



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Thirty-Eighth Report of Session 2019–21

Drawing special attention to:

Channel Tunnel (Customs and Excise) (Amendment) (EU Exit) Order 2020 (S.I. 2020/1417)

International Waste Shipment (Amendment of Regulation (EC) No 1013/2006) Regulations 2020 (S.I. 2020/1455)

Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021 (S.I. 2021/8)

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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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Instruments reported

At its meeting on 27 January 2021 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. 2020/1417: Reported for requiring elucidation

Channel Tunnel (Customs and Excise) (Amendment) (EU Exit) Order 2020

1.1 The Committee draws the special attention of both Houses to this Order on the ground that it requires elucidation in one respect.

1.2 This Order, which is subject to the negative resolution procedure, amends the importation time of goods at the Eurotunnel site in Coquelles to deal with the anomaly that the duty-free shop is currently sited outside of the control zone. The amendment is designed to ensure that when a traveller enters the control zone more than once, any previous importation before boarding the train is disregarded and consequently only one set of duty-free allowances can apply to the goods the traveller is importing. The Committee noticed that new article 5(8) (inserted by article 2(2)(b)) refers to the goods being removed from a control zone and not to the person importing those goods leaving the control zone and asked HM Revenue and Customs to explain how that article would apply to a person who buys goods outside the control zone, enters the control zone, leaves the goods in the control zone (perhaps with a fellow traveller), exits the control zone, buys more goods, and re-enters the control zone and whether, in that case, the person would benefit from the duty-free limits more than once. In a memorandum printed at Appendix 1, the Department explains that this possibility has not been provided for in the Order because it is not presently expected to be capable of occurring, as a result of the configuration of the site. The Department also explains that the arrangements provided for by the Order are, in effect, only a transitory arrangement pending the completion of planned infrastructure changes. **The Committee accordingly reports article 5(8) for requiring elucidation, provided by the Department's memorandum.**

2 S.I. 2020/1455: Reported for requiring elucidation

International Waste Shipment (Amendment of Regulation (EC) No 1013/2006) Regulations 2020

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in two related respects.

2.2 These Regulations, which are subject to the negative resolution procedure, implement changes to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to enhance controls on shipments of plastic waste.

2.3 The preamble to the Regulations cites that they are made “in exercise of the power conferred by Article 58(1)(a) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste”; a footnote to the preamble adds that “Article 58 of Regulation (EC) No 1013/2006 as it forms part of domestic law on and after IP completion day (see section 3 of the European Union (Withdrawal) Act 2018 (c. 16)) was amended by S.I. 2019/473 so that the power contained in that Article is now vested in the Secretary of State”.

2.4 The amending instrument (the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 (S.I. 2019/473)) did not come into force until IP completion day, some three weeks after these Regulations were made. These Regulations are therefore being made as an anticipatory exercise of the powers to make them. Section 13 of the Interpretation Act 1978 provides for anticipatory exercise in some circumstances and is applied to subordinate legislation by section 23. Section 23ZA of the 1978 Act applies specified provisions of the 1978 Act “to any retained direct EU legislation so far as it ... is amended by ... subordinate legislation”, but section 13 is expressly excluded from the applications under section 23ZA.

2.5 The Committee asked the Department for Environment, Food and Rural Affairs to identify the authority for anticipatory exercise in this case. In a memorandum printed at Appendix 2, the Department asserts that it relies on section 13 of the 1978 Act as attracted by section 23(1). The Department also explains why it did not include a reference to the amending instrument in the preamble to the Regulations. The implication of the Department’s memorandum is that the express exclusion of section 13 from section 23ZA is not to be taken as suggesting a policy intent to prohibit anticipatory exercise in the case of powers added to retained EU legislation by amendment, but simply as reflecting the fact that it will always be possible to rely on section 13, either directly or as attracted by section 23(1), when operating under amended retained EU legislation. The Committee accepts that on balance that is the more likely of the two constructions of the exclusion. But retained EU legislation is a novel concept for the UK statute book, and much about it is less than entirely intuitive: that being so, it is helpful to have on the record as much as possible of the Government’s reasoning and policy in relation to this new class of legislation. **The Committee accordingly notes the Government’s assertion in relation to the attraction of section 13 of the 1978 Act and reports the preamble for requiring elucidation, provided by the Department’s memorandum.**

2.6 The Committee also asked whether the amending statutory instrument should have been cited in the preamble. The Committee notes the Department’s response in the memorandum based on precedent. Precedent as to anticipatory exercise aside, the concept of an instrument being made under a provision of retained EU legislation as amended by a statutory instrument is both novel and potentially confusing for readers, and preambles should be cast in a way that maximises legal certainty and clarity, and on that basis there might have been a case for including the amending domestic legislation in the preamble. Ultimately the Committee recognises that this is a matter of practice for the Government to determine, provided that it acts consistently across the range of statutory instruments and provided that the reader has the necessary information to understand the authority for the instrument (which in this case the Department has achieved adequately through the use of a footnote). On that basis **the Committee reports the preamble for requiring elucidation on this additional ground, provided by the Department’s memorandum.**

3 S.I. 2021/8: Reported for requiring elucidation and for defective drafting

Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021

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 are subject to the made affirmative resolution procedure, amend the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (S.I. 2020/1374—the “All Tiers Regulations”) to impose a national lockdown across England. They do this by placing every area of England under the Tier 4 restrictions set out in Schedule 3A to the All Tiers Regulations.

3.3 The intention to impose a national lockdown was announced by the Prime Minister on Saturday 4 January 2021, with guidance published the same day. The guidance directs: “You should follow this guidance immediately. The law will be updated to reflect these new rules.” The guidance directs people to limit exercise to once a day, not to “travel outside your local area”—which is defined as “avoiding travelling outside of your village, town or the part of a city where you live”, to maintain a set distance from people not in their household or support bubble, and to leave home to shop only for “basic necessities”. The Regulations were made at 4.30 p.m. on 5 January and came into force at midnight on 6 January. None of the restrictions quoted above were included in the Regulations. The Committee asked the Department for Health and Social Care to confirm that the “rules” relating to limited exercise, local travel, social distancing and shopping only for basic necessities amount to non-statutory advice or guidance that is not legally enforceable. In a memorandum published at Appendix 3, the Department confirms that this is the case. The Committee remains concerned that guidance continues to be used in the context of the emergency pandemic response in a way that appears to purport to impose more severe restrictions than are imposed by law. The “new rules” were widely reported before the Regulations were published and have been the focus of public and media attention. The Committee is concerned that many readers will not readily appreciate the distinction in rule of law terms between provisions of regulations and paragraphs in government guidance; and a statement such as “the law will be updated to reflect these new rules” is likely to add to the confusion by suggesting exact correspondence between the “rules” (which are not in fact rules but guidance) and the law. The Committee considered it important to have confirmed on the record that a number of specific provisions of the guidance, despite being described by Ministers as “rules” and using imperative language, are in fact no more than guidance, **and accordingly reports the Regulations for requiring elucidation, provided in the Department’s memorandum.**

3.4 These Regulations also tighten some of the Tier 4 restrictions. Paragraphs (4)(d) and (e) and (6)(a) and (b) of regulation 3 amend childcare-related exceptions to the prohibition on leaving home so that it is permitted for a critical worker to leave their home, or for a gathering to take place indoors or outdoors, if it is reasonably necessary for the purposes of “later years provision, within the meaning of section 96(6) of the Childcare Act 2006”. The Committee asked the Department to explain an apparent discrepancy between these

references to later years provision and the description of the effect of the amendments in paragraph 6.16 of the Explanatory Memorandum. In its memorandum, the Department explains the apparent discrepancy, and helpfully acknowledges that the Explanatory Memorandum could have been worded more clearly and undertakes to correct it. **The Committee accordingly reports the Explanatory Memorandum to this instrument for requiring elucidation, provided by the Department’s memorandum.**

3.5 Paragraphs (4)(e) and (6)(b) of regulation 3 also define who is a critical worker for the purposes of the childcare exceptions by reference to the description of a critical worker in a piece of guidance published by the Cabinet Office and updated on 5 January 2021. A link to an electronic version of that guidance is provided in a footnote to regulation 3(4), but when the Committee considered the instrument, the link led to a version of the guidance updated on 8 January 2021. The Committee asked the Department to explain whether the definition of “relevant guidance” inserted by regulation 3 is intended to be ambulatory and, if not, where the “relevant guidance” that matches the definition may be found. In its memorandum, the Department explains that the definition is not intended to be ambulatory, provides the correct link to the 5 January guidance, and undertakes to correct the footnote by correction slip (which the Committee agrees would be a proper use of that procedure). The Committee notes that particular care should be taken to cite external documents correctly where, as here, they contain information that is necessary in order to understand the legislation. **The Committee accordingly reports regulation 3(4) for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 27 January 2021 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. 2021/53 Health Protection (Coronavirus, Restrictions) (All Tiers) (England) (Amendment) Regulations 2021

Draft Instruments requiring affirmative approval

Draft S.I. Non-Domestic Rating (Designated Area) Regulations 2021

Draft S.I. Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations 2021

Draft S.I. Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2021

Draft S.I. Armed Forces Act (Continuation) Order 2021

Draft S.I. Electronic Commerce Directive (Education, Adoption and Children) (Amendment etc.) Regulations 2021

Draft S.I. Guaranteed Minimum Pensions Increase Order 2021

Draft S.I. Judicial Pensions (Fee-Paid Judges) (Amendment) Regulations 2021

Draft S.I. Social Security (Contributions) (Rates, Limits and Thresholds Amendments and National Insurance Funds Payments) Regulations 2021

Draft S.I. Social Security Benefits Up-rating Order 2021

Draft S.I. Tax Credits, Child Benefit and Guardian's Allowance Up-rating Regulations 2021

Instruments subject to annulment

S.I. 2020/1360 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 27) Regulations 2020

S.I. 2020/1519 Rent Officers (Housing Benefit and Universal Credit Functions) (Modification) Order 2020

S.I. 2020/1523 Social Security Contributions (Disregarded Payments) (Coronavirus) (No. 2) Regulations 2020

S.I. 2020/1530 Government Resources and Accounts Act 2000 (Estimates and Accounts) (Amendment) (No. 2) Order 2020

- S.I. 2020/1532 Social Security Contributions (Disregarded Payments) (Coronavirus) (Scotland and Wales) Regulations 2020
- S.I. 2020/1554 Maritime Enforcement Powers (Specification of the Royal Navy Police) Regulations 2020
- S.I. 2020/1555 Air Navigation (Amendment) Order 2020
- S.I. 2020/1584 Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020
- S.I. 2020/1594 Human Medicines (Coronavirus) (Further Amendments) Regulations 2020

Instruments not subject to parliamentary proceedings not laid before Parliament

- S.I. 2020/1547 Nuclear Safeguards Act 2018 (Commencement No. 2) Regulations 2020
- S.I. 2020/1569 Social Security (Iceland, Liechtenstein and Norway) (Citizens' Rights Agreement) (Revocation) Order 2020
- S.I. 2020/1570 Social Security (Switzerland) (Citizens' Rights Agreement) (Revocation) Order 2020
- S.I. 2020/1583 Wireless Telegraphy (Automotive Short Range Radar) (Exemption) (Amendment) Regulations 2020

Appendix 1

S.I. 2020/1417

Channel Tunnel (Customs and Excise) (Amendment) (EU Exit) Order 2020

1. In its letter to Her Majesty’s Revenue and Customs of 13 January 2021, the Select Committee requested a memorandum on the following point:

Given that the new article 5(8) (inserted by article 2(2)(b)) refers to the goods being removed from a control zone and not to the person importing those goods leaving the control zone, explain how the article would apply to a person who buys goods outside the control zone, enters the control zone, leaves the goods in the control zone (perhaps with a fellow-traveller), exits the control zone, buys more goods, and re-enters the control zone: in that case, would the person benefit from the duty free limits more than once?

2. In general, it is not possible to exit a control zone without boarding a train apart from in exceptional circumstances. The amendment made by this Order was to deal with an anomaly to this at the control zone in Coquelles where people board in their vehicles. Pending infrastructure changes there were two possible routes which could be taken by vehicles before boarding a shuttle train at Coquelles. The first was to directly board without leaving the control zone, the second was to go via the retail shop. The retail shop is located outside the control zone. If the second route was taken it was not possible to stop after customs checks and before exiting the control zone, nor to return to the part of the control zone where the vehicle was before exiting. Therefore, the factual scenario raised by the Select Committee could not arise (if a person took the route which exited the control zone they would have to take their goods with them). Discussions with Eurotunnel regarding changing the infrastructure so that vehicles would not be able to exit the control zone before boarding were ongoing at the time this legislation was laid. When HMRC is able to confirm the required infrastructure changes have been made we will review the need for this provision.

Her Majesty’s Revenue and Customs

15 January 2021

Appendix 2

S.I. 2020/1455

International Waste Shipment (Amendment of Regulation (EC) No 1013/2006) Regulations 2020

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following points:

- (1) If section 13 of the Interpretation Act 1978 is being relied as authority for anticipatory exercise, explain—by reference to sections 23(1) and 23ZA(1) (including the parenthetical exception in s.23(ZA)(1))—by what route it is thought that section 13 applies.
- (2) If section 13 is being relied on as imported by section 23(1) in relation to S.I. 2019/473, explain whether consideration was given to citing that instrument in the preamble to this instrument.
- (3) If section 13 is not being relied upon, identify the authority for anticipatory exercise of the enabling power.

The Department's response

Question (1)

2. The Department relies on s.13 of the Interpretation Act 1978 as imported by s.23(1). The Department considers that s.23ZA is not relevant, because that section concerns retained direct EU legislation, whereas (as the parenthetical reference to exceptions in ss.(1) of that section acknowledges) s.13 is a proposition about amending Acts or instruments.

Question (2)

3. The Department considered how to cite the various enabling and related provisions in the preamble, in particular considering practice in relation to the anticipatory exercise of a provision of an Act (A), which is being inserted by an amending Act (B). Here, it appeared to the Department to be practice to cite A rather than B in the preamble, and to refer to B as a relevant amendment in a footnote. The Department could see no reason not to adopt that practice in a case where A is retained direct EU legislation and B is a statutory instrument. It follows that the instrument refers to Regulation (EC) 1013/2006 in the preamble and to S.I. 2019/473 as a relevant amendment in a footnote.

Question (3)

4. It follows that question (3) does not need to be answered.

Department for Environment, Food and Rural Affairs

19 January 2021

Appendix 3

S.I. 2021/8

Health Protection (Coronavirus, Restrictions) (No. 3) and (All Tiers) (England) (Amendment) Regulations 2021

1. In its letter to the Department of 13 January 2021, the Committee requested a memorandum on the following points:

(1) *Explain which correctly reflects the policy intent: (a) the amendments made by regulation 3(4)(d) and (e) (which refer to “later years provision”); or (b) the statement in paragraph 6.16 of the Explanatory Memorandum that regulation 3(4) “amends the exceptions for children so that registered childcare can only be provided for early years” (and similarly, the amendments made by regulation 3(6), which also refer to “later years provision” but are described by paragraph 6.17 as mirroring the changes described in paragraph 6.16).*

(2) *The guidance entitled “National lockdown: Stay at Home”, published on 4 January 2021, states:*

“You should follow this guidance immediately. The law will be updated to reflect these new rules.” The same guidance directs that: “You can continue to exercise alone, with one other person or with your household or support bubble. This should be limited to once per day, and you should not travel outside your local area. You should maintain social distancing”; “When around other people, stay 2 metres apart from anyone not in your household ... or your support bubble. Where this is not possible, stay 1 metre apart with extra precautions (e.g. wearing a face covering)”; “If you need to travel you should stay local—meaning avoiding travelling outside of your village, town or the part of a city where you live”; “You may leave the home to: shop for basic necessities, for you or a vulnerable person”. Confirm that the underlined passages do not reflect the Regulations, and amount to non-statutory advice or guidance that is not legally enforceable.

(3) *In relation to regulation 3(4)(e) (inserted sub-paragraph (14A)(b)), given that the url cited in the footnote to that provision now leads to a copy of the guidance as updated on 8th January 2021, rather than 5th January 2021, explain—*

(a) whether the definition of “relevant guidance” in sub-paragraph (14A)(b) is intended to be ambulatory,

(b) if so, how effect is given to that intention and what enabling power is relied on for the ambulation; and

(c) if not, where the “relevant guidance” as defined in sub-paragraph (14A)(b) may be found.

2. The Department’s response to the Committee’s points is as follows.

3. In response to point (1), the amendments made by regulation 3(4)(d) and (e) correctly reflect the policy position.
4. The effect of those amendments (to paragraph 2(13)(e) and (14) of Schedule 3A) is:
 - a. a person will have a reasonable excuse to leave, or be outside, the place where they are living where it is reasonably necessary for the purposes of later years provision or supervised activities for children; and
 - b. this only applies where the “responsible person” is a critical worker, and the later years provision or supervised activities are reasonably necessary for the purposes listed in paragraph 2(14)(a)(i) to (iii) or are provided for a vulnerable child or young person.
5. Paragraph 2(13) and (14), as amended, does not relate to early years provision: this is covered by the exception in paragraph 2(5)(b) for the situation where it is reasonably necessary to leave, or be outside, one’s home for a purpose of the type specified in paragraph 6(3). Paragraph 6(3) includes, at paragraph (a), “early years provision”. The exception in paragraph 2(5) is not limited in the same way as the exception in paragraph 2(13)(e) (as outlined at paragraph 4(b) above of this memorandum). Accordingly, paragraph 2(5) (b) read with paragraph 6(3) enables a person to leave, or be outside, their home for the purposes of early years provision.
6. This is consistent with the Explanatory Memorandum which states (at paragraph 2.2) that the amendments made by the Regulations include “*restricting childcare (other than early years provision) and supervised activities for children to vulnerable children and children of critical workers...*” and (at paragraph 6.16) that regulation 3(4) “*amends the exceptions for children so that registered childcare can only be provided for early years and childcare and supervised activities for the children of critical workers or vulnerable children*”. However, the Department considers that the Explanatory Memorandum could have been worded more clearly and proposes to lay a revised Explanatory Memorandum with clearer wording. The Department apologises to the Committee for the lack of clarity.
7. In response to point (2), the Department confirms that the underlined passages amount to non-statutory advice or guidance that is not legally enforceable. The final underlined sentence (“*You may leave the home to: shop for basic necessities, for you or a vulnerable person*”) represents the Department’s view of the effect of paragraph 1 of Schedule 3A by way of a reasonable excuse for leaving, or being outside, the place where one is living.
8. In response to point (3)(a) and (b), the Department confirms that the definition of “relevant guidance” was not intended to be ambulatory.
9. In response to point (3)(c), the “relevant guidance” can be found at: <https://web.archive.org/web/20210105200828/https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>.
10. The Department apologises for the error in the url cited in the footnote and proposes to amend the footnote by way of a correction slip.

Department of Health and Social Care

19 January 2021