



House of Lords
House of Commons
Joint Committee
on Statutory Instruments

**Twenty-Ninth Report
of Session 2019–21**

Drawing special attention to:

Afghanistan (Sanctions) (EU Exit) Regulations 2020 (S.I. 2020/948)

Immigration and Nationality (Replacement of Tier 4 and Fees) and Passport (Fees) (Amendment) Regulations 2020 (S.I. 2020/966)

Non-Contentious Probate (Amendment) Rules 2020 (S.I. 2020/1059)

Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) (No. 3) Regulations 2020 (S.I. 2020/1060)

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 16) Regulations 2020 (S.I. 2020/1070)

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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 4 November 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 five 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. 2020/948: Reported for defective drafting

Afghanistan (Sanctions) (EU Exit) 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.**

1.2 These Regulations establish a domestic sanctions regime relating to Afghanistan 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. It appeared to the Committee that text was missing from the end of regulation 26(1). It asked the Foreign, Commonwealth and Development Office to confirm that this provision is incomplete. In a memorandum printed at Appendix 1, the Department confirms that two sub-paragraphs were inadvertently deleted and undertakes to correct the error at the earliest opportunity. The Committee welcomes the undertaking, and **accordingly reports regulation 26(1) for defective drafting, acknowledged by the Department.**

2 S.I. 2020/966: Reported for unexpected use of enabling powers

Immigration and Nationality (Replacement of Tier 4 and Fees) and Passport (Fees) (Amendment) Regulations 2020

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they make unexpected use of the enabling power in one respect.**

2.2 These Regulations make several amendments to the Immigration and Nationality (Fees) Regulations 2018 (S.I. 2018/330). Regulation 21 amends Schedule 7 to change the definition of the “super priority visa service” for visa and entry clearance applications. This had been defined as a service that aimed “to process relevant applications for entry clearance to enter the United Kingdom *within 24 hours of receipt of the application*” (emphasis added). It is now defined as a service that aims to process such applications “*within a period shorter than that within which it is aimed to process applications under the priority settlement service or, as the case may be, the priority visa service*”. Both the “priority settlement service” and the “priority visa service” merely aim to process applications “on an expedited basis”. The fee for the redefined super priority visa service remains hundreds of pounds higher than the fee for either priority service (and nearly at the fee maximum). Regulations 22 and 23 make equivalent amendments to Schedule 9 (which applies to the Isle of Man) and Schedule 10 (which applies to Guernsey and Jersey).

2.3 Given that neither of the priority services is provided by reference to a specific target period, it was not clear to the Committee: what was intended to constitute a shorter period than “an expedited basis”; by what benchmark the Home Office and applicants would be able to assess whether the super priority service had been delivered (as opposed to the priority service); and, having regard to both those matters and the removal of the 24-hour target from the legislation, what costs or other factors were covered by the significantly higher fee for the super priority service. It asked the Home Office to explain.

2.4 In a memorandum printed at Appendix 2, the Department asserts that the change to the definition of super priority service does not change the service standard, and the 24-hour processing target remains in place for the time being. It explains that the definition was changed as it was considered “unnecessary for the 2018 Regulations to specify the precise service standards offered, so long as the definitions make clear the distinction between the three kinds of priority service”. It asserts that the benchmarks against which service delivery will be measured are the service standards published on the Government’s website, and that the fee will be reviewed in the usual way if the service standards change.

2.5 The Committee remains concerned that the new definition fails to make a clear distinction between the priority and super priority services. The concept of “faster than faster than usual” appears neither to meet the Department’s own criterion, nor to provide a clear and justiciable legal meaning. The service standards referred to by the Department do explain what is presently intended by each service; but they do not form part of the delegated legislation and have no legislative authority, and they can be changed informally (indeed, the Department states in the Explanatory Memorandum that it has changed the legal definition precisely in order to give itself more flexibility to change the standards). Taking all this together, the Committee remains unsure whether Parliament could have expected such a significant fee uplift to be charged without any clear and justiciable distinction between the lower-priced and the higher-priced premium service. **The Committee accordingly reports regulations 21 to 23 for making unexpected use of the enabling power.**

3 S.I. 2020/1059: Reported for requiring elucidation

Non-Contentious Probate (Amendment) Rules 2020

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

3.2 These Rules make several amendments to the Non-Contentious Probate Rules 1987 (S.I. 1987/2024). Rule 2 introduces an overriding objective to the 1987 Rules, which is “to enable non-contentious and common form probate business to be dealt with justly and expeditiously by the court and the registry”. There is, however, no explanation of what is meant by dealing with such business “justly and expeditiously”. The Committee asked the Ministry of Justice to explain the omission, having regard to similar provisions in, *inter alia*, the Criminal Procedure Rules 2020 (S.I. 2020/759, rule 1.1(2)), the Court of Protection Rules 2017 (S.I. 2017/1035, rule 1.1(3)), the Civil Procedure Rules 1998 (S.I. 1998/3132, rule 1.1(2)) and the Welsh Language Tribunal Rules 2015 (S.I. 2015/1028, rule 3(2)).

3.3 In a memorandum printed at Appendix 3, the Department explains that it considered a more expansive definition to be unnecessary because in these cases the work is largely paper based and non-contentious, and because of the experience of the office holders who apply the 1987 Rules. On the former ground in particular, the Department distinguishes the proceedings to which the 1987 Rules apply from those governed by the rules of procedure cited above. It appears to the Committee, as noted in relation to S.I. 2019/1264 in its First Report of Session 2019–21, that it has become part of standard legislative practice for rules of procedure that include an overriding objective (and not only those cited in its question to the Department) to define it by reference to the competing interests that must be weighed, and that if justice and expedition require to be balanced, then as in the case of other procedure rules the criteria to be applied in striking the balance could helpfully be articulated on the face of the legislation. The Committee, however, notes the Department’s approach and **accordingly reports rule 2 (inserted rule 3A) for requiring elucidation, provided in the Department’s memorandum.**

4 S.I. 2020/1060: Reported for defective drafting

Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) (No. 3) Regulations 2020

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

4.2 These Regulations amend the Official Controls (Plant Health and Genetically Modified Organisms) (England) Regulations 2019 (S.I. 2019/1517) to provide for new civil sanctions, which are set out in the Schedule 4A inserted by regulation 2(9) of and the Schedule to these Regulations. The Committee asked the Department for Environment, Food and Rural Affairs to explain the intended difference in meaning between “6 months from *the date from when* the appropriate authority notifies the person” in paragraph 16(2) of Schedule 4A and “6 months from *the date on which* the appropriate authority notifies the person” in paragraph 28(3) (emphasis added). In a memorandum printed at Appendix 4, the Department acknowledges that there is no intended difference in meaning, and that paragraph 16(2) should have used the same wording as paragraph 28(3). It undertakes to correct the error at the next opportunity. The Committee welcomes the undertaking, and **accordingly reports the Schedule to this instrument (in particular, paragraph 16(2) of new Schedule 4A) for defective drafting, acknowledged by the Department.**

5 S.I. 2020/1070: Reported for requiring elucidation

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 16) Regulations 2020

5.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that the Explanatory Memorandum requires elucidation in one respect.**

5.2 These Regulations amend the Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (S.I. 2020/568) to add an alternative time limit to the self-isolation period that applies to a person who arrives in England from a non-exempt country, and to increase the amounts of the fixed penalty notices that can be issued if a

person does not comply with the duty to self-isolate. They were made on 30 September, laid on 1 October, and came into force on 2 October. The Explanatory Memorandum notes that the Department regrets the breach of the rule that an instrument should not normally come into force until at least 21 days after it is laid before Parliament. It does not offer any reasons as to why the breach was considered necessary. The Committee asked the Department for Transport to explain. In a memorandum printed at Appendix 5, the Department provides the detailed explanation. The Committee believes that breaches of the 21-day rule should always be justified in the original Explanatory Memorandum. **The Committee accordingly reports these Regulations on the ground that the Explanatory Memorandum requires elucidation, provided in the Department’s memorandum.**

Instruments not reported

At its meeting on 4 November 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.	Coronavirus Act 2020 (Expiry of Mental Health Provisions) (England and Wales) Regulations 2020
Draft S.I.	Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020
Draft S.I.	New Heavy Duty Vehicles (Carbon Dioxide Emission Performance Standards) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Organic Products (Production and Control) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Ozone-Depleting Substances and Fluorinated Greenhouse Gases (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Product Safety and Metrology etc. (Amendment etc.) (UK (NI) Indication) (EU Exit) Regulations 2020
Draft S.I.	Road Vehicle Carbon Dioxide Emission Performance Standards (Cars and Vans) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Ecodesign for Energy-Related Products and Energy Information (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Data Protection Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2020
Draft S.I.	Food and Feed Hygiene and Safety (Miscellaneous Amendments etc.) (EU Exit) Regulations 2020
Draft S.I.	Hazardous Substances and Packaging (Legislative Functions and Amendment) (EU Exit) Regulations 2020
Draft S.I.	Supplementary Protection Certificates (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Audiovisual Media Services (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit) Regulations 2020
Draft S.I.	Construction Products (Amendment etc.) (EU Exit) Regulations 2020

Draft S.I.	European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020
Draft S.I.	Financial Holding Companies (Approval etc.) and Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Securities Financing Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020
Draft S.I.	Unmanned Aircraft (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Ship Recycling (Facilities and Requirements for Hazardous Materials on Ships) (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Common Organisation of the Markets in Agricultural Products (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2020
Draft S.I.	Common Organisation of the Markets in Agricultural Products (Miscellaneous Amendments) (EU Exit) Regulations 2020
Draft S.I.	Control of Mercury (Amendment) (EU Exit) Regulations 2020
Draft S.I.	Detergents (Amendment) (EU Exit) Regulations 2020
Draft S.I.	REACH etc. (Amendment etc.) (EU Exit) Regulations 2020

Instruments requiring affirmative approval

S.I. 2020/1103	Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020
S.I. 2020/1104	Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020
S.I. 2020/1105	Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020
S.I. 2020/1128	Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) (Amendment) Regulations 2020
S.I. 2020/1131	Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) (Amendment) Regulations 2020
S.I. 2020/1176	Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High and Very High) (England) (Amendment) (No. 2) Regulations 2020

Instruments subject to annulment

S.I. 2020/673¹	Merchant Shipping (Safety of Navigation) Regulations 2020
S.I. 2020/842	Education (Induction Arrangements for School Teachers) (England) (Coronavirus) (Amendment) Regulations 2020
S.I. 2020/844	Education (National Curriculum Assessment Arrangements, Attainment Targets and Programmes of Study) and (Pupil Information and School Performance Information) (Amendment) (England) Regulations 2020

¹ The Committee asked for a memorandum in relation to this instrument and a satisfactory response was received.

- S.I. 2020/911** National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) (No. 2) Regulations 2020
- S.I. 2020/1047²** Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) (Amendment) Order 2020
- S.I. 2020/1093** Births, Deaths and Marriages (Records and Fees) (Amendment) Regulations 2020
- S.I. 2020/1097** Employment and Support Allowance and Universal Credit (Coronavirus Disease) (Amendment) Regulations 2020

Instruments subject to annulment (Northern Ireland)

- S.R. 2020/134** Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No.2) Regulations (Northern Ireland) 2020

2 The Committee asked for a memorandum in relation to this instrument and a satisfactory response was received.

Appendix 1

S.I. 2020/948

Afghanistan (Sanctions) (EU Exit) Regulations 2020

1. On 14 October 2020, the Committee requested that the Foreign, Commonwealth and Development Office (“FCDO”) submit a memorandum on the following point:

Confirm that regulation 26(1) is incomplete.

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

3. The Committee is correct that regulation 26(1) is incomplete; some words (consisting of two short sub-paragraphs) have inadvertently been deleted during the drafting or checking process. We will seek to put it right by means of amendment at the earliest opportunity.

Foreign, Commonwealth and Development Office

19 October 2020

Appendix 2

S.I. 2020/966

Immigration and Nationality (Replacement of Tier 4 and Fees) and Passport (Fees) (Amendment) Regulations 2020

1. At its meeting on 14th October 2020, the Committee requested a memorandum to explain the following points:

“In relation to the amendments made by regulations 21 to 23, given that neither the priority visa service nor the priority settlement service is provided by reference to a specific target period, and that both purport to process applications “on an expedited basis” only, explain:

(1) what is intended to constitute a shorter processing period for the purposes of the super priority visa service;

(2) by what benchmark the Home Office and applicants will be able to assess whether the super priority service has been delivered (as opposed to the priority service); and

(3) what costs and/or other factors are covered by the significantly higher fee retained for the super priority service (having regard to the matters raised in questions (1) and (2) and the removal of the 24-hour target).”

2. The Department’s response is as follows:

Question (1). References in Schedule 7, 9 and 10 to the Immigration and Nationality (Fees) Regulations 2018 (“the 2018 Regulations”) to the “super priority service” cover particular services offered to applicants by the Home Office falling within the descriptions in the definitions in those Schedules. As things stand, each of the “super priority services” referred to offers the processing of applications within 24 hours, which is a shorter processing period than that offered under the “priority settlement service” and the “priority visa service”. There has been no change to that. However, the Department considers it unnecessary for the 2018 Regulations to specify the precise service standards offered, so long as the definitions make clear the distinction between the three kinds of priority service. For example, the fees in 17.1.1 and 17.1.2 in Table 17 in Schedule 6 to the 2018 Regulations do not describe the service levels under the respective services. The current 24 hour processing target for the “super priority service” presents operational difficulties in some cases caused by relative time differences between the place where the applicant is located and the place where the decision about the application is made. Consideration is being given to changing that processing period to “by close of next working day” or another very short timeframe so that it can cater for those operational issues and enable the service to be extended to more locations. However, the service standard remains unchanged at present.

Question (2). The references to the “priority settlement service”, the “priority visa service” and the “super priority service” cover services offered by the Home Office and falling within the descriptions in the definitions of those expressions. Applicants apply under a chosen

service, which has service standards published on www.gov.uk. Those services standards are the benchmark against which it may be assessed whether the service in question has been delivered. Performance data is published as part of quarterly transparency reports.

Question (3). As explained above, the processing target for the “super priority service” offered by the Home Office is still 24 hours. The Department is of course mindful that when setting the amount of any fee under section 68 of the Immigration Act 2014 there is an exhaustive list in subsection (9) of the matters to which the Secretary of State may have regard. There has been no change in that assessment in relation to the fee currently specified. However, the fee will be kept under review as and when consideration is given to altering the processing target under the “super priority service”.

Home Office

20 October 2020

Appendix 3

S.I. 2020/1059

Non-Contentious Probate (Amendment) Rules 2020

1. On 14 October 2020, the Committee requested that the Ministry of Justice submit a memorandum relating to the above instrument asking the Ministry of Justice, to explain why rule 2 (inserted rule 3A) does not set out what is meant by dealing with non-contentious and common form probate business “justly and expeditiously”, having regard to similar provisions in, inter alia, the Criminal Procedure Rules 2020 (S.I. 2020/759, rule 1.1(2)), the Court of Protection Rules 2017 (S.I. 2017/1035, rule 1.1(3)), the Civil Procedure Rules 1998 (S.I. 1998/3132, rule 1.1(2)) and the Welsh Language Tribunal Rules 2015 (S.I. 2015/1028, rule 3(2)), and having regard to the paragraphs relating to S.I. 2019/1264 in the Committee’s First Report of Session 2019–21.
2. The Department is grateful for the Committee’s consideration of this instrument and sets out below its response to the matters raised.
3. The non-contentious probate rules are made under section 127 of the Senior Courts Act 1981 and Part 1 of Schedule 1 to the Constitutional Reform Act 2005 by the Lord Chief Justice (LCJ) or by their nominated judicial office holder, in this case the President of the Family Division (the PFD), and contained in a statutory instrument.
4. Following that statutory framework, rule 2 of this instrument, inserting rule 3A into the Non-Contentious Probate Rules 1987 (S.I. 1987/2024) (the 1987 Rules), was formulated by a working group set up by the PFD in 2013.
5. That working group considered the issue of the discretion that was required to ensure justice to all parties who sought disposal of a matter under the 1987 Rules and the appropriate formulation of the corresponding rule required. That formulation was considered both in the light of the matters that commonly arise under the 1987 Rules and of the experience of the office holders who apply those Rules.
6. During the drafting of the statutory instrument in question the issue was further revisited by the Ministry of Justice, with input from those experienced in and/or tasked with the application of the 1987 Rules. The draft SI was also approved by the acting PFD.
7. It was the aim of Ministry of Justice to provide a rule that properly reflected the nature of the work which is largely paper based and, as the name would indicate, non-contentious. The non-contentious nature of the business is of great significance to the lack of need for an expansively formulated overriding objective clause, such as is contained in the Civil Procedure Rules 1998 (the CPR) identified by the Committee.
8. As the Committee will no doubt be aware, the CPR deal with matters which are of a dramatically different nature in that they are, or are very likely to become, highly contentious and subject to great degrees of litigation and for which a fuller clause is needed.

9. That contrast can be further clearly seen from the fact that matters that commence as non-contentious probate business under the 1987 Rules but become contentious are transferred to be dealt with by the Chancery Division of the High Court applying the CPR, for example Part 57.

10. It is also of note that this distinction is applicable to each of the statutory instruments very helpfully highlighted by the Committee.

11. For these reasons the Ministry of Justice and the acting PFD felt that the overriding objective as formulated in the statutory instrument in question was both sufficient for and proportionate to the matters to be dealt with under the 1987 Rules.

Ministry of Justice

20 October 2020

Appendix 4

S.I. 2020/1060

Official Controls (Plant Health and Genetically Modified Organisms (England) (Amendment) (No. 3) Regulations 2020

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

In new Schedule 4A (inserted by regulation 2(9)), explain the intended difference in meaning between “6 months from the date from when the appropriate authority notifies the person” in paragraph 16(2) and “6 months from the date on which the appropriate authority notifies the person” in paragraph 28(3).

2. There is no intended difference of meaning. The Department accepts that paragraph 16(2) should have referred to “the date on which”, and so been aligned with the wording in paragraph 28(3), so as to read:

“Criminal proceedings for offences to which a notice or third party undertaking in sub-paragraph (1) relates may be instituted at any time up to 6 months from the date on which the appropriate authority notifies the person against whom the proceedings are to be taken that the person has failed to comply with that notice or undertaking.”

3. The Department regrets the oversight, and will amend regulation 16(2) at the next opportunity.

Department for Environment, Food and Rural Affairs

19 October 2020

Appendix 5

S.I. 2020/1070

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 16) Regulations 2020

1. In its letter to the Department of Health and Social Care of 14 October 2020, the Committee requested a memorandum on the following point:

“Explain why it was necessary for these Regulations [to] breach the 21-day rule.”

As the Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 16) Regulations 2020 (“the amending Regulations”) were made by the Secretary of State for Transport, this memorandum has been prepared by the Department for Transport.

2. The amending Regulations made amendments to the Health Protection (Coronavirus, International Travel) (England) Regulations 2020, S.I. 2020/568 (“the principal Regulations”).

3. Regulation 4 of the principal Regulations requires individuals arriving in England to self-isolate if, within the 14 days preceding their arrival, they have departed from or transited through a non exempt country or territory. Breach of this requirement is a summary-only criminal offence, punishable on conviction by fine (regulation 6(1)(b) of the principal Regulations). The offence is subject to a fixed penalty regime and, prior to the coming into force of the amending Regulations, the amount of the fixed penalty was £1,000 for the first breach of the requirement to self-isolate, and for all subsequent breaches.

4. On 28 September, new regulations—the Health Protection (Coronavirus, Restrictions) (Self Isolation) (England) Regulations 2020, S.I. 2020/1045 (“the domestic Regulations”)—came into force, introducing a requirement to self-isolate for individuals who either test positive for coronavirus or come into close contact with a person who tests positive for coronavirus. Breach of this requirement is, again, a summary-only criminal offence, punishable on conviction by fine. This offence is also subject to a fixed penalty regime, with a penalty starting at £1,000 for the first breach and increasing up to a maximum of £10,000 in the event of subsequent breaches.

5. As the new self-isolation requirement was a measure taken to reduce the serious and imminent threat to public health posed by the spread of coronavirus, the domestic Regulations were made using the emergency procedure set out in section 45R of the Public Health (Control of Disease) Act 1984. The new self-isolation requirement came into force on 28 September 2020.

6. The amending Regulations made two changes to the principal Regulations, namely they:

- a) amended regulation 4 of the principal Regulations so that the requirement to self-isolate ceases to apply if a person is required to self-isolate under the domestic Regulations,
- b) introduced a “laddered” structure to the fixed penalty regime under the principal Regulations so that increasing penalties, up to a maximum of £10,000, apply for repeated breaches of the requirement to self-isolate.

Both changes were considered urgent, for the reasons set out below.

7. The introduction of the requirement to self-isolate under the domestic Regulations meant that a person who had departed from or transited through a non-exempt country or territory in the preceding 14 days, who also tested positive for coronavirus or came into close contact with a person who had tested positive, would be subject to two separate requirements to self-isolate under the principal Regulations and the domestic Regulations.

8. This would mean that an individual could commit offences under both those Regulations if they failed to self isolate. This was not considered to be proportionate and urgent action was therefore needed to amend the principal Regulations to avoid double liability arising.

9. Further, the self-isolation requirements under the two regimes are not identical—the period of self-isolation and the exemptions and exceptions to the requirements differ. In light of the potential for confusion, which is particularly of concern where criminal penalties apply, it was considered highly undesirable for an individual to be subject to both regimes at the same time.

10. The domestic Regulations created a “laddered” penalty structure as mentioned above. As domestic rates of coronavirus are rising, the Government considered larger penalties to be justified in order to incentivise compliance with the measures. The domestic Regulations having been made using the emergency procedure, urgent action was required to amend the penalty structure under the principal Regulations in order to swiftly implement the Government’s decision that higher penalties were required and to avoid creating asymmetrical penalties under the two regimes.

11. The Department for Transport regrets the breach of the 21-day rule in these circumstances, however it does not consider that any undue prejudice is caused by failing to adhere to the convention. The first amendment made to the principal Regulations removes a requirement placed on individuals, rather than imposing a new or amended requirement. Whilst the second amendment increases the penalty for multiple breaches of the requirement to self-isolate, the penalty for the first breach remains unchanged. Further, by virtue of regulation 7(5B) of the principal Regulations, inserted by regulation 2(3)(b) of the amending Regulations, in respect of the period before the coming into force of the amending Regulations (2 October 2020), only one previous fixed penalty notice under the principal Regulations may be taken into account in determining the penalty for subsequent breaches under the new, “laddered” structure. This mitigates the effect of the breach of the 21-day rule.

Department for Transport

20 October 2020