



House of Lords
House of Commons
Joint Committee on Statutory
Instruments

**Twenty-First Report of
Session 2022–23**

Drawing special attention to:

*Education (Student Loans) (Repayment) (Amendment) (No. 3) Regulations
2022 (S.I. 2022/1151)*

*Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations
2022 (S.I. 2022/1186)*

*Ordered by the House of Lords to be
printed 14 December 2022*

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Joint Committee on Statutory Instruments

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[Lord Chartres](#) (*Crossbench*)

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[Baroness Gale](#) (*Labour*)

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House of Commons

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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

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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.

Committee staff

The current staff of the Committee are Sue Beeby (Committee Operations Officer), Liz Booth (Committee Operations Officer), Apostolos Kostoulas (Committee Operations Officer), Christine Salmon Percival (Lords Clerk), Hannah Stone (Commons 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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Instruments reported

At its meeting on 14 December 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 two 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. 2022/1151: Reported for defective drafting

Education (Student Loans) (Repayment) (Amendment) (No. 3) Regulations 2022

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

1.2 These Regulations, which are subject to the negative resolution procedure, amend the Education (Student Loans) (Repayment) Regulations 2009 to set a maximum interest rate for income-contingent student loans for a period of three months. Four previous statutory instruments have set maximum interest rates for fixed periods and have all contained expiry provisions (the amending instruments).

1.3 Regulation 3(2), (3), (4), (5), (6), (7), (9) and (10) purports to amend text that is no longer there at the time this instrument comes into force. The Committee asked the Department for Education to explain. In a memorandum printed at Appendix 1, the Department explains that it understood the expiry provision within the four previous amending instruments to only operate on the instrument itself and not the textual amendments made by that instrument, the effect being multiple paragraphs within the 2009 Regulations. This is a fundamental error: an amending provision is a continuing legislative proposition like any other, and when the amending provision ceases to have effect, the amended text automatically reverts to its pre-amended form. This follows the “always speaking” rule for interpreting legislation, and the Department itself followed that rule when drafting previous amending instruments (for example, S.I. 2021/1005 and S.I. 2021/1378). The approach suggested by the Department here, as well as being contrary to precedent and accepted legislative practice, would render the expiry clause nugatory as the instrument is entirely amending another instrument. (The self-revoking provisions contained in regulation 3(8) and (11) are also unnecessary as the whole instrument will be revoked on that same day.) For the purposes of keeping the statute book tidy, the correct approach would be to revoke the expired amending instruments, as the Department undertakes to do in a forthcoming instrument later this month. **The Committee accordingly reports 3(2), (3), (4), (5), (6), (7), (8), (9), (10) and (11) for defective drafting.**

1.4 Regulation 3(11) omitted to specify the regulation into which the new text should be inserted. A correction slip was subsequently issued, changing the text of regulation 3(11) to specify regulation 21B. The Committee asked the Department on whose authority the correction slip was issued to change the substantive text of this instrument. In its memorandum, the Department suggests that the error was “typographical” and could not alter the meaning of the provision. The SI Registrar at the National Archives authorised a correction slip. The Committee has made clear on many occasions (see, in particular,

Transparency and Accountability in Subordinate Legislation, First Special Report of Session 2017–19, paragraph 3.7) that subordinate legislation should not be corrected by correction slip where the change could possibly amount to a change of substance. If an error is obvious, the reader will be able to see what is meant without a correction slip (and the courts will if necessary exercise their judicial discretion to give a rectifying construction in accordance with the rule in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (HL)). Apart from that, the only lawful method of altering the text of a statutory instrument is by an amending instrument. In this case the place where an insertion is to be made is a matter of substance. If the Department thought the correct location beyond question, they should have left the instrument alone; if it needed correction, it should have been corrected by an amending instrument. Informal changes of legislation once enacted are undemocratic and suggest a casual attitude to the rule of law that the Committee deeply deprecates. **The Committee accordingly reports regulation 3(11) for defective drafting in this additional respect and draws attention to the incorrect use of the correction slip procedure in this instance.**

2 S.I. 2022/1186: Reported for doubtful *vires* and for requiring elucidation

Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022

2.1 **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 two respects and that they require elucidation in another respect.**

2.2 These Regulations, which are subject to the negative resolution procedure, make provision as to how a public authority is to determine the gross cash amount or the gross cash equivalent of a subsidy for the purpose of certain provisions of the Subsidy Control Act 2022. The gross cash equivalent is calculated by reference to the value of the benefit conferred taking into account the difference between the terms on which the subsidy is given and the terms on which such financial assistance might reasonably have been expected to be available on the market. The Schedules contain rates to help determine the gross cash equivalent of a subsidy. These relate to the mark up rate for loans or the percentage risk that a claim may be made for a guarantee. The relevant percentages that apply are determined by the creditworthiness of the person in receipt of the subsidy.

2.3 The creditworthiness of a person is determined by their credit rating or “a person may be treated as having a strong, good or satisfactory level of creditworthiness if no such credit rating has been issued in respect of that person but there are reasonable grounds to believe that that person’s level of creditworthiness is at least equivalent to a person who would qualify as having a strong, good or satisfactory level of creditworthiness” (regulation 2(2)(b)). Regulation 4(6) relates to subsidies where the amount of a subsidy that will be paid under a measure is unknown in advance and allows a determination to be based on “a reasonable estimate” of the maximum foreseeable gross cash equivalent. As these regulations appear to involve an element of discretion, the Committee asked the Department for Business, Energy and Industrial Strategy to indicate what powers are relied upon for the exercise of the discretion in regulations 2(2)(b) and 4(6). In a memorandum printed at Appendix 2, the Department explains that it is relying on section 82 of the

Subsidy Control Act 2022 which gives the power to “make provision” about how the gross cash amount, and the gross cash equivalent amount, is to be determined for various purposes. The Department argues that it is implicit in the purpose of the Regulations that public authorities will need to make judgements on various aspects of their calculations in each case. In relation to regulation 4(6), the Department states that it does not characterise providing a reasonable estimate as an exercise of discretion but rather as a requirement of what a public authority must do in particular circumstances. The Committee is clear that a general power to “make provision” (as contained in section 82(1)) does not rebut the strong presumption against sub-delegation: it is at least strongly arguable that the enabling power is expecting the subordinate instrument to refer to objective criteria rather than to discretionary judgements. **The Committee accordingly reports regulations 2(2)(b) and 4(6) for doubt as to whether they are *intra vires*.**

2.4 The Committee also asked the Department what would constitute a reasonable ground to believe that a person’s level of creditworthiness is at least equivalent to a person who would qualify as having a strong, good or satisfactory level of creditworthiness. In its memorandum, the Department sets out the considerations which a public authority will take into account to assess the creditworthiness of a person to which it is giving a subsidy. **The Committee accordingly reports regulation 2(2)(b) for requiring elucidation, provided by the Department’s memorandum.**

Instruments not reported

At its meeting on 14 December 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

Draft instrument requiring affirmative approval

S.I. Numbers	S.I. Title
Draft	Civil Legal Aid (Housing and Asylum Accommodation) Order 2023

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2022/659	Toys and Cosmetic Products (Restriction of Chemical Substances) Regulations 2022
S.I. 2022/1198	Non-Domestic Rating (Alteration of Lists and Appeals) (England) (Amendment) Regulations 2022
S.I. 2022/1222	Producer Responsibility Obligations (Packaging Waste) (Amendment) (England and Wales) Regulations 2022
S.I. 2022/1225	Rural Development (Amendment) (No. 2) (England) Regulations 2022
S.I. 2022/1229	Occupational Pensions (Revaluation) Order 2022
S.I. 2022/1230	Police, Fire and Crime Commissioner for Cumbria (Fire and Rescue Authority) Order 2022
S.I. 2022/1235	Aviation Safety and Air Traffic Management (Amendment) Regulations 2022
S.I. 2022/1236	Democratic Republic of the Congo (Sanctions) (EU Exit) (Amendment) Regulations 2022
S.I. 2022/1249	Public Interest Disclosure (Prescribed Persons) (Amendment) (No. 2) Order 2022
S.I. 2022/1250	State Pension Debits and Credits (Revaluation) Order 2022
S.I. 2022/1251	State Pension Revaluation for Transitional Pensions Order 2022

Draft instruments subject to annulment

S.I. Numbers	S.I. Title
Draft	East Hertfordshire (Electoral Changes) Order 2023
Draft	Fenland (Electoral Changes) Order 2023
Draft	Mole Valley (Electoral Changes) Order 2023

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2022/1197	Offshore Installations (Safety Zones) (No. 3) Order 2022
S.I. 2022/1210	Building Safety Act 2022 (Commencement No. 3 and Transitional Provision) Regulations 2022
S.I. 2022/1226	Elections Act 2022 (Commencement No. 4 and Savings) Regulations 2022

Appendix 1: Memorandum from the Department for Education

S.I. 2022/1151

Education (Student Loans) (Repayment) (Amendment) (No. 3) Regulations 2022

1) The Committee has asked the Department for Education for a memorandum on the following point(s):

(1) Explain why regulation 3(2), (3), (4), (5), (6), (7), (9) and (10) purports to amend text that is no longer there at the time this instrument comes into force and why this instrument does not instead tidy the statute book by revoking the expired amending instruments.

(2) Explain on whose authority the correction slip was issued to correct the substantive text of regulation 3(11).

Regulations 3(2), (3), (4), (5), (6), (7), (9) and (10)

2) The Department for Education thanks the JCSI for raising this query.

3) The Department's understanding was that the textual amendments made by S.I. 2021/677, 1005, 1378 and 2022/889 (the "Amending Instruments") remained in the Education (Student Loans) (Repayment) Regulations 2009/470 ("the 2009 Regulations"), notwithstanding the expiry of the Amending Instruments (albeit that the amendments are now spent).

4) Whilst each Amending Instrument contained an expiry provision, the Department's understanding was that this only operated on the Amending Instrument itself and did not revoke the textual amendments made by those Instruments.

5) Accordingly, the Department understood that the 2009 Regulations contained, in regulation 21A, multiple paragraphs (2G), (4A) and, in regulation 21B, multiple paragraphs (1A) ("the textual amendments"). These had been inserted by the Amending Instruments.

6) The decision to include provision in S.I. 2022/1151 to omit the textual amendments followed discussions with the National Archives, which advised that explicit amendment was necessary for omission of the text. The provisions referred to by the JCSI were therefore intended to do that.

7) In this instance, rather than creating a new paragraph (2G) in regulation 21A, we inserted a new regulation 8A which capped the maximum annual percentage rate of charge under paragraphs (2), (2ZA),(2A),(2C),(2D),(2F) and (4) of regulation 21A. We also drafted self-revoking provisions in regulations 3(8) and (11) to ensure that these amending provisions are omitted on expiry of S.I. 2022/1151.

8) The Department's understanding was that revoking the Amending Instruments would not revoke the textual amendments made in the 2009 Regulations, which is why we adopted the approach described above.

9) The Department will revoke the spent Amending Instruments in a forthcoming S.I (to be laid this month), which makes a number of amendments to the 2009 Regulations aimed at improving their clarity and accessibility.

Correction slip for regulation 3(11)

10) The Department considers that the amendment to regulation 3(11) was to correct a typographical error and did not alter the meaning of the provision. The Department raised this issue with the SI Registrar at the National Archives and sought their views as to whether regulation 3(11) could be corrected via a correction slip or whether this required an amending statutory instrument to be made. The SI Registrar informed the Department that the amendment was appropriate for addressing via a correction slip.

11) The Department again thanks the JCSI for raising these matters and providing an opportunity for our further consideration and response.

Department for Education

6 December 2022

Appendix 2: Memorandum from the Department for Business, Energy and Industrial Strategy

S.I. 2022/1186

Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022

1) The Committee has asked the Department for Business, Energy and Industrial Strategy for a memorandum on the following point(s):

(1) What powers are relied upon for the exercise of the discretion in regulations 2(2)(b) and 4(6).

(2) What would constitute a reasonable ground to believe that a person's level of creditworthiness is at least equivalent to a person who would qualify as having a strong, good or satisfactory level of creditworthiness.

2) The powers relied upon are the powers in section 82 of the Subsidy Control Act 2022.

3) The power is a power by regulations to make provision about how the gross cash amount, and the gross cash equivalent amount, is to be determined for the various purposes of the Act including for example, whether to upload the subsidy to the subsidy database, whether a referral is to be made to the Subsidy Advice Unit in the Competition Appeal Tribunal or whether the subsidy qualifies as a Minimal Financial Assistance to which some of the provisions of the Act do not apply.

4) How a subsidy is determined inherently involves a public authority making a judgement on a number of variables. For example, in determining the amount of subsidy in relation to a loan, a public authority will have to consider the appropriate market comparator for a loan on market terms, the likelihood of repayment or the nature of the security on which the loan is made. We consider that it is therefore implicit in the purpose of the Regulations that public authorities will need to make judgements on various aspects of their calculations in each case.

5) We have provided public authorities with certain formulae which may simplify the task of determining the gross cash equivalent of a subsidy in the case of lower value subsidies. These relate to the mark up rate for loans or the percentage risk that a claim may be made for a guarantee. The relevant percentages that apply will be determined by the credit ratings for the enterprise in receipt of the subsidy.

6) The credit ratings are explained in regulation 2(2). In some circumstances, as we have said in regulation 2(2)(b), an enterprise may not have a credit rating, so the provision in the regulations will not apply. This is often the case where an enterprise is a small or medium sized enterprise. Therefore, we have provided that a public authority can, in those circumstances, make their own assessment of the creditworthiness.

7) Public authorities will be well used to taking such judgements based on the information available about a company and will consider that information objectively in each case having regard to commonly understood credit rating practices. There will be objective considerations which will help a public authority to assess the creditworthiness of an enterprise to which it is giving a subsidy, for example whether a subsidy is given to a start-up company, whether the start-up is part of a wider group of companies or has a parent company with a strong credit rating, the nature of the company in question, external reports into the credit rating of the company and internal assessments that are made by the public authority on the credit history of the enterprise.

8) Regulation 4(6) deals with subsidies where the amount of a subsidy that will be paid under a measure is unknown in advance. Examples may include tax subsidies for research and development (where the amount of subsidy is contingent on the value of research undertaken by eligible enterprises) or where the amount of the subsidy is contingent on demand or some other variable rather than an amount agreed in advance. In such cases, the only way to determine the subsidy is for public authorities, to provide a reasonable estimate of the amount of subsidy that might be provided under the relevant measure.

9) We would not characterise this as an exercise of discretion so much as a requirement of what a public authority must do in particular circumstances, namely provide a reasonable estimate which, as is the case with an assessment of credit ratings, will be made with all the objective information that a public authority will have to make those determinations. On this basis, we consider that the regulation is within the *vires* of section 82 of the enabling Act.

Department for Business, Energy and Industrial Strategy

6 December 2022

Formal Minutes

Wednesday 14 December 2022

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Baroness D’Souza

Baroness Gale

Lord Haskell

Baroness Newlove

Lord Smith of Hindhead

Richard Thomson

Liz Twist

Report consideration

Draft Report (Twenty-First Report), 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 2.4 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 2.

Resolved, That the Report be the Twenty-First 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 11 January 2023 at 3.40 p.m.