



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Tenth Report of Session 2022–23

Drawing special attention to:

Common Organisation of the Markets in Agricultural Products (Third Country Listing for Fruit and Vegetables) (Amendment, etc.) Regulations 2022 (S.I. 2022/608)

National Health Service (Areas of Integrated Care Boards: Appointed Day) Regulations 2022 (S.I. 2022/632)

Health and Care Act 2022 (Consequential and Related Amendments and Transitional Provisions) Regulations 2022 (S.I. 2022/634)

National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022 (S.I. 2022/642)

School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) Regulations 2022 (S.I. 2022/662)

Russia (Sanctions) (EU Exit) (Amendment) (No.10) Regulations 2022 (S.I. 2022/689)

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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 20 July 2022 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 six of those considered. The instruments and the grounds for reporting are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2022/608: Reported for failure to comply with proper legislative practice

Common Organisation of the Markets in Agricultural Products (Third Country Listing for Fruit and Vegetables) (Amendment, etc.) Regulations 2022

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.

1.2 These Regulations, which are subject to the negative resolution procedure, approve checks on conformity to marketing standards, carried out by authorities of certain EU member states, on fruit and vegetables prior to import into Great Britain. Article 15(4) of Commission Implementing Regulation (EU) No 543/2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors states that the Secretary of State “shall make available, by the means it considers appropriate, details of the official authorities and inspection bodies concerned”. The Committee asked the Department for Environment, Food and Rural Affairs to explain where those details can be found. In a memorandum printed at Appendix 1, the Department explains that the names of certain official authorities and inspection bodies can be found in the Schedule to this instrument and that it is in the process of publishing further details of the official authorities and inspection bodies on the gov.uk website. The Committee is concerned that information which would be helpful in connection with the application of this instrument has not been published alongside it and accordingly **reports these Regulations for failure to comply with proper legislative practice.**

2 S.I. 2022/632: Reported for requiring elucidation

National Health Service (Areas of Integrated Care Boards: Appointed Day) Regulations 2022

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

2.2 These Regulations, which are subject to the negative resolution procedure, appoint 1st July 2022 as the appointed day for the purposes of provisions of the Health and Care Act 2022 amending the National Health Service Act 2006 to provide for, amongst other things, the establishment of integrated care boards and the abolition of clinical commissioning groups. The power relied upon to make this instrument was not commenced in a previous commencement order, and the instrument appears to rely on the anticipatory exercise

power in section 13 of the Interpretation Act 1978. The Committee asked the Department of Health and Social Care, given that the power to appoint a day is the entire substantive purpose of s.14Z25(9), why it was decided not to commence it before using it and why it was thought that section 13 of the Interpretation Act 1978 applied. In a memorandum printed at Appendix 2, the Department sets out in helpful detail the thought process that led to reliance on section 13. In general, the Committee strongly supports the appropriate use of section 13 of the 1978 Act, and deprecates the emerging practice of expressly commencing provisions solely for the purposes of exercising powers in anticipation of substantive commencement. In this case, however, the Committee doubts whether appointing a day, under a power that permits nothing else, can be said to be a legitimate anticipation of that power for the purposes of section 13. It would have been safer to commence the power before exercising it. However, on the basis of the explanation in the Department’s memorandum, **the Committee is content to report the Regulations for requiring elucidation, provided by the Department’s memorandum.**

3 S.I. 2022/634: Reported for defective drafting and for requiring elucidation

Health and Care Act 2022 (Consequential and Related Amendments and Transitional Provisions) Regulations 2022

3.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in two respects and require elucidation in one respect.

3.2 These Regulations, which are subject to the negative resolution procedure, make amendments to instruments which are consequential on, or related to, the Health and Care Act 2022.

3.3 The Committee noticed that regulation 40(3)(a)(i) makes an amendment in the English language version of S.I. 2009/1385 (W. 141) which regulation 41(3)(a) does not make in the Welsh: the phrase “other than a clinical commissioning group” is revoked from the English regulation 15(1)(d), but not from its Welsh equivalent, regulation 15(1)(ch). The Committee asked the Department of Health and Social Care to explain. In a memorandum printed at Appendix 3, the Department asserts that no equivalent revocation is required for regulation 15(1)(ch) because the phrase appears only in the English text, not in the Welsh. The Department refers to regulations 15(1)(d) and (ch) as substituted by S.I. 2012/1641, which did insert a discrepancy between the English and Welsh texts. But that discrepancy was subsequently corrected by S.I. 2013/235 (Sch.2, para.128(6)(b)(i)), which inserted the phrase “ac eithrio grŵp comisiynu clinigol” (“other than a clinical commissioning group”) into the Welsh language text, so that it matched the English. Given that the phrase does appear in the provision being amended by regulation 41(3)(a), an equivalent to regulation 40(3)(a)(i) is required. **The Committee accordingly reports regulation 41(3)(a) for defective drafting.**

3.4 The Committee also noticed (a) one substitution in a Welsh provision where the words substituted appear to be the same as the words replaced (reg.43(2)); and (b) the use of the term “integrated care board” without definition (regs.215(2), 218(2) and 219(2)). It asked the Department to explain. In its memorandum, the Department admits that point

(a) was a drafting mistake, which will need to be corrected by amending legislation; in relation to point (b), it offers reasoning for failure to define “integrated care board”. On the basis of the explanations given, **the Committee: reports regulations 215(2), 218(2) and 219(2) for requiring elucidation, provided by the Department’s memorandum; and reports regulation 43(2) for defective drafting, acknowledged by the Department.**

4 S.I. 2022/642: Reported for requiring elucidation

National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022

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

4.2 These Regulations, which are subject to the negative resolution procedure, provide that the power in section 65Z5(1) of the National Health Service Act 2006, as inserted by section 71 of the Health and Care Act 2022, does not apply to certain functions of NHS England or to certain provisions of the Health and Social Care Act 2012 listed in regulation 2(b). Section 65Z5 contains provision about joint working and delegation arrangements for certain bodies including NHS England. The Explanatory Memorandum to these Regulations states (at para.11.1) that NHS England “will publish statutory guidance on joint working and delegation under section 65Z5 of the NHS Act 2006” and “will also set out a list of restrictions on functions that may be delegated and conditions relating to the delegation of such functions”. The Committee asked the Department of Health and Social Care whether the Explanatory Memorandum is to be taken as meaning that the statutory guidance will impose conditions on the delegation of functions and, if so, the basis on which section 65Z7 permits statutory guidance by NHS England – rather than regulations by the Secretary of State – to impose those conditions. In a memorandum printed at Appendix 4, the Department assures the Committee that the Explanatory Memorandum is not intended to be taken as meaning that the statutory guidance will impose conditions on the delegation of functions, and that “conditions” in the last sentence of paragraph 11.1 was intended to mean advised or recommended limitations and constraints on the exercise of the power of joint working and delegation, rather than conditions imposed by regulations pursuant to the power in section 65Z5(3) or by guidance issued pursuant to another power. The Department helpfully acknowledges that this intention may not be apparent to all readers of the Explanatory Memorandum and undertakes to clarify it in a future Explanatory Memorandum; it also assures the Committee that NHS England “will also be clear as to the nature of its guidance”. The Committee is grateful for these helpful assurances, and accordingly **reports the Explanatory Memorandum to the Regulations for requiring elucidation, provided by the Department’s memorandum.**

5 S.I. 2022/662: Reported for failure to comply with proper legislative practice

School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) Regulations 2022

5.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.

5.2 These Regulations, which are subject to the negative resolution procedure, amend the School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) Regulations 2020, which amended the School Admissions (Appeals Arrangements) (England) Regulations 2012 for a temporary period. Regulation 3(2) of the 2020 Regulations made incorrect provision for the expiry of the amendments, and that provision is corrected by these Regulations. The Explanatory Note to these Regulations records that they are being issued free of charge to all known recipients of the School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) (No. 2) Regulations 2021 which last amended the expiry date in regulation 3(2) of the 2020 Regulations. Since the error being corrected appeared in the original version of the 2020 Regulations and has not since been amended, the Committee asked the Department for Education to explain why these Regulations are not being issued free of charge to all known recipients of the 2020 Regulations. In a memorandum printed at Appendix 5, the Department simply reasserts the position set out in the Explanatory Note. As noted in the Committee’s First Special Report of Session 2017–19 (Transparency and Accountability in Subordinate Legislation) it is open to question whether the free issue procedure continues to serve the purpose for which it was originally designed, particularly in the light of electronic usage of the statute book. In that Report the Committee invited the Government to reconsider the process; but while it remains in its present form the Committee believes it should be applied as widely as is likely to be helpful to enable readers to understand the law overall, and that where an error in effect spans more than one instrument the free issue procedure should be applied to all instruments in the chain. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice.**

6 S.I. 2022/689: Reported for doubtful vires and for defective drafting

Russia (Sanctions) (EU Exit) (Amendment) (No.10) Regulations 2022

6.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that there is doubt as to whether they are *intra vires* in four connected respects and that they are defectively drafted in one respect.

6.2 These Regulations, which are subject to the made affirmative procedure, amend the Russia Sanctions (EU Exit) Regulations 2019 (“the 2019 Regulations”) to introduce new trade sanctions. These include:

- regulation 5(1)(a), which amends regulation 22 of the 2019 Regulations so that the prohibition on exports imposed by that regulation includes a prohibition on exporting maritime goods and maritime technology for placing on board of a Russian-flagged vessel;
- regulation 5(2)(a), which amends regulation 24 so that the prohibition on supplying or delivering goods imposed by that regulation is extended to include a prohibition on supplying or delivering maritime goods and maritime technology from a third country for placing on board of a Russian-flagged vessel;
- regulation 6, which inserts a new Chapter 2A of Part 5 into the 2019 Regulations. Chapter 2A includes a new regulation 30B which prohibits the export of relevant restricted goods and relevant restricted technology to, or for use in, non-government controlled Ukrainian territory. It also includes a new regulation 30C which prohibits the supply and delivery of relevant restricted goods and relevant restricted technology from a third country to a place in non-government controlled Ukrainian territory.

6.3 The powers to impose trade sanctions are conferred by section 5 of, and Schedule 1 to, the Sanctions and Anti-Money Laundering Act 2018. Schedule 1 allows prohibitions to be imposed on the export of goods and on the supply and delivery of goods from a third country. But it does not allow such prohibitions to be applied to technology. Accordingly, the Committee asked the Foreign, Commonwealth and Development Office to explain how, in the case of each of the provisions referred to in the previous paragraph, it falls within the powers conferred by Schedule 1. In a memorandum printed at Appendix 6, the Department accepts that the *vires* in Schedule 1 do not extend to prohibiting the export of technology, or to prohibiting the supply or delivery of technology. Regulations have now been made which revoke the provisions identified by the Committee and which replace them with provisions whose prohibitions are limited to goods. **The Committee accordingly reports regulations 5(1)(a) and (2)(a) and 6 for doubt as to whether they are *intra vires*, acknowledged by the Department.**

6.4 Regulation 8 inserts a new Chapter 4D of Part 5 into the 2019 Regulations which makes provision about interception and monitoring services. Chapter 4D includes a new regulation 46K which prohibits any person from providing interception and monitoring services to, or for the benefit of, the Government of Russia. It also includes a new regulation 46L which prohibits any person from supplying or delivering interception and monitoring services to, or for the benefit of, the Government of Russia from a third country. The Committee asked the Department to explain how the two prohibitions differed. In its memorandum, the Department states that it has concluded that the prohibition in regulation 46L should not have been included as it is already covered by regulation 46K. Regulations have now been made which replace Chapter 4D of Part 5, with what was formerly regulation 46L not included in the new Chapter 4D. **The Committee accordingly reports regulation 8 for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 20 July 2022 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

Instruments requiring affirmative approval

S.I. Numbers	S.I. Title
S.I. 2022/782	Money Laundering and Terrorist Financing (High-Risk Countries) (Amendment) (No. 2) Regulations 2022

Draft instruments requiring affirmative approval

S.I. Numbers	S.I. Title
Draft	Drivers' Hours, Tachographs, International Road Haulage and Licensing of Operators (Amendment) Regulations 2022
Draft	Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022
Draft	Motor Fuel (Composition and Content) (Amendment) (Northern Ireland) Regulations 2022

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2022/708	Accounts and Audit (Amendment) Regulations 2022
S.I. 2022/709	Dover Harbour Revision Order 2022
S.I. 2022/718	Building (Approved Inspectors etc.) (Amendment) (England) Regulations 2022
S.I. 2022/726	Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2022
S.I. 2022/733	Occupational Pension Schemes (Climate Change Governance and Reporting) (Amendment, Modification and Transitional Provision) Regulations 2022
S.I. 2022/739	Official Controls (Plant Health) (Frequency of Checks) Regulations 2022
S.I. 2022/742	Gender Recognition (Disclosure of Information) (England) Order 2022
S.I. 2022/743	Care and Support (Charging and Assessment of Resources) (Amendment) (No. 2) Regulations 2022
S.I. 2022/752	Universal Credit (Transitional Provisions) Amendment Regulations 2022
S.I. 2022/753	Safety of Sports Grounds (Designation) (Amendment) (England) (No. 2) Order 2022

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2022/734	Health and Care Act 2022 (Commencement No. 2 and Transitional and Saving Provision) Regulations 2022
S.I. 2022/754	Taxation of Chargeable Gains (Gilt-edged Securities) Order 2022

Appendix 1: Memorandum from the Department for Environment, Food and Rural Affairs

S.I. 2022/608

Common Organisation of the Markets in Agricultural Products (Third Country Listing for Fruit and Vegetables) (Amendment, etc.) Regulations 2022

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

Explain where the details of the official authorities and inspection authorities can be found (in accordance with article 15(4) of Commission Implementing Regulation (EU) No 543/2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors).

2. The names of certain official authorities and inspection bodies can be found in the Schedule to the Common Organisation of the Markets in Agricultural Products (Third Country Listing for Fruit and Vegetables) (Amendment, etc.) Regulations 2022. The Department for Environment, Food and Rural Affairs is in the process of publishing further details of the official authorities and inspection bodies on the gov.uk website.

Department for Environment, Food and Rural Affairs

11 July 2022

Appendix 2: Memorandum from the Department of Health and Social Care

S.I. 2022/632

National Health Service (Areas of Integrated Care Boards: Appointed Day) Regulations 2022

1. In its letter to the Department of 6 July 2022, the Committee requested a memorandum on following point:

Given that the power to appoint a day is the entire substantive purpose of s.14Z25(9), explain: (a) why it was decided not to commence it in S.I. 2022/515; and (b) why it was thought that section 13 of the Interpretation Act 1978 (the 1978 Act) permits appointment of a day before commencement of the subsection.

2. The Department’s response to the Committee’s point is as follows.

3. Section 19(2), in so far as it inserts section 14Z25(9) into the National Health Service Act 2006 (references to section 19(2) below are to that subsection insofar as it inserts section 14Z25(9)), was not commenced in S.I. 2022/515 as S.I. 2022/515 concerned provisions to be commenced on 9 May 2022 whereas the intention was to commence section 19(2) on 1 July 2022.

4. The provisions of the Health and Care Act 2022 (the 2022 Act) to be commenced on or after 1 July were commenced in S.I. 2022/734. Section 19(2) was commenced for remaining purposes in that instrument.

5. The Secretary of State relied on section 13 of the 1978 Act to make the instrument prior to the commencement of section 19(2) but did not appoint a day prior to the commencement of the enabling power in section 19(2). The instrument sets the appointed day as 1 July 2022 – the same date as that on which section 19(2) was commenced under S.I. 2022/734 and the date on which the instrument itself commenced. The Department was conscious that, atypically for ‘appointed day regulations’, provision made under section 14Z25(9) is subject to the negative procedure.

6. The Department considers that making the instrument before 1 July 2022 was necessary or expedient, within the meaning of section 13 of the 1978 Act, for the purpose of giving full effect to section 19(2) when it came into force. In *Usher v Barlow* (1952 Ch 255) the court held that “expedient” covers things “without which the Act can come into operation, but with which the Act will come into operation more conveniently or effectively”.

7. The Department considers that making the instrument prior to the commencement of the enabling power was expedient as it enabled the 2022 Act to operate effectively on and after the date on which the relevant provisions came into force.

8. The instrument sets an appointed day for the purposes of sections 14Z25(4) and section 14Z27, inserted by section 19(2) of the 2022 Act.

9. Section 14Z25(4) requires NHS England to ensure that, at all times on and after the appointed day, the areas of integrated care boards together cover the whole of England.

10. Section 14Z27 abolishes any clinical commissioning group in existence immediately before the appointed day, at the beginning of that day.

11. The appointed day being 1 July 2022, making the instrument in advance of that date provided certainty, and served to provide advance notice to NHS England, as to the day on and after which the areas of integrated care boards were to cover the whole of England and the day from which clinical commissioning groups were abolished.

12. The Department considers that that certainty and advance notice would have enabled the 2022 Act to operate effectively on and after 1 July, and that making the instrument prior to 1 July was accordingly necessary or expedient.

13. The above approach is consistent with that in relation to S.I. 2022/736 which was made under section 14Z31(3) of the National Health Service Act 2006, as inserted by section 20 of the 2022 Act. S.I. 2022/736 was laid on 11 June and made on 30 June 2022, in reliance on section 13 of the 1978 Act, and came into force on 1 July 2022, the same date as that on which section 14Z31(3) was commenced.

Department of Health and Social Care

12 July 2022

Appendix 3: Memorandum from the Department of Health and Social Care

S.I. 2022/634

Health and Care Act 2022 (Consequential and Related Amendments and Transitional Provisions) Regulations 2022

1. In its letter to the Department of 6 July 2022, the Committee requested a memorandum on the following points:

- (1) Explain why regulation 41(3)(a) does not include a provision equivalent to regulation 40(3)(a)(i).
- (2) Explain whether the substitution of “grŵp comisiynu clinigol” for “grŵp comisiynu clinigol” by regulation 43(2) reflects the policy intent, and if not, what the substituted phrase should be.
- (3) Explain where “integrated care board” is defined for the purposes of the provisions inserted by regulations 215(2), 218(2) and 219(2).

2. The Department’s response to the Committee’s points is as follows.

Point (1)

3. In relation to point (1), the amendment made by regulation 41(3)(a) to the Welsh language text of S.I. 2009/1385 (W. 141) is intentionally limited to the equivalent of the amendments made by regulation 40(3)(a)(ii) to the English language text of that S.I. This is because the text omitted by regulation 40(3)(a)(i), in regulation 15(1)(d) of the English language version, does not exist in the Welsh language version (i.e. in regulation 15(1)(ch)). Regulation 15(1)(d) and (1)(ch) was substituted by paragraph 12(3)(a) and (6)(a) respectively, of Schedule 3 to S.I. 2012/1641 and in the substituted text, the phrase “ac eithrio grŵp comisiynu clinigol” (“other than a clinical commissioning group”) is not found in the Welsh language version. Therefore, an equivalent to regulation 40(3)(a)(i) is not required in regulation 41(3).

Point (2)

4. In relation to point (2), this was a drafting error. In regulation 43(2), the substituted phrase should be “fwrdd gofal integredig”. The Department apologises for the error and will take remedial action to correct it in an instrument to be laid in the near future.

Point (3)

5. For the purposes of the provisions inserted by regulation 215(2) of the instrument, regulation 82 of the instrument inserts a definition of “integrated care board”. For the purposes of regulation 218(2) (which amends S.I. 2018/756) and regulation 219(2) (which amends S.I. 2018/757) of the instrument, no definition of “integrated care board” is inserted into the amended instrument in either case.

6. This approach is consistent with the approach generally taken to all instruments amended by the instrument which replaces references to a clinical commissioning group with references to an integrated care board:

- a) where “clinical commissioning group” is used and defined in an amended instrument, the instrument inserts a new definition for “integrated care board”;
- b) where “clinical commissioning group” is used in an amended instrument but not defined, the instrument does not insert any definition of “integrated care board”.

7. The Department considers that the approach taken in regulations 218(2) and 219(2) of the instrument is consistent with the drafting style in the amended instrument in both cases. Regulation 4 of S.I. 2018/756 lists eligible bodies but none is defined in that instrument. The same point applies to S.I. 2018/757.

8. The Department considers that the meaning of “integrated care board” in regulation 4 of S.I. 2018/756 (as inserted by the instrument) is clear. The meaning of “integrated care board” is informed by its meaning in the enabling Act (the Health and Care Act 2022) where the expression is used only in the sense of an integrated care board established under Chapter A3 of Part 2 of the National Health Service Act 2006 (as inserted by the Health and Care Act 2022). The same point applies to S.I. 2018/757.

9. The Department took a different approach to new regulation 22 of S.I. 2018/756 (as inserted by regulation 218(3) of the instrument). New regulation 22 contains the expressions “a CCG”, “Monitor” and “NHS TDA” which are defined. Here, the Department considered that the definitions were needed to aid readers on the basis that those bodies were abolished on 1 July 2022. The same point applies to S.I. 2018/757.

Department of Health and Social Care

12 July 2022

Appendix 4: Memorandum from the Department of Health and Social Care

S.I. 2022/642

National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022

1. In its letter to the Department of 6 July 2022, the Committee requested a memorandum on the following point:

Explain: (a) whether paragraphs 7.4 and 11.1 of the Explanatory Memorandum are to be taken as meaning that the statutory guidance will impose conditions on the delegation of functions; and (b) if so, the basis on which section 65Z7 permits statutory guidance by NHS England – rather than regulations by the Secretary of State – to impose those conditions, having regard to the express provision in section 65Z5(3)(b) and the absence thereof in section 65Z7.

2. The Department’s response to the Committee’s point is as follows.

3. Paragraphs 7.4 and 11.1 of the Explanatory Memorandum are not intended to be taken as meaning that the statutory guidance, published by NHS England under section 65Z7(1) of the National Health Service Act 2006 (“the Act”), will impose conditions on the delegation of functions.

4. Paragraph 7.4 of the Explanatory Memorandum is intended to provide an overview of the policy context of excluded functions from the joint working and delegation power in section 65Z5 of the Act, inserted by section 71 of the Health and Care Act 2022.

5. Paragraph 11.1 of the Explanatory Memorandum states:

NHS England will publish statutory guidance on joint working and delegation under section 65Z5 of the NHS Act 2006 (inserted by section 71 of the Health and Care Act 2022). This will set out the delegation and joint working arrangements permitted by legislation and the use of these delegation and joint working functions. NHS England will also set out a list of restrictions on functions that may be delegated and conditions relating to the delegation of such functions.

6. “Conditions” in the last sentence of paragraph 11.1 was intended to mean *advised or recommended* limitations and constraints on the exercise of the power of joint working and delegation, rather than conditions *imposed* by regulations pursuant to the power in section 65Z5(3) or by guidance issued pursuant to another power.

7. NHS England’s guidance will set out the exclusions from the joint working and delegation power in section 65Z5 of the Act that apply by virtue of the instrument, along

with advice and expectations about when and how the powers should or should not be used. Relevant bodies must have regard to the statutory guidance, in accordance with section 65Z7(2) of the Act.

8. In view of the status of any guidance issued by NHS England under section 65Z7(2) of the Act (i.e. relevant bodies must have regard to it), the Department intended for the interpretation set out in paragraph 6 of this memorandum to apply. However, the Department acknowledges that this may not be apparent to all readers of the Explanatory Memorandum, for which we apologise. The Department recognises that use of the term “conditions” in the last sentence of paragraph 11.1 may be misleading in so far as it implies that guidance might purport to trespass on the regulation-making power at section 65Z5(3)(b) of the Act. Any restrictions or conditions on the joint working and delegation power will be prescribed in regulations, and any guidance published would be subject to the regulations. The guidance will only set out relevant matters which should be taken into account in deciding whether a function should be exercised by or jointly with another relevant body.

9. The instrument will be updated in the near future to exclude further functions from the power in section 65Z5(1) of the Act. The Department proposes to confirm the position above in the associated Explanatory Memorandum, by way of clarification as to the nature and content of the guidance issued by NHS England under section 65Z7(1). NHS England will also be clear as to the nature of its guidance.

Department of Health and Social Care

12 July 2022

Appendix 5: Memorandum from the Department for Education

S.I. 2022/662

School Admissions (England) (Coronavirus) (Appeals Arrangements) (Amendment) Regulations 2022

1. The Committee has asked the Department for Education for a memorandum on the following point:

Given that the error being corrected is in that part of regulation 3(2) that appeared in the original version of S.I. 2020/446 and has not since been amended, explain why this instrument is not being issued free of charge to all known recipients of S.I. 2020/446.

2. We have proceeded on the basis that the obligation to issue a free copy of this SI, which corrected an error contained in SI 2021/992, applies to everyone who received the SI that made the incorrect amendment, rather than the SI that it amended. In our view, this is consistent with SIP paragraph 3.5.20.

Department For Education

12 July 2022

Appendix 6: Memorandum from the Foreign, Commonwealth and Development Office

S.I. 2022/689

Russia (Sanctions) (EU Exit) (Amendment) (No. 10) Regulations 2022

1. The Committee has asked in its letter of 6th July 2022 to the Foreign Commonwealth and Development Office (“FCDO”) for a memorandum on the following points:

- (1) Explain how the amendment made by regulation 5(1)(a), in so far as it provides for the prohibition on exports in regulation 22 of the Russia (Sanctions) (EU Exit) Regulations 2019 (“the 2019 Regulations”) to apply to maritime technology, falls within the powers conferred by Schedule 1 to the Sanctions and Anti-Money Laundering Act 2018 (“2018 Act”).
- (2) Explain how the amendment made by regulation 5(2)(a), in so far as it provides for the prohibition in regulation 24 of the 2019 Regulations to apply to the supply or delivery of maritime technology, falls within the powers conferred by Schedule 1 to the 2018 Act.
- (3) Explain how the amendment made by regulation 6, in so far as it provides for the prohibitions in regulations 30B and 30C of the 2019 Regulations to apply to relevant restricted technology, falls with the powers conferred by Schedule 1 to the 2018 Act.
- (4) With respect to the amendment made by regulation 8, explain how the prohibition in new regulation 46L of the 2019 Regulations on the supply or delivery of interception and monitoring services differs from the prohibition in new regulation 46K on the provision of interception and monitoring services. To the extent that there is any difference, explain the powers under which regulation 46L is made.

2. The FCDO is grateful for the Committee’s consideration of this instrument and responds as follows:

- a) The FCDO accepts that the *vires* in Schedule 1 to the 2018 Act do not extend to prohibiting the export of technology and will amend regulation 5(1)(a) to correct the error.
- b) The FCDO also accepts that the *vires* in Schedule 1 to the 2018 Act do not extend to prohibiting the supply or delivery of technology and will amend regulation 5(2)(a) to correct the error.
- c) The FCDO accepts that the *vires* in Schedule 1 to the 2018 Act do not extend to prohibiting either the export or the supply and delivery of technology and will amend regulation 6 to correct the error.

- d) Finally, with regard to question 4, the FCDO has concluded that the prohibition in new regulation 46L of the 2019 Regulations should not have been included as the prohibition of the supply and delivery of interception and monitoring services in the circumstances the regulation describes is already covered by regulation 46K. The FCDO will amend the 2019 Regulations removing regulation 46L at the earliest opportunity.
3. In light of the errors identified by the Committee, the FCDO will revoke and remake the Russia (Sanctions) (EU Exit) (Amendment) (No. 10) Regulations in the week commencing 11th July to correct these provisions, and other errors.

Foreign, Commonwealth and Development Office

12 July 2022

Formal Minutes

Wednesday 20 July 2022

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Chartres

Baroness D’Souza

Dr James Davies

Baroness Gale

Lord Haskel

Paul Holmes

Baroness Newlove

Lord Smith of Hindhead

Report consideration

Draft Report (Tenth Report of Session 2022–23), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 6.4 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 6.

Resolved, That the Report be the Tenth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Adjournment

Adjourned till Wednesday 7 September at 3.40 p.m.