House of Lords
House of Commons

Joint Committee on Statutory Instruments

Thirty-Fifth Report of Session 2019–21

Drawing special attention to:

Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (**S.I. 2020/1349**)

Road Vehicles (Display of Registration Marks) (Amendment) Regulations 2020 (**S.I. 2020/1276**)

Air Navigation (Isle of Man) (Amendment) Order 2020 (**S.I. 2020/1280**)

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Joint Committee on Statutory Instruments

Current membership

House of Lords

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Lord Haskel *(Labour)*

Baroness Gale (*Labour*)

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

Baroness Scott of Needham Market (*Liberal Democrat*)

Lord Stirrup *(Crossbench)*

House of Commons

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Sir Robert Syms MP (*Conservative, Poole*)

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Liz Twist MP *(Labour, Blaydon)*

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

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), 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).

Contacts

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Contents

Instruments reported

At its meeting on 16 December 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 three 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. 2020/1349: Reported for elucidation

Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect**.

1.2 These Regulations, which are subject to the made affirmative resolution procedure, concern wrongful trading under sections 214 and 246ZB of the Insolvency Act 1986 ("the 1986 Act"). Under those provisions, a director of a company can in certain circumstances be made to contribute to the assets of a company in insolvency or administration if they carried on trading when they knew or should have known that the company was failing.

1.3 Section 12 of the Corporate Insolvency and Governance Act 2020 ("the 2020 Act") in effect suspended the wrongful trading regime in Great Britain, in response to the coronavirus public health emergency, by providing that for the purposes of section 214 or 246ZB the court should assume that a director was not responsible for any worsening of the financial position of a company or its creditors that occurred from 1 March 2020 to 30 September 2020. These Regulations, which are made under the 2020 Act, revive the suspension of the wrongful trading regime for the period from 26 November 2020 to 30 April 2021, by replicating the assumption provided for in section 12.

1.4 The Committee asked the Department for Business, Energy and Industrial Strategy whether the assumption is intended to be absolute, or whether it is capable of being rebutted by evidence that a director's behaviour worsened the financial position of the company or its creditors for reasons, or in ways, that had nothing to do with the public health crisis. In a memorandum printed at Appendix 1, the Department explains that the assumption is intended to be absolute. The Department also argues that to read the assumption as rebuttable would make it nugatory. The Committee does not agree: it would have been both rational and effective to require a court to assume that a decision to continue trading during the pandemic was not culpable, unless the inevitability of insolvency was clearly shown to be due to factors that had nothing to do with the public health crisis. Such a policy would, indeed, have been in accordance with the statement of the Minister at the Report Stage of the Bill for the 2020 Act in the House of Lords that "the suspension does not mean that a struggling company could just carry on trading without any regard for the consequences, but that, if it unfortunately enters insolvency, the directors will not face personal liability for using their best endeavours and trading while the pandemic is having such an impact on businesses". Nevertheless, the Committee notes the Department's assertion that the intention is for the assumption to be absolute.

(Whether that intention has been achieved as a matter of law is, of course, a matter for the courts.) **The Committee accordingly reports regulation 2(1) for elucidation, provided in the Department's memorandum**.

2 S.I. 2020/1276: Reported for requiring elucidation

Road Vehicles (Display of Registration Marks) (Amendment) Regulations 2020

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect**.

2.2 These Regulations, which are subject to the negative resolution procedure, permit a vehicle to display a green device next to the registration plate to indicate that it "cannot produce any tailpipe emissions". The Committee asked the Department for Transport to explain what is intended to be meant by that expression (in regulation 4(c), inserted paragraph 11(a)). In a helpful memorandum printed at Appendix 2, the Department explains that it is intended to cover vehicles that do not directly emit greenhouse gases from an exhaust, including both electric vehicles without a tailpipe and also converted petrol or diesel vehicles which retain a tailpipe but no longer emit through it. **The Committee accordingly reports regulation 4(c) for requiring elucidation, provided in the Department's memorandum**.

3 S.I. 2020/1280: Reported for failure to comply with proper legislative practice

Air Navigation (Isle of Man) (Amendment) Order 2020

3.1 **The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with proper legislative practice in one respect**.

3.2 This Order, which is not subject to any Parliamentary scrutiny procedure (see below), amends the Air Navigation (Isle of Man) Order 2015 (S.I. 2015/870) to remove provisions made redundant by domestic Isle of Man legislation.

3.3 Paragraph 3 of the Explanatory Memorandum asserts that the Order is not subject to Parliamentary procedure. The Order was nonetheless laid before Parliament, apparently in reliance on procedural provisions in the Civil Aviation Act 1982 that would have included Parliamentary scrutiny procedure. The Committee asked the Department for Transport to explain. In a memorandum printed at Appendix 3, the Department explains that as the relevant procedural provisions of the 1982 Act were not extended to the Isle of Man, Orders under that Act in relation to the Isle of Man are not subject to Parliamentary procedure. The Department explains that the Order was laid before Parliament by error. **The Committee accordingly reports the Order for failure to comply with proper legislative practice, acknowledged by the Department**.

3.4 (The Department's memorandum also contains helpful assurances of steps taken to ensure that people affected by this instrument would have sufficient time to prepare for its coming into force, despite the non-application of the 21-day rule to this class of instrument.)

Instruments not reported

At its meeting on 16 December 2020 the Committee considered the instruments set out in the Annex to this Report, none of which was required to be reported to both Houses.

Annex

Instruments requiring affirmative approval

S.I. 2020/1483	Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2020
S.I. 2020/1533	Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment) Regulations 2020

Draft Instruments requiring affirmative approval

Draft S.I.	Airports Slot Allocation (Amendment) (EU Exit) Regulations 2021

Instruments subject to annulment

S.I. 2020/1335	National Health Service (Dental Charges) (Amendment) Regulations 2020
S.I. 2020/1355	Parish and Community Meetings (Coronavirus) (Polls) (Amendment) (England) Rules 2020
S.I. 2020/1361	Road Vehicles (Registration and Licensing) (Amendment) (EU Exit) Regulations 2020
S.I. 2020/1370	Public Lending Right Scheme 1982 (Commencement of Variation) (No. 2) Order 2020
S.I. 2020/1391	State Pension Debits and Credits (Revaluation) (No. 2) Order 2020
S.I. 2020/1392	State Pension Revaluation for Transitional Pensions (No. 2) Order 2020
S.I. 2020/1397	Sanctions (EU Exit) (Miscellaneous Amendments) (No. 5) Regulations 2020
S.I. 2020/1411	Vaccine Damage Payments (Specified Disease) Order 2020
S.I. 2020/1413	Value Added Tax (Reduced Rate) (Hospitality and Tourism) (Extension of Time Period) (Coronavirus) Order 2020
S.I. 2020/1415	National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) (No. 3) Regulations 2020

Draft Instruments subject to annulment

Draft S.I.	Reading (Electoral Changes) Order 2021

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2020/1271	Republic of Belarus (Sanctions) (Overseas Territories) Order 2020
S.I. 2020/1416	Counter-Terrorism (Sanctions) (EU Exit) (Commencement) Regulations 2020

Appendix 1

S.I. 2020/1349

Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020

1. In its letter to the Department for Business, Energy and Industrial Strategy of 9 December 2020, the Committee requested a memorandum on the following point:

> *In relation to the requirement in regulation 2(1) (which replicates section 12(1) of the Corporate Insolvency and Governance Act 2020) for the court making a determination for the purposes of section 214 or 246ZB of the Insolvency Act 1986 "to assume that the [director of a company] is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period", explain whether the assumption is intended to be absolute, or whether it is intended to be capable of being rebutted by evidence that the financial position is worsened as a result of behaviour, events or factors other than COVID-19.*

2. The Department confirms that the assumption the court is required to make by regulation 2(1), that the director of a company is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period, is intended to be absolute.

3. The Department considers that the drafting of regulation 2(1) gives a clear, unqualified direction to the court that it "is to" assume that a director of a company is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period. This reading of the regulation is consistent with the legislative purpose, which is to provide certainty for directors of a company in financial distress that trading during the relevant period will not render them liable for any wrongful trading, even if doing so in normal circumstances might render them so liable. If regulation 2(1) were read so that there were a rebuttable presumption, that would undermine that legislative purpose.

4. Further, in ordinary circumstances, liability for wrongful trading under sections 214 and 246ZB of the Insolvency Act 1986 only arises if the liquidator or administrator can show that the company is worse off on a net basis as a result of the director deciding to continue trading. As such, if regulation 2(1) were to be read so that there is a rebuttable assumption as well as the existing evidential test, it would be nugatory drafting, as it would have the same effect as sections 214 and 246ZB. That is, the liquidator or administrator must present the court with evidence that the director is responsible for the worsening of the financial position to satisfy sections 214 and 246ZB. The liquidator or administrator must then present further evidence that the director was the cause of that worsening rather than it being an effect of COVID-19 to rebut the assumption in regulation 2(1). Given that a reading of regulation 2(1) as creating a rebuttable presumption would have this nugatory effect and having regard to the presumption that Parliament does not legislate in vain, the Department contends that this is a further reason why the provision would not be read in that way.

Department for Business, Energy and Industrial Strategy

14 December 2020

Appendix 2

S.I. 2020/1276

Road Vehicles (Display of Registration Marks) (Amendment) Regulations 2020

1. By a letter dated 2nd December 2020, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

> "*Explain what is intended to be meant by the expression "which cannot produce any tailpipe emissions" in regulation 4(c) (inserted paragraph 11(a)).*"

2. The expression "which cannot produce any tailpipe emissions" refers to vehicles which do not produce any tailpipe emissions from a vehicle exhaust, when being driven or stationary.

3. These vehicle types are typically propelled by electricity and do not directly emit any greenhouse gases (such as carbon dioxide, carbon monoxide, nitrogen oxide, sulphur dioxide and volatile organic compounds), and are therefore zero (tailpipe) emission vehicles.

4. These types of vehicle are not typically manufactured with an exhaust pipe. However, if a petrol or diesel fuelled vehicle is converted into a zero emission vehicle it may still display an exhaust pipe, although no tailpipe emissions will be emitted from the vehicle.

Department for Transport

8 December 2020

Appendix 3

S.I. 2020/1280

Air Navigation (Isle of Man) (Amendment) Order 2020

1. By a letter dated 2nd December 2020, the Joint Committee on Statutory Instruments requested a memorandum on the following points:

> "*1. Explain why this instrument was not made sooner – or at least laid on the same day it was made—to comply with the 21-day rule.*
>
> *2. Explain why paragraph 3.2 of the Explanatory Memorandum asserts that this instrument is not subject to parliamentary procedure, given that Part 2 of Schedule 13 to the Civil Aviation Act 1987 provides for Air Navigation Orders made under section 60 of that Act to be subject to either the affirmative resolution procedure or the negative resolution procedure depending on their subject matter.*"

2. The answer to the first point is dependent on the answer to the second point and so the Department will respond to the second point first.

The procedure applying to the instrument

3. Section 108(1) of the Civil Aviation Act 1982 ("the 1982 Act") enables an Order in Council to provide that provisions of that Act (other than certain excepted provisions) are to extend to any "relevant overseas territory", subject to such modifications (if any) as may be prescribed in the Order. "Relevant overseas territory" is defined in section 105(1) of the 1982 Act to include the Isle of Man. Under these provisions, the Civil Aviation (Isle of Man) Order 2007 (S.I. 2007/614) extended to the Isle of Man the power in section 60 of the 1982 Act to make Orders in Council. However, neither section 102 of the 1982 Act (power to make Orders in Council, orders and regulations), nor Schedule 13 to that Act (subordinate instruments) which section 102 introduces, have been extended to the Isle of Man. Accordingly, Orders in Council made under section 60 of the 1982 Act as extended to the Isle of Man are not subject to any Parliamentary procedure.

4. As the instrument was not subject to Parliamentary procedure, it was not required to be laid before Parliament. Previous instruments made under section 60 as extended to the Isle of Man have not been laid before Parliament: see for example the Air Navigation (Isle of Man) Order 2015 (S.I. 2015/870) which this instrument amends, and similarly S.I. 2016/155 (another amendment to S.I. 2015/870). The laying of the present instrument was a result of a misunderstanding between the Department and the Privy Council Office. The Department regrets this error and apologises to the Committee. It will endeavour to ensure that this does not happen again.

The 21-day rule

5. As the instrument was not subject to any Parliamentary procedure, the instrument is not subject to the 21-day rule. The Department is aware of the importance which the Committee attaches to complying with the principle of the 21-day rule, even in cases

where the rule itself does not apply. However, in the present case the underlying objective, of ensuring that persons affected had sufficient time to familiarise themselves with the new rules applying to them and to make any necessary changes to their practices and procedures, was ensured through publication in the Isle of Man of the new rules which apply there from 1st December 2020 in place of those revoked by this instrument. Those rules are listed in the Explanatory Note to this instrument and not repeated here. They were approved by Tynwald on 22nd July 2020, and details were published in the Isle of Man Legislation Newsletter number 2020–0007 on 31st July 2020. On 13th October 2020 the Isle of Man authorities informed the Department that they had notified affected parties in their aviation industry that the new regime would apply from 1st December 2020.

6. Originally the Department planned to submit this instrument to the Privy Council in October 2020 (there having been no meeting in August or September) but the volume of Covid-related work meant that November was the earliest date which was possible. The Department considered whether to ask the Isle of Man authorities to agree a later commencement date, but ultimately took the view that, as the 21-day rule did not apply and the Isle of Man authorities had already notified affected persons, it was preferable (including for affected persons) to stick to the commencement date of 1st December 2020 even though this would mean a slightly shorter period between publication of this instrument and its coming into force. Those affected still had at least from 13th October to 1st December to familiarise themselves with the new rules and to make any changes necessary to ensure compliance. In the circumstances, the Department respectfully considers that the principle and objectives underlying the 21-day rule were complied with in the present case.

Department for Transport

8 December 2020