



House of Lords
House of Commons

Joint Committee on Statutory
Instruments

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

Drawing special attention to:

*Payment and Electronic Money Institution Insolvency (Scotland) Rules 2022
(S.I. 2022/1239)*

*Architects (Fees, Electronic Communications and Miscellaneous
Amendments) Regulations 2022 (S.I. 2022/1388)*

*Parliamentary Elections (Welsh Forms) (Amendment) Order 2022
(S.I. 2022/1402)*

*Health Protection (Coronavirus, International Travel from China) (England)
Regulations 2023 (S.I. 2023/2)*

*Energy Bills Support Scheme and Alternative Fuel Payment Pass-through
Requirement (Northern Ireland) Regulations 2023 (S.I. 2023/10)*

*Ordered by the House of Lords
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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 8 February 2023 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 are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2022/1239: Reported for defective drafting and for requiring elucidation

Payment and Electronic Money Institution Insolvency (Scotland) Rules 2022

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

1.2 These Rules, which are subject to the negative resolution procedure, apply where payment and electronic money institutions in Scotland go into special administration. They set out the procedure – in Scotland – for the new regime established by the Payment and Electronic Money Institution Insolvency Regulations 2021 (S.I. 2021/716) and are largely modelled on the Rules that apply in England and Wales (S.I. 2021/1178).

1.3 Under the new regime, specified individuals must provide a statement of the institution's affairs to the newly appointed administrator. Rule 16(3) prescribes the contents of the notice that informs individuals of that obligation. Unlike the equivalent provision in the Rules for England and Wales, and unlike other rules in this instrument that apply to different types of notice (e.g., rules 27 and 134), rule 16(3) does not expressly require the notice of a statement of affairs to include details about the proceedings, the institution and the administrator. The Committee asked His Majesty's Treasury to explain the discrepancy. In a memorandum printed at Appendix 1, the Department explains that its intention was to avoid duplicating the notification requirements in rule 15(5), but it acknowledges that the inconsistent approach is potentially confusing and undertakes to review and amend the notification rules at the next appropriate legislative opportunity. **The Committee accordingly reports rule 16(3) for defective drafting, acknowledged by the Department.**

1.4 Rule 22(1) provides for the reasonable expenses of a “nominated person making the statement of affairs and a statutory declaration or a relevant person making a statement of concurrence” to be paid as an expense of the special administration. The Committee asked the Department to explain what statutory declaration this rule is referring to, noting that both the statement of affairs and the statement of concurrence must be a statutory declaration (under paragraph 47(5) of Schedule B1 to the Insolvency Act 1986 and rule 19(6) respectively). In its memorandum, the Department acknowledges that this reference to a statutory declaration is redundant and undertakes to correct the error at the next appropriate legislative opportunity. **The Committee accordingly reports rule 22(1) for defective drafting, acknowledged by the Department.**

1.5 Rule 197 sets out how a period of time expressed in months should be calculated. If a rule specifies the beginning of the period (for example, “the period of six months beginning with the date on which the institution entered special administration”, as in rule 86(2)(a)), then under rule 197(2)(a), the month in which the period ends is the specified number of months *after* the month in which it begins (in the example above, the period ends in month 7 – six months after month 1); and the day on which the period ends is either the day before the date on which it begins or, if there is no such day (i.e., on the first of the month), the last day of the month *in which it ends*.

1.6 This appears to result in a discrepancy between a period beginning on the first of the month and a period beginning on any other day: a period of six months beginning on 2 June would end on 1 December, but a period of six months beginning on 1 June would end on 31 December. The Committee asked the Department to explain whether this reflects the policy intent for periods beginning on the first of the month. In its memorandum, the Department confirms that although it creates a surprising result, rule 197(2)(a) achieves the policy intent of consistency with other, well-established and understood insolvency procedure rules. The creation of a statutory time period whose length is determined by whether it began on the first of the month (cf. any other day) is not very satisfactory, but the Committee accepts that consistency across insolvency regimes is desirable **and is accordingly content to report rule 197(2)(a) for requiring elucidation, provided by the Department’s memorandum.**

2 S.I. 2022/1388: Reported for doubtful *vires* and for defective drafting

Architects (Fees, Electronic Communications and Miscellaneous Amendments) 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 one respect and that they are defectively drafted in one respect.**

2.2 These Regulations, which are subject to the negative resolution procedure, grant new powers and discretions to the Architects Registration Board, including as to the calculation and payment of fees and the membership of its committees.

2.3 Regulation 2 confers new powers and discretions on the Board that relate to the charging of fees. Paragraph (1) allows the Board to charge fees in respect of specified services. Paragraph (2) sub-delegates to the Board the ability to prescribe, by rules, who is liable to pay such fees and how they are to be calculated (subject to a cap set by paragraph (4)) and paid. The Committee asked the Department for Levelling Up, Housing and Communities to explain what power is relied on for the sub-delegation in regulation 2(2). In a memorandum printed at Appendix 2, the Department identifies section 24A of the Architects Act 1997 as the enabling power. It asserts that the sub-delegation is lawful on the basis that “the Act expressly sub-delegates powers to the [Board] in numerous places, including in relation to fees” and that the intention of section 24A is to permit the “sub-delegation of more administrative aspects of fee-charging”.

2.4 The Committee disagrees, in particular, as to the power to prescribe who is liable to pay the fees. None of the provisions the Department cites in its memorandum “sub-

delegates” fee-charging powers to the Board: in each of those sections, Parliament delegates directly to the Board a power to charge fees in relation to services and to a person that Parliament has specified. It was open to Parliament to do the same in section 24A. It did not. Instead, Parliament delegates its legislation-making power to the Secretary of State to make provision about the services in respect of which the Board may charge a fee (rather than leaving this to the Board’s discretion) and to make provision about the persons who are liable to pay a fee. The latter is not, in the Committee’s view, an administrative aspect of fee-charging but a direct interference with rights under Article 1 of the First Protocol to the European Convention on Human Rights. The distinction between the direct delegation to the Board in some provisions but to the Secretary of State in section 24A is meaningful; it supports rather than rebutting the strong presumption against sub-delegation without express authority. (And the Committee refers again to its opinion as expressed in its Fifth Report of Session 2019–21, in relation to S.I. 2020/41: that the general power to “make provision” does not rebut that presumption.) **The Committee accordingly reports regulation 2(2) for doubt as to whether it is *intra vires*.**

2.5 Under paragraphs 18 and 19 of Schedule 1 to the Architects Act 1997, the Board may establish committees to discharge any of its functions (subject to a few exceptions) or to help it discharge any of its functions. While the Board may appoint anyone to the second type of committee, the first type must have a majority of Board members. Regulation 3(3) revokes that requirement, giving the Board complete discretion as to the membership of any of its committees. That discretion appears, however, to be undermined by paragraph 20 of Schedule 1, which provides that votes of the first type of committee are invalid unless most of those voting are Board members. The Committee asked the Department to explain whether paragraph 20 is intended to continue to apply where the Board exercises the new discretion conferred by regulation 3(3). In its memorandum, the Department explains that this is not the intention, although it acknowledges that it is the effect of these Regulations. It undertakes to correct the error as soon as possible by way of further amendment to the Act. **The Committee accordingly reports regulation 3(3) for defective drafting, acknowledged by the Department.**

3 S.I. 2022/1402: Reported for defective drafting

Parliamentary Elections (Welsh Forms) (Amendment) Order 2022

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

3.2 This Order, which is not subject to any parliamentary procedure, updates the Welsh language version of forms used during parliamentary elections, and the Welsh form of words on bilingual forms, to anticipate the coming into force of voter photo ID provisions.

3.3 Schedule 6 to the Voter Identification Regulations 2022 (S.I. 2022/1382) includes these photo ID requirements in the new English language version of the official proxy poll card that is sent to an appointed proxy voting in person (Form B of Part 1). Schedule 2 to this instrument includes them in the new bilingual version of the same poll card (Form 7). The Committee noticed that some of the information on the English language poll card does not appear on the bilingual version (what to do if you are away or cannot go to the polling station on voting day). It asked the Department for Levelling Up, Housing and

Communities to explain the discrepancy. In a memorandum printed at Appendix 3, the Department acknowledges the error and undertakes to correct it by amending Order at the next suitable opportunity. **The Committee accordingly reports Form 7 of Schedule 2 for defective drafting, acknowledged by the Department.**

3.4 Article 2(2) inserts a new sub-paragraph (t) into a paragraph of S.I. 2007/1014. The Committee asked the Department to confirm that the paragraph’s opening words, which refer to “sub-paragraphs (a) to (s)”, should have been amended to reflect that insertion. In its memorandum, the Department acknowledges the error and undertakes to correct it in the same amending Order. **The Committee accordingly reports article 2(2) for defective drafting, acknowledged by the Department.**

4 S.I. 2023/2: Reported for defective drafting

Health Protection (Coronavirus, International Travel from China) (England) Regulations 2023

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, which are subject to the negative resolution procedure, impose coronavirus testing requirements on people travelling from China to England, and on the operators of the commercial flights on which they arrive. They are largely modelled on earlier coronavirus legislation and so are drafted in very similar terms. In the Schedule, paragraph 6(9)(c) defines “member of a consular post” (using the same definition as in S.I. 2022/125), but the term does not appear elsewhere in this instrument. The Committee asked the Department of Transport to explain why the definition was needed. In a memorandum printed at Appendix 4, the Department acknowledges that the definition was included in error. **The Committee accordingly reports paragraph 6(9)(c) of the Schedule for defective drafting, acknowledged by the Department.**

5 S.I. 2023/10: Reported for defective drafting

Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023

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

5.2 The Regulations make provision in connection with energy bill support provided to domestic customers in Northern Ireland. In Northern Ireland, there is provision for a single support payment to be made in accordance with a direction given by the Secretary of State under section 22 of the Energy Prices Act 2022 (referred to in the Regulations as the “EBSS AFP NI Direction”). The Regulations require recipients of the support to pass through amounts to end users, where they themselves are not the end user, or not the only end user, of the energy in respect of which the support has been paid (such a person is referred to in the Regulations as an “intermediary”).

5.3 Regulation 2 sets out definitions for the purposes of the Regulations and includes a definition of the term “EBSS AFP NI support payment”. The Committee asked the Department for Business, Energy and Industrial Strategy to explain why that definition refers to a payment which an electricity supplier is required to provide each scheme month, given that the Direction provides for a single payment to be made by a supplier to each of its eligible customers. In a memorandum printed at Appendix 5, the Department acknowledges that the definition is defective in suggesting that the EBSS AFP NI Direction requires suppliers to make monthly payments. The Department will include a correcting amendment in a further set of regulations, subject to obtaining Ministerial approval to do so. **The Committee accordingly reports regulation 2 for defective drafting, acknowledged by the Department.**

5.4 Regulation 3(7) specifies circumstances in which a scheme benefit is to be treated as not having been provided to an intermediary for the purposes of the Regulations. Those circumstances are where the intermediary has notified the person who provided the benefit that it has been provided in error and the intermediary is taking steps to return the benefit to that person “in accordance with the requirements of EBSS AFP NI (as appropriate)”. The Committee asked the Department to explain those words, given that it is the EBSS AFP NI Direction which provides for benefits to be given to domestic customers in Northern Ireland, and the Direction does not contain provisions requiring the return of benefits provided in error to a customer.

5.5 In its memorandum, the Department explains that the term “EBSS AFP NI” is defined in regulation 2 to mean the Energy Bills Support Scheme and Alternative Fuel Payment in Northern Ireland, which are the two schemes governing the provision of support to domestic energy customers in Northern Ireland. According to the Department, the schemes are primarily set out in the EBSS AFP NI Direction but are also contained in the wider announcements as to the details of the schemes, and the associated guidance.

5.6 The Department acknowledges that the reference in regulation 3(7) to “the requirements of” the EBSS AFP NI is inappropriate because the EBSS AFP NI Direction does not contain any provisions concerned with the return of scheme benefits provided in error. Nor is there any suggestion that such provisions exist elsewhere within the schemes. Despite this, the Department considers that the meaning of the provision is still sufficiently clear. In the view of the Committee, the natural construction of regulation 3(7) is that it is referring to the situation where a scheme benefit has been provided in error and the intermediary is taking steps to return the benefit in accordance with requirements for doing so imposed by the EBSS AFP NI. The fact that such a construction cannot sensibly be applied to the provision because no such requirements exist does not make the drafting acceptable, even if it is unlikely to affect the operation of the provision in practice. **The Committee accordingly reports regulation 3(7) for defective drafting.**

5.7 Regulation 5 requires an intermediary to notify each of its end users about certain matters, including the fact that a scheme benefit has been provided to it and that the end user is entitled to receive a proportion of it. The Regulations do not however include any mechanism for enforcing the requirements. The Department explains in its memorandum that this follows the approach adopted in the Energy Bills Support Scheme and Energy Price Guarantee Pass-through Requirement (England and Wales and Scotland) Regulations 2022 (SI 2022/1102). Section 19(10)(b) of the Energy Prices Act 2022 enables pass-through regulations to require an intermediary, who fails to comply

with an information requirement, to pay an amount on an application made by the end user. The Department explains that, during the drafting of the earlier Regulations, the decision was taken not to include this enforcement mechanism because it was considered that end users were unlikely in practice to apply it. The Department decided to follow the same approach in these Regulations. Despite the lack of any means of enforcement, the Department considered there was merit in including the notification requirements because intermediaries are still likely in practice to comply with them.

5.8 The Committee takes the view that it is inappropriate for legislation to impose a requirement on a person if there is no effective mechanism for enforcing compliance. Without a means of enforcement, a requirement can be disregarded with impunity and so cannot operate in practice as a requirement. The fact that earlier Regulations adopted the same approach does not affect this principle. Nor does it matter, in the view of the Committee, that the only means of enforcement provided in the enabling legislation is one that the Department now considers unlikely to be effective in practice. **The Committee accordingly reports regulation 5 for defective drafting.**

Instruments not reported

At its meeting on 8 February 2023 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

S.I. Number	S.I. Title
Draft	National Minimum Wage (Amendment) Regulations 2023
Draft	Occupational Pension Schemes (Administration, Investment, Charges and Governance) and Pensions Dashboards (Amendment) Regulations 2023
Draft	Postponement of Local Elections (Northern Ireland) Order 2023

Instruments subject to annulment

S.I. Numbers	S.I. Title
S.I. 2022/1335	Education (Student Loans) (Repayment) (Amendment) (No.4) Regulations 2022
S.I. 2023/13	Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2023
S.I. 2023/18	Agricultural Holdings (Units of Production) (England) Order 2023
S.I. 2023/44	Criminal Procedure (Amendment) Rules 2023

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. Numbers	S.I. Title
S.I. 2023/58	Advanced Research and Invention Agency Act 2022 (Commencement) Regulations 2023
S.I. 2023/69	Finance Act 2022, Section 71 (Margin Schemes and Removal or Export of Goods: Zero-rating) (Appointed Day and Transitional Provision) Regulations 2023
S.I. 2023/71	Protection of Trading Interests (Authorisation) (Amendment) Regulations 2023

Appendix 1: Memorandum from HM Treasury

S.I. 2022/1239

Payment and Electronic Money Institution Insolvency (Scotland) Rules 2022

1. The Committee has asked HM Treasury for a memorandum on the following point(s):

(1) Explain why rule 16(3) does not expressly provide that the notice requiring a statement of affairs must include information about the proceedings, the institution and the administrator (in contrast with the corresponding provision in S.I. 2021/1178 and rules 27(2), 38, 85 and 134 of this instrument).

(2) Where rule 22(1) refers to a “nominated person making the statement of affairs and a statutory declaration”, explain what statutory declaration is being referred to.

(3) In relation to rule 197, explain whether the policy intent is achieved by paragraph (2)(a) for periods beginning on the first day of any month (e.g., whether it reflects the policy intent that for a period of one month beginning on 1 June, the period ends on the last day of July).

2. On question 1, rule 16(3) was drafted in this manner to avoid duplication of the provision made in rule 15(5) and to shorten the instrument. However, we accept that there is a difference in drafting approach from that taken elsewhere in the rules in relation to notification. In considering this rule again along with the rules the Committee has expressly mentioned we have formed the view that it is potentially confusing to make provision regarding the giving of notices by the administrator generally in a rule headed “Notification and advertisement of administrator’s appointment”. Therefore we undertake to amend rule 15(5) at the next appropriate legislative opportunity and to review the other notification rules mentioned by the Committee beforehand with the intention of increasing the consistency of drafting approach.

3. On question 2, the statement of affairs must be given in the form of a statutory declaration – see paragraph 47(5) of Schedule B1 to the Insolvency Act 1986 (which applies by virtue of regulation 37 of the Payment and Electronic Money Institution Insolvency Regulations 2021). We accept that the reference to a statutory declaration in rule 22(1) is unnecessary, because a statement of affairs must be a statutory declaration. For this reason, we undertake to delete the reference to a statutory declaration from rule 22(1) at the next appropriate legislative opportunity.

4. Regarding question 3, yes, the policy intent is achieved, although we understand the Committee’s point that the treatment of periods beginning on the first of a month appears surprising. However, it is consistent with that taken in other insolvency procedures and so is well established and understood by those working in this field. The wording reflects

that used in rule 1.4 of the Insolvency (Scotland)(Company Voluntary Arrangements and Administration) Rules 2018 and the Insolvency (Scotland) (Receivership and Winding up) Rules 2018.

HM Treasury

31 January 2023

Appendix 2: Memorandum from the Department for Levelling Up, Housing and Communities

S.I. 2022/1388

Architects (Fees, Electronic Communications and Miscellaneous Amendments) Regulations 2022

1. The Committee has asked the Department for Levelling Up, Housing and Communities for a memorandum on the following point(s):

(1) Explain what power is relied on for the sub-delegation in regulation 2(2).

2. We rely on the power at section 24A (Fees) of the Architects Act 1997 (“the Act”) for the sub-delegation in regulation 2(2). We recognise that there is a general presumption against sub-delegation where it is not expressly permitted, and in our view that presumption is rebutted in this case.

3. The Act established the Architects Registration Board (“ARB”) as the regulator of the architectural profession and gives it statutory duties and responsibilities. Section 24A was inserted by the Building Safety Act 2022 in anticipation that the ARB would need to charge further fees in relation to new procedures it was putting in place on account of the UK’s exit from the EU and its implication for the recognition of overseas professional qualifications.

4. The Act expressly sub-delegates powers to the ARB in numerous places, including in relation to fees. For example, the Act determines a number of circumstances in which a fee can be paid and clearly sub-delegates decisions about the amount of that fee to the ARB (see sections 6(1) and (2), section 6A(2), section 8(1) and (3), section 18(4) and section 21A(2) (c)). Section 23 provides that when the ARB intends to make rules, for example, in relation to a fee level, it must publish these in draft and give interested bodies an opportunity to provide comments and engage with the ARB on them. So, whilst the Act does not specify a particular fee level, for example, the policy approach taken for the purposes of regulating architects is that the ARB is best placed to make these types of decisions.

5. The Act is drafted in this way so that the ARB enjoys a good level of autonomy. In particular, the ARB is best placed to make more administrative decisions such as around how fees are paid. Fee calculations under the Act are delegated to the ARB because they are familiar with their own finances, including the cost of exercising their regulatory functions and therefore better placed to determine matters such as fee levels. As a body carrying out a public function, the ARB must act reasonably and comply with principles around the use of public money. This is context in which the Act delegates activities to the ARB.

6. Section 24A(1) expressly allows the Secretary of State by regulations to make provision for the services for which the ARB may charge a fee. In giving the Secretary of State this power, we consider Parliament intended that the existing approach to delegation to the

ARB remain the same and that the sub-delegation of more administrative aspects of fee-charging could continue. In order to give practical effect to section 24A(1), it is clear that further detailed regulations are required and this is the purpose of section 24A(2), which is the enabling power for regulations 2(2). In our view it is an appropriate interpretation of the power that it permits lawful sub-delegation of appropriate decisions to the ARB.

7. In our view, given the context of the Act, making regulations ‘about’ the activities listed at paragraph (a) to (d) of section 24A(2) can lawfully include the sub-delegation of these activities to the ARB. Further, the requirements of section 23 apply to the ARB, as it does for other lawful sub-delegations to the ARB contained elsewhere in the Act.

(2) Where the Board exercises its discretion, as conferred by regulation 3(3), to establish a committee to discharge any of its functions where the majority of members are not members of the Board, explain whether it is intended that paragraph 20 of Schedule 1 to the Architects Act 1997 continues to apply to votes of that committee.

8. No, that is not the intention. The intention is that where the Board exercises its discretion to establish a committee whose members include individuals who are not members of the Board, paragraph 20 of Schedule 1 to the Act does not apply to votes of that committee. We accept that this intention is not achieved by the regulations and that, until further amendments are made to the Act, paragraph 20 of Schedule 1 will continue to apply to the votes of any committee established by the Board for the discharge of its functions. We will endeavour to make appropriate amendments to the Act as soon as possible.

Department for Levelling Up, Housing and Communities

31 January 2023

Appendix 3: Memorandum from the Department for Levelling Up, Housing and Communities

S.I. 2022/1402

Parliamentary Elections (Welsh Forms) (Amendment) Order 2022

1. The Committee has asked Department for Levelling Up, Housing and Communities for a memorandum on the following point(s):

(1) Confirm that article 2(2) ought to have amended “the forms listed in sub-paragraphs (a) to (s)”, in the opening words of article 6(1) of S.I. 2007/1014, to reflect the insertion of new sub- paragraph (t).

(2) Explain why Form 7 in Schedule 2 differs from its English-only equivalent (in Schedule 6 to S.I. 2022/1382) in that it does not include information about what to do “if you are away or cannot go to the polling station on [day][date of poll]”.

2. On the first point, the Department confirms that the reference to “sub-paragraphs (a) to (s)” in article 6(1) of S.I. 2007/1014 should have been amended to reflect new sub-paragraph (t), as inserted by article 2(2) of S.I. 2022/1402 (“the Order”).

3. On the second point, the Department can confirm that Form 7 in Schedule 2 to the Order, the Welsh and English version of the prescribed form of the Official proxy poll card for use in respect of parliamentary elections, should have included the information identified by the Committee (together with Welsh equivalent information). The information was unintentionally omitted from the final version of Form 7.

4. The Department intends to rectify both issues via a further Order at the next suitable opportunity.

Department for Levelling Up, Housing and Communities

30 January 2023

Appendix 4: Memorandum from the Department for Transport

S.I. 2023/2

Health Protection (Coronavirus, International Travel from China) (England) Regulations 2023

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

Explain why the regulation 6(9)(c) of the Schedule defines “member of a consular post” given that the term is not used elsewhere in the Regulations.

2. The Department acknowledges that this definition should not have been included in the Schedule as the term is not used elsewhere in the Regulations.

3. On 30th December 2022, the Prime Minister announced the introduction of travel restrictions affecting arrivals in the UK from mainland China. The restrictions took effect on 5th January 2023.

4. Due to the pace at which the Regulations needed to be produced in order to protect public health, this error was not identified before the Regulations were laid on 4th January 2023. The Department notes that this error does not have any impact on the effect of the restrictions imposed by the Regulations.

Department for Transport

31 January 2023

Appendix 5: Memorandum from the Department Business, Energy & Industrial Strategy

S.I. 2023/10

Energy Bills Support Scheme and Alternative Fuel Payment Pass-through Requirement (Northern Ireland) Regulations 2023

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

- (1) Explain why the definition of “EBSS AFP NI support payment” in regulation 2 refers to a payment which an electricity supplier is required to provide each scheme month pursuant to the EBSS AFP NI Direction, given that the Direction provides for a single payment to be made by a supplier to each of its eligible customers.
- (2) Explain the reference in regulation 3(7) to the return of scheme benefits by a relevant intermediary “in accordance with the requirements of the EBSS AFP NI (as appropriate)”.
- (3) Explain the mechanisms which exist to enforce the notification requirements imposed by regulation 5.

Introduction

2. The instrument forms part of a series of SIs which impose pass-through requirements in relation to a package of energy cost support schemes for domestic and non-domestic consumers.

3. The principle on which the instrument was drafted was generally to follow the drafting of the previous similar pass-through regulations (SIs 2022/1102, /1103, and /1125¹) as closely as possible. S.I. 2022/1102 (the Energy Bills Support Scheme and Energy Price Guarantee Pass-through Requirement (England and Wales and Scotland) Regulations 2022), in particular, was used as a template for the instrument since it dealt with the GB version of EBSS.

- (1) Explain why the definition of “EBSS AFP NI support payment” in regulation 2 refers to a payment which an electricity supplier is required to provide each scheme month pursuant to the EBSS AFP NI Direction, given that the Direction provides for a single payment to be made by a supplier to each of its eligible customers.

4. Unfortunately we can see on reflection that the drafting here is in error, for the reason that you give.

¹ S.I.s 2022/1101 and /1124 also concern pass-through requirements but in relation to heat suppliers and take a more divergent approach.

5. To provide a little context, the GB EBSS scheme involved payment in monthly instalments, and this was reflected in the corresponding pass-through regulations for the scheme set out in S.I. 2022/1102. Although the EBSS AFP NI scheme only involves a single payment, the reference to “scheme month” was retained in the EBSS AFP NI Direction, as suppliers will potentially provide payments to different customers in different months. The retention of the reference to “scheme month” in the EBSS AFP NI Direction led us to erroneously conclude that the definition of “EBSS AFP NI support payment” did not need to be changed from that used in S.I. 2022/1102.

6. Having reviewed the position, we consider that the error is very unlikely to lead to any uncertainty in interpretation of the instrument (it will be identified as a mistake by readers after consideration), or undermine its effectiveness. This is because (as you have identified) the EBSS AFP NI Direction to which the definition in question refers is completely clear on the point (ie that only a single payment is required). The instrument determines the question of entitlement to a benefit that is provided to an intermediary and which must be passed-through entirely by reference to the Direction. We are also aware that if the point came before the courts they would likely 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).

7. However, we anticipate making at least two further sets of pass-through regulations to cover further schemes. Given this, we consider that it would be proportionate to include provision within one of these instruments to amend the definition of “EBSS AFP NI support payment” so that it refers to a single payment. This is obviously subject to Ministerial approval, which we have not yet had the opportunity to obtain.

8. We will also ensure that the associated guidance is clear on the point.

‘(2) Explain the reference in regulation 3(7) to the return of scheme benefits by a relevant intermediary “in accordance with the requirements of the EBSS AFP NI (as appropriate)”.’

9. The drafting referred to reflects wording in previous pass-through S.I.s, updated to refer to EBSS AFP NI. Regulation 2 defines “EBSS AFP NI” as the Energy Bills Support Scheme and Alternative Fuel Payment in Northern Ireland, i.e. the two schemes. These schemes are primarily set out in the EBSS AFP NI Direction, but also in the wider announcements as to the details of the schemes, and the associated guidance.

10. The schemes as a whole make it clear that it is end users who are the intended beneficiaries under the schemes (not intermediaries) and that in general each end user should receive a single payment of £600 (unless it is just and reasonable for the intermediary to pass through less as provided for in the instrument).

11. Regulation 3(7) refers to a situation where an intermediary has received a scheme benefit in error and is seeking to return it. For example this might occur where the number of £600 payments an intermediary receives exceeds the number of their end users. In these circumstances we think it is correct to say that the excess payments are being returned in accordance with the schemes, even though the EBSS AFP NI Direction itself does not expressly deal with this. The intermediary is able to identify that they have received an overpayment in error because of the details of the schemes as a whole.

12. On reflection however we think that it would have been better if the drafting quoted had omitted “the requirements of” so that it read ““in accordance with the EBSS AFP NI (as appropriate)”, given that the Direction does not contain express requirements on this aspect. However we do not consider that this undermines the effectiveness of the instrument, as we consider that the meaning is still clear.

13. We have considered the merits of amending this drafting, given that we intend to make an amendment as discussed under point 1 above. However in this case we are wary of doing so. We consider that this would be a case of a drafting improvement rather than the correction of a clear error. We are also mindful that similar drafting was used in regulation 3(7) in S.I. 2022/1102. We think it would be disproportionate in this case to amend.

‘(3) Explain the mechanisms which exist to enforce the notification requirements imposed by regulation 5.’

14. Section 19(10)(b) of the Energy Prices Act 2022 provides that pass-through regulations may require an intermediary who is in breach of requirements to provide information to pay a specified amount on application by the end user to a specified person. During the drafting of previous pass-through regulations we considered whether to include such an enforcement provision, but the policy decision was not to do so. We understand that this was on the basis that the incentive for end users to make such an application would have been insufficient given the time and administrative burden involved in doing so.

15. However it was still considered that there was merit in including notification requirements in the instrument. This was on the basis that many intermediaries would be likely to comply with the requirements notwithstanding the lack of an enforcement mechanism. This would be aided by the associated guidance being able to explain the requirements and that they were a legal obligation.

16. This general approach has been maintained in the instrument in relation to regulation 5.

Department for Business, Energy & Industrial Strategy

30 January 2023

Formal Minutes

Wednesday 8 February 2023

Members present

Jessica Morden, in the Chair

Lord Chartres

Paul Holmes

Lord Leong

Lord Sahota

Lord Smith of Hindhead

Report consideration

Draft Report (*Twenty-Sixth 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 5.8 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 5.

Resolved, That the Report be the Twenty-Sixth 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 22 February at 3.40 p.m.