House of Lords
House of Commons

Joint Committee on Statutory Instruments

Forty-Third Report of Session 2019–21

Drawing special attention to:

Cat and Dog Fur (Control of Movement etc.) (EU Exit) Regulations 2021 (**Draft S.I.**)

Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (**S.I. 2020/1497**)

FLEGT Licensing Scheme (Council Regulation (EC) No 2173/2005) (Amendment) Regulations 2021 (**S.I. 2021/2**)

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Joint Committee on Statutory Instruments

Current membership

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Baroness Gale (*Labour*)

Lord Haskel *(Labour)*

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

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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

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).

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Instruments reported

At its meeting on 10 March 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 Draft S.I.: Reported for failure to comply with proper legislative practice and for defective drafting

Cat and Dog Fur (Control of Movement etc.) (EU Exit) Regulations 2021

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that in one respect there is a failure to comply with proper legislative practice and they are defectively drafted in one respect.**

1.2 These draft Regulations, which are subject to the draft affirmative resolution procedure, make provision with respect to the placing on the market, and the import and export, of cat and dog fur, and cat and dog fur products. They amend Regulation (EC) 1523/2007 and the Cat and Dog Fur (Control of Import, Export and Placing on the Market) Regulations 2008 ("the 2008 Regulations").

1.3 The Regulations replace an earlier instrument which was laid before and approved by both Houses in March 2019. Paragraph 3.1 of the Explanatory Memorandum states that the earlier instrument was never made. The Committee asked the Department for International Trade to explain this statement in the light of the fact that:

- the earlier instrument was given a number (SI 2019/830) which can only happen after an instrument is made, and
- the instrument appears on the websites of commercial publishers of legislation with a date of making of 8 April 2019.

1.4 In a supplementary memorandum, printed at Appendix 2, the Department explains that the instrument was signed by the Minister but that it was a nullity because it was different from the version that had been laid before and approved by Parliament. This error was notified to the National Archives with the instruction that the instrument be withdrawn from publication. The Department notes that the withdrawal from publication was not noticed by legal publishers. According to the Department, those publishers have now been contacted directly to draw their attention to this issue so that instrument can be removed from their databases and match the public record.

1.5 The Department acknowledges that its failure to ensure that the instrument did not continue to be published on the subscription databases of legal publishers may have led some users of those websites to be confused as to the state of the law. In the view of the Committee, the Department's failure goes much wider than this. The Committee considers that, as soon as the Department realised a mistake had been made with the Minister signing the wrong instrument, it should have considered what steps it could take to regularise the position. If, having done so, the Department reached the view that

it would not be appropriate to revoke the instrument, then the Department should have taken steps to publicise the fact of the instrument's withdrawal and the reasons for it. This would have allowed those affected by the Department's decision to be aware of it and to consider whether or not they wished to challenge the decision. In the view of the Committee, withdrawal from publication alone, given the lack of transparency it involves, was an insufficient response to what happened. Nor is it a sufficient cure that this replacement instrument has now been laid. **The Committee accordingly reports the draft Regulations for a failure to comply with proper legislative practice.**

1.6 Regulations 3(3) and 4(2) amend the 2008 Regulations to make it an offence where a person contravenes Regulation (EC) 1523/2007, both as that Regulation has effect as retained EU law and as it has effect by virtue of the Protocol on Ireland/ Northern Ireland in the EU withdrawal agreement. One of the effects of the amendments is to make a person convicted summarily of an offence liable to a fine, without specifying any maximum limit for the fine. In respect of Scotland and Northern Ireland, this represents a change from the current position under the 2008 Regulations, where the fine which may be imposed is expressly subject to the statutory maximum.

1.7 In a memorandum printed at Appendix 1, the Department for International Trade appears to suggest that summary fines for Northern Ireland and Scotland will in practice be capped, despite the absence of any express words limiting fines to a particular maximum. In respect of Northern Ireland, the Department notes that a cap on fines imposed under primary legislation applies by virtue of Article 4 of the Fines and Penalties (Northern Ireland) Order 1984. In respect of Scotland, it is noted that section 225 of the Criminal Procedure (Scotland) Act 1995 sets the amount of the statutory maximum on summary conviction for offences triable either way. The Department goes on to say that:

> "A summary offence would be understood by the relevant judicial officers with reference to the underlying standard scale levels in primary legislation in each jurisdiction where the penalties would be applied".

1.8 The suggestion seems to be that, despite the fact that these statutory limits do not apply to fines imposed under the 2008 Regulations, the relevant judicial officers will nevertheless act as if they do. The Committee does not consider it is possible to justify the absence of express limits on this basis, particularly as in other contexts express provision is made for summary fines to be subject to the statutory maximum. If the policy is that fines should be subject to the statutory maximum on summary conviction in Scotland or Northern Ireland, then in the view of the Committee the draft Regulations should have expressly provided for this. **The Committee accordingly reports regulations 3(3) and 4(2) for defective drafting.**

2 S.I. 2020/1497: Reported for requiring elucidation and for defective drafting

Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020

2.1 **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.**

2.2 These Regulations, which are subject to the negative resolution procedure, transpose the Environmental Impact Assessment (EIA) Directive (EU Directive 2011/92/EU) into UK law in relation to oil and natural gas projects.

2.3 Several regulations impose a requirement to give "reasons" for a decision (see regulations 6(7), 15(4) and 18(3)); others impose a requirement to give "main reasons" (see regulations 6(4), 14(4) and 19(4)); while there is no express requirement to give reasons at all in relation to some decisions (such as a decision under regulation 7 or a decision to grant consent under regulation 15). The Committee asked the Department for Business, Energy and Industrial Strategy to explain the intended difference in meaning between "reasons" and "main reasons" and the apparent inconsistency as to when they are required.

2.4 In a memorandum printed at Appendix 3, the Department explains that as this instrument is transposing the provisions of the Directive, it "is intended to follow the wording of the corresponding provision of the Directive without amendment". That accounts for most of the discrepancies in the instrument **and the Committee accordingly reports the Regulations for elucidation, provided by the Department's memorandum**. (The Committee notes, however, that "copy-out" transposition of the English-language version of a Directive does not always produce effective domestic law, and in this case it might have been preferable to produce an internally consistent result that the UK courts could apply in accordance with the presumption that change of language implies change of meaning.)

2.5 In relation to regulation 15(4) the Department's memorandum acknowledges that it is intended to transpose Article 8a(2) of the Directive, and the requirement for "reasons" in regulation 15(4) is not the same as the corresponding requirement to provide "main reasons" in Article 8a(2) of the Directive. The Department asserts that the courts would nevertheless apply a construction that amounts to satisfactory transposition; be that as it may, having adopted a policy of copying-out the English-language version of the Directive, the Department should have applied it consistently. **The Committee accordingly reports regulation 15(4) for defective drafting, acknowledged by the Department.**

2.6 Regulation 12(3)(a) imposes a requirement on the Secretary of State to notify the developer if they receive additional information "during the period between the service of the notice under regulation 11(3)(c) and the OGA's notification to the developer under regulation 15" (emphasis added). The Committee asked the Department to confirm that the reference should be to publication of the notice, given that regulation 11(3)(a) requires the developer to serve on specified parties a notice served on the developer by the Secretary of State, while regulation 11(3)(c) requires the developer to publish a notice stating that an application for consent has been made and providing information as to how representations may be submitted. In its memorandum, the Department acknowledges the error and confirms that the cross-reference should be to publication of a notice under regulation 11(3)(c). The Department asserts that the meaning is sufficiently clear notwithstanding the error. Whether or not it is true that the courts would be forced to construe the reference in the way the Department asserts, **the Committee reports regulation 12(3)(a) for defective drafting, acknowledged by the Department.**

3 S.I. 2021/2: Reported for requiring elucidation

FLEGT Licensing Scheme (Council Regulation (EC) No 2173/2005) (Amendment) Regulations 2021

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that the Explanatory Memorandum accompanying them requires elucidation in one respect.**

3.2 These Regulations, which are subject to the negative resolution procedure, amend EUR 2005/2173 to list Indonesia as a partner country under the GB FLEGT licensing scheme. This was made possible by a new Voluntary Partnership Agreement between the UK and Indonesia. The effect is that specified timber products originating in Indonesia and imported into Great Britain are considered to have been legally harvested—as was the case when the United Kingdom was part of the EU FLEGT licensing scheme, under which Indonesia is a partner country. Between 11pm on 31 December 2020, when the United Kingdom left the EU scheme, and the beginning of 5 January 2021, when this instrument came into force, Indonesia was not a partner country of the United Kingdom under any FLEGT licensing scheme. Paragraph 7.6 of the Explanatory Memorandum asserts that during this period, the Office for Product Safety Standards ("OPSS")" will "consider a FLEGT licence [from Indonesia] as meeting the due diligence requirement for the import of timber". The Committee asked the Department for Environment, Food and Rural Affairs to explain what authority enables the OPSS to do so. In a memorandum printed at Appendix 4, the Department explains that the OPSS is responsible for investigating compliance with EUR 2010/995, which requires operators to conduct due diligence to ensure that the timber they import has been legally harvested; it asserts that "as a matter of fact, the issuing of a FLEGT licence … is good evidence that the timber was legally harvested". The Committee accepts this **and accordingly reports the Explanatory Memorandum to this instrument as requiring elucidation, provided in the Department's memorandum.**

Instruments not reported

At its meeting on 10 March 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

Draft Instruments requiring affirmative approval

Draft	Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021
Draft	Direct Payments to Farmers (Reductions and Simplifications) (England) (Amendment) Regulations 2021
Draft	Food and Drink (Miscellaneous Amendments Relating to Food and Wine Composition, Information and Labelling) Regulations 2021
Draft	Greenhouse Gas Emissions (Kyoto Protocol Registry) Regulations 2021
Draft	Nuclear Safeguards (Fissionable Material and Relevant International Agreements) (EU Exit) (Amendment) Regulations 2021
Draft	Whiplash Injury Regulations 2021
Draft	Agriculture (Financial Assistance) Regulations 2021
Draft	Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases)

Instruments subject to annulment

S.I. 2021/4[1]	Universal Credit (Transitional Provisions) (Claimants previously entitled to a severe disability premium) Amendment Regulations 2021
S.I. 2021/78	Official Controls (Temporary Measures) (Coronavirus) (Amendment) Regulations 2021
S.I. 2021/83	Framework for the Free Flow of Non-Personal Data (Revocation) (EU Exit) Regulations 2021
S.I. 2021/91	Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2021
S.I. 2021/93	Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling) Order 2021
S.I. 2021/94	Organic Control (Amendment) Regulations 2021
S.I. 2021/96	Driver and Vehicle Standards Agency Trading Fund (Revocation) Order 2021
S.I. 2021/98	Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 5) Regulations 2021

1 The Committee asked for a memorandum on this instrument and a satisfactory response was received.

S.I. 2021/99	Asylum Support (Amendment) Regulations 2021
S.I. 2021/104	Airports (Designation) (Removal and Disposal of Vehicles) (Amendment) Order 2021
S.I. 2021/105	Airport Byelaws (Designation) Order 2021

Appendix 1

Draft S.I.

Cat and Dog Fur (Control of Movement etc.) (EU Exit) Regulations 2021

1. In its letter to the Department of 3rd February 2021, the Committee requested a memorandum on the following point:

> *Explain why paragraph 3.1 of the Explanatory Memorandum refers to the fact that an earlier version of the instrument, which was laid before and approved by Parliament, was not made, when: that earlier instrument was numbered (the SI number being 2019/830)*

2. The Department's response to the Committee's point is as follows.

3. The SI numbered 2019/830 was never officially made further to its passage through Parliament. This is because that SI when it was originally laid before Parliament did not take account of the implications of the Northern Ireland Protocol to the EU Withdrawal Agreement. The implications of the Protocol upon this SI necessitated further extensive amendment post the passage of the SI in Parliament and the Department therefore chose not to proceed to make the SI but to lay a replacement SI instead.

4. In consequence SI 2019/830 does not appear on legislation.gov.uk. The Department notes the inaccuracy of these third-party websites in this specific instance identified by the Committee; and will be requesting of those companies that these references are deleted since they do not accurately reflect the legislation that applies to restrictions on trade and cat and dog fur.

5. In the Committee's letter, the Committee requested a memorandum on the following point;

> *Explain the effect of the words "in Great Britain" in regulation 2A(1) of the Cat and Dog Fur (Control of Import, Export and Placing on the Market) Regulations 2008 ("the 2008 Regulations") inserted by regulation 3(3).*

6. The Department's response to the Committee's point is as follows.

7. The reference to Great Britain was included to clarify the scope of the new penalty provisions under this regulation confining their application to offences committed in the criminal law jurisdictions of Scotland and England and Wales.

8. In the Committee's letter, the Committee further requested a memorandum on the following point;

> *Explain the effect of the words "in Northern Ireland" in regulation 2(1) of the 2008 Regulations, as substituted by regulation 4(2).*

9. Specific reference to Northern Ireland has been included to clarify the scope of the new penalty provisions under this regulation, confining their application to offences committed in Northern Ireland.

10. In the letter, the Committee finally requested a memorandum on the following point;

> *In the amendments made by regulations 3(3) and 4(2), why are fines imposed on summary conviction in Scotland or Northern Ireland not subject to the statutory maximum?*

11. The Department responds as follows.

12. Summary fines for Northern Ireland and Scotland are capped for the purpose this regulation. For Northern Ireland where there is primary legislative statutory cap of summary offences fines in Article 4 of Fines and Penalties (Northern Ireland) Order 1984 (as amended), and for Scotland, section 225 Criminal Procedure (Scotland) Act 1982 sets the standard scale for offences triable either way. A summary offence would be understood by the relevant judicial officers with reference to the underlying standard scale levels in primary legislation in each jurisdiction where the penalties would be applied.

13. The Department notes that at the time of the original 2008 regulation, a statutory maximum applied across these criminal jurisdictions equally with reference to the standard scale for summary fines.

Department for International Trade

9 February 2021

Appendix 2

Draft S.I.

Cat and Dog Fur (Control of Movement etc.) (EU Exit) Regulations 2021

1. In its letter to the Department of 24th February 2021, the Committee requested a memorandum on the following point:

> *"The SI numbered 2019/830 was never officially made further to its passage through Parliament."*
>
> *Explain what is meant by the statement that the statutory instrument was not "officially" made. If it means that the instrument was made, explain why it is appropriate to treat the making of the instrument as not being "official" and therefore capable of being ignored. If, on the other hand, the instrument was not made (in that it was not signed by the Minister), explain:*

- *why it was given an SI number, which in accordance with section 2 of the Statutory Instruments Act 1946 may only happen after an instrument is made; and*
- *why for a period of time it was published as a made instrument, which it must have been for it to appear on the websites of third-party commercial publishers.*

2. The Department's response to the Committee's point is as follows.

3. As previously disclosed to the Committee, S.I. 2019/830 was a nullity in legal terms. The Department for International Trade has made a records check of the instrument with the National Archive. This has shown that in 2019 the then Minister was asked to sign a copy of the withdrawn draft version of those Regulations rather than the superseding draft version subsequently approved by Parliament. The resulting instrument, which was numbered as S.I. 2019/830 was therefore a nullity.

4. This error was notified by the Department to the National Archive, to correct the public record, but the SI had already been published. The National Archive withdrew the instrument on our instruction, but legal publishers did not pick up on the correction issued by the National Archive and the relevant change to the public record. Those publishers have been contacted directly by the Department to draw their attention to this issue so that instrument can be removed from their databases in accordance and match the public record. It is regrettable that the Minister was asked to sign that instrument at that time. Although the Department corrected the error as quickly as possible it did not anticipate or notice that the instrument continued to appear on subscription databases after that date, which might have led some users of those services to be confused as to the state of the law.

5. The Minister was not asked to sign the approved version of that instrument because it became apparent, around the same time, that further developments in the international law framework of the UK's departure from the European Union, particularly in relation to Northern Ireland, would almost certainly require the instrument to be amended. The relevant amendments have been made in the draft instrument that is before the Committee.

Department for International Trade

2 March 2021

Appendix 3

S.I. 2020/1497

Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020

1. By letter dated 24 February 2021, the Joint Committee on Statutory Instruments has requested a memorandum on the following points:

> *(1) Explain—*
>
> *(a) the intended difference between "main reasons" in regulations 6(4), 14(4) and 19(4) and "reasons" in regulations 6(7), 15(4) and 18(3), and the purpose behind that intended difference; and*
>
> *(b) why the Regulations do not include an express requirement for reasons in connection with other decisions (such as, for example, a decision to impose conditions on the grant of an application, a decision under regulation 7, or a decision to grant consent under regulation 15).*
>
> *(2) In relation to the reference in regulation 12(3)(a) to a notice under regulation 11(3)(c): confirm that the reference should be to publication not service, having regard to the different terms used in regulation 11(3)(a) and (c).*

2. In response to point 1(a), regulations 6(4), 6(7), 14(4), 18(3) and 19(4) are intended to transpose the provisions of Articles 4(5), 4(6), 8a(2), 2(4) and 9(2) (second paragraph) respectively of Directive 2011/92/EU (as amended by Directive 2014/52/EU). In each case, the use of "main reasons" or "reasons" in the regulations is intended to follow the wording of the corresponding provision of the Directive without amendment.

3. Regulation 15(4) is also intended to transpose Article 8a(2) of the Directive. We acknowledge that the requirement for "reasons" in regulation 15(4) is not the same as the corresponding requirement to provide "main reasons" in Article 8a(2) of the Directive. We are grateful to the Committee for identifying this discrepancy. We consider that as a matter of general public law, the obligation on the OGA under Regulation 15(4) to provide "reasons" requires the provision of at least all relevant reasons for its decision, which should be either identical to or broader than the "main reasons". We therefore consider that compliance with the obligation imposed by regulation 15(4) would necessarily entail compliance with the corresponding provision of the Directive, and accordingly the requirements of Article 8a(2) have been fully transposed in the regulations.

4. In response to point 1(b), the provisions of the Directive identified above are all of those requiring the provision of "reasons" or "main reasons". The Department did not seek to impose requirements for reasons for other decisions additional to those required to transpose the Directive. For example, Article 4(3) of the Directive did not require main reasons (or reasons) to be given in respect of decisions which are now regulation 7 decisions.

5. In response to point (2), we confirm that the reference in regulation 12(3)(a) to "service" of a notice under regulation 11(3)(c) should be to "publication" of such a notice. We are grateful to the Committee for drawing this to our attention. While we regret this error, we consider that the meaning of regulation 12(3)(a) is nevertheless sufficiently clear in the context of the overall scheme for publication and public consultation under regulations 11 and 12. The obligation to provide notice to the developer under regulation 12(3) also falls on the Secretary of State, not developers or the wider public, so the risk of confusion should be minimal to non-existent.

Department for Business, Energy and Industrial Strategy

1 March 2021

Appendix 4

S.I. 2021/2

FLEGT Licensing Scheme (Council Regulation (EC) No 2173/2005) (Amendment) Regulations 2021

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

> *Explain what authority enables the Office for Product Safety Standards, during the period between the end of the Implementation Period and the date this instrument comes into force, to "consider a FLEGT licence [from Indonesia] as meeting the due diligence requirement for the import of timber" (as paragraph 7.6 of the Explanatory Memorandum asserts it will do).*

The Department's response

2. SI 2021/2 came into force on 5 January 2021. From this time, Indonesia was a Partner Country for the purpose of the UK FLEGT Regulations—and timber/timber product imported to the UK from Indonesia was subject to the FLEGT licensing regime. In the four days prior to 5 January, timber/timber product imported to the UK from Indonesia was subject to the UK Timber Regulations: https://www.legislation.gov.uk/eur/2010/995/contents.

3. Article 4(2) of the Timber Regulations requires 'operators' (i.e. those who first place timber/timber product on the GB market) to conduct due diligence on the timber/timber product to ensure it is legally harvested timber. Article 6 describes the due diligence system (including risk mitigation measures) that operators must use. The Office of Product Safety Standards (OPSS) investigates compliance with the Timber Regulations, and in particular, investigates compliance with the requirement that operators conduct due diligence when first placing on the market. In the case where operators placed Indonesian timber on the GB market between 1 and 4 January 2021, then OPSS will—when assessing compliance with the due diligence obligation—accept that a FLEGT licence was reliable evidence (for due diligence purposes) that the timber/timber product to which the licence related was legally harvested. As a matter of fact, the issuing of a FLEGT licence for timber harvested in Indonesia is good evidence that the timber was legally harvested.

Department for Environment, Food and Rural Affairs

2 March 2021