



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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# Thirty-Second Report of Session 2019–21

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**Drawing special attention to:**

*Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020 (S.I. 2020/1087)*

*Marriage and Civil Partnership (Northern Ireland) (No.2) Regulations 2020 (S.I. 2020/1143)*

*Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High, and Very High) (England) (Amendment) (No.3) Regulations 2020 (S.I. 2020/1183)*

*Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020 (S.I. 2020/1200)*

*Export Control (Amendment) (EU Exit) Regulations 2020 (Draft S.I.)*

*Ordered by the House of Lords  
to be printed 25 November 2020*

*Ordered by the House of Commons  
to be printed 25 November 2020*

**HL 179  
HC 75-xxxii**

Published on 27 November 2020  
by authority of the House of Lords  
and the House of Commons

## Joint Committee on Statutory Instruments

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### Powers

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

### Remit

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

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

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

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

The Committee usually meets weekly when Parliament is sitting.

### **Publications**

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The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

### **Committee staff**

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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# Contents

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<b>Instruments reported</b>	<b>3</b>
1 S.I. 2020/1087: Reported for defective drafting	3
Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020	3
2 S.I. 2020/1143: Reported for unusual or unexpected use of enabling powers and for defective drafting	3
Marriage and Civil Partnership (Northern Ireland) (No.2) Regulations 2020	3
3 S.I. 2020/1183: Reported for requiring elucidation and for defective drafting	5
Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High, and Very High) (England) (Amendment) (No.3) Regulations 2020	5
4 S.I. 2020/1200: Reported for defective drafting	6
Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020	6
5 Draft S.I.: Reported for defective drafting and for unusual or unexpected use of enabling powers	6
Export Control (Amendment) (EU Exit) Regulations 2020	6
<b>Instruments not reported</b>	<b>9</b>
<b>Annex</b>	<b>9</b>
<b>Appendix 1</b>	<b>11</b>
S.I. 2020/1087	11
Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020	11
<b>Appendix 2</b>	<b>12</b>
S.I. 2020/1143	12
Marriage and Civil Partnership (Northern Ireland) (No.2) Regulations 2020	12
<b>Appendix 3</b>	<b>14</b>
S.I. 2020/1183	14
Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High, and Very High) (England) (Amendment) (No.3) Regulations 2020	14
S.I. 2020/1200	14
Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020	14
<b>Appendix 4</b>	<b>16</b>
Draft S.I.	16
Export Control (Amendment) (EU Exit) Regulations 2020	16



# Instruments reported

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At its meeting on 25 November 2020 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to five of those considered. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda are published as appendices to this report.

## 1 S.I. 2020/1087: Reported for defective drafting

### *Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020*

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

1.2 These Regulations set out the conduct, performance and appeals tribunals regulations for the Ministry of Defence Police. Under regulation 35 (Schedule 1) representations may be made to the chair of a misconduct hearing in relation to certain matters. This includes (at paragraph (5)) written representations “by any journalist or other representative of the media.” Under regulation 53(5) of the same Schedule there is a similar provision in relation to an accelerated misconduct hearing but that regulation refers to representations being made “by any representative of the media”. The Committee asked the Ministry of Defence to explain the difference in meaning. In a memorandum printed at Appendix 1, the Department confirms that there is no intended difference in meaning and undertakes to amend regulation 35(5) to be consistent with the wording of regulation 53(5) at the next available opportunity. It is an important principle of statutory interpretation that a change of wording should imply a change of meaning and **the Committee accordingly reports regulation 35(5) of Schedule 1 for defective drafting, acknowledged by the Department.**

## 2 S.I. 2020/1143: Reported for unusual or unexpected use of enabling powers and for defective drafting

### *Marriage and Civil Partnership (Northern Ireland) (No.2) Regulations 2020*

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

2.2 These Regulations make provision for same-sex couples to convert a civil partnership to a marriage, and opposite-sex couples to convert a marriage to a civil partnership in Northern Ireland. Conversion must follow one of four procedures (regulation 7) and each procedure has two parts: provision of the required information and signing of the conversion declaration. In the case of the two-stage procedure the second part of the procedure must take place within a year of the first part of the procedure (regulation 7(6) (b)). Under the special procedure and the procedure for detained persons the second part of the procedure takes place on the same day as the first part of the procedure or “on a later day” (regulations 7(8)(b) and 7(10)(b)). The Committee asked the Northern Ireland Office to confirm that there is no time constraint on when “a later day” may be in those

regulations. In a memorandum printed at Appendix 2, the Department confirms that the time constraint will not apply to the special procedure or the procedure for detained persons and asserts that they do not expect any delay to be a problem given the incentives for parties following these procedures to act quickly. The Department explains that the policy rationale for the time constraint in regulation 7(6)(b) is that an extensive period between the two stages could give rise to administrative difficulties for the General Register Office (Northern Ireland). The Committee presumes that the same administrative difficulties would arise if there was an extensive period between the two stages of the special procedure or the procedure for detained persons and finds it surprising that the Department has chosen to rely on the incentives for people to act quickly rather than making the same legislative provision as for the other procedures. **The Committee accordingly reports regulations 7(8)(b) and 7(10)(b) for unusual use of the enabling power.**

2.3 If the conversion is to follow the special procedure one of the required documents is a statement from a registered medical practitioner stating that the party to the intended conversion by reason of serious illness or disability should not be moved from the place where they are for three months from the date on which the statement/certificate is given (regulations 8(6) and 9(6)). It appeared to the Committee that the three-month period referred to in the statement could have expired before the conversion takes place and that the “immovable party” could by that time be able to move from the place where they are. It seems surprising that the special procedure is capable of applying after the expiry of the three-month period. The Committee asked the Department to clarify. The Department’s memorandum does not address the point and **the Committee accordingly reports regulations 8(6) and 9(6) as making an unusual or unexpected use of the enabling power.**

2.4 The Committee asked the Department to confirm whether the reference in regulation 28(4) to “civil partnership” should be to “marriage”. In its memorandum, the Department confirms this and proposes to change the reference by correction slip. The Committee has made its view known (see, in particular, *Transparency and Accountability in Subordinate Legislation*, First Special Report of Session 2017–19, paras. 3.1–3.15) that correction slips should not be used to change the operative text of an instrument, whether or not the Government and the Queen’s Printer believe that the change makes a difference to the meaning in a particular context. If an error is obvious, the reader will be able to see what is meant without a correction slip; and the courts will if necessary exercise their judicial discretion to give a rectifying construction in accordance with the rule in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (HL). Apart from that, the only lawful method of altering the text of a statutory instrument is by an amending instrument. **The Committee accordingly reports regulation 28(4) for defective drafting, acknowledged by the Department, and notes that a correction slip should not be used to rectify the defect.**

### 3 S.I. 2020/1183: Reported for requiring elucidation and for defective drafting

#### *Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High, and Very High) (England) (Amendment) (No.3) Regulations 2020*

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

3.2 These Regulations (which have since been revoked) changed the COVID-19 alert level applicable to a number of areas and made minor amendments to the Alert-level Regulations. Regulation 4(5) inserted provisions in the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020.

3.3 Inserted paragraph 8 prohibited off-licences from selling alcohol between 9 pm and 5 am. It contained an application of a definition in a previous paragraph as a result of which, amongst other things, it would be lawful for an off-licence to sell alcohol “for consumption in an area adjacent to the premises of the business where customers gather to drink outside the business”. The Committee thought this a surprising exemption and asked the Department of Health and Social Care to confirm that it was intended. In a memorandum printed at Appendix 3, the Department confirms the policy intention and provides an explanation. **The Committee accordingly reports regulation 4(5) for requiring elucidation provided by the Department’s memorandum in relation to inserted paragraph 8.**

3.4 Inserted paragraph 11 prohibited trade shows and defined them as events held to bring together members of a particular industry to display to members of the public. The Committee was surprised that this definition would exclude a trade show involving only members of an industry, such as manufacturers or wholesalers displaying to retailers. In its memorandum the Department agrees that this was an unintended and undesirable effect and undertakes to ensure that in replacement instruments the policy is correctly reflected. **The Committee accordingly reports regulation 4(5) for defective drafting acknowledged by the Department in relation to inserted paragraph 11.**

3.5 Inserted paragraph 12 provided exceptions from some of the previously listed prohibitions. The Committee noticed that as a result of one exception an off-licence, during times when it was required to be closed, could still operate a system where a person entered, selected alcohol they wished to buy, left the premises, telephoned the shopkeeper from immediately outside the premises to order the alcohol, returned to the premises and collected and paid for the alcohol. The Committee considered this an obvious avoidance opportunity and asked the Department to explain. In its memorandum the Department confirms that this was the intention and says that consideration was given to ways of limiting the option for collection but that “on balance, it was considered that permitting collections after 21:00 without restrictions, was the most proportionate approach in all the circumstances”. The Committee appreciates that it is difficult to craft prohibitions and exemptions in the present extraordinary circumstances that combine effectiveness with proportionality. The Committee notes, however, that the effectiveness of public health regulations depends in large part on their being seen by the public to be both rigorous and logical. Without understating the difficulty of the task that Departments face in crafting

these regulations, the Committee invites Departments on future occasions to consider whether anomalies and avoidance opportunities as obvious and wide as this one risk undermining the effectiveness of the regulations and the public respect with which they need to be treated. **The Committee accordingly reports regulation 4(5) for requiring elucidation in respect of inserted paragraph 12.**

#### **4 S.I. 2020/1200: Reported for defective drafting**

##### ***Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020***

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

4.2 These Regulations place restrictions on persons leaving the place where they are living and on gatherings. Regulation 13 contains an exception to the restriction on gatherings; a household can link with another household (a linked childcare household) for the purposes of informal childcare in accordance with that regulation. Regulation 2(1) defines childcare as having the meaning given in section 18 of the Childcare Act 2006; and section 18(4) of that Act excludes childcare provided by a relative. The Committee asked the Department of Health and Social Care to confirm whether, as a result of this definition, a household cannot form a linked childcare household with another household containing a relative of the child. In a memorandum printed at Appendix 3, the Department confirms that it did not intend to prevent a household forming a linked childcare household with another household containing a relative of the child. The Department asserts that “informal childcare” in regulation 13 is intended to have a different meaning to “childcare” as defined in regulation 2(1) and that “informal childcare” could “arguably” encompass childcare provided by a relative. The Committee disagrees. The defined term is “childcare”, and the definition excludes childcare provided by relatives. Adding the word “informal” could be intended to have a range of effects, and it is, at the least, insufficiently clear that it is intended to disapply the restriction on the meaning of “childcare” that has been expressly imported by a reference in the definition of “childcare” to another enactment. If the intention was for the exclusion of relatives to be disapplied in relation to informal childcare, that should have been stated clearly. As drafted, the effect of the instrument is that a household cannot form a linked childcare household with another household containing a relative of the child, which is clearly not the Department’s intention. **The Committee accordingly reports regulation 13 for defective drafting.**

#### **5 Draft S.I.: Reported for defective drafting and for unusual or unexpected use of enabling powers**

##### ***Export Control (Amendment) (EU Exit) Regulations 2020***

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

5.2 Regulation 7(9) has the effect of inserting a new Part 6A into the Export Control Order 2008 (“the 2008 Order”). The purpose of the new Part is to implement or supplement EU instruments relating to strategic export controls, as those instruments have effect by virtue of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement. Part 6A includes article 42N(2) which makes provision about the transfer by non-electronic means of software or technology intended for WMD purposes.\* After IP completion day, article 12 of the 2008 Order will generally prohibit such a transfer where it is to a destination outside the UK. The effect of article 42N(2) is to disapply this prohibition, in relation to transfers from Northern Ireland to destinations in the EU customs territory, where both the following conditions set out in sub-paragraphs (a) and (b) of article 42N(2) are met:

- The final destination for the transfer is within the EU customs territory.
- The software or technology will be subject to processing or working within the EU customs territory.

5.3 It appeared to the Committee that the exception in article 42N(2) may have been drawn too narrowly in requiring both the conditions in sub-paragraphs (a) and (b) to be met. It is inconsistent with the position under article 12 of the 2008 Order as it currently has effect before IP completion day. The current position is that a transfer to a destination within the EU customs territory is allowed if either the final destination for the transfer is within the EU customs territory, or the software or technology will be subject to processing or working within the EU customs territory. In a memorandum printed at Appendix 5, the Department for International Trade acknowledges this error.

5.4 Since this is a draft statutory instrument, it would have been open to the Department to withdraw the instrument and re-lay it before Parliament with the defect in article 42N(2) corrected. The Department explains that it has not done this because it intends to include the correction in amending legislation to be made early in 2021. It considers the likelihood to be very low of the defect in the legislation having any practical impact before the correcting legislation is made. The Committee is not convinced by this explanation. In the view of the Committee, the Government should not make legislation which it knows will have an effect which is significantly different from what is intended, unless doing so cannot reasonably be avoided. Nothing is said in the Department’s memorandum to indicate that laying a corrected draft would not have been practicable. **The Committee accordingly reports regulation 7(9) for defective drafting, acknowledged by the Department.**

5.5 Part 5 of the draft Regulations amends the Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations 2020 (“Trade in Torture Regulations”). The Trade in Torture Regulations have not yet been made and accordingly the Committee asked the Department to explain why Part 5 of these Regulations is being used to amend another statutory instrument which has not yet been made, rather than making that other instrument with the necessary changes incorporated in it.

5.6 In its memorandum, the Department explains that the Trade in Torture Regulations were approved by both Houses in April 2019 at a time before the EU withdrawal agreement had been entered into, and as a result they need to be amended before they come into force.

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\* “WMD purposes” is defined by article 2 of the 2008 Order to mean use in connection with the development, production etc. of chemical, biological or nuclear weapons and other connected uses.

The Department also explains that it is proceeding with the original Regulations because the required amendments are technical and not substantive, and therefore it avoids requiring Parliament to debate again what are in substance unchanged Regulations. The Department also refers in its memorandum to another instrument from 2019 where a similar approach was adopted.

5.7 The Committee is not convinced by the Department's explanation. It seems to the Committee that Government should as a matter of general principle avoid making legislation which it knows to be defective. In this case, the Trade in Torture Regulations were approved in draft by both Houses more than 18 months ago. Since that time there has been a significant change in circumstances in that the EU withdrawal agreement has been entered into, including the Protocol on Ireland/ Northern Ireland. The amendments made by Part 5 include amendments in regulation 15 which are needed to take account of the effect of the Protocol. **Accordingly, the Committee reports Part 5 of the Regulations as making an unusual or unexpected use of the enabling powers.**

## Instruments not reported

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At its meeting on 25 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

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### Draft Instruments requiring affirmative approval

<b>Draft S.I.</b>	Renewable Transport Fuel Obligations (Amendment) Order 2020
<b>Draft S.I.</b>	Unmanned Aircraft (Amendment) (EU Exit) Regulations 2020
<b>Draft S.I.</b>	Agriculture and Horticulture Development Board (Amendment) Order 2020
<b>Draft S.I.</b>	Direct Payments to Farmers (England) (Amendment) Regulations 2020
<b>Draft S.I.</b>	World Trade Organisation Agreement on Agriculture (Domestic Support) Regulations 2020
<b>Draft S.I.</b>	Social Security Co-ordination (Revocation of Retained Direct EU Legislation and Related Amendments) (EU Exit) Regulations 2020
<b>Draft S.I.</b>	Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2020

### Instruments subject to annulment

<b>S.I. 2020/1201</b>	Social Security (Coronavirus) (Further Measures) (Amendment) and Miscellaneous Amendment Regulations 2020
<b>S.I. 2020/1212</b>	Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2020
<b>S.I. 2020/1220</b>	Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020
<b>S.I. 2020/1222</b>	Merchant Shipping (Safety Standards for Passenger Ships on Domestic Voyages) (Miscellaneous Amendments) Regulations 2020
<b>S.I. 2020/1227</b>	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 22) Regulations 2020
<b>S.I. 2020/1228</b>	Civil Procedure (Amendment No. 6) Rules 2020
<b>S.I. 2020/1233</b>	Syria (United Nations Sanctions) (Cultural Property) (EU Exit) Regulations 2020
<b>S.I. 2020/1235</b>	Social Security (Personal Independence Payment) (Amendment) Regulations 2020
<b>S.I. 2020/1238</b>	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 23) Regulations 2020

- S.I. 2020/1243** Town and Country Planning (General Permitted Development) (England) (Amendment) Regulations 2020
- S.I. 2020/1244** Central Counterparties (Equivalence) Regulations 2020
- S.I. 2020/1245** Network and Information Systems (Amendment and Transitional Provision etc.) Regulations 2020
- S.I. 2020/1248** Consumer Credit (Enforcement, Default and Termination Notices) (Coronavirus) (Amendment) Regulations 2020
- S.I. 2020/1277** Health Protection (Coronavirus, International Travel, Travel from Denmark) (England) (Amendment) Regulations 2020

### **Instruments not subject to parliamentary proceedings not laid before Parliament**

- S.I. 2020/1241** Wireless Telegraphy (Limitation of Number of Licences) Order 2020

# Appendix 1

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## S.I. 2020/1087

### ***Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020***

1. The Joint Committee on Statutory Instruments (JCSI) has requested further information about various points in the Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) Regulations 2020 (SI 2020/1087). The question raised and the Ministry's response are set out below.

*Explain the intended difference in meaning between the words “any journalist or representative of the media” (regulation 35(5) of Schedule 1) and “any representative of the media” (regulation 53(5) of Schedule 1).*

2. There is no intended difference in meaning. The Ministry of Defence accepts that regulation 35(5) should have referred to “any representative of the media” and so be consistent with the wording used in regulation 53(5).

3. The Department regrets the error and will amend regulation 35(5) at the next opportunity.

**Ministry of Defence**

**17 November 2020**

## Appendix 2

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### S.I. 2020/1143

#### ***Marriage and Civil Partnership (Northern Ireland) (No.2) Regulations 2020***

1. By a letter dated 11 November 2020 the Joint Committee on Statutory Instruments requested a memorandum on three points arising from the Committee’s consideration of the Marriage and Civil Partnership (Northern Ireland) (No. 2) Regulations 2020. The Department’s response is set out below.

*1. Confirm that (unlike regulation 7(6)(b)) there is no time constraint on when “a later day” may be in regulations 7(8)(b) and 7(10)(b).*

2. All conversions under the regulations are subject to the time constraint set out in regulation 6. That is, the signing of the conversion declaration must take place within 3 years of the coming into force of the regulations. We confirm that it is the intention to make the two-stage procedure subject to a one year time constraint (in regulation 7(6)(b)), and that that constraint will not apply to the special procedure (regulation 7(8)(b)) or the procedure for detained persons (regulation 7(10)(b)).

3. The policy rationale for the time constraint in regulation 7(6)(b) is that an extensive period between the two stages could give rise to administrative difficulties for the General Register Office (Northern Ireland).

4. The special procedure applies when one of the parties is seriously ill. Under the procedure for detained persons, the statement given by the responsible authority under regulation 8(7) or 9(7) will only be valid while the party concerned remains in the same establishment in which they were detained when the first part of the procedure (under regulation 7(10)(a)) is followed. Given the incentives for parties following these procedures to act quickly, we do not expect delay to be a problem, and do not consider that a secondary time constraint is necessary.

*2. Confirm that it is the intention that the three-month period referred to in the statement required by regulation 8(6) and the certificate required by regulation 9(6) is to include the date on which the conversion takes place and explain how effect is given to that intention.*

5. It is not the intention that the statement required by regulation 8(6) (or the certificate required by regulation 9(6)) would include the date on which the conversion is to take place. The purpose of the medical statement/ certificate is to confirm that the person ought not to be moved from the place where they are for a period of at least three months from the date on which the statement/ certificate is given. If a person is so ill that they cannot be moved for such a period, then the marriage (under Article 18(6) of the Marriage (Northern Ireland) Order 2003) or conversion (under regulation 8) will take place where the immovable party is. The procedure is not available where a person is unwell and ought not to be moved for a shorter period. The doctor completing the statement/ certificate does not need to know, or refer to, the date of the conversion.

*3. Confirm whether the reference in regulation 28(4) to “civil partnership” should be to “marriage”.*

6. We confirm that regulation 28(4) should refer to ‘marriage’ rather than ‘civil partnership’. Thank you for drawing this to our attention. We consider that this was a typographical, rather than a substantive error, and are in the process of contacting the National Archives to use a correction slip.

**Northern Ireland Office**

**17 November 2020**

## Appendix 3

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### S.I. 2020/1183

#### ***Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium, High, and Very High) (England) (Amendment) (No.3) Regulations 2020***

### S.I. 2020/1200

#### ***Health Protection (Coronavirus, Restrictions) (England) (No.4) Regulations 2020***

1. In its letter to the Department of Health and Social Care of 11 November 2020, the Committee requested a memorandum on the following points:

**In respect of S.I 2020/1183:**

*1. In regulation 4(5) (inserted paragraph 8(1)), confirm that as a result of the application of paragraph 7(3)(b) the sale of alcohol for consumption in an area adjacent to the premises of the business where customers gather to drink outside the business would not be prohibited between the hours of 21:00 and 05:00, as it would not count as sale for consumption “off the premises”.*

*2. In regulation 4(5) (inserted paragraph 11(2)), confirm that an event held to bring together members of a particular industry (such as manufacturers or wholesalers) to display, demonstrate and discuss products and services with other members of that industry (such as retailers) does not fall within the definition of a “trade show”.*

*3. In regulation 4(5) (inserted paragraph 12(3)), confirm that it would not be unlawful for a person to enter an off-licence, select alcohol they wished to buy, leave the premises, telephone the shopkeeper from outside the premises to order that alcohol, and then return to the premises to collect and pay for the alcohol.*

**In respect of S.I 2020/1200:**

*4. Confirm that a household cannot form a linked childcare household with another household containing a relative of the child (because the definition of childcare in section 18 of the Childcare Act 2006 excludes care provided by a relative (section 18(4)).*

2. As a preliminary point, S.I. 2020/1183 is now spent as the provisions affected by it have been revoked by regulation 25 of S.I. 2020/1200. This includes paragraphs 8, 11 and 12 of Schedule 2A to the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 which are the subject of the Committee’s request.

3. In response to point (1), the Department confirms that as a result of the application of paragraph 7(3)(b) the sale of alcohol for consumption in an area adjacent to the premises

of the business where customers gather to drink outside the business (“an adjacent area”) would not be prohibited between the hours of 21:00 and 05:00. That was the policy intention.

4. Under paragraph 7, a restricted business is permitted to stay open until 22:00 hours and to sell alcohol until that time (if certain other conditions are met) for consumption on the premises, including in an adjacent area.

5. But for the application of paragraph 7(3)(b), the reference, in paragraph 8, to the sale of alcohol for consumption “off” the premises between the hours of 21:00 and 05:00 would have resulted in prohibition of the sale of alcohol in an adjacent area earlier than the 22:00 hours referred to in paragraph 7, thus preventing the sale of alcohol in that area from 21:00 hours (until 22:00 hours).

6. In response to point (2), the Department confirms that this is the case. This was an oversight for which the Department apologises but as mentioned in paragraph 1 above, regulation 4(5) (along with the rest of S.I. 2020/1183) is spent in any event. In the event of similar provision being made in future, the Department will ensure that the policy is correctly reflected.

7. In response to point (3), the Department confirms that this is the case. Consideration was given to alternative options of permitting no collections after 21:00 and permitting collections after 21:00 where pre-orders were placed before a certain time. On balance, it was considered that permitting collections after 21:00 without restrictions, was the most proportionate approach in all the circumstances.

8. An absolute prohibition on collection of alcohol would have had an adverse impact on persons, such as NHS workers, ordering groceries online for subsequent collection and who might only be able to collect their purchases after a certain time. But for paragraph 12(3), such persons would be prevented from collecting their purchases if these included alcohol. In addition, some businesses, particularly large supermarkets, would have had to amend their IT systems to prevent collection slots being available to persons who wished to collect alcohol (or purchases which included alcohol) in Nottinghamshire after 21:00. As the instrument was to come into force the next day (for reasons of urgency), it was considered that this would have placed a disproportionate burden on those businesses.

9. The alternative of imposing restrictions on the hours during which pre-orders must be placed would similarly have required some retailers to amend their IT systems to offer limited collection slots purely for customers living in Nottinghamshire whose order included alcohol. This, too, would have placed a disproportionate burden on those retailers for the reasons set out above.

10. In response to point (4), this was not the intention nor, arguably, the effect of the instrument. Regulation 13 of S.I. 2020/1200 refers to “informal childcare” rather than “childcare” (within the meaning of section 18 of the Childcare Act 2006) and as such this is intended to carry a different meaning—one which would arguably encompass childcare provided by a relative.

**Department of Health and Social Care**

**16 November 2020**

## Appendix 4

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### Draft S.I.

#### ***Export Control (Amendment) (EU Exit) Regulations 2020***

1. The Department for International Trade (“the Department”) provides this memorandum at the request of the Joint Committee on Statutory Instruments (“the JCSI”) following its consideration of the draft Export Control (Amendment) (EU Exit) Regulations (ISBN 978-0-348-21378-2; “the draft Regulations”).

*(a) Inadvertent drafting error in article 42N(2)*

2. The Department acknowledges the inadvertent drafting error identified by the JCSI in new article 42N(2) of the Export Control Order 2008 (S.I. 2008/3231), which regulation 7(9) of the draft Regulations would insert into that Order at the end of the transition period.

3. The Department undertakes to correct the error in early-2021 when making routine amendments to the Export Control Order 2008.

*Purpose of new article 42N(2)*

4. The purpose of new article 42N(2) is to re-enact in relation to transfers from Northern Ireland an existing exception that allows the transfer of software or technology for WMD purposes(A) from the United Kingdom by non-electronic means if:

*(a) the final destination of the software or technology is the customs territory of the European Union; or*

*(b) processing or working is to be performed on the software or technology in the customs territory of the European Union (in which case the law of the destination member State will be responsible for the control of any subsequent transfer).*

5. Re-enactment is necessary because the existing exception, which applies in relation to the entire United Kingdom, is to be removed at the end of the transition period by regulation 4(11) of the Export Control (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/137).

*Effect of the inadvertent error*

6. The effect of the incorrect conjunction in new article 42N(2) – “and” instead of “or” between subparagraphs (a) and (b)—is to make the exception less permissive in relation to transfer from Northern Ireland after the transition period than the existing exception (which applies in relation to transfers from the United Kingdom).

#### Correcting the inadvertent error

7. The Department does not consider the error to have sufficient impact to warrant the withdrawal, correction, and re-laying, of the draft Regulations.

8. The Department assesses as very low the likelihood that a person wishes in early-2021 to transfer software or technology from Northern Ireland to the customs territory of the European Union by non-electronic means despite awareness the software is, or may be intended, in entirety or in part, for WMD purposes.<sup>†</sup>

*(b) Amendments to the draft Trade in Torture etc. Goods (Amendment) (EU Exit) Regulations (ISBN 978-0-11-118352-6)*

9. Part 5 of the draft Regulations contains amendments to an instrument that has not been made: the draft Torture etc. Goods (Amendment) (EU Exit) Regulations (ISBN 978-0-11-118352-6). The Department's intention is for the unmade instrument to be made on the same day, but prior to, the draft Regulations. The making of the instruments in this sequence will allow the draft Regulations to correct the deficient commencement clause in the Torture etc. Goods (Amendment) (EU Exit) Regulations before that clause comes into force (the deficiency arose as a result of those Regulations being approved by Parliament in April 2019, before ratification of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community).

10. There is precedent for a draft instrument requiring affirmative approval to correct a deficient commencement clause in an earlier draft instrument that has been approved by Parliament but not made (by making both instruments on the same day and in sequence). The Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/1361) were made with a deficient commencement clause (regulation 1(2)) that was subsequently corrected before the deficient clause came into force by regulations 1(2) and 6 of the Financial Services (Miscellaneous) (Amendment) (EU Exit) (No. 3) Regulations 2019 (S.I. 2019/1390).

11. The Department submits that Part 5 of the draft Regulations is appropriate in light of the precedent and the additional Parliamentary time that would be required if the Torture etc. Goods (Amendment) (EU Exit) Regulations were re-laid following technical—but not substantive—amendment and debated again in entirety by each House of Parliament.

## **Department for International Trade**

**17 November 2020**

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<sup>†</sup> "WMD purposes" are the "use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, or the development, production, maintenance or storage of missiles capable of delivering such weapons" (as defined in regulation 2(1) of the Export Control Order 2008).