



House of Lords
House of Commons
Joint Committee on Statutory
Instruments

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

Drawing special attention to:

Merchant Shipping (Watercraft) Order 2023 (S.I. 2023/35)

Civil Procedure (Amendment) Rules 2023 (S.I. 2023/105)

Alternative Fuel Payment Pass-Through Requirement (England and Wales and Scotland) Regulations 2023 (S.I. 2023/178)

Non-Domestic Alternative Fuel Payment Pass-Through Requirement and Amendment Regulations 2023 (S.I. 2023/188)

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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.

Committee staff

The current staff of the Committee are Sue Beeby (Committee Operations Officer), Liz Booth (Committee Operations Officer), Christine Salmon Percival (Lords Clerk), Hannah Stone (Commons Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Justin Leslie, Vanessa MacNair (Commons); Nicholas Beach, James Cooper, and Ché Diamond (Lords).

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Instruments reported

At its meeting on 8 March 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 four 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. 2023/35: Reported for defective drafting

Merchant Shipping (Watercraft) Order 2023

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

1.2 This Order, which is subject to the negative resolution procedure, provides for specified existing legislation applying to ships to also apply, with modifications, to watercraft.

1.3 The Merchant Shipping (Registration of Ships) Regulations 1993 is applied with modifications by Schedule 1 of the Order. Some of the modifications replace references to sections within the 1993 Regulations whilst not changing the reference to the Act. Those Regulations define “the Act” as the Merchant Shipping (Registration, etc.) Act 1993. It appeared to the Committee that the new references were to sections within the Merchant Shipping Act 1995. The Committee asked the Department for Transport to explain. In a memorandum printed at Appendix 1, the Department confirms that the definition of “the Act” should have been modified to refer to the Merchant Shipping Act 1995. **The Committee accordingly reports Schedule 1 for defective drafting, acknowledged by the Department.**

1.4 The Committee also asked the Department whether Schedule 1 should have applied regulation 91 of the 1993 Regulations. The Committee was not clear whether that provision was relevant. The Department confirmed that it should not. **The Committee accordingly reports Schedule 1 for defective drafting in this additional respect, acknowledged by the Department.**

2 S.I. 2023/105: Reported for defective drafting

Civil Procedure (Amendment) Rules 2023

2.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in seven respects (two of which are related).**

2.2 These Rules, which are subject to the negative resolution procedure, make a variety of amendments to the Civil Procedure Rules 1998 (S.I. 1998/3132, CPR).

2.3 The Committee noticed that the citation and coming into force provision appears twice. It asked the Ministry of Justice to confirm that rule 1(2) is unnecessary. In a memorandum printed at Appendix 2, the Department acknowledges the error and is considering how best to address it. **The Committee accordingly reports rule 1(2) for defective drafting, acknowledged by the Department.**

2.4 Rule 12 makes substantial amendments to Part 19 CPR, which governs the addition and substitution of parties in proceedings already underway. Paragraph (5) inserts a new rule 19.4(10), which provides that the party making an application to amend the proceedings “*will usually be responsible for the costs of and arising from the amendment*”. The Committee was concerned that this wording, which appears to have been copied from Practice Direction 19A, is insufficiently clear and certain to form a legal obligation. It asked the Department to clarify the intended meaning. In its memorandum, the Department acknowledges that the drafting does not clearly establish the binding effect appropriate to a rule. It undertakes to raise the question of a clarifying amendment with the Civil Procedure Rule Committee. (The Committee draws the Department’s attention to paragraphs 9 to 11 of the Committee’s First Special Report of Session 2013–2014: [Excluding the inert from secondary legislation](#) as being relevant to that question.) **The Committee accordingly reports rule 12(5) for defective drafting, acknowledged by the Department.**

2.5 Rule 13(1) amends rule 20.3(4) CPR to identify which rules in Part 14 apply to additional claims other than counterclaims. The cross-references appeared to the Committee to be redundant and possibly incorrect. It asked the Department to explain. In its memorandum, the Department acknowledges that the cross-references are incorrect and undertakes to seek an amendment at the next suitable opportunity. **The Committee accordingly reports rule 13(1) (substituted paragraph (4)) for defective drafting, acknowledged by the Department.**

2.6 Rule 14(6)(a)(iii)(cc) provides for the substitution of the phrase “on behalf of the deputy” in rule 21.5(2)(b) CPR, where that phrase does not appear (although rule 21.5(2)(b) does refer to something being done “on behalf of the *defendant*”). The Committee asked the Department to confirm that the substitution is incorrect. In its memorandum, the Department acknowledges the error and undertakes to address it. In the Committee’s view, this is not a change suitable for amendment by correction slip (it refers the Department to paragraphs 3.5 to 3.15 of its First Special Report of Session 2017–19: [Transparency and Accountability in Subordinate Legislation](#)). The Committee accordingly reports rule 14(6)(a)(iii)(cc) for defective drafting, acknowledged by the Department.

2.7 Rule 21(2) makes minor amendments to rule 38.2 CPR, adding the words “At any time” to the beginning of paragraph (1) and replacing “he” with “they” in paragraph (2)(a). The Committee asked the Department to confirm that amendments should have been made as a consequence of these changes (i.e., removing “at any time” from the end of paragraph (1) and changing the tense of “wishes” in paragraph (2)(a)). In its memorandum, the Department acknowledges both errors; it notes that the first also reflects a failure to insert new words that would clarify the application of rule 38.2(1), as had been the policy intent. It undertakes to seek corrections at the next suitable opportunity. **The Committee accordingly reports rule 21(2) for defective drafting in two related respects, acknowledged by the Department.**

2.8 Rule 21(3)(b) inserts a new paragraph (5) into rule 38.3 CPR which appeared to the Committee merely to duplicate a provision already inserted by rule 16 of S.I. 2022/783. It asked the Department to explain the duplication. In its memorandum, the Department acknowledges that rule 21(3)(b) is unnecessary and undertakes to seek a correction at the next suitable opportunity. **The Committee accordingly reports rule 21(3)(b) for defective drafting, acknowledged by the Department.**

3 S.I. 2023/178: Reported for defective drafting

Alternative Fuel Payment Pass-Through Requirement (England and Wales and Scotland) Regulations 2023

4 S.I. 2023/188: Reported for defective drafting and for failure to comply with proper legislative practice

Non-Domestic Alternative Fuel Payment Pass-Through Requirement and Amendment Regulations 2023

3.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they are both defectively drafted in one connected respect and that SI 2023/188 fails to comply with proper legislative practice in one respect.**

3.2 These instruments, which are both subject to the made affirmative procedure, make provision about the pass-through by intermediaries of benefits received by them under domestic and non-domestic alternative fuel payment schemes. In the case of both instruments, they include at regulation 5 requirements concerned with ensuring that intermediaries notify end-users about the fact that a scheme benefit has been provided, and that the end user is entitled to receive a proportion of it. But there is no mechanism for enforcing the requirements.

3.3 A near identical provision was included in SI 2023/10 which was reported on by the Committee in its 26th Report of this Session. The Committee reported that instrument for defective drafting because of the absence any provision for enforcing the requirements.

3.4 In memorandums printed at Appendices 3 and 4, the Department for Energy Security and Net Zero explains the reasons for including the requirements in regulation 5 without any provision for enforcing the requirements. They are:

- The fact that the enforcement mechanism provided for in the enabling legislation is considered unlikely to be effective.
- Despite the absence of an enforcement mechanism, the Department considers that many intermediaries would be likely to comply with the requirements.
- Retaining the requirements ensures consistency with earlier statutory instruments.

3.5 These reasons are effectively the same as those given in respect of SI 2023/10, and the Committee remains unconvinced by them. The failure to include any mechanism for enforcing the requirements means that the persons on whom they are imposed can disregard them with impunity so that they do not operate in practice as requirements. This is implicitly acknowledged by the Department when stating that many intermediaries would be likely to comply with the requirements. The fact that many will in practice comply does not achieve the policy objective suggested by the regulation of requiring all intermediaries to do so. **The Committee accordingly reports regulation 5 of SI 2023/178 and 2023/188 for defective drafting.**

3.6 Regulation 8 of SI 2023/188 corrects an error in SI 2023/10. No indication is given on the face of the instrument as to whether free copies of the correcting instrument will be made available to all known recipients of the earlier one. Paragraph 4.7.6 of Statutory Instruments Practice makes it clear that, where an instrument contains both new and correcting provisions, the SI Registrar should be consulted before deciding whether to make free copies available. In its memorandum at Appendix 4, the Department indicates that it did not comply with the procedure in paragraph 4.7.6; but that it will seek the SI Registrar's advice, and, if deemed appropriate in the interests of transparency and accessibility, it will take steps to issue a free copy to all known recipients of SI 2023/10. **The Committee accordingly reports SI 2023/188 for a failure to comply with proper legislative practice, acknowledged by the Department.**

Instruments not reported

At its meeting on 8 March 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	Health Education England (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023
Draft	Local Government and Elections (Wales) Act 2021 (Corporate Joint Committees) (Consequential Amendments) Order 2023
Draft	Service Police (Complaints etc.) Regulations 2023

Instruments subject to annulment

S.I. Number	S.I. Title
S.I. 2023/82	Marriage and Civil Partnership (Minimum Age) Act 2022 (Consequential Amendments) Regulations 2023
S.I. 2023/103	Middlesbrough Development Corporation (Establishment) Order 2023
S.I. 2023/104	Hartlepool Development Corporation (Establishment) Order 2023
S.I. 2023/142	Town and Country Planning (Development Management Procedure) (England) (Amendment) Order 2023
S.I. 2023/172	Maritime Enforcement Powers (Specification of the Civil Nuclear Constabulary) Regulations 2023
S.I. 2023/174	Education (School Day and School Year) (England) (Amendment) Regulations 2023
S.I. 2023/175	Non-Domestic Rating (Designated Areas) Regulations 2023
S.I. 2023/179	Tax Credits and Child Benefit (Miscellaneous Amendments) Regulations 2023
S.I. 2023/180	Public Service (Civil Servants and Others) Pensions (Amendment) Regulations 2023
S.I. 2023/185	Road Traffic Act 1988 (Police Driving: Prescribed Training) Regulations 2023
S.I. 2023/186	Social Security (Contributions) (Amendment) Regulations 2023

Appendix 1: Memorandum from the Department for Transport

S.I. 2023/35

Merchant Shipping (Watercraft) Order 2023

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

1. Explain why shipping provisions are applied with the modification of substituting only the references to sections and not specifying that those sections are contained within the Merchant Shipping Act 1995 (noting that “the Act” is defined in S.I. 1993/3138 as The Merchant Shipping (Registration, etc.) Act 1993). Examples are: Schedule 1 paragraph 1(2) and Schedule 1 paragraph 2(1)(b)(ii).

2. Explain why Schedule 1 paragraph 1(11) applies regulation 91 of S.I. 1993/3138 (which disapplies Schedule 1 to The Merchant Shipping (Registration, etc.) Act 1993).

2) The Department acknowledges that both of the points raised by the Committee reflect errors in the drafting of S.I. 2023/35:

a) In relation to point 1, S.I. 2023/35 omitted to provide, at paragraph 2(1)(b) of Schedule 1, for a modification of the definition of “the Act” in regulation 1(2) of S.I. 1993/3138, which would have made clear that the modified references to sections of “the Act” were intended to be to sections of the Merchant Shipping Act 1995 (as opposed to sections of the Merchant Shipping (Registration, etc.) Act 1993).

b) In relation to point 2, paragraph 1(11) of Schedule 1 to S.I. 2023/35 was included in light of an earlier approach to the drafting which applied all of section 16 of the Merchant Shipping Act 1995 (and, consequently, Schedule 1 of the Merchant Shipping (Registration, etc.) Act 1993 as repealed and re-enacted by the Merchant Shipping Act 1995). A subsequent change to that approach (where only section 16(3) of the Merchant Shipping Act 1995 was applied, which does not refer to the re-enacted Schedule 1) mistakenly did not result in a consequential amendment to paragraph 1 of Schedule 1 to S.I. 2023/35.

3) The Department undertakes to correct these errors at the next suitable legislative opportunity.

Department for Transport

28 February 2023

Appendix 2: Memorandum from the Ministry of Justice

S.I. 2023/105

Civil Procedure (Amendment) Rules 2023

1) The Committee has asked the Ministry of Justice for a memorandum on the following point(s):

1. Confirm that rule 1(2) is unnecessary.
2. In relation to rule 12(5), inserted rule 19.4(10), explain—
 - (a) what is intended to fall within costs “arising from the amendment”;
 - (b) whether this rule is intended to—
 - (i) impose an obligation on the applying party to pay costs associated with the application;
 - (ii) confer a discretion on the court to allocate costs; or
 - (iii) both,

and how effect is given to that intention; and

(c) if it is intended to confer a discretion, what criteria are intended to identify the “usual” circumstances and determine when they do not apply.

3. In relation to rule 13(1) (substituted rule 20.3(4)), explain—
 - (a) what sub-paragraph (b) adds that is not achieved by sub-paragraph (a);
 - (b) whether the reference to rule 14.1(2) in sub-paragraph (b) is correct (having regard to the description in parentheses at the end of that sub-paragraph); and
 - (c) whether the references to rule 14.2 should be references to rule 14.1A (also having regard to the descriptions in parentheses).

4. Confirm that rule 14(6)(a)(iii)(cc) should refer to “the defendant” rather than “the deputy”.

5. In relation to rule 21(2), confirm that—
 - (a) “at any time” should have been revoked from the end of rule 38.2(1) as a consequence of paragraph (a); and
 - (b) “wishes” in rule 38.2(2)(a) should have been amended as a consequence of paragraph (b).

6. Explain why rule 21(3)(b) is necessary, having regard to rule 16 of S.I. 2022/783.

2) The Ministry is grateful to the Committee for its scrutiny. The Ministry’s response on the points raised by the Committee is set out below, in the order of the points.

3) *The first point.* The Ministry confirms that paragraph (2) of rule 1 is unnecessary, being a duplicate of paragraph (1) which appears to have come into the instrument during the process of fixing an issue with the statutory instrument template. The Ministry is in contact with the SI Registrar and is considering the best way to address this error, having regard to the guidance provided by Part 3 (in particular paragraph 3.11) of the Committee’s First Special Report of Session 2017–19.

4) *The second point.* The wording which appears as the new paragraph (10) of rule 19.4 of the Civil Procedure Rules (CPR) was originally in a practice direction and was carried over as part of the ongoing exercise of rationalisation and consolidation of the CPRC and their attendant practice directions, which in this case included revocation of the entire practice direction and incorporation in the rules of those provisions considered to be properly of the nature of rules rather than guidance. However, while the wording in issue had formed part of the practice direction for many years without problems, it is acknowledged that it is in itself, without additional provision, insufficient to establish with clarity the binding effect appropriate to a rule. The provision would more appropriately be cast as a general rule or default position giving way to court discretion and/or specific circumstances; and the Ministry will take up with the Civil Procedure Rule Committee (CPRC) (which next meets on 3 March 2023) how best the wording might be amended to address the issue.

5) *The third point.* The substituted version of CPR rule 20.3(4) cross-refers to provisions of CPR Part 14 which are still undergoing revision as part of the CPRC’s rolling programme of revision and modernisation of the CPR and their attendant practice directions; and those cross-references are incorrect as a result. The Ministry will seek to have rule 20.3(4) amended at the next suitable opportunity (likely to be the next routine amending instrument for the CPR planned to be laid before Parliament in July 2023) so that it cross-refers appropriately; and this is likely to be considered at the CPRC’s next meeting.

6) *The fourth point.* The Ministry confirms that the reference to “deputy” in rule 14(6)(a)(iii)(cc) should indeed be to “defendant”, since the intended change was simply, as part of the ongoing exercise referred to in paragraph 4 above, to substitute shorter wording, namely “on the defendant’s behalf” in place of the existing wording “on behalf of the defendant”. The Ministry is considering how best this error should be addressed: should it require legislative amendment rather than being susceptible to correction by way of correction slip, the Ministry will aim for this to be done in next routine amending instrument for the CPR referred to in paragraph 5 above.

7) *The fifth point.* On the first part of this point, the Committee has identified an error of slightly greater extent than the request might suggest. The intended amendments to rule 38.2(1) were twofold, the first being the amendment so that the start of the paragraphs reads “At any time, a claimant” and the second being the substitution for the words “at any time” at the end of the paragraph of the words “against one or more defendants”. That second amendment was omitted in error, and the Ministry will be seeking to have it included in the next routine instrument amending the CPR as referred to above.

8) On the second part of this point, the Committee is correct that “wishes” should have been amended to “wish” so as to correspond to “they” (as substituted for “he”). The Ministry will seek to have this corrected in the next routine amending instrument as referred to above.

9) *The sixth point.* The error which the Committee has identified lies in there having been two versions of the provision inserted, one having been inserted by S.I. 2022/783, and one, in slightly different terms but to the same effect, forming part of a wider set of amendments considered slightly later by the CPRC, at which point the fact that the necessary amendment had already been included was not properly registered. The resulting duplication is a matter the Ministry will seek to have dealt with in the next routine amending instrument as referred to above.

Ministry of Justice

28 February 2023

Appendix 3: Memorandum from the Department for Energy Security and Net Zero

S.I. 2023/178

Alternative Fuel Payment Pass-Through Requirement (England and Wales and Scotland) Regulations 2023

1) The Committee has asked the Department for Energy Security and Net Zero for a memorandum on the following point(s):

Having regard to the Committee's Report on S.I. 2023/10 (see the 26th Report of the current Session), explain why the notification requirements imposed by regulation 5 have been included, without also including provision for enforcing those requirements.

2) The Department adopts the justification provided in paragraph 3.2 of the Explanatory Memorandum to S.I. 2023/188. The Department has duly considered the Committee's view in its previous report but has decided not to modify its approach at this stage. 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. The Department decided that the incentive for end users to make such an application for payment would have been insufficient given the time and administrative burden involved in doing so. However, it considered that there was merit in including notification requirements in the instrument. This is 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 are a legal obligation. Furthermore, it was considered important to ensure consistency across the pass-through regulations relating to the energy support schemes.

Department for Energy Security and Net Zero

3 March 2023

Appendix 4: Memorandum from the Department for Energy Security and Net Zero

S.I. 2023/188

Non-Domestic Alternative Fuel Payment Pass-through Requirement and Amendment Regulations 2023

1) The Committee has asked the Department for Energy Security and Net Zero for a memorandum on the following point(s):

1. Explain whether there are any reasons, in addition to those set out in paragraph 3.2 of the Explanatory Memorandum, to justify the absence of any provision for enforcing the duties imposed by regulation 5.
2. Explain whether free copies of the instrument are being made available to all known recipients of SI 2023/10 in the light of the correction made by regulation 8. If not, confirm that this decision has been agreed with the SI Registrar, as required by paragraph 4.7.6 of Statutory Instrument Practice.

2) On the first point, the Department reiterates the justification provided in paragraph 3.2 of the Explanatory Memorandum. The Department has duly considered the Committee's view in its previous report but has decided not to modify its approach at this stage. 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. The Department decided that the incentive for end users to make such an application for payment would have been insufficient given the time and administrative burden involved in doing so. However, it considered that there was merit in including notification requirements in the instrument. This is 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 are a legal obligation. Furthermore, it was considered important to ensure consistency across the pass-through regulations relating to the energy support schemes.

3) On the second point, the Department apologises that it has not followed the procedure required by paragraph 4.7.6 of Statutory Instrument Practice. The Department will seek the SI Registrar's advice, and, if deemed appropriate in the interests of transparency and accessibility, it will take steps to issue a free copy to all known recipients of S.I. 2023/10.

Department for Energy Security and Net Zero

3 March 2023

Formal minutes

Wednesday 8 March 2023

Virtual meeting

Members present

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Baroness d'Souza

Peter Grant

Lord Leong

Damien Moore

Lord Sahota

Baroness Sater

Lord Smith of Hindhead

Maggie Throup

Report consideration

Draft Report (Twenty-Ninth 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 3.6 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 4.

Resolved, That the Report be the Twenty-Ninth 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 15 March at 3.40 p.m.