



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

**Thirteenth Report
of Session 2019–21**

Drawing special attention to:

*Taking Control of Goods and Certification of Enforcement Agents
(Amendment) (Coronavirus) Regulations 2020 (S.I. 2020/451)*

*National Health Service (Quality Accounts) (Amendment) (Coronavirus)
Regulations 2020 (S.I. 2020/466)*

*Misuse of Drugs (Coronavirus) (Amendments Relating to the Supply of
Controlled Drugs During a Pandemic etc.) Regulations 2020 (S.I. 2020/468)*

*Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion)
Order 2020 (S.I. 2020/481)*

*Ordered by the House of Lords
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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 73](#), relating to Public Business.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii that its parent legislation says that it cannot be challenged in the courts;
- iii that it appears to have retrospective effect without the express authority of the parent legislation;
- iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

- v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii that its form or meaning needs to be explained;
- viii that its drafting appears to be defective;
- ix any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

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The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

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Instruments reported

At its meeting on 3 June 2020 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to four of those considered. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2020/451: Reported for defective drafting and for requiring elucidation

Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020

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

1.2 For the period that restrictions on movement are in place due to the coronavirus emergency, these Regulations impose restrictions on enforcement agents taking control of goods and extend the time periods for enforcement. The Regulations insert text into the Taking Control of Goods Regulations 2013. The inserted text uses the word “month” or “months” in four places; in one place only it is qualified as “calendar month”. The Committee was unsure why the qualification was felt necessary in just one place. Moreover, the Interpretation Act 1978 provides that “month” means “calendar month” except where the contrary is implied; and the Committee was concerned that for the Regulations to provide expressly for “month” to mean “calendar month” in one place, might be seen as implicitly disapplying the general 1978 Act definition in so far as it would otherwise apply to the other three places. The Committee asked the Ministry of Justice to explain. In a memorandum printed at Appendix 1, the Department accepts that “calendar month” is a superfluous term, confirms that it was not intended to displace the Interpretation Act 1978 in relation to the other uses of the term “month” in the instrument, and undertakes to amend the term at the next available opportunity. **The Committee accordingly reports regulation 2(3)(b) (inserted regulation (6)) for defective drafting, acknowledged by the Department.**

1.3 The Committee also asked the Department to explain (using examples) (i) when the period referred to in regulation 2(3)(b) (inserted regulation (5)) begins; (ii) when the period referred to in regulation 3(3)(c) (inserted regulation (3)) ends and (iii) which day is the relevant day referred to regulation 3(3)(c) (inserted regulation (4)). In its memorandum, the Department gives examples indicating that “month” should be construed as “calendar month” in each instance. Given the uncertainty caused by the issues discussed above, it is helpful to have the Department’s clarification of how the instrument is intended to operate, and the **Committee accordingly reports regulation 2(3)(b) (inserted regulation (5)) and regulation 3(3)(c) as requiring elucidation, provided by the Department’s memorandum.**

2 S.I. 2020/466: Reported for requiring elucidation

National Health Service (Quality Accounts) (Amendment) (Coronavirus) Regulations 2020

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.

2.2 These Regulations suspend the legal duties of providers of NHS services for the reporting period 1 April 2019 to 31 March 2020 to seek assurance on their Quality Accounts by 30 April 2020, and to publish them and provide a copy to the Secretary of State by 30 June 2020. The instrument provides that, for the reporting period ending with 31 March 2020, the relevant documents may be provided later than the dates specified in the regulations without substituting new fixed dates (though providers remain under a statutory duty to publish their Quality Accounts for the reporting period). The Explanatory Memorandum states that revised timelines and guidance in relation to the production and publication of Quality Accounts for the reporting period 2019/20 will be issued by NHS England and NHS Improvement. The Committee asked the Department of Health and Social Care whether it is intended that revised timelines will only be issued by NHS England and NHS Improvement (rather than in legislation) and to identify the power which allows that. In a memorandum printed at Appendix 2, the Department explains that it agreed with NHS England and NHS Improvement that the regulations should not substitute new fixed dates because providers of NHS services are facing an uncertain challenge during the coronavirus emergency. The Department helpfully acknowledges that any new recommended dates in guidance will not be substitutes for the previous legislative time limits in the sense that they do not form part of the law and cannot be enforced, but adds that it expects voluntary compliance with the new dates. **The Committee accordingly reports these regulations for elucidation, provided by the Department’s memorandum.**

3 S.I. 2020/468: Reported for doubtful vires

Misuse of Drugs (Coronavirus) (Amendments Relating to the Supply of Controlled Drugs During a Pandemic etc.) Regulations 2020

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that there is doubt as to whether they are *intra vires* in one respect.

3.2 This instrument amends the Misuse of Drugs Regulations 2001 to allow, among other things, pharmacists at a registered pharmacy business to supply certain controlled medicines without a prescription and, in certain circumstances, to change the intervals on instalment prescriptions without the immediate need for a new prescription. These regulatory relaxations are to be turned on and off by an announcement of the Secretary of State. The Committee asked the Home Office to identify the power for this sub-delegation of legislative power. In a memorandum printed at Appendix 3, the Department argues that the presumption against sub-delegation is overridden by the “strongly adverse consequences” that would ensue as a result of the “inability of the Secretary of State to provide for the reasonable and proportionate response as set out in the Regulations”. The Committee rejects this argument. If it were essential in the present emergency that the Secretary of State should acquire power to turn regulatory restrictions on and off

by administrative action, the Department could have made regulations under the Civil Contingencies Act 2004, which provide the vires for sub-delegation. The vires used for these Regulations do not permit sub-delegation, and they should be made when required, commenced by commencement provision in the ordinary way, and revoked when no longer required, in the usual way. Other instruments to deal with the coronavirus public health crisis have operated in that way. The Committee is concerned that the present emergency should not be taken as an opportunity to relax the principles of the rule of law, of which the presumption against sub-delegation is a key component. **The Committee accordingly reports regulations 4 and 5 on the ground that there is doubt as to whether they are *intra vires*.**

3.3 (In its memorandum the Department surprisingly asserts that the judgment of Lord Briggs in *Project Blue Limited v Commissioners for Her Majesty’s Revenue and Customs* [2018] UKSC 30 endorses “a modern contextual approach to the construction of statutes, where regard is to be had to the consequences” which “represents a significant difference from earlier authorities in which sub-delegation was considered unlawful even if convenient and desirable”. Had the case been about sub-delegation (which wasn’t mentioned), and had Lord Briggs been in the majority (rather than a 4:1 minority), and had his comments about contextual construction and consequences added anything to the accepted doctrines of convenience and absurdity (see *Craies on Legislation*, 11th Edition, Chapter 19), the Department might have a point: as it is, the Committee strongly rejects the suggestion that modern contextual construction has overridden the long-standing presumption against sub-delegation in favour of sub-delegation where “convenient and desirable” and very much hopes that the Government is not intending to assert this more generally.)

4 S.I. 2020/481: Reported for doubtful vires

Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020

4.1 The Committee draws the special attention of both Houses to this Order on the ground that there is doubt as to whether it is *intra vires* in one respect.

4.2 This Order excludes from competition prohibitions agreements between dairy produce suppliers and agreements between logistics service providers intended to address the effects of the coronavirus emergency on the demand for dairy produce in the United Kingdom. The provisions are in effect for “the dairy produce demand disruption period” which begins on 1 April 2020 and ends on the expiry of the period of three months beginning with the day the Order comes into force or on an earlier date specified by the Secretary of State in a notice (in the circumstances set out in article 7). The Committee asked the Department for Business, Energy and Industrial Strategy to identify the power for the sub-delegation in article 7. In a memorandum printed at Appendix 4, the Department argues that “an emergency reserve power [of the kind relied on to make this Order] would have been intended to be construed widely and that it would have been in the contemplation of Parliament that some small elements of discretion of an administrative kind should be left to the Secretary of State”. It asserts that arriving at a reasonably held view that “there is no longer a significant disruption or a threat of significant disruption to the demand for dairy produce as a result of coronavirus” is a small element of discretion of an administrative

kind. The Committee disagrees. Turning legislation on and off is a legislative function. The presumption against sub-delegation in legislation is long-standing and strong, so where Parliament intends to confer legislative discretion it must do so by express words or (exceptionally) by necessary implication. The decision as to the duration of the dairy produce demand disruption period and whether it continues to justify the disapplication of antitrust laws goes to the heart of this instrument and cannot be categorised as merely administrative. **The Committee accordingly reports article 7 on the ground that there is doubt as to whether it is *intra vires*.**

Instruments not reported

At its meeting on 3 June 2020 the Committee considered the instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Instrument requiring affirmative approval

S.I. 2020/500 Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020.

Instruments subject to annulment

- S.I. 2020/477** Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) (Coronavirus) (Amendment) (England) Regulations 2020
- S.I. 2020/489** Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) (Amendment) Regulations 2020
- S.I. 2020/496** Merchant Shipping (Port State Control and Prevention of Pollution from Noxious Liquid Substances in Bulk) (Amendment) Regulations 2020
- S.I. 2020/501** Merchant Shipping (Life-Saving Appliances and Arrangements) Regulations 2020
- S.I. 2020/502** Local Government Pension Scheme (Northumberland and Tyne and Wear Pension Fund Merger) Regulations 2020
- S.I. 2020/504** Regulation (EC) No 1370/2007 (Public Service Obligations in Transport) (Amendment) (EU Exit) Regulations 2020
- S.I. 2020/509** Electricity (Individual Exemptions from the Requirement for a Generation Licence) (England) Order 2020
- S.I. 2020/510** Direct Payments to Farmers (Application Deadlines) (Coronavirus) (Amendment) (England) Regulations 2020
- S.I. 2020/512** Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations 2020
- S.I. 2020/513** Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) (Northern Ireland) Regulations 2020
- S.I. 2020/515** Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020
- S.I. 2020/516** Sea Fishing (Enforcement) (Amendment) Regulations 2020

Appendix 1

S.I. 2020/451

Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020

1. On 13 May 2020, the Committee requested that the Ministry of Justice submit a memorandum relating to the above instrument (the “Amending Regulations”) relating to the following points:

(1) Is the reference to “calendar month” in regulation 2(3)(b) (inserted regulation (6)) intended to disapply section 5 and Schedule 1 of the Interpretation Act 1978 in relation to other references to months in these provisions?

(2) Explain (using examples) (i) when the period referred to in regulation 2(3)(b) (inserted regulation (5)) begins; (ii) when the period referred to in regulation 3(3)(c) (inserted regulation (3)) ends and (iii) which day is the relevant day referred to regulation 3(3)(c) (inserted regulation (4)).

2. The Department is grateful for the Committee’s consideration of the Amending Regulations and sets out its response to the matters raised below.

Reference to “Calendar Month”.

3. The Committee is correct to note that “calendar month” is a superfluous term. It was not intended to displace the Interpretation Act 1978 in relation to the other uses of the term “month” in these provisions. The Amending Regulations are intended to be repealed when they are no longer required, but the Department will amend the provision at the next available opportunity if it is not otherwise repealed before a suitable opportunity arises.

Explain (using examples) (i) when the period referred to in regulation 2(3)(b) (inserted regulation (5)) begins;

4. Regulation 2(3)(b) reads “on or after 26th February 2020 but before the beginning of the emergency period”

5. The emergency period is defined in Regulation 2 of the 2013 Regulations as amended by the Amending Regulations, as follows:

“emergency period” means, where the address contained in the notice of enforcement is in England, any time during which a restriction or requirement is in place under regulation 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 or, where the address contained in the notice of enforcement is in Wales, any time during which a restriction or requirement is in place under regulation 8(1) of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020.

6. The restrictions or requirements that are referred to (the “restrictions”) are those that prevent a person leaving the place in which they usually live without a reasonable excuse.

Although there may in future be changes made to the list of reasonable excuses for the purpose of the restrictions, the emergency period will be ongoing until a person has no requirement for a reasonable excuse in order to leave the place in which they usually live.

7. The beginning of this emergency period was, in England, 1pm on 26 March 2020, when the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 came into force (see regulation 3(1)(a) of those regulations) and, in Wales, 4pm on 26 March 2020 when the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 came into force (see regulation 3(1)(a) of those regulations)).

8. However, the effect of inserted regulation 9(2)(5)(b) in conjunction with inserted regulation 9(2)(5)(a) is that, if the relevant day falls on or after 26 February 2020 and before the end of the emergency period, the period for the taking control of goods will be automatically extended, so the precise timing of the beginning of the emergency period is not of material significance to the reader of the regulations. Where the relevant day falls on 26 March 2020 this day falls both under regulation 9(2)(5)(a) and regulation 9(2)(5)(b) but it is clear that the condition for the extension to be made is met.

9. Prior to the Amending Regulations coming into force, the period referred to in Regulation 9(1) of the Amending Regulations 2013 (the “enforcement period”) would expire 12 months after the Notice of Enforcement is served, unless the enforcement period extended by the Court in accordance with Regulation 9(3).

10. The Amending Regulations provide that in any case where there was one month or less of the enforcement period remaining on 26 February 2020, or this point is reached thereafter but at a time when the restrictions remain in place, the enforcement period will be automatically extended by a period of 12 months.

11. The Amending Regulations provide for this by specifying a “relevant day”—being the day one month before the expiry of the enforcement period. If this day falls between 26 February 2020 and the beginning of the emergency period, or during the emergency period, then the automatic extension is applied.

12. For example:

- a) If the notice of enforcement was given in England on 13 April 2019 and the enforcement period had not been extended by the court in accordance with regulation 9(3) of the 2013 Regulations, then it would be due to expire on 13 April 2020. The “relevant day” would be 13 March 2020. This is after 26 February 2020 so the enforcement period is automatically extended until 13 April 2021.
- b) If the notice of enforcement was given in England on 15 May 2018 and the enforcement period had been extended by the Court in accordance with regulation 9(3) of the 2013 Regulations, then the enforcement period would be due to expire on 15 May 2020. The relevant day would be 15 April 2020. This is during the emergency period in England and therefore the enforcement period would be automatically extended until 15 April 2021.
- c) If the notice of enforcement was given in England on 19 October 2019 and has not been extended by the Court under regulation 9(3) of the 2013 regulations then the enforcement period would be due to expire on 19 October 2020. The

relevant day is 19 September 2020. We do not yet know whether this enforcement period will be automatically extended but if the coronavirus restrictions remain in place in England on 19 September 2020 then the enforcement period will be extended until 19 October 2021.

Explain, using examples, when the period referred to in regulation 3(3)(c) (inserted regulation (3)) ends

13. Inserted paragraph (3) reads:

“(3) If the relevant day falls—

(a) during the emergency period; or

(b) on or after 26th December 2019 but before the beginning of the emergency period,

the certificate will continue to have effect date for a period of 9 months beginning with the relevant day.”

14. The emergency period is defined for these purposes by amendments to regulation 2, as follows:

“emergency period” means any time during which a requirement or restriction is in place under regulation 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 or regulation 8(1) of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020;”

15. It is not yet known when the emergency period referred to in regulation 3(3)(c) will end. This will be the day on which there is no longer any restriction preventing a person from leaving the place in which they usually live without a reasonable excuse in either England or Wales. This will be the later of:

- a) the day and at the time specified in a direction published by the Secretary of State terminating the requirement or restriction imposed by regulation 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (see regulation 3(1)(b) of those regulations); and
- b) the day and time specified in a direction published by the Welsh Ministers terminating the restrictions imposed by regulation 8(1) of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (see regulation 3(1)(b) of those regulations).

16. Unlike regulation 2(3) which defines the emergency period by reference to the address contained in the notice of enforcement, since a certificate of enforcement usually gives rights exercisable across England and Wales, the presence of restrictions in either jurisdiction on the relevant day will lead to an automatic extension of the period of validity of the certificate.

17. For the purposes of inserted paragraph (3) the relevant day is defined in inserted paragraph (4) as the day three months prior to the period mentioned in paragraph (1), which is the period of two years beginning with the date on which the enforcement agent’s certificate was issued.

18. For example:

- a) a certificate that was issued on 12 March 2018 would be due to expire on 12 March 2020 and the relevant day would be three months prior to this, on 12 January 2020. As this date is after 26 December 2019 and before the beginning of the emergency period beginning on 26 March 2020, the validity of the certificate would be subject to an automatic extension of six months. It would therefore now expire 9 months after the relevant day, on 12 September 2020; and
- b) a certificate that was issued on 12 December 2018 would be due to expire on 12 December 2020 and the relevant day would be three months prior to this, on 12 September 2020. This date will fall within the emergency period unless, prior to that date, a direction has been published both by the Secretary of State terminating the requirement or restriction imposed by regulation 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and by the Welsh Ministers terminating the restrictions imposed by regulation 8(1) of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020.

Ministry of Justice

19 May 2020

Appendix 2

S.I. 2020/466

National Health Service (Quality Accounts) (Amendment) (Coronavirus) Regulations 2020

1. The Joint Committee on Statutory Instruments has noted that revised timelines in relation to the production and publication of quality accounts for 2019/20 will be set out in guidance by NHS England and NHS Improvement and has asked which power allows for this.

2. NHS England and NHS Improvement work together as a single organisation under the name 'NHS England and NHS Improvement'. Each year NHS England and NHS Improvement publishes guidance to NHS providers to confirm reporting requirements for quality accounts for each reporting period. The powers in relation to the provision of guidance by NHS Improvement to providers are relevant to the question posed by the Joint Committee and are set out below.

3. NHS Improvement is the operating name for two statutory bodies, namely Monitor and the National Health Service Trust Development Authority (the TDA), each of which can issue guidance to Trusts under their general powers. In particular:

- Monitor's functions including authorising and licensing NHS foundation trusts are under the relevant provisions of the NHS Act 2006 and the Health and Social Care Act 2012. Guidance can be issued to foundation trusts in exercise of Monitor's powers to do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the exercise of those functions (paragraph 15, Schedule 8 to the 2012 Act)
- The TDA is a Special Health Authority established under section 28 of the NHS Act 2006 and its functions are set out in directions made by the Secretary of State for Health under section 8 of that Act. The relevant directions are the National Health Service Trust Development Authority Directions 2016. These direct the TDA to exercise various functions, including to oversee, develop and support NHS trusts in England (6(b) and (g)) and to publish guidance in connection with so doing (direction 3(1)(b)).

4. Under the NHS provider licence issued by Monitor to foundation trusts, these trusts have a duty to have regard to guidance issued by Monitor in connection with the governance of providers of NHS services, and good corporate governance generally (conditions C5 and FT4.3(a)). NHS trusts are required by the TDA to comply with an equivalent condition (under direction 6(c) of the 2016 Directions).

5. The guidance on quality accounts for the reporting period 2019/20 was published on 29 January 2020 and will be revised in light of the changes made under S.I. 2020/466. Ahead of this, providers have been notified of a recommended revised publication date of 15 December 2020 and a recommended date of 15 October 2020 by when draft accounts for 2019/20 should be sent to relevant stakeholders for scrutiny and comment. These are recommended suggestions and will apply for the one reporting period only.

6. The context underpinning S.I. 2020/466 is the major impact that the coronavirus pandemic is having on NHS providers. Providers are facing their most uncertain challenge which is why the Department and NHS England and NHS Improvement agreed that the regulations should not substitute new fixed dates in relation to the production and publication of quality accounts for 2019/20. However, providers have been made aware that they remain under a statutory duty to publish their quality accounts for each reporting period. Although the new recommended date for publishing the accounts of 2019/20 cannot be enforced, the aforementioned guidance by NHS England and NHS Improvement will encourage providers to comply with that new date.

Department of Health and Social Care

19 May 2020

Appendix 3

S.I. 2020/468

Misuse of Drugs (Coronavirus) (Amendments Relating to the Supply of Controlled Drugs During a Pandemic etc.) Regulations 2020

1. By letter dated 13 May 2020, the Joint Committee on Statutory Instruments has requested a memorandum on the following point:

(1) Identify the power for the sub-delegation in regulation 4 (inserted 10A(1) (a) and (b)) and regulation 5 (inserted 15(5)(a) and (b)).

2. In response, whilst it is the case that, in the absence of a contrary intention, a power to make delegated legislation is not generally interpreted as authorising sub-delegation, the Department is of the view section 31(1)(a) of the Misuse of Drugs Act 1971 provides the power for the sub-delegation in question in this particular case. This is the case as it is noted that any canon of construction is an aid to interpretation only, and potentially exists in tension with other canons of interpretation. In this particular case, the presumption against sub-delegation exists in tension with the consequences of such an interpretation.

3. The purpose of the amendments in regulations 3(2) and 11(3) was to provide flexibility to registered persons in respect of residential family centres and children’s homes in complying with the relevant duties. In considering this tension, the Department notes, as set out in Bennion on Statutory Interpretation, that the consequences of adopting particular constructions should be assessed, and “[i]f on balance the consequences of a particular construction are more likely to be adverse than beneficent this is a factor telling against that construction”.¹ It is also noted that where there is a likelihood of a strongly adverse consequence, that consequence itself may raise doubt as to Parliament’s intention regarding the meaning of the enactment in relation to the facts of a particular case, “such that the adverse-beneficent test comes into play”.² In applying this approach, the Department also notes Lord Briggs’ dissenting judgment in *Project Blue Limited v Commissioners for Her Majesty’s Revenue and Customs* [2018] UKSC 30, paragraph 110, endorsing a modern contextual approach to the construction of statutes, where regard is to be had to the consequences. This, the Department notes, represents a significant difference from earlier authorities in which sub-delegation was considered unlawful even if convenient and desirable (see for example *Jackson, Stansfield and Sons v Butterworth* [1948] 2All ER 558 at 565³).

4. In the circumstances of the current pandemic the inability of the Secretary of State to provide for the reasonable and proportionate response as set out in the Regulations, creates a strongly adverse consequence, such that “more likely to be adverse than beneficent” test is to be taken into account in order to determine Parliament’s intention.

5. The Department considers that the scope of the enabling powers should be construed on the basis that Parliament cannot have intended for the strongly adverse consequence to arise whereby the powers do not permit the provision of a reasonable and proportionate response to the pandemic.

1 Bennion on Statutory Interpretation, section 9.6 (7th Edition).

2 Ibid

3 Ibid

6. In the particular context of the current pandemic, that response, in the Department's view, required very context specific easements that require a level of detail that can only reasonably and adequately be provided by administrative documents (i.e. the announcements that were provided for) rather than legislation. In addition, the easements in question are to the benefit of any defendant, as the instrument provides for the relaxation of otherwise strict requirements, and enables more flexible arrangements to ensure lawful supply in three specified circumstances. To this end, the instrument allows pharmacists at registered pharmacies to supply Schedule 2 to Part 1 of Schedule 4 controlled drugs to patients without the directions of a practitioner or other authorised prescriber or to reduce the amount to be supplied to a patient or substitute a different product (for example, a different pharmaceutical form of the drug that was prescribed) under a Serious Shortage Protocol. In addition, in the case of Schedule 2 or 3 controlled drugs intended to be supplied by instalments, pharmacists are permitted, with the agreement of the prescriber or their appointed representative, to change the intervals. Given the effect of these measures and the need to ensure that appropriate safeguards are in place, the Department considers that they should only be engaged in a pandemic situation following the Secretary of State's announcement.

7. We hope that this Memorandum assists the Committee and we are, of course, happy to provide any further assistance that the Committee requires.

Home Office

19 May 2020

Appendix 4

S.I. 2020/481

Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020

1. By a letter dated 13th May 2020, the Committee requested a Memorandum on the following point:

Identify the power for the sub-delegation in article 7.

2. The power in paragraph 7(1) and (2) of Schedule 3 to the Competition Act 1998 allows the Secretary of State to exclude “any agreement of a particular description” from the application of the Chapter I prohibition and to “make provision for the exclusion of the agreement or agreements to which the order applies, or of such of them as may be specified, only in specified circumstances”.

3. Article 3 of the Order provides that agreements which relate to a qualifying activity undertaken by a dairy produce supplier are excluded from the Chapter I prohibition. Article 4 of the Order provides that agreements which relate to a qualifying activity undertaken by a logistics service provider are excluded from the Chapter I prohibition. The definitions of qualifying activities listed in articles 3 and 4 of the Order respectively specify that it is only activities undertaken during the dairy produce demand disruption period which qualify for the exclusions. In the view of the Department, providing that only agreements which relate to qualifying activities occurring while there is disruption to the demand for dairy produce is part of specifying the circumstances in which the agreements are to be excluded.

4. The Order requires the Secretary of State to publish a notice when he believes there is no longer a significant disruption or a threat of significant disruption to the demand for dairy produce as a result of coronavirus. This does determine when the dairy produce disruption period is to end, but the Order defines the circumstances in which the Secretary of State is to publish the notice and any discretion the Secretary of State has will be constrained by the fact that his belief must be reasonably held. The giving of the notice is therefore a mechanism determined by the Order for ensuring that the exclusion applies to agreements only whilst specified circumstances relating to a disruption to demand for dairy produce.

5. The power in paragraph 7 is intended to deal effectively with circumstances where exceptional and compelling reasons of public policy give rise to a need for an exclusion of key elements of competition law. The Department submits that an emergency reserve power of this kind would have been intended to be construed widely and that it would have been in the contemplation of Parliament that some small elements of discretion of an administrative kind should be left to the Secretary of State.

6. This must have been the basis for the approach in the Competition Act 1998 (Public Policy Exclusion) Order 2012 (SI 2012/710). Under article 3 of that Order a qualifying protocol for the purposes of the exclusion under that Order is an agreement which

provides that it can only be activated by a decision of the Secretary of State that there is a fuel supply disruption; and provides that it will only remain activated for the duration of the fuel supply disruption.

7. In the view of the Department the giving of the notice under article 7 of the Order and ending the dairy produce demand disruption period in this way falls within the powers in paragraph 7(1) and (2) of Schedule 3 to the Competition Act 1998.

Department for Business, Energy and Industrial Strategy

18 May 2020