



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Thirty-First Report of Session 2019–21

Drawing special attention to:

Product Safety and Metrology etc. (Amendment) (Northern Ireland) (EU Exit) Regulations 2020 (S.I. 2020/1112)

Transfrontier Shipment of Radioactive Waste and Spent Fuel (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1115)

Aviation Safety (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1116)

Draft Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020 (Draft S.I.)

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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 73](#), relating to Public Business.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii that its parent legislation says that it cannot be challenged in the courts;
- iii that it appears to have retrospective effect without the express authority of the parent legislation;
- iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

- v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii that its form or meaning needs to be explained;
- viii that its drafting appears to be defective;
- ix any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

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The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

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

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Instruments reported

At its meeting on 18 November 2020 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to four of those considered. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2020/1112: Reported for requiring elucidation and for defective drafting

Product Safety and Metrology etc. (Amendment) (Northern Ireland) (EU Exit) Regulations 2020

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

1.2 These Regulations amend several instruments relating to product safety and metrology in order to implement the Protocol on Ireland/Northern Ireland (“the Northern Ireland Protocol”) that is part of the Withdrawal Agreement between the United Kingdom and the European Union.

1.3 Schedule 6 amends the Cosmetic Products Enforcement Regulations 2013 (S.I. 2013/1478) so that they continue to apply in Northern Ireland in accordance with the Protocol. The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/696) make different amendments to the 2013 Regulations in respect of their application in Great Britain. Schedule 6 reflects these differences by, *inter alia*, removing most references to England and Wales and Scotland. The Committee asked the Department for Business, Energy and Industrial Strategy to explain why regulation 20 of the 2013 Regulations as it applies in Northern Ireland will continue to refer to the powers of an enforcement authority in England and Wales and appeals to the Crown Court in England and Wales given the removal, by other provisions of Schedule 6, of references to England and Wales in the definition of “enforcement authority” in regulation 2(1) and the appropriate court in regulation 16. In a memorandum printed at Appendix 1, the Department explains that its approach in amending the 2013 Regulations was “to make the amendments that are strictly necessary and where a provision will still work for the whole of the United Kingdom (albeit that some of the provisions may not apply in different parts of the United Kingdom), the approach is to leave them as they are”; the Department adds that regulation 20 will continue to work in Northern Ireland notwithstanding the vestigial references to enforcement authorities in England and Wales because these “will not be relevant to Northern Ireland”. **The Committee accordingly reports Schedule 6 as requiring elucidation, provided in the Department’s memorandum.**

1.4 Schedules 13 and 14 amend the Non-automatic Weighing Instruments Regulations 2016 (S.I. 2016/1152) and the Measuring Instruments Regulations 2016 (2016/2253). The Committee asked the Department to explain why paragraphs 2(1)(h) of Schedule 13 and 2(1)(g) of Schedule 14 omit the definition of “Union harmonisation legislation” (i.e. “any European Union legislation harmonising the conditions for the marketing of products”)

from those 2016 Regulations, given that later provisions continue to rely on it. In its memorandum, the Department asserts that the definition is unnecessary. The Committee does not agree: the term is not intuitive, and as it is still used the definition should have been retained. **The Committee accordingly reports paragraphs 2(1)(h) of Schedule 13 and 2(1)(g) of Schedule 14 for defective drafting.**

1.5 The Committee also asked the Department to explain how the substitutions in paragraph 2(1)(e) of Schedule 14 will be given effect when neither “make available on the market” nor “place on the market” (the definitions in which the substitution is intended to be made) contains the exact phrase “market in the European Economic Area” (the phrase to be substituted). In its memorandum, the Department acknowledges that paragraph 2(1)(e) cites the wrong expression and undertakes to correct the error at the earliest opportunity. **The Committee accordingly reports paragraph 2(1)(e) of Schedule 14 for defective drafting, acknowledged by the Department.**

2 S.I. 2020/1115: Reported for unusual or unexpected use of enabling powers and for defective drafting

Transfrontier Shipment of Radioactive Waste and Spent Fuel (Amendment) (EU Exit) Regulations 2020

2.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they make unusual or unexpected use of the enabling power in one respect and are defectively drafted in two respects.**

2.2 This instrument amends the Transfrontier Shipment of Radioactive Waste and Spent Fuel (EU Exit) Regulations 2019 (S.I. 2019/156) to implement the Northern Ireland Protocol, and in particular to ensure that Council Directive 2006/117/EURATOM (“the Euratom Directive”) continues to apply in Northern Ireland.

2.3 Regulation 12(1) of the 2019 Regulations allows a person to appeal a decision by a UK competent authority in relation to an application for authorisation of a shipment, and regulation 12(2) sets out the powers of the appellant body when deciding the appeal: it may confirm the original decision or direct the competent authority to grant or vary the conditions of an authorisation. Regulation 12 of this instrument amends regulation 12(1) so that a person may also appeal a decision of the Chief Inspector for Northern Ireland in relation to an application for consent (where authorisation has been granted by the competent authority of an EU Member State). Regulation 12 does not make any corresponding amendment to regulation 12(2), with the apparent effect that where a person appeals a decision regarding consent, the only power of the appellant body is to confirm the original decision. The Committee asked the Department for Business, Energy and Industrial Strategy to explain. In a memorandum printed at Appendix 2, the Department acknowledges that this is the effect of not amending regulation 12(2), but asserts that this restores the original approach of the Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008 (S.I. 2008/3087), which originally implemented the Euratom Directive in the United Kingdom. The Committee accepts that; but a right of appeal that allows for only one possible outcome is not a coherent legislative approach. **The Committee accordingly reports regulation 12 for making an unusual or unexpected use of the enabling power.**

2.4 Regulation 13 of the 2019 Regulations sets out the procedure for dealing with shipments that are not in accordance with either those Regulations or an authorisation granted under them: the competent authority may decide that the shipment may not be completed (paragraph (1)); “the person holding the authorisation granted under these Regulations” must return or otherwise dispose of the shipment (paragraph (3)); and “the person holding the authorisation” is liable for costs arising if the shipment is not completed (paragraph (5)). Regulation 13 of this instrument inserts the words “(or the person having responsibility for a shipment that has not been authorised)” into paragraph (3), as an alternative to “the person holding the authorisation granted under these Regulations”. The Committee asked the Department to explain the circumstances in which a shipment of radioactive waste or spent fuel could be brought into the United Kingdom without being authorised (and who is liable for costs arising if a shipment that has not been authorised is not completed). In its memorandum, the Department asserts that the inserted text is intended to refer to a person whose authorisation is granted by the competent authority of an EU Member State rather than by a UK competent authority. (It does not answer the Committee’s question as to liability for costs.) That may be the intention, but regulation 13 does not achieve it, as it refers simply to a shipment that “has not been authorised” (which means that the reference in paragraph (5) to “the person holding the authorisation” simply does not work). **The Committee accordingly reports regulation 13 for defective drafting.**

2.5 Regulation 16 inserts several new paragraphs into Schedule 1 to the 2019 Regulations. Inserted paragraph 9 applies “when the destination for a shipment is in Northern Ireland and the Chief Inspector receives acknowledgment of receipt of the shipment in accordance with regulation 8” of the 2019 Regulations. The Committee asked the Department to clarify the circumstances in which this will occur, given that regulation 8 applies to shipments “from the United Kingdom to another country”. In its memorandum, the Department acknowledges that inserted paragraph 9 should have referred to notification under regulation 7 of the 2019 Regulations, rather than under regulation 8. It undertakes to correct the error at the next opportunity. **The Committee accordingly reports regulation 16 (inserted paragraph 9) for defective drafting, acknowledged by the Department.**

3 S.I. 2020/1116: Reported for defective drafting

Aviation Safety (Amendment) (EU Exit) Regulations 2020

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

3.2 These Regulations amend several instruments to correct defects arising as a result of Brexit, among them the Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/645). Regulation 46 corrects an error in regulation 367(2)(a)(iii) of the 2019 Regulations so that it properly cites the phrase that it wishes to replace in Commission Regulation (EU) No 965/2012, point SPA.GEN.100(b) of Subpart A of Annex 5 (Part-SPA) (i.e., “Notwithstanding point (a)(2), for” instead of “Notwithstanding (a)(2), for”). Regulation 67 of this instrument makes the same change as corrected regulation 367(2)(a)(iii) of the 2019 Regulations. The Committee asked the Department for Transport to confirm that regulation 67 is superfluous. In a memorandum printed at Appendix 3, the Department confirms that it is. **The Committee accordingly reports regulation 67 for defective drafting, acknowledged by the Department.**

4 Draft S.I.: Reported for defective drafting

Draft Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020

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

4.2 The Regulations implement, in relation to Northern Ireland, Regulation (EU) No 2017/821 which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. Regulation 8 enables the Secretary of State to serve a notice requiring a person to provide information where that information is necessary for the purposes of the exercise of the Secretary of State's functions under the Regulations. The persons on whom such a requirement may be imposed include, but are not limited to, Union importers (as defined in regulation 2). Regulations 14 and 15, and the Schedule to the Regulations, contain provision for enforcing obligations imposed by the Regulations. However, this is limited to enforcing obligations imposed on Union importers. Accordingly, the Regulations contain no provision for enforcing a requirement under regulation 8 imposed on a person who is not a Union importer.

4.3 In a memorandum printed at Appendix 4, the Foreign, Common and Development Office acknowledges that the Regulations are defective in not including provision for enforcing a requirement imposed under regulation 8 on a person who is not a Union importer. The Department indicates that it will bring forward amending legislation as soon as possible and that in the meantime the Secretary of State will not exercise the power to require production of information under regulation 8 against persons other than Union importers. **Accordingly, the Committee reports the Regulations for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 18 November 2020 the Committee considered the instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Instruments requiring affirmative approval

S.I. 2020/1242 Health Protection (Coronavirus, Restrictions) (England) (No. 4) (Amendment) Regulations 2020

Draft Instruments requiring affirmative approval

Draft S.I. Medical Devices (Amendment etc.) (EU Exit) Regulations 2020

Draft S.I. Antique Firearms Regulations 2020

Draft S.I. Prohibition on Quantitative Restrictions (EU Exit) Regulations 2020

Draft S.I. Plant Health (Phytosanitary Conditions) (Amendment) (EU Exit) Regulations 2020

Draft S.I. Plant Health (Amendment etc.) (EU Exit) Regulations 2020

Instruments subject to annulment

S.I. 2020/1138 Universal Credit (Earned Income) Amendment Regulations 2020

S.I. 2020/1147 Immigration and Nationality (Replacement of Tier 2 and Fees) (Amendment) (EU Exit) Regulations 2020

S.I. 2020/1161 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 20) Regulations 2020

S.I. 2020/1166 Merchant Shipping (Maritime Labour Convention and Work in Fishing Convention) (Amendment) Regulations 2020

S.I. 2020/1178 Road Vehicles (Construction and Use) (Amendment) Regulations 2020

S.I. 2020/1181 Education (Student Fees, Awards and Support) (Amendment etc.) (EU Exit) Regulations 2020

S.I. 2020/1187 Harwich Haven and Walton Backwaters (Application of the Pilotage Act 1987) Order 2020

S.I. 2020/1190 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 21) Regulations 2020

S.I. 2020/1195 Energy Information (Amendment) Regulations 2020

S.I. 2020/1202 Local Authorities (Collection Fund: Surplus and Deficit) (Coronavirus) (England) Regulations 2020

S.I. 2020/1138 was considered in error, having already been considered. See the [30th report](#).

- S.I. 2020/1206** Greater London Authority (Consolidated Council Tax Requirement Procedure) Regulations 2020
- S.I. 2020/1217** Electricity Storage Facilities (Exemption) (England and Wales) Order 2020

Instruments not subject to parliamentary proceedings not laid before Parliament

- S.I. 2020/1157** Worcestershire Health and Care National Health Service Trust (Establishment) and the Worcestershire Mental Health Partnership National Health Service Trust (Dissolution) (Amendment) Order 2020

Appendix 1

S.I. 2020/1112

Product Safety and Metrology etc. (Amendment) (Northern Ireland) (EU Exit) Regulations 2020

1. In its letter to the Department of 4 November 2020, the Committee requested a memorandum on the following points:

1. In relation to Schedule 6, explain why regulation 20 of the instrument amended by that Schedule will continue to refer to the powers of an enforcement authority in England and Wales and appeals to the Crown Court in England and Wales, given the removal, by that Schedule, of references to England and Wales in the definition of “enforcement authority” in regulation 2(1) and the appropriate court in regulation 16.

2. Explain why the definition of “Union harmonisation legislation” is omitted by paragraphs 2(1)(h) of Schedule 13 and 2(1)(g) of Schedule 14 given that it appears to be retained and relied on by paragraphs 8(c) of Schedule 13 and 8(2)(d) of Schedule 14.

3. Explain how the substitutions in paragraph 2(1)(e) of Schedule 14 will be given effect in light of the fact that neither “make available on the market” nor “place on the market” contains the exact phrase “market in the European Economic Area”.

Issue 1: Schedule 6

2. Schedule 6 amends the Cosmetic Products Enforcement Regulations 2013 (“the 2013 Regulations”) as they will apply in Northern Ireland. The 2013 Regulations will continue to apply in Great Britain. However, their application will be different in Great Britain and Northern Ireland. In Northern Ireland the 2013 Regulations will enforce Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (“the EU Regulation”) which will continue to be directly applicable in Northern Ireland arising out of obligations in the Protocol on Ireland/ Northern Ireland in the Withdrawal Agreement (“the Protocol”).

3. The approach that has been taken with respect to amendments is to make the amendments strictly necessary and where a provision will still work for the whole of the United Kingdom (albeit that some of the provisions may not apply in different parts of the United Kingdom), the approach is to leave them as they are.

4. It is necessary to amend the definition of “enforcement authority” for the purposes of the law in Northern Ireland. This is because “enforcement authorities” are “competent authorities” for the purposes of some of the provisions of the EU Regulation as it applies in Northern Ireland and it is therefore necessary to exclude any enforcement authorities based in Great Britain for the purposes of the obligations that must be undertaken by competent authorities under the EU Regulation.

5. Conversely, the Department took the view that regulation 20 of the 2013 Regulations will still continue to work as they are currently drafted for Northern Ireland, since it is clear what enforcement authorities in Northern Ireland can do. The references to enforcement authorities in England and Wales will not be relevant to Northern Ireland.

Issue 2: Schedules 13 and 14

6. The Department took the view it is not necessary to have a definition of “Union harmonisation legislation”. The key point is that it is only legislation that applies to Northern Ireland by virtue of the Protocol that is relevant. The other amendments to the paragraphs amended make this clear and therefore readers will not be in any doubt as to which legislation these provisions refer.

Issue 3: Schedule 14

7. This is an error, for which we apologise. We will take action to amend this as soon as we can.

Department for Business, Energy and Industrial Strategy

6 November 2020

Appendix 2

S.I. 2020/1115

Transfrontier Shipment of Radioactive Waste and Spent Fuel (Amendment) (EU Exit) Regulations 2020

1. In its letter to the Department of 4 November 2020, the Committee requested a memorandum on the following:

Explain

(a) why regulation 12 amends regulation 12(1) of S.I. 2019/156, but does not make a consequential amendment to regulation 12(2); and

(b) accordingly, where an appeal relates to an application for consent, what the appellant body may do if it does not wish to confirm the original decision.

2. The Transfrontier Shipment of Radioactive Waste and Spent Fuel (Amendment) (EU Exit) Regulations 2020 (“the 2020 Regulations”) amend the Transfrontier Shipment of Radioactive Waste and Spent Fuel (EU Exit) Regulations 2019 (“the 2019 Regulations”) for the purpose of implementing Article 5 with Annex 2 of the Protocol on Ireland/Northern Ireland (“the Protocol”). This requires the continued application of Council Directive 2006/117/EURATOM (“the Directive”) with respect to Northern Ireland although, as the Department has set out in the Explanatory Memorandum, there are presently no shipments of radioactive waste or spent fuel into Northern Ireland, nor are they foreseen. The Directive was transposed into domestic law by the Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008 (“the 2008 Regulations”), which the 2019 Regulations revoke. Regulation 12 of the 2020 Regulations amends regulation 12 (appeals) of the 2019 Regulations to re-instate in full the wording and effect of regulation 13 (appeals) of the 2008 Regulations. The Department considers that this approach ensures the continued application of the Directive as originally transposed by the 2008 Regulations, thereby satisfying the requirements of the Protocol. The Department decided against amendments going beyond the re-instatement of the provisions of the 2008 Regulations necessary to comply with the Protocol in order to ensure continuity for operators and competent authorities.

3. The Department acknowledges that should the appellant body not wish to confirm the decision relating to a refusal for an application for consent, the regulations do not provide alternative action. This lack of provision results from the drafting of the 2008 Regulations. As per the explanation above, the Department decided against amendments which would have gone beyond re-instating the wording and effect of the 2008 Regulations, since they effectively implemented the Directive.

In relation to the words “(or the person having responsibility for a shipment that has not been authorised)” in regulation 13, explain the circumstances in which a shipment of radioactive waste or spent fuel could be brought into the United Kingdom without being authorised (and who is liable for costs arising if a shipment that has not been authorised is not completed).

4. A shipment of radioactive waste or spent fuel could be brought into the United Kingdom which has not been authorised under the UK Regulations, but has been authorised by the competent authority of the Euratom Community state of origin, where consent to the authorisation has been given by the Northern Ireland competent authority. The insertion of the words “(or the person having responsibility for a shipment that has not been authorised)” into regulation 13 (unlawful shipments) of the 2019 Regulations re-instates in full the wording and effect of regulation 14(3) (unlawful shipments) of the 2008 Regulations. This ensures that shipments which were not authorised but were consented to by the Chief Inspector are included in scope. As explained above, in order to comply with the requirements of the Protocol, the Department decided to re-instate as necessary the wording and effect of the 2008 Regulations which implemented the Directive thereby ensuring continuity for operators and competent authorities.

In relation to regulation 16 (inserted paragraph 9), clarify the circumstances in which the Chief Inspector will receive notification “in accordance with regulation 8” for a shipment whose destination is Northern Ireland, given that regulation 8 applies to shipments from the United Kingdom to another country.

5. The Department is grateful to the Committee for bringing this matter to its attention. The reference to “regulation 8” in the provision cited by the Committee is an error. The provision should read “in accordance with regulation 7”. Regulation 7 provides for notification of a competent authority by a person who receives a shipment of radioactive waste and spent fuel from outside the United Kingdom. Where the destination of such a shipment is in Northern Ireland and the shipment originates from a member State, the Chief Inspector must send copies of the notification to the relevant competent authorities. The Department will correct this error at the next opportunity.

Department for Business, Energy and Industrial Strategy

10 November 2020

Appendix 3

S.I. 2020/1116

Aviation Safety (Amendment) (EU Exit) Regulations 2020

1. By a letter dated 4th November 2020, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

“Given the effect of regulation 367(2)(a)(iii) of the Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/645) as amended by regulation 46 of this instrument, confirm that regulation 67 is superfluous.”

2. The Department confirms that in the circumstances described, regulation 67 is superfluous. The Department regrets this oversight and apologises to the Committee.

Department for Transport

10 November 2020

Appendix 4

Draft S.I.

Draft Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020

1. By letter of 4 November the Committee requested a memorandum on the following point:

Explain the sanctions or other enforcement measures which apply where a person other than a Union importer (as defined in the Regulations) fails to comply with a requirement imposed under regulation 8.

2. The FCDO is grateful to Committee officials for their comments on this point. The FCDO accepts that regulation 8 is only enforceable against Union importers and that the Regulations do not provide for sanctions or other enforcement measures where a person other than a Union importer (as defined in the Regulations) fails to comply with a requirement imposed under regulation 8. The FCDO accepts the point of principle made by the Committee that the imposition of obligations in statutory instruments should be accompanied by enforcement measures with equivalent scope and will bring forward amending legislation to rectify this error. While on this occasion the FCDO will proceed with the Regulations as it is necessary for them to be made before the end of the Transition Period in order to meet the UK's obligations under the Northern Ireland Protocol, the Department intends to bring forward amending legislation as soon as possible. In the meantime, the Secretary of State proposes to undertake not to exercise the power to require production of information under regulation 8 against persons other than Union importers.

Foreign, Commonwealth and Development Office

10 November 2020