House of Lords
House of Commons

Joint Committee
on Statutory Instruments

Twenty-Fourth Report of Session 2019–21

Drawing special attention to:

Mali (Sanctions) (EU Exit) Regulations 2020 **(S.I. 2020/705)**

Yemen (Sanctions) (EU Exit) Regulations 2020 **(S.I. 2020/733)**

Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020 **(S.I. 2020/756)**

Family Procedure (Amendment No. 2) Rules 2020 **(S.I. 2020/758)**

Railways (Miscellaneous Amendments, Revocations and Transitional Provisions) (EU Exit) Regulations 2020 **(S.I. 2020/786)**

Motor Vehicles (Tests) (Amendment) (Coronavirus) (No. 2) Regulations 2020 **(S.I. 2020/790)**

Ordered by the House of Lords
to be printed 30 September 2020

Ordered by the House of Commons
to be printed 30 September 2020

HL 136
HC 75-xxiv
Published on 2 October 2020
by authority of the House of Lords
and the House of Commons

Joint Committee on Statutory Instruments

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Lord Haskel *(Labour)*

Baroness Gale (*Labour*)

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

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Powers

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

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.

Committee staff

The current staff of the Committee are Liz Booth (Committee Assistant), Luanne Middleton (Commons Clerk), Christine Salmon Percival (Lords Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Daniel Greenberg, and Vanessa MacNair (Commons); Nicholas Beach, James Cooper, and Ché Diamond (Lords).

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Contents

Instruments reported

At its meeting on 30 September 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 six 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. 2020/705: Reported for doubtful vires

Mali (Sanctions) (EU Exit) Regulations 2020

1.1 **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.**

1.2 These Regulations establish a domestic sanctions regime relating to Mali to ensure that the United Kingdom will remain in compliance with its UN obligations when it ceases to be part of the current EU regime. Regulation 6(7) defines the terms "military goods" and "military technology" by reference to "any thing for the time being specified in Schedule 2 to the Export Control Order 2008". The Committee asked the Foreign, Commonwealth and Development Office to identify the enabling power relied on to make these definitions ambulatory. In a memorandum printed at Appendix 1, the Department asserts that it did not, and was not required to, rely on any specific enabling power as the effect of section 20(2) of the Interpretation Act 1978 is that references to provisions in other enactments are to those provisions as amended; it asserts further that the words "for the time being specified" serve only to displace any argument that the legislator intended section 20(2) not to apply in relation to those definitions. The Committee does not agree. It has never been generally assumed that section 20(2) is intended to bring in amendments made after the date when legislation is enacted or made (see *Craies on Legislation*, 11th Edition, paragraphs 21.1.23 *et seq*., and, in particular, *Willows v Lewis* [1982] STC 141), and the rule of law consequences of such an assumption are obvious. At the time when a new Law A is enacted, it is logical to assume that a reference to an earlier Law B is intended to include any amendments already made to it, but there can be no reason to assume that amendments made to Law B by future Laws C, D and so on will necessarily be apposite for application by Law A – and to make that assumption amounts to a sub-delegation, to all the putative authors of future law amending Law B, of the power to amend Law A (which is why section 20(2) has generally been given the narrower construction). In this case, the fact that express powers to make ambulatory reference to provisions such as the Export Control Order 2008 were included in Schedule 1 to the enabling Act (albeit in relation to types of sanction not relevant to this instrument) confirms that, as usual, Parliament did not intend such references to be ambulatory as a general rule in subordinate legislation made under the Act. **The Committee accordingly reports regulation 6(7) on the ground that there is doubt as to whether it is *intra vires*.**

2 S.I. 2020/733: Reported for doubtful vires

Yemen (Sanctions) (EU Exit) Regulations 2020

2.1 **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.**

2.2 This instrument ensures that the UK continues to meet its obligations under the UN regime relating to sanctions against Yemen after the Transition Period ends. Given that these Regulations make immigration sanctions (regulation 18), the Committee asked the Foreign, Commonwealth & Development Office to explain why section 4 of the Sanctions and Anti-Money Laundering Act 2018 is not cited in the preamble. In a memorandum printed at Appendix 2, the Department accepts that section 4 of the 2018 Act should have been included in the preamble and explains that it will bring forward legislation before the end of the Transition Period to address this. Failure to cite a section in the preamble on which the Department relies raises doubts as to vires (see *Vibixa Ltd and Polestar Jowetts Ltd v Komori UK Ltd and another* [2006] EWCA Civ 536). **The Committee accordingly reports regulation 18 for doubt as to whether it is *intra vires*.**

3 S.I. 2020/756: Reported for requiring elucidation

Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020

3.1 **The Committee draws the special attention of both Houses to this Order on the ground that it requires elucidation in two respects.**

3.2 This Order creates a new class of generally permitted development, Class ZA (inserted by article 4(2)), which allows a building that meets specified criteria, and that obtains prior approval from the planning authority in relation to specified matters, to be demolished and replaced by either a block of flats or a single dwelling house. New paragraph ZA.2(2) sets out the matters in relation to which the developer must apply to the local planning authority for prior approval. The Committee asked the Ministry of Housing, Communities and Local Government to explain why paragraph ZA.2(2)(i) requires prior approval as to the impact of the development's increase in residential use in the area on all businesses, but only on new residents. In a memorandum printed at Appendix 3, the Department explains that this approval criterion reflects the "agent of change" principle in the current National Planning Policy Framework, which requires the applicant to mitigate adverse impacts on existing businesses and community facilities. The Department suggests that such mitigation might include steps to prevent complaints from new residents (e.g. about noise) from limiting the operation of those businesses and facilities. It remains unclear to the Committee what steps—if any—the developer must take to mitigate adverse impacts on existing residents in those cases where the new development is in a partly or wholly residential area. **The Committee accordingly reports article 4(2) (inserted paragraph ZA.2(2)) for requiring elucidation, partly provided in the Department's memorandum.**

3.3 The Committee also asked the Department to explain whether it is intended that approval might be granted or withheld for new dwelling houses by reference to compliance with the "Technical housing standard—nationally described space standard". In its

memorandum, the Department explains that it does not intend local planning authorities to grant approval by reference to that standard and that it expressly omitted any condition which would have that effect. **The Committee accordingly reports article 4(2) (inserted paragraph ZA.2(2)(i)) for requiring elucidation, provided in the Department's memorandum.**

4 S.I. 2020/758: Reported for defective drafting

Family Procedure (Amendment No. 2) Rules 2020

4.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in one respect.**

4.2 This instrument creates new rules to govern contempt of court applications and proceedings in family courts; they are set out in the Schedule, which inserts a new Part 37 into the Family Procedure Rules 2010 (S.I. 2010/2955). Several of the new rules refer to the court making an order or imposing a punishment "under the law", a phrase which did not appear in similar rules that are revoked and replaced by this instrument. The Committee asked the Ministry of Justice what this phrase was intended to add.

4.3 In a memorandum, printed at Appendix 4 the Department asserts that the phrase is intended "to make it clear that sanctions against a contemnor under the law generally, whether procedural or substantive, are not affected and continue to be available", including such other punishments as are not included in the list "a fine, imprisonment, confiscation of assets". In the context of the class of available punishments, the Committee accepts that a reminder that the court has other powers that it may wish to use is helpful, although the phrase "other punishment available under the law" gives less help to the reader than a more specific reference would provide (and risks unintended applications of the *eiusdem generis* rule).

4.4 The Committee notes that the Department's explanation does not address the insertion, in rule 37.10(3), of the phrase "under the law" into the standard legal formulation that the court may "make such order as it thinks fit". In this context, the phrase appears to add nothing. It goes without saying that the court has no power to make orders except in accordance with the law. Adding an unnecessary phrase here creates an unhelpful contrast with the shorter phrase (and variants) used elsewhere in the Family Procedure Rules—and very widely in legislation—and is consequently a likely source of argument and confusion which is to be deprecated. **The Committee accordingly reports the Schedule to this instrument (new rules 37.2, 37.4(2)(p), 37.9(1) and 37.10(3)) for defective drafting.**

(The Department also confirms that the reference to "any respondent" in new rule 37.8(4)(e) is intended to include the defendant in contempt proceedings, and that the phrase "to the extent that the substantive law permits" in relation to the court attaching a power of arrest to a committal order is intended to draw a distinction between the rules of procedure—which cannot create a power of arrest—and the substantive law.)

5 S.I. 2020/786: Reported for defective drafting

Railways (Miscellaneous Amendments, Revocations and Transitional Provisions) (EU Exit) Regulations 2020

5.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in two respects.**

5.2 These Regulations correct deficiencies that would otherwise prevent retained EU law relating to railways from operating effectively after the Transition Period ends. Paragraphs (3) and (4) of regulation 1 provide for the extent of each amendment. The Committee asked the Department for Transport to explain why regulations 5 and 8(2) extend only to Great Britain given that the provisions they amend extend to the whole of the United Kingdom. In a memorandum printed at Appendix 5, the Department acknowledges the error and undertakes to correct it at the earliest opportunity. The Committee welcomes the undertaking, and **accordingly reports regulation 1(3) and (4) for defective drafting, acknowledged by the Department.**

5.3 The effect of regulation 7 is to amend provisions of the Railways and Other Guided Transport Systems (Safety) Regulations 2006 (S.I. 2006/599). New text inserted by paragraph (2)(f) refers to "regulation 18(A1)" of the 2006 Regulations, but given that regulation 18 will have been omitted by the time this instrument comes into force, the Committee asked the Department to confirm whether that should be a reference to "regulation 18A(1A)". In its memorandum, the Department confirms that it should and undertakes to correct the error at the earliest opportunity. Again, the Committee welcomes the undertaking, and **accordingly reports regulation 7(2)(f) for defective drafting, acknowledged by the Department**.

(In its memorandum, the Department suggests making two amendments by correction slip. Having regard to the criteria set out at paragraph 3.10 of its First Special Report of Session 2017–19: *Transparency and Accountability in Subordinate Legislation*, the Committee does not agree that the text of legislation can be amended by correction slip. If the mistake and the intended meaning are obvious, then readers will be able to work out what was meant if the text is left in its deficient form. If the mistake and intended meaning are not obvious (as is definitely the case in relation to the defect identified in regulation 7(2)(f)) the legislation should be amended by a new instrument.)

6 S.I. 2020/790: Reported for failure to comply with proper legislative practice

Motor Vehicles (Tests) (Amendment) (Coronavirus) (No. 2) Regulations 2020

6.1 **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.**

6.2 This instrument amends an exclusion to the requirement to hold a test certificate that was introduced at the end of March by the Motor Vehicles (Tests) (Amendment) (Coronavirus) Regulations 2020 (S.I. 2020/382) because of "the potential for widespread disruption to the vehicle testing regime with little or no notice". Under that exclusion, if a vehicle was road-worthy and had yet to be examined for a new test certificate on the day

before its current certificate expired, and if the expiry date fell between 30 March 2020 and 29 March 2021, the vehicle could lawfully be used on the road for a further six months from the expiry date. Regulation 2 brings forward by several months the date on which the exclusion ends, from 29 March 2021 to 1 August 2020. The new deadline for obtaining a test certificate takes effect eight days after the instrument was laid before Parliament, breaching the convention that an instrument subject to annulment should be laid at least 21 days before it is due to come into force. In the Explanatory Memorandum to this instrument, the Department for Transport states that it "regrets the delay but considers that the public announcement of this policy on 29th June has provided adequate notice to interested persons".

6.3 The Committee asked the Department to explain why regulation 2 did not end the policy on a later date to avoid a breach of the 21-day rule, having regard, on the one hand, to the need to give individuals affected by this legislation sufficient time to prepare for it and, on the other, to the fact that an announcement of policy intent may not lead to, and cannot be treated as, equivalent to a change in law. In a memorandum printed at Appendix 6, the Department asserts that a mid-August commencement, and a late change to the date announced in June, would have had a significant and detrimental impact, affecting more than 800,000 vehicle tests and confusing vehicle users as to their legal obligations. The Committee finds this situation unsatisfactory. It is entirely reasonable for a person not to assume that a policy announced in June will become law in August, but instead to wait until the law is made before they act. This is especially true when—as the Department itself noted—things are changing with little or no notice. The speed of other changes may also have made it impossible for people to obtain a new test certificate by the foreshortened deadline (if, for instance, they had been self-isolating when the change took effect). The Committee believes that people are entitled to proper notice of changes in the law, and it agrees with the Department that resourcing issues are not a sufficient explanation of a failure to provide that notice. If the Department has the resources to announce a new policy, it should also be able to make the implementing legislation in sufficient time to observe the 21-day rule, which is an important part of the accessibility and transparency components of the rule of law. **The Committee accordingly reports these regulations for failure to comply with proper legislative practice, acknowledged by the Department**.

Instruments not reported

At its meeting on 30 September 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

Draft Instruments requiring affirmative approval

Draft S.I.	Apprenticeships (Alternative English Completion Conditions and Miscellaneous Provisions) (Amendment) (Coronavirus) Regulations 2020
Draft S.I.	Electricity (Risk-Preparedness) (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	European Qualifications (Health and Social Care Professions) (EFTA States) (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020
Draft S.I.	Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020
Draft S.I.	Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020
Draft S.I.	Common Rules for Exports (EU Exit) Regulations 2020

Instruments requiring affirmative approval

S.I. 2020/974	Health Protection (Coronavirus, Restrictions) (Bolton) Regulations 2020
S.I. 2020/986	Health Protection (Coronavirus, Restrictions) (No. 2) (England) (Amendment) (No. 4) Regulations 2020
S.I. 2020/987	Health Protection (Coronavirus, Restrictions) (Leicester) (No. 2) (Amendment) (No. 2) Regulations 2020
S.I. 2020/988	Health Protection (Coronavirus, Restrictions) (Birmingham, Sandwell and Solihull) Regulations 2020
S.I. 2020/990	Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) (Amendment and Revocation) Regulations 2020
S.I. 2020/1005	Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020
S.I. 2020/1008	Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020
S.I. 2020/1010	Health Protection (Coronavirus, Restrictions) (North East of England) Regulations 2020

S.I. 2020/1012 Health Protection (Coronavirus, Restrictions) (North East of England) (Amendment) Regulations 2020

Instruments subject to annulment

S.I. 2020/940 Transfer of Functions (Digital Government) Order 2020

S.I. 2020/957 Feed-in Tariffs (Amendment) (Coronavirus) (No. 2) Order 2020

S.I. 2020/959 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 12) Regulations 2020

S.I. 2020/963 Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) (Amendment) (No. 2) Order 2020

S.I. 2020/965 Education (Information About Individual Pupils) (England) (Amendment) Regulations 2020

S.I. 2020/982 Football Spectators (Seating) Order 2020

Draft Instruments subject to annulment

Draft S.I. London Borough of Richmond upon Thames (Electoral Changes) Order 2020

Draft S.I. City of Westminster (Electoral Changes) Order 2020

Appendix 1

S.I. 2020/705

Mali (Sanctions) (EU Exit) Regulations 2020

1. On 16 September 2020, the Committee requested that the Foreign, Commonwealth and Development Office ("FCDO") submit a memorandum on the following point

> *(1) Identify the enabling power for the ambulation in the definitions of "military goods" and "military technology" in regulation 6(7).*
>
> *(2) If the enabling power is paragraph 21 or 23 of Schedule 1 to the Sanctions and Anti-Money Laundering Act 2018, explain why the relevant paragraph is not cited in the preamble.*

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

3. No vires in the Sanctions and Anti-Money Laundering Act 2018 ('SAMLA') are relied on, or required, for the ambulatory definitions of 'military goods' or 'military technology' in regulation 6(7). These references are ambulatory by reference to things specified in another enactment (Schedule 2 to the Export Control Order 2008).

4. Those references have effect in accordance with section 20(2) of the Interpretation Act 1978 (as read together with section 23(1) of that Act): "Where an Act [or subordinate legislation (*in accordance with s23*)] refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended...]."The use of the term 'for the time being" in the definitions of "military goods" and "military technology", serves only to displace any argument that Parliament may have had a 'contrary intention' when using those terms, and that they are intended to refer to the Export Control Order as amended, rather than as specified in the Order at a fixed point in time.

5. The powers in paragraph 21 or 23 of Schedule 1 to SAMLA are not relevant vires for this provision. The vires contained in Schedule 1 to SAMLA relate only to 'trade sanctions'. The definitions of 'military goods' and 'military technology' as used in regulation 6(7) are not related to trade sanctions. They are instead included as general interpretation provisions in order to determine whether a person meets the criteria for designation under regulation 6(1). The Schedule 1 SAMLA powers are not therefore cited in the preamble.

Foreign, Commonwealth and Development Office

22 September 2020

Appendix 2

S.I. 2020/733

Yemen (Sanctions) (EU Exit) Regulations 2020

1. On 9 September, the Committee requested that the Foreign, Commonwealth and Development Office ("FCDO") submit a memorandum on the following point:

> *Given that these regulations make immigration sanctions, explain why section 4 of the Sanctions and Anti-Money Laundering Act 2018 is not cited in the preamble (compare S.I.2020/616).*

2. The FCDO apologises for missing the deadline for responding to the Committee, which was due to an internal administrative error. We recognise and respect the importance of providing full information to the Committee in a timely manner and have put measures in place to ensure such errors do not occur in future.

3. We are grateful for the Committee's consideration of this instrument and respond to the Committee's request as follows.

4. Given the FCDO's consistent practice in citing section 4 in the preamble to other instruments made under the Sanctions and Anti-Money Laundering Act 2018 and containing immigration sanctions, we accept section 4 of SAMLA should have been included in the preamble to this instrument. The FCDO apologises for this omission and we intend to bring forward legislation before the end of the Transition Period to address this.

Foreign, Commonwealth and Development Office

22 September 2020

Appendix 3

S.I. 2020/756

Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020

1. The Committee requested a memorandum on three points in relation to the Order.

> *In the new Class ZA inserted by article 4(2):*
>
> *explain the human rights A1P1 analysis carried out by the Government in relation to the application of paragraph ZA.1(e) to an old building which has no occupiers but has more than one owner in relation to different parts of the building;*

2. The Department understands that the concern underlying this question is how the permitted development rights introduced by S.I. 2020/756 impacts upon the private property rights of owners of the different parts of a building.

3. Article 1 of Protocol 1 to the European Convention on Human Rights guarantees the right of every natural or legal person to the peaceful enjoyment of their property. It is the Department's view that S.I. 2020/756 does not infringe a person's right to the enjoyment of their property. Simply put, if one owner acquires the right to develop the land by obtaining prior approval under the permitted development right this would not affect or override the property rights of the owner of another part of the building or their ability to enforce such rights under the common law. Any attempt by a developer to implement planning permission without the owner's permission could amount to trespass and the landowner would be entitled to seek a remedy against the developer.

4. Under the statutory regime in the Town and Country Planning Act 1990, a person does not have to own land in order to seek to permission to develop the land. Permission to develop relates to the land rather than the applicant or owner. For example, a prospective purchaser might seek permission to develop before deciding whether to purchase.

> *In relation to paragraph ZA.2:*
>
> *(a) explain why sub-paragraph (2)(i) requires prior approval as to the impact of the development's increase in residential use in the area on all businesses, but only on new residents; and*

5. Paragraph 182 of the National Planning Policy Framework, which was revised in July 2018, introduced the "agent of change" principle into a consideration for new developments.

> "*Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have*

> *a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed.*"

6. The new permitted development right applies to offices, research and development and light industrial buildings as well as residential blocks of flats. On that basis this prior approval at ZA.2(2)(i) envisages the situation where residential use could be introduced to an area previously used solely or primarily for business use, and therefore allows for consideration of the impact on existing businesses, for example of matters related to hours of operation, traffic etc. The condition therefore requires the local planning authority to consider the impact on the new residents of the redeveloped site and applies the agent of change principles. For example, the development might be expected to provide double glazing to minimise the impact of the operation of the business on residents and avoid complaints about noise limiting the operation of the business. Where it is not possible to provide appropriate mitigation, it could be a matter in relation to which prior approval is refused.

> *(b) explain whether it is intended that approval might be granted or withheld for new dwellinghouses by reference to compliance with the "Technical housing standard - nationally described space standard" and if so, how effect is given to that intention.*

7. The Department does not intend that approval would be granted by reference to compliance with the "Technical housing standards", which is why there is no such express condition in the Order. The Department expects any block of flats or new dwellinghouse to be of good quality whatever the planning route, including those delivered through this right, and whether it was available to buy or to rent. Smaller properties can be less expensive, opening home ownership to more people. Well-designed new homes, delivered both through a planning application and permitted development rights, can be smaller than the nationally described space standards. Nevertheless, the Government will continue to keep all aspects of housing delivery under review.

Ministry of Housing, Communities and Local Government

22 September 2020

Appendix 4

S.I. 2020/758

Family Procedure (Amendment No. 2) Rules 2020

1. By a letter dated 16 September 2020, the Committee sought a memorandum on the following points:

> *In relation to the Schedule, explain:*
>
> *(1) whether the reference in new rule 37.8(4)(e) to "any respondent" is intended to include the defendant, having regard to the definition of "defendant" in new rule 37.2;*
>
> *(2) what the phrase "under the law" in new rules 37.2, 37.4(2)(p), 37.9(1) and 37.10(3) is intended to add (compared, for example, to existing rule 37.12 or 37.31); and*
>
> *(3) what difference in meaning is intended between a thing being permitted by "the substantive law" in new rule 37.9(4) and a thing being permitted "under the law" in the new rules listed above.*

2. The Ministry of Justice's response is set out below.

3. In relation to the first question, as the Explanatory Memorandum to this instrument explains (in paragraph 7.4), the amendments to the Family Procedure Rules (FPR) made by this instrument mirror, for Part 37 of the FPR, the new Part 81 of the Civil Procedure Rules (CPR) substituted by S.I. 2020/747, save for changes considered necessary to reflect differences between the civil and family courts. One such change relates to the provision made for hearings of contempt proceedings to be in public and the circumstances in which that general rule may be departed from. The new rule 81.8 of the CPR (to which new rule 37.8 of the FPR corresponds) makes provisions for hearings by stating that "In accordance with rule [CPR] 39.2", hearings of contempt proceedings are to be listed and heard in public unless the court otherwise directs. That imports by reference the provisions of CPR rule 39.2(3) for matters of which the court must be satisfied if a hearing or part of it is to be in private.

4. For the FPR, however, there is no equivalent to CPR rule 39.2, and there is a clear preference for making the FPR freestanding and self-contained as far as possible, which tells against importing provisions in rules outside the FPR by express reference. The approach adopted was therefore to provide in paragraph (1) of new FPR rule 37.8 that hearings must be in public "applying the provisions of paragraph (4)"; paragraph (4) then "importing" CPR rule 39.2(3). Paragraphs (5) and (6) of FPR rule 37.8 were then drafted to contain supplementary provisions corresponding to paragraphs (4) and (5) of CPR rule 39.2.

5. The wording so "imported" includes in paragraph (4)(e) the wording to which the Committee draws attention, referring to its being unjust to "any respondent" for there to be a public hearing. That paragraph corresponds to CPR rule 39.2(3)(e). In CPR rule

39.2, which is of broad application to hearings under the CPR, the term "respondent" will include parties beyond a defendant in contempt proceedings (for example, a respondent to an application made in existing proceedings which is to be dealt with at the hearing in question). "Respondent" in that context will therefore bear a broader meaning than "defendant"; but that meaning will be conditioned, in its application in relation to contempt proceedings, by the nature of contempt proceedings and who may be parties to them. In relation to contempt proceedings under FPR new Part 37, the wording is of course not appearing in that more general context, but within the bounds of Part 37; but the Ministry does consider that it includes "defendant" in the sense of the person against whom the contempt application is made.

6. In relation to the second question, the wording "under the law" is intended to make it clear that sanctions against a contemnor under the law generally, whether procedural or substantive, are not affected and continue to be available. This is with a view to covering the possibility of exercise of powers not covered by "fine", "period of imprisonment" or "confiscation of assets", such as a "Hadkinson order" (*Hadkinson v Hadkinson* [1952] 2 All ER 567; and see also *Assoun v Assoun* [No 1] [2017] EWCA Civ 21 and, for a recent exercise of this power, *HR v DS* [2019] *EWHC 2425* (Fam)), or for a contemnor aged 18–20, an attendance centre order or committal to be detained, under section 60 or 108 of the Powers of Criminal Courts (Sentencing) Act 2000.

7. In relation to the third question, the reference to a power of arrest being able to be made by the court to the extent that "the substantive law" permits is intended to draw the distinction between the rules of procedure, which cannot create a power of arrest, and the substantive law. The distinction is drawn with a view to making it clear that the rules do not affect the court's powers regarding arrest (and in particular do not give the court any power which it does not have outside the rules).

Ministry of Justice

22 September 2020

Appendix 5

S.I. 2020/786

Railways (Miscellaneous Amendments, Revocations and Transitional Provisions) (EU Exit) Regulations 2020

1. By a letter dated 16th September 2020, the Joint Committee on Statutory Instruments requested a memorandum on the following points:

> *(1). Explain why regulations 5 and 8(2) extend only to Great Britain given that the provisions they amend extend to the whole of the United Kingdom.*
>
> *(2). Confirm whether the reference in regulation 7(2)(f) to "regulation 18(A1)" should be a reference to "regulation 18A(1A)".*

2. On the first point, regulations 5 and 8(2) should have extended to the whole of the United Kingdom. The Department is grateful to the Committee for raising this issue and apologises for the error. For the reasons set out below the Department do not consider that it will have a material impact, but steps will of course be taken to make appropriate amendments at the first available opportunity.

3. **Regulation 5**

This regulation amends the Connecting Europe Facility (Revocation) (EU Exit) Regulations 2019 (the "2019 CEF EU Exit Regulations"). As it currently stands, for Northern Ireland, regulation 3(3) would read:

> *For the purposes of paragraph (2), a person has been awarded grant funding if, before the end of 2020 (whether before or after exit day)—*
>
> *(a) the person has entered into a grant agreement with the European Commission; or*
>
> *(b) the following criteria are met—*
>
> *(i) the European Commission has informed the person of a decision to award grant funding to the person; and*
>
> *(ii) the Secretary of State considers that the European Commission would have entered into a grant agreement with the person in respect of that funding if the United Kingdom had not withdrawn from the European Union.*

4. In the present case whilst the inconsistency of approach between Great Britain and Northern Ireland is regrettable, the Department does not consider that the failure to amend this provision of the 2019 CEF EU Exit Regulations for Northern Ireland will have an impact in practice.

5. Regulation 3 of the 2019 CEF Regulations makes provision for the Secretary of State to make grant payments, subject to certain conditions, to persons awarded grant funding under the EU Connecting Europe Facility in cases where payments under those grants are not made by the EU. The original drafting required that to be eligible for a payment,

among other things, the grant should have been awarded by the EU before the end of 2020, whether this was before or after exit day. As amended for Great Britain the words "IP completion date" have been substituted for the reference to "the end of 2020". However, as the IP completion date is 11 pm on 31st December this year (the end of the Transition Period), the Department considers there is no practical difference between the position for Great Britain and Northern Ireland. In each case, to be eligible for a payment by the Secretary of State, a person would have to have entered into a grant agreement with the EU before the end of 2020. The current EU Connecting Europe Facility also expires at the end of 2020 and as 11pm GMT is equivalent to midnight Central European Time, there would be no possibility of a grant being awarded by the EU between 11pm and midnight GMT.

6. **Regulation 8(2)**

Regulation 8(2) omits regulation 6(2)(b) of the Railways (Safety, Access, Management and Interoperability) (Miscellaneous Amendments and Transitional Provision) (EU Exit) Regulations 2019 (S.I. 2019/1310) (the "EU Exit Interoperability No 2 Regulations 2019"). Those Regulations in turn amended an earlier set of EU Exit Regulations, the Railways (Interoperability) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/345) (the "EU Exit Interoperability No1 Regulations 2019) which (at regulation 2(27)) had substituted a new regulation 23 into the Railways Interoperability Regulations 2011 ("S.I. 2011/3066) (the "2011 Regulations").

7. The new regulation 23 inserted into the 2011 Regulations is also amended by regulation 4(5)(a) of the present Regulations. Regulation 4 extends to the whole of the United Kingdom.

8. Regulation 4(5)(a)(i) substitutes the words "drawn up before, on or before or after IP completion day" for the words "drawn up before or after exit day" in the new regulation 23(2)(a) of the 2011 Regulations. As new regulation 23(2)(a) was originally drafted, the intention was to ensure that railway interoperability constituents certified, before EU exit day, as complying with relevant standards on the basis of an EU declaration of conformity or suitability could continue to be placed on the market in the UK after exit day. The purpose of the substantive amendment in regulation 4(5)(a)(i) is therefore to ensure instead that interoperability constituents certified against an EU declaration of conformity or suitability, before IP completion day, can continue to be placed on the market in the UK after that date.

9. In the Northern Ireland version of the 2011 Regulations, however, the existing wording in regulation 23(2)(a), which regulation 4(5)(a)(i) of these Regulations amends, will remain as "drawn up on before or after exit day" [italics added]. This is because of the failure to extend regulation 6(2)(a) of the present Regulations to Northern Ireland as that provision would have removed the word "on" shown in italics above immediately prior to regulation 23(2)(a) of the 2011 Regulations being amended by regulation 4(5)(a)(i) of the present Regulations.

10. Again, the Department apologises for this error. In practice it is considered that it would be unlikely to cause significant confusion and that the amendment made to regulation 23(2)(a) of the 2011 Regulations by regulation 4(5)(a) of these Regulations will still be effective as regards Northern Ireland.

11. The Department also notes that there are additional/repeated words ("before or") in the substituted text in regulation 4(5)(a)(i) which should also be omitted. Consideration will be given to whether this minor typographical error can be corrected by a correction slip.

12. Regulation 4(5)(c) provides that in the new regulation 23(4) the words "on or after IP Completion Day" are to be substituted for the words "after exit day". Because of the failure to extend regulation 8(2) to Northern Ireland, the words "on or", which were inserted before "after exit day" by the EU Exit Interoperability No 2 Regulations 2019 will remain in place. The result will be that the version of the 2011 Regulations that extends to Northern Ireland will now presumably read "on or on or after IP Completion Day". However, again the Department is of the opinion, that when interpreting the legislation, it will be quite clear that the additional "on or" is a mistake and would not impact on the legal effect.

13. Appropriate amendments to deal with these issues will be made at the earliest possible opportunity in a suitable Rail EU Exit instrument.

14. On the second point, the Department can confirm that the reference in regulation 7(2)(f) to "regulation 18(AI)" should be a reference to "regulation 18A(1A)". It is hoped to be able to correct this error using a correction slip. It is considered that the reference to a "cross-border service" in the revised text makes it clear that the cross-reference is indeed intended to be to regulation 18A(1A) of the Railways and Other Guided Transport Systems (Safety) Regulations 2006 which are ultimately being amended here. Regulation 18A(1A) makes provision in relation to vehicles used for cross-border services. However, in the event that using a correction slip to rectify this error is not an option, steps will be taken to make the necessary amendment at the earliest possible opportunity in a suitable Rail EU Exit instrument.

Department for Transport

22 September 2020

Appendix 6

S.I. 2020/790

Motor Vehicles (Tests) (Amendment) (Coronavirus) (No. 2) Regulations 2020

1. By a letter dated 16th September 2020, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

> "*Explain why regulation 2 did not substitute a date later than "2nd August 2020" to avoid a breach of the 21-day rule, having regard, on the one hand, to the need to give individuals affected by this legislation sufficient time to prepare for it and, on the other, to the fact that an announcement of policy intent may not lead to, and cannot be treated as, equivalent to a change in law.*"

2. The Department announced on 29th June 2020 that mandatory vehicle testing would be reintroduced for light vehicles from 1st August and the relevant guidance for vehicle users was concurrently updated. It had been made clear to vehicle users in earlier announcements that the policy of postponing tests would be kept under review and ended when widespread testing could resume.

3. The statutory instrument to implement this change was not laid until 23rd July, seven full days before its coming into force, due to the Department's focus on other urgent work related to COVID-19. The Department accepts that a lack of resource is not a sufficient reason for a breach of the 21-day rule but considers that the impact on vehicle users was mitigated by the earlier announcements.

4. Substituting, in mid-July, "2nd August 2020" for a date in mid-August to avoid a breach of the 21-day rule would have had a significant and detrimental impact: (a) more than 800,000 vehicle tests would have been affected, causing further disruption to the annual testing schedule; (b) the private vehicle testing industry would have continued to suffer a loss of income from testing; and (c) a late substitution of the date for reintroducing mandatory testing could have caused confusion among vehicle users about their legal obligations.

5. The Department regrets the breach of the 21-day rule and acknowledges that it should be complied with whenever possible. It was only due to the unique circumstances of urgent demands for resource and the major impact of any delay on the testing regime and industry, following several months of unprecedented disruption, that the breach occurred.

Department for Transport

22 September 2020