HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

9th Report of Session 2021–22

Instruments under the European Union (Withdrawal) Act 2018:

Proposed Negative Instruments

Includes information paragraphs on:

1 instrument relating to COVID-19

Draft Ecodesign for Energy-Related Products and Energy Information (Lighting Products) Regulations 2021

Markets in Financial Instruments (Capital Markets) (Amendment) Regulations 2021

Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021

Ordered to be printed 13 July 2021 and published 15 July 2021

Published by the Authority of the House of Lords

HL Paper 45

Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 13 May 2021, are set out on the website but are, broadly:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Bakewell of Hardington Mandeville
Rt Hon. Lord Chartres
Rt Hon. Lord Cunningham of Felling
Lord German
Viscount Hanworth
Lord Hodgson of Astley Abbotts (Chair)
The Earl of Lindsay
Lord Lisvane
Lord Sherbourne of Didsbury
Baroness Watkins of Tavistock

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Jane White (Adviser) and Louise Andrews (Committee Operations Officer).

Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Ninth Report

PROPOSED NEGATIVES UNDER THE EUROPEAN UNION WITHDRAWAL ACT 2018

Proposed Negative Statutory Instruments about which no recommendation to upgrade is made

- REACH etc. (Amendment) Regulations 2021
- Medical Devices (Amendment) (EU Exit) Regulations 2021

CORRESPONDENCE: THE RELATIONSHIP BETWEEN GUIDANCE AND LEGISLATION AND THE ROLE OF SENIOR RESPONSIBLE OWNERS FOR STATUTORY INSTRUMENTS

1. In June we wrote to the Rt. Hon. Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons, about the relationship between guidance and legislation and about the role of Senor Responsible Owners in providing oversight of Statutory Instruments in government departments. Our letter and the response we have received are published in Appendix 1 of this report.

INSTRUMENTS RELATING TO COVID-19

Changes to business practice and regulation

Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (SI 2021/773)

2. This Order revokes the following four Orders which were made to suspend temporarily prohibitions of certain types of anti-competitive activity, as set out in Chapter 1 of the Competition Act 1998:

- The Health Services for Patients in England Order[1] was made to cover contractual arrangements between independent healthcare providers and NHS England, enabling such providers to support the NHS by expanding its capacity in England during the pandemic. The Health Services for Patients in Wales Order[2] allowed equivalent arrangements between independent healthcare providers and NHS Wales. As of 31 March 2021, all relevant contractual arrangements in England and Wales have expired.

- The Solent Maritime Crossings Order[3] was made to enable collaboration between the Solent crossing operators to ensure the continuity of essential transport services between the Isle of Wight and mainland UK. The Department for Business, Energy and Industrial Strategy says that the Secretary of State is satisfied that the temporary measures are no longer needed as there is no more threat of severe disruption to Isle of Wight ferry crossing services.

- The Groceries No.2 Order[4] was made as a contingency measure to prepare for a possible combination of short-term disruption to UK food supply as a result of the pandemic and the potential effects of the end of the Transition Period on 31 December 2020 following EU Exit. The Groceries No.2 Order expired at the end of 31 March 2021, in line with a sunset provision, but it is revoked by this instrument for completeness.

3. Two other Orders dealing with the groceries and dairy sectors have already been revoked.[5]

1 Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 (SI 2020/368).
2 Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 (SI 2020/435).
3 Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 (SI 2020/370).
4 Competition Act 1998 (Groceries) (Public Policy Exclusion) Order 2020 (SI 2020/1568).
5 SI 2020/369 and SI 2020/481 were revoked by SI 2020/933.

INSTRUMENTS OF INTEREST

Draft Ecodesign for Energy-Related Products and Energy Information (Lighting Products) Regulations 2021

4. These draft Regulations propose updated Ecodesign and Energy Labelling requirements for lighting products that are placed on the market in Great Britain (GB), replacing the existing requirements. The instrument also proposes to replace the existing Energy Label with a rescaled label, moving from an A++ to E scale to a simpler A to G scale which, according to the Department for Business, Energy and Industrial Strategy (BEIS), will make it easier for consumers to identify the most energy efficient lighting products. The instrument proposes further changes to enable market surveillance authorities to enforce the new rules.

5. BEIS says that the changes aim to achieve greater savings in energy, carbon and consumer energy bills, and also reflect the requirements of two EU regulations[6] which the UK supported when it was a Member State and which will apply in Northern Ireland (NI) under the NI Protocol and in the EU from 1 September 2021. BEIS emphasises that without these changes, suppliers would potentially have to operate two separate supply chains and product lines, one for the GB market and one for the EU/NI market. Suppliers would potentially also have to undertake dual conformity assessment processes to ensure compliance with both sets of requirements. BEIS says that the changes introduced by this instrument avoid this outcome and the associated costs to business.

6. The Explanatory Memorandum states that while the technical requirements will be equivalent, some differences between the EU and GB regimes will exist, such as the GB Energy Label using the Union flag rather than an EU flag. We asked BEIS whether these differences would have any impact on trade between GB and NI. The Department explained that:

> "[T]he EU flag is required to be displayed on the energy label in NI, whereas in GB, the UK flag is required. Nevertheless, across the UK, both the EU and UK labels may be supplied, if manufacturers choose to do so, for as long as UK and EU labels contain exactly the same information in terms of grading, energy usage and testing (which they will continue to do following this SI coming into force). This means that the same products can be sold in NI and in GB. The technical requirements in the GB regulations (this SI) reflect the EU requirements which will be in force in NI; similarly, the international standards which underpin the requirements will be the same. This means that manufacturers will be assessing conformity in the exact same way for both the EU/NI and GB markets. Nevertheless, for products placed on the NI market, the 'declaration of conformity' must reference the applicable EU legislation (i.e. not the GB legislation, as will be required for products placed on the GB market). […] any product placed lawfully on the NI market can subsequently be placed on the GB market".

6 Commission Regulation (EU) 2019/2020 with respect to Ecodesign for light sources and separate control gears and Commission Delegated Regulation (EU) 2019/2015 with respect to Energy Labelling for light sources.

Markets in Financial Instruments (Capital Markets) (Amendment) Regulations 2021 (SI 2021/774)

7. These Regulations amend retained EU law and related legislation[7] which regulates the buying, selling and organised trading of financial securities. HM Treasury (HMT) explains that the instrument is part of a wider package of reforms to the UK's framework for wholesale capital markets, which will also require primary legislation. According to HMT, the instrument is part of the first legislative step of that package involving a series of small, initial amendments which aim to reduce regulatory burdens on certain financial services firms by removing unnecessary reporting requirements, without compromising investor protection standards. HMT says that the Financial Conduct Authority is proposing related changes to its Handbook rules[8] which are intended to complement the changes made by this instrument.

8. The instrument revokes, for example, a requirement for investment firms providing portfolio management services to inform their client whenever the overall value of the portfolio depreciates by 10% and thereafter at multiples of 10%. HMT says that feedback from professional clients suggested that this requirement was not useful. While the obligation is revoked in relation to professional clients who will be able to agree with investment firms what reporting is appropriate based on their specific circumstances, HMT plans to consult on whether this change should also be extended to retail clients. The instrument also exempts investment firms providing portfolio management services from having to provide cost benefit analyses to professional clients when they switch the instruments in which they invest, after feedback from professional investors suggested that this requirement was superfluous. The obligation is revoked for professional clients but retained for retail clients.

Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021 (SI 2021/775)

9. This instrument allows non-religious weddings and civil partnerships to take place in outdoor spaces linked to already-approved venues in England and Wales. Confirmation must be secured from the superintendent registrar that the proposed location for the proceedings is "seemly and dignified". Other conditions are that the venue must be accessible to the public, clear directions posted, and that no food or alcoholic drink may be consumed prior to the ceremony. New applications for venues in outdoor spaces must also be linked to a suitable "built premises".

10. The measure is temporary, until 5 April 2022, to help deal with the backlog of ceremonies that has built up during the pandemic restrictions. Full consultation, an Impact Assessment etc will follow and a further instrument is promised in Spring 2022 to make more permanent arrangements which may also include religious ceremonies.

11. The Committee however notes that this legislation has been brought into effect within 24 hours of laying–this policy has been in development since 2019 and no aspect of its implementation meets the criteria for emergency

---

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulations 2001 (SI 2001/995) and Commission Delegated Regulation (EU) 2017/565 which supplements the EU's Markets in Financial Instruments Regulation (MiFIR).

8 See: Financial Conduct Authority, 'FCA Handbook': https://www.handbook.fca.org.uk/ [accessed 14 July 2021].

legislation, the main rationale given is to support the "wedding industry". **The Committee will be writing to the Minister to seek better justification for this breach of the convention that negative instruments should be laid at least 21 days before they come into effect ("the 21 day rule").**

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

	Ecodesign for Energy-Related Products and Energy Information (Lighting Products) Regulations 2021
	Licensing Act 2003 (2020 UEFA European Championship Licensing Hours) Order 2021[9]
	Pensions Regulator (Employer Resources Test) Regulations 2021
	Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 2) Order 2021

Instruments subject to annulment

SI 2021/754	Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021
SI 2021/755	Air Navigation (Overseas Territories) (Amendment) (No. 2) Order 2021
SI 2021/773	Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021
SI 2021/774	Markets in Financial Instruments (Capital Markets) (Amendment) Regulations 2021
SI 2021/775	Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021
SI 2021/780	Hydrocarbon Oil and Biofuels (Northern Ireland Private Pleasure Craft) Regulations 2021
SI 2021/781	Childcare Payments (Miscellaneous Amendment) Regulations 2021
SI 2021/786	Social Security (Scotland) Act 2018 (Disability Assistance for Children and Young People) Consequential Modifications) Order 2021

9 Not considered due to an accelerated procedure.

APPENDIX 1: CORRESPONDENCE: THE RELATIONSHIP BETWEEN GUIDANCE AND LEGISLATION AND THE ROLE OF SENIOR RESPONSIBLE OWNERS FOR STATUTORY INSTRUMENTS

Letter from Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee, to the Rt Hon. Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons

I am writing to you as Chair of the Secondary Legislation Scrutiny Committee (SLSC).

On 12 May, with other members of the SLSC, I joined the Delegated Powers and Regulatory Reform Committee (DPRRC) to hear you give evidence on legislative practice. During the evidence session, a number of issues were touched upon which had particular relevance to the SLSC. These included, amongst other things, the relationship between guidance and legislation, and quality control measures in relation to secondary legislation.

In evidence, you said: "I very strongly agree with your point that guidance is guidance and the law is the law. The Government should not give the impression that they can make law by guidance". I would therefore like to seek your views about an instrument that the SLSC considered at the end of May: the Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England) (No. 2) Order 2021 (SI 2021/548), and reported on it in its 2nd Report of this session. At paragraph 6, we said:

> "We note that there appears to be an inconsistency between the provisions in the Order which make it an offence to allow common pheasants and redlegged partridges to escape into protected areas in England without a licence, and the statutory guidance which states that any activity "must not encourage the released birds to inhabit or occupy an adjacent European site". We take the view that the statutory guidance appears to offer a more realistic approach to the not inconsiderable challenges of trying to prevent the movement of gamebirds in the wild. The mismatch between the provisions in the Order and the statutory guidance again raises concerns about the relationship between guidance and legislation which we have expressed repeatedly before."

This mismatch is a matter that we have raised more often in the context of instruments made in response to the pandemic, where the guidance appeared to be stricter than the law. On this occasion, the reverse appears to be the case. Neither circumstance is acceptable. We would welcome your proposals therefore on how this issue of a mismatch between guidance and legislation can be resolved to ensure not only clarity, but also congruence, between the two.

We are aware that an important element of quality control of statutory instruments has been the introduction of SI Senior Responsible Officers (SROs) in departments. This matter was raised in an evidence session held by the SLSC with three Permanent Secretaries on 20 April, and taken up again when you came before the DPRRC. You said:

> "Statutory instruments need to be got right. The processes that have been introduced around statutory instruments have been tightened up. If you go back five years, the Leader's office was not expected to have a Minister responsible for statutory instruments in each department.

> Things had been improving before my time and I hope that is continuing. Every department should have an SRO for this. We will take up the issue with the departments you have mentioned and will revert back to the committee on why there is this gap."

We have now received a list of SROs. While we are grateful for the list, we would welcome the further information you indicated you would provide about the departments which are currently recruiting an SRO (Cabinet Office, HM Treasury, MHCLG and the NIO). We were concerned to learn that these departments have yet to appoint SROs and would welcome further information, in particular, about when the recruitment exercises began and when it is expected that the posts will be filled. It would also assist us in our work if you would undertake to provide an updated list as when it is amended. It is our intention to make contact with the SROs to ensure a mutual understanding of what constitutes good practice in presenting secondary legislation to Parliament

I am copying this letter to Lord Blencathra, Chair of the DPRRC, and to Dame Elizabeth Gardiner, First Parliamentary Counsel.

16 June 2021

Letter from the Rt. Hon. Jacob Rees-Mogg MP, Lord President of the Council and Leader of the House of Commons, to Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your letter of 16 June following my evidence session with the Delegated Powers and Regulatory Reform Committee (DPRRC) and for the important points you raised regarding the distinction between legislation and guidance and the importance of quality control measures for secondary legislation.

As I mentioned in my letter to you of 14 February, as a general principle, legislation needs to be detailed and clear enough that guidance does not need to be relied upon for the purposes of interpretation. Similarly, where guidance accompanies legislation, it is important that it describes the effect of the legislation accurately. I have asked officials to remind departments of this. With reference to the specific case you mention, I understand the department will be writing to provide further details and would be happy to meet if the Committee wishes.

I agree that the role of Senior Responsible Officers (SRO) within departments is an important part of ensuring the quality of secondary legislation across government. I can confirm that the departmental vacancies you drew to my attention during the evidence session were as a result of personnel changes. MHCLG and the NIO have now filled these positions permanently, HM Treasury has appointed an interim SRO whilst they appoint a suitable permanent replacement and the Cabinet Office is in the process of appointing a replacement. An updated list will be sent in due course.

6 July 2021

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 13 July 2021, Members declared the following interests:

Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021 (SI 2021/754)

The Earl of Lindsay

Chairman, BPI Pension Trustees Limited

Attendance:

The meeting was attended by Lord Chartres, Lord German, Viscount Hanworth, Lord Hodgson of Astley Abbotts, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.