **22** | **29**[38] | **40** | **0** | **0** | **4** | **7** | **2** |

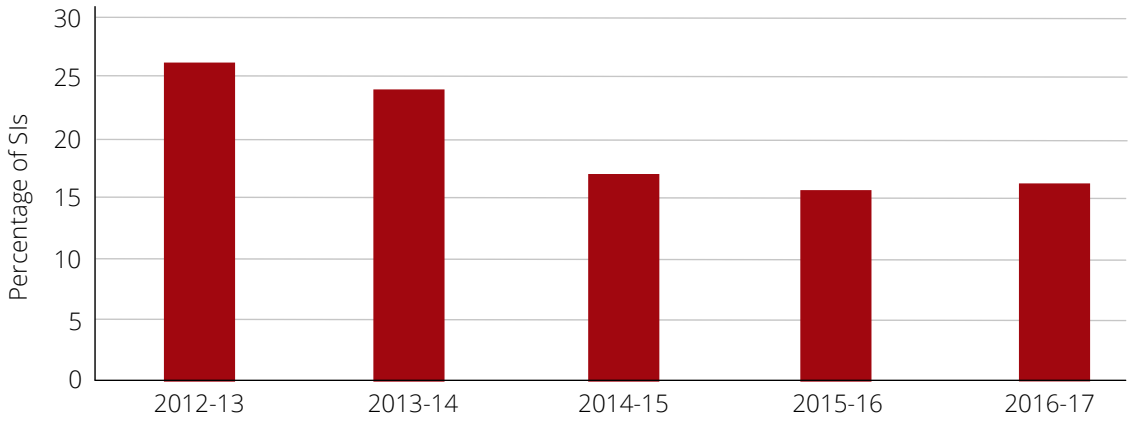
* Includes Instruments laid by DECC and BIS up to 18 July 2016 when they merged
** Includes Health and Safety Executive
*** Includes Food Standards Agency

## Chart 4: Corrections

| SIs | Number laid | Number of SIs replaced by correction | Percentage | Number of EMs replaced by correction | Percentage |
|---|---|---|---|---|---|
| Affirmative | 150 | 12 | 8 | 23 | 15.3 |
| Negative | 509 | 23 | 4.5 | 24 | 4.7 |
| Total | 659 | 35 | 5.3 | 47 | 7.1 |

37 See SLSC's terms of reference : http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/role/tofref/
38 51 SIs reported, two of these SIs were reported on two grounds each.

**Chart 5: The percentage of SIs that were the subject of short paragraph compared with the last four sessions**



# APPENDIX 1: DRAFT ELECTRICITY SUPPLIER OBLIGATIONS (AMENDMENT AND EXCLUDED ELECTRICITY) (AMENDMENT) REGULATIONS 2017

## Additional information from the Department for Business, Energy and Industrial Strategy

*Q1: For the consultation on exemption from the indirect costs of CFDs, you allowed only five weeks, most of which fell in the August holiday period. Why did you not allow longer, to assist consultation respondents who may have been away during that period? Did you receive any complaints about the timing? Why, given that the consultation closed on 26 August, did you publish the Government response only in March 2017 (so, five weeks allowed for responses, over six months taken to finalise the Government response)?*

A1: The context for this consultation was that the policy to introduce an exemption for eligible energy intensive industries (EIIs) from a proportion of the indirect costs of Contracts for Difference (CFD) had already been decided and announced by Government.[39] A number of previous consultations on the CFD exemption had taken place[40] and Regulations for the CFD exemption had been introduced in 2015. The purpose of this latest consultation was to consult on some technical changes to the 2015 Regulations, as well as changes that were needed to comply with the terms of the State Aid approval for the CFD exemption. We held a number of meetings with interested parties, including energy suppliers and business energy users, during and after the consultation period.

The reason for the relatively short period of formal consultation was that, at the time of the consultation, the intention was to consider responses and subsequently lay the amended Regulations to a tight timetable that would allow the Regulations to come into force by the end of February 2017. This was to enable the Government to introduce, from April 2017, two additional exemptions for EIIs, from the indirect costs of the Renewables Obligation (RO) and small-scale Feed-in Tariffs (FIT), eligibility for which is intended to be defined by reference to these amended Regulations for the CFD exemption. The target date of April 2017 for starting the RO and FIT exemption schemes was set out in a Government consultation in April 2016,[41] with the intention that, subject to stakeholders' views, State aid approval and Parliamentary approval, these exemption schemes would replace the existing RO and FIT compensation scheme.

[Subsequently, the Government has communicated that it will not be possible to start the RO and FIT exemption schemes in April–we are continuing discussions with the European Commission to secure State Aid approval for these exemptions and the current compensation will remain in place in the meantime].

We did not receive any complaints about the timing of the consultation.

39 https://www.gov.uk/government/news/energy-intensive-industries-to-be-exempt-from-new-low-carbon-costs

40 https://www.gov.uk/government/consultations/electricity-market-reform-contracts-for-difference-costs-exemption-eligibility
https://www.gov.uk/government/consultations/electricity-intensive-industries-relief-from-the-indirect-costs-of-renewables
https://www.gov.uk/government/consultations/emr-changes-to-the-cfd-supplier-obligation
https://www.gov.uk/government/consultations/supplier-obligation-consequential-amendments-to-the-balancing-and-settlement-code

41 https://www.gov.uk/government/consultations/implementing-an-exemption-for-energy-intensive-industries-from-the-indirect-costs-of-the-ro-and-the-fits

The reason we were not able to publish the Government response earlier is due to the complexity of the Regulations. Following the consultation, some of the technical issues needed further consideration to ensure the amended Regulations achieved their objectives. We continued dialogue with stakeholders during the period following the consultation to keep them informed about progress.

*Q2: You say in the Explanatory Memorandum that "concern was raised that eligible businesses will receive the benefit of the CFD exemption whilst their non-eligible direct competitors will not, and the latter will face higher energy bills to fund the CFD exemption. The Department is aware of and understands these concerns. Whilst we continue to seek a resolution to this issue, we are also investigating options that may be available to us within the scope of the EU State Aid guidelines." Does BEIS not consider that this handling of the CFD exemption is in fact distorting competition in the relevant sectors? If not, why not? Does BEIS not consider that the policy is open to legal challenge given this apparent inconsistency in the handling of the CFD exemption? What resolution is BEIS seeking, and over what timescale?*

A2: We consider it unlikely that our policy for the CFD exemption will have a significant effect on competition within the UK. This is based on competition assessments for energy intensive industries,[42] conducted in line with Green Book guidance, that, whilst undertaken for a different purpose, nonetheless have conclusions that are relevant to the proposed CFD exemption.

We assessed the impact of the CFD exemption on the electricity bills of ineligible businesses. As set out in Annex A of the Government response to the consultation, for an illustrative non-exempt EII the impact is approximately 0.3% of their total electricity bill.

We considered competition between UK and international competitors as well as competition between businesses within the UK. As set out in the Government response to the consultation, the Government does not wish to delay bringing in an exemption for the most electricity intensive businesses (i.e. those whose electricity intensity is 20% or more) whose international competitiveness is most at risk. If we did not introduce this measure, the most electricity intensive businesses would be disadvantaged in comparison with their international competitors in countries where similar exemptions from the costs of renewable energy policy have been introduced, as permitted by EU State Aid Guidelines.

We do not consider that the policy will be open to successful legal challenge. The eligibility criteria for the CFD exemption are the same as the eligibility criteria for the RO and FIT compensation scheme which has been in operation for over a year and provides a higher value of relief to eligible companies.

The European Commission has approved our State Aid notification to introduce this CFD exemption for businesses in eligible sectors whose electricity intensity is 20% or more. In providing this approval, the Commission has to be satisfied that the measure does not adversely affect trading conditions to an extent contrary to the common interest on the basis of compatibility with the relevant State Aid guidelines that require eligibility to be determined on the basis of objective, non-discriminatory and transparent criteria.

Whilst the Government also submitted a State Aid notification to the European Commission to address any potential competitive distortion by including direct competitors (who do not themselves meet the 20% electricity intensity threshold)

42 Internal BEIS assessments, containing commercially sensitive material, that have not been published.

within the scope of the exemption, the Commission has not approved this notification and we cannot proceed without the Commission's approval.

We are considering a range of alternative options that may be available to us within the scope of the relevant EU State Aid guidelines.

We are considering how quickly we could implement any option, which would be dependent on securing State Aid and Parliamentary approval.

*Q3: You say in the Explanatory Memorandum that the costs of the exemption for EIIs will be redistributed to domestic and non-eligible business users, increasing their bills. "For domestic users this is likely to be an increase of around £1 per year; for a medium energy business user this is likely to be around £3,100 per year by 2023/24." Has BEIS explained these impacts to the groups concerned (including consumers)? What representations about the impacts has BEIS received from those groups, or their representatives?*

A3: The impacts on the bills of other consumers have been set out in consultations on the CFD exemption policy and in the published Impact Assessment that accompanied the 2015 CFD exemption Regulations (http://www.legislation.gov.uk/uksi/2015/721/impacts). Annex A of the Government response to the 2016 consultation contains the most recent estimate of the impact, based on the latest data available, which shows a smaller estimated increase in bills than previous estimates. The impact has also been covered in ongoing dialogue with stakeholders.

Recent representations to BEIS have been from energy intensive sectors in which there are direct competitor businesses who do not meet the 20% electricity intensity threshold, raising the issues set out in the questions above. We have not received recent representations from consumer groups about the impact of the CFD exemption.

**5 April 2017**

## 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 25 April 2017, a Member declared the following interest:

### Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 (SI 2017/500)

Lord Janvrin

*Senior Adviser, HSBC Private Bank (UK) Ltd*

### Attendance:

The meeting was attended by Lord Bowness, Lord Goddard of Stockport, Lord Haskel, Lord Janvrin, Lord Rowlands, Baroness Stern and Lord Trefgarne.