HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

24th Report of Session 2017–19

Includes 7 Information Paragraphs on 7 Instruments

Ordered to be printed 27 March 2018 and published 29 March 2018

Published by the Authority of the House of Lords

HL Paper 114
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 Blackstone Lord Haskel Lord Sherbourne of Didsbury
Lord Faulkner of Worcester Rt Hon. Lord Janvrin Rt Hon. Lord Trefgarne (Chairman)
Baroness Finn Lord Kirkwood of Kirkhope Baroness Watkins of Tavistock
Lord Goddard of Stockport 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.
Draft Combined Authorities (Borrowing) Regulations 2018

1. The Ministry of Housing, Communities and Local Government (MHCLG) has laid these draft Regulations with an Explanatory Memorandum (EM). Under powers in the Local Democracy, Economic Development and Construction Act 2009, the Government have established six combined authorities for the areas of two or more local authorities in England: the Cambridgeshire and Peterborough Combined Authority (CPCA); the Greater Manchester Combined Authority (GMCA); the Liverpool City Region Combined Authority (LCRCA); the Tees Valley Combined Authority (TVCA); the West Midlands Combined Authority (WMCA); and the West of England Combined Authority (WECA). Each of these combined authorities has an elected mayor.\footnote{The Committee has brought a number of statutory instruments relating to the establishment and operation of these mayoral combined authorities to the special attention of the House. In the 2016–17 Session, for example, these included the draft Greater Manchester Combined Authority (Functions and Amendment) Order 2016 (17th Report, HL Paper 75); the draft West of England Combined Authority Order 2017 (23rd Report, HL Paper 106); and the draft Cambridgeshire and Peterborough Combined Authority Order 2017 (24th Report, HL Paper 110).}

2. In the EM, MHCLG says that the Regulations implement a commitment\footnote{The commitment was made by the Chancellor of the Exchequer in his Autumn Statement in November 2016.} to extend the borrowing powers of mayoral combined authorities in England who have agreed debt caps with HM Treasury. While the mayoral combined authorities already have borrowing powers for transport, MHCLG explains that extending the borrowing powers will fulfil the Chancellor’s aim that the mayoral combined authorities should be able to invest in economically productive infrastructure.

Draft Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018

3. The Department for Business, Energy and Industrial Strategy (BEIS) has laid this draft Order with an Explanatory Memorandum (EM) and Impact Assessment. BEIS says that, in amending earlier legislation,\footnote{Namely, section 23 of the Enterprise Act 2002.} the Order extends the powers of the Secretary of State to intervene in mergers which might give rise to national security implications and into which he would not otherwise be able to intervene. Specifically, the instrument amends the “share of supply” test to allow the scrutiny of more mergers in three areas: military and dual-use technologies; and two parts of the advanced technology sector: computing hardware; and quantum technologies.\footnote{Relevant guidance published by BEIS says: “While a conventional computer uses binary ‘bits’ which take the value 0 or 1, the fundamental unit of information in a quantum computer is the qubit which can be in the state 0, 1 or a combination of both simultaneously. A new generation of quantum technologies are now driving and enabling a new generation of devices and systems, from very powerful medical imaging devices to entirely new methods of computing to solve currently intractable problems – all made possible by the engineering of quantum effects into next-generation technologies.” See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/690627/EA02_guidance_draft_final_for_publication.docx.pdf} For these areas, the Order amends the share of supply test so that it is met where a merger...
or takeover involves a target with 25% or more share of supply in the UK, as well as where the deal leads to an increase in the share of supply to, or above, this threshold.

4. In the EM, BEIS says that, if the draft Order is approved, it intends to lay a further instrument to amend the turnover test to allow the scrutiny of more mergers in the same three areas of the economy. The second instrument will lower the threshold which the target business’s UK turnover must exceed from £70 million to £1 million. In the longer term, the Government intends to bring forward primary legislation to make more substantive changes to how they scrutinise the national security implications of foreign investments.

5. We obtained further information from BEIS, which we are publishing at Appendix 1.

Draft Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018

6. In our 22nd Report of this Session,\(^5\) we published information about an earlier instrument\(^6\) which provided that, from 1 October 2018, mandatory licensing is to apply to Houses in Multiple Occupation (HMOs) that are below three storeys (if occupied by five or more persons in two or more separate households) as well as to those of three or more storeys. We were not persuaded that such a significant extension of licensing could be readily achieved in the relatively short period until the Order took effect. We wrote to the Minister accordingly, and published the correspondence in our 23rd Report.\(^7\)

7. In the Explanatory Memorandum to the latest Order, the Ministry of Housing, Communities and Local Government says that it is already mandatory for a local housing authority (LHA) to include certain conditions in HMO licences, relating to the provision of smoke and carbon monoxide alarms, and to gas safety and the safety of electrical appliances and furniture. The Order proposes two new conditions which LHAs must include when granting new (or renewal) licences from October of this year. The first specifies minimum sizes of rooms which may be occupied as sleeping accommodation and also requires the LHA to specify the maximum number of persons (if any) who may occupy a specified room for the purpose of sleeping accommodation in the licensed HMO. The second new condition requires licence holders to comply with any local authority scheme for refuse storage and disposal at the HMO.

Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018 (SI 2018/321)

8. This instrument updates UK law so that it is consistent with the revised EU Regulation 996/2010 on the investigation and prevention of civil aviation air accidents and incidents. Although most of the EU Regulation’s requirements have direct effect, the instrument sets out the offences that constitute a breach of the Regulation. As well as including provisions to enable the Chief Inspector of Air Accidents (“the Chief Inspector”) to conduct safety investigations fairly and effectively, the instrument allows the Chief Inspector

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\(^6\) The Licensing of Houses in Multiple Occupation (Prescribed Description) (England) Order 2018 (SI 2018/221).
to investigate where an accident or serious incident has occurred in a state that is not a party to the Convention on International Civil Aviation and where that state does not intend to conduct its own investigation. The instrument also introduces a new permissive power for the Chief Inspector, under the EU Regulation, to conduct safety investigations into accidents and serious incidents involving military, customs, police or similar aircraft services where he expects to draw safety lessons for civil aviation from the investigation.

Immigration and Nationality (Fees) Regulations 2018 (SI 2018/330)

9. The main purpose of this instrument is to increase certain immigration and nationality fees, most of which will increase by 4% with effect from 6 April 2018, in line with the Home Office’s budget plans for 2018–19. The key categories affected by this increase will be workers, visitors and full-time students as well as people seeking settlement or residence in the UK and those seeking registration or naturalisation as British Citizens. Fees for the optional ‘Priority Visa’ service (by which applications for entry clearance to enter the UK to work, study or visit are processed more quickly) will increase by 15%. Sponsors’ licence fees (paid by employers or education providers wishing to recruit overseas skilled workers or offer full-time education to overseas students) will not be increased for the fourth year in succession. The Home Office estimates that the changes will raise an additional income of £60 million in 2018–19. The Explanatory Memorandum explains that the instrument conforms with its established policy of using any surplus generated by fees to contribute to the wider operation of the immigration system. The instrument also amends a small number of fee waivers and exceptions to make clearer to which application routes they apply. In particular the instrument introduces a fee waiver for people directly affected by the Grenfell Tower tragedy who are now applying for leave to remain in the UK.

Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 (SI 2018/343)

10. The Ministry of Housing, Communities and Local Government (MHCLG) has laid this Order with an Explanatory Memorandum (EM). Among a number of changes being made to so-called permitted development, the Order increases the size limits that apply to such development on agricultural land. It also amends the existing right to change the use of agricultural buildings to residential use, so as to allow up to a total of five homes on a single site, and to increase the floor space limits of agricultural buildings permitted to change to residential use for larger homes.

11. In the EM, MHCLG says that it consulted from 7 February to 2 May 2017 on measures to support housing in rural areas and modern farming. As regards the proposal to extend permitted development rights for larger agricultural development, under half (46%) of the 175 respondents agreed. MHCLG says that some respondents wanted higher thresholds, while others were concerned about the impact of permitted development on protected areas. As regards the proposal on converting agricultural buildings to residential use,

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8 Permitted development rights allow specified forms of development to be carried out without the need to apply for planning permission.

MHCLG explains that, while 59% of the 185 respondents voiced support, some suggested that to ensure that homes met local need, there should be a rural worker occupancy restriction, price restriction, or a limit on the size of the homes. In the event, the Order allows the change of use of up to five homes on one site, but each may be no larger than 100 square metres “to help ensure affordability for rural families”. **We question whether this in itself will ensure that the homes are occupied by rural workers.**


12. This instrument implements a number of EU Regulations which have the objective of protecting human health and ensuring good quality bottled water. In essence, the instrument introduces a risk-based approach to monitoring for radioactive substances in bottled spring water and bottled drinking water by local authorities; brings the frequency of monitoring and method of analysis in relation to such water in line with the approach supported by the World Health Organisation (WHO); removes a national requirement (which was allowed but not required by the EU Regulations) on the hardness of bottled drinking water which has been softened or desalinated; and introduces a lighter touch enforcement regime, moving from a purely criminal based approach to one which starts with improvement notices. Under this new regime appeals against such improvement notices will go to the First-tier Tribunal, and failure to comply with an improvement notice will be a criminal offence. The Department for Environment, Food and Rural Affairs (Defra) explains that this shift to using civil sanctions is part of a wider approach to avoiding the proliferation of unnecessary criminal offences and being more proportionate in enforcing food quality.

13. Noting that the 25 Year Environment Plan,\(^1\) published by Defra in January does not contain explicit references to the potential pollution of drinking water by plastic particles, we asked Defra about the Regulations in the context of the Government’s recent ban on the manufacture of cosmetics and care products containing plastic microbeads. We pointed to the widely reported findings of research in the United States that plastic particles had been detected in bottled water. A recent Parliamentary Question in the House of Commons\(^1\) also asked about the steps Defra was taking to prevent the presence of plastic particles in bottled water. In its response, Defra highlighted the UK’s existing standards and quality criteria for bottled water and pointed to the responsibility of local authorities for enforcing the regulations and carrying out routine monitoring checks and sampling. **We question whether this is an adequate response to growing concern about the possible pollution of bottled water by plastic particles.**

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\(^1\) Commons Written Answer (PQ 132954), 15 March 2018.
### INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

**Draft instruments subject to affirmative approval**

- Draft Combined Authorities (Borrowing) Regulations 2018
- Draft Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018
- Draft Licensing of Houses in Multiple Occupation (Mandatory Conditions of Licences) (England) Regulations 2018

**Instruments subject to annulment**

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APPENDIX 1: DRAFT ENTERPRISE ACT 2002 (SHARE OF SUPPLY TEST) (AMENDMENT) ORDER 2018

Additional Information from the Department for Business, Energy and Industrial Strategy

Q1: The Explanatory Memorandum states: “… this affirmative instrument amends the share of supply test to allow the scrutiny of more mergers in three areas: (i) military and dual-use technologies, (ii) two parts of the advanced technology sector, encompassing computing hardware and quantum technologies.” Why have only these three areas been chosen at this stage? Do the Government already have sufficient powers to scrutinise mergers in obvious areas of vulnerability, such as the supply of energy and water?

A1: These amendments are intended to close an existing loophole, but to do so in a way which is proportionate—hence they focus on military and dual-use technologies and areas of advanced technology where, due to the nature of the sector, it is more likely that national security risks arise below the existing thresholds. The Enterprise Act 2002 grants the Government powers to intervene in mergers for national security reasons as long as the threshold tests are met. Mergers in the energy sector or water are much more likely to meet these thresholds and so it was not deemed proportionate to amend the thresholds for these sectors.

Q2: In the draft Guidance, it is stated: “The businesses that are driving the development of innovative goods and technological advances are not necessarily those with large turnovers.” This fact presumably lies behind the intention of laying a second instrument to lower the threshold which the target business’s UK turnover must exceed from £70 million to £1 million. But does this fact not also call into question whether it is appropriate to specify that “a target” should have 25% or more share of supply in the UK? If a target has just 1% share but possesses technology that could be used hostilely to disrupt the UK’s economy, shouldn’t it also be caught within the scope of this scrutiny?

A2: The purpose of the thresholds in s.23 of the Enterprise Act 2002 was to provide a “safe harbour” for mergers that are sufficiently small in scale, in terms of their potential impact on the supply of goods or services in the United Kingdom, that they can be exempted from the merger regime without any need for individual consideration in relation to their impacts on the public interest. The thresholds help ensure the proportionality of the merger control regime by relieving some merging businesses from the need to consider the merger regime beyond satisfying themselves that their merger falls below the two thresholds.

There is of course a possibility that a business with little or no share of UK supply holds a disruptive technology for which change of ownership would be damaging to UK interests. However, given the potential impact that lowering the threshold for national security purposes has on the wider merger regime and following public consultation, the Government deemed that it was not appropriate or proportionate to remove the [share of supply] threshold altogether. This is precisely why we consulted at the same time on a new regime which would allow the Government to intervene in such circumstances—this would require primary legislation.

21 March 2018
APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at [http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests](http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests). The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 27 March 2018, Members declared the following interests:


Lord Trefgarne  
*Chairman, Fairoaks Airport Consultative Committee*

**Attendance:**

The meeting was attended by Baroness Blackstone, Baroness Finn, Lord Goddard of Stockport, Lord Haskel, Lord Janvrin, Lord Kirkwood of Kirkhope, Lord Sherbourne of Didsbury, Lord Trefgarne and Baroness Watkins of Tavistock.