House of Lords
House of Commons

Joint Committee on Statutory Instruments

# Eleventh Report of Session 2021–22

**Drawing special attention to:**

*Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021* (**S.I. 2021/534**)

*Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations 2021* (**S.I. 2021/619**)

*Official Controls (Temporary Measures) (Coronavirus (Amendment) (No. 2) Regulations 2021* (**S.I. 2021/681**)

*Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 4) Regulations 2021* (**S.I. 2021/766**)

*Ordered by the House of Lords to be printed 15 September 2021*

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## Joint Committee on Statutory Instruments

### Current membership

**House of Lords**

Baroness D'Souza (*Crossbench*)

Baroness Gale (*Labour*)

Lord Haskel *(Labour)*

Baroness Newlove *(Conservative)*

Lord Rowe-Beddoe (*Crossbench*)

Baroness Scott of Needham Market (*Liberal Democrat*)

Lord Smith of Hindhead (*Conservative*)

**House of Commons**

Jessica Morden MP (*Labour, Newport East*) (Chair)

Dr James Davies MP (*Conservative, Vale of Clwyd*)

Paul Holmes MP (*Conservative, Eastleigh*)

John Lamont MP (*Conservative, Berwickshire, Roxburgh and Selkirk*)

Sir Robert Syms MP (*Conservative, Poole*)

Richard Thomson MP *(Scottish National Party, Gordon)*

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. 74, 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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# Instruments reported

**At its meeting on 15 September 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 four 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. 2021/534: Reported for defective drafting, for failure to comply with proper legislative practice and for requiring elucidation

### *Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021*

1.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it is defectively drafted in seven respects, fails to comply with proper legislative practice in one respect, and requires elucidation in one respect.**

1.2 This Order, which is subject to the negative resolution procedure, implements the Carbon Offsetting and Reduction Scheme for International Aviation ("the CORSIA") set out in Volume IV of Annex 16 to the 1944 Chicago Convention on International Civil Aviation.

1.3 Article 26(1) requires an aeroplane operator to notify the Regulator of any proposals for modification of its Emissions Monitoring Plan. Article 27(1) permits a Regulator to allow an aeroplane operator to notify modifications of the Emissions Monitoring Plan that are not significant. The Committee asked the Department for Transport to explain the intended difference between these two provisions and how they are intended to relate to each other in practice. In a memorandum printed at Appendix 1, the Department asserts that article 26(1) requires modifications to be submitted for approval whereas article 27(1) confers discretion on the Regulator to allow non-significant modifications, such as rectifying typographical errors and "changes analogous to those changes to a statutory instrument which can be effected by a correction slip", simply to be notified rather than also requiring to be approved. While the Committee finds this explanation interesting, the provisions do not achieve the intended policy result: as drafted, the discretion in article 27(1) is superfluous to the obligation in article 26(1), since all modifications must be notified to the Regulator. It is not made clear that the purpose of the discretion is to dispense with a requirement for approval. **The Committee accordingly reports article 27 for defective drafting**.

1.4 Article 37(7) imposes an obligation to use data provided by the International Civil Aviation Organisation to calculate total sectoral CO2 emissions and "the Sectoral Growth Factor" where the Regulator does not provide an annual aggregated Emissions Report by the appropriate deadline. The Committee asked the Department to explain who is intended to be subject to that obligation and where "Sectoral Growth Factor" is defined. In its memorandum, the Department acknowledges that article 37(7) was included in error as it purports to transpose an obligation imposed by the CORSIA on an international body; it undertakes to correct the error in an amending Order. **The Committee accordingly reports article 37(7) for defective drafting, acknowledged by the Department**.

1.5 Part 5 of the Order provides for compliance with its obligations to be monitored by the Regulator. Article 45(1) allows the Regulator to delegate any of its powers under Part 5 to an "authorised person", and article 47(1) confers powers of entry on a Regulator or an authorised person acting under a warrant issued under article 48. Article 48(1), however, merely confers power on a judge to "by warrant authorise a Regulator to designate an authorised person to exercise the power in article 47(1)(a)". It appeared to the Committee that this unnecessarily duplicates article 45(1) while also not conferring power on the judge to issue a warrant allowing the Regulator to exercise the power of entry directly. It asked the Department to explain. In its memorandum, the Department acknowledges that article 48(1) does not achieve the intended policy intent and undertakes to correct it. **The Committee accordingly reports article 48(1) for defective drafting, acknowledged by the Department**.

1.6 Article 65(1)(b) provides for the right to appeal notices given by the Regulator under specified provisions. Article 65(2)(e) specifies a notice given under article 26(2) as one that may be appealed, and article 67(2)(c) provides that bringing an appeal does not suspend the effect of a notice under that article. Given that article 26(2) imposes an obligation on aeroplane operators and makes no reference to a notice given by the Regulator, the Committee asked the Department to explain its inclusion in articles 65(2)(e) and 67(2)(c). In its memorandum, the Department acknowledges that this was done in error (the appeal would lie against a decision of the Regulator under article 27(2)) and undertakes to make appropriate amendments. **The Committee accordingly reports articles 65(2)(e) and 67(2)(c) for defective drafting, acknowledged by the Department**.

1.7 Schedule 1 transposes into domestic law Appendix 1 of Annex 16, Volume IV, which sets out in table form the deadlines by which parties must comply with the obligations imposed by the CORSIA. Paragraph 1(2) to (6) provides that "aeroplane operators and Regulators must comply with the requirements according to the timeline" in each table. The Committee noticed, however, that several of the requirements listed in the timelines are imposed on the Secretary of State, and that corresponding paragraphs of the Appendix require compliance by "aeroplane operators and States". The Committee asked the Department to explain the omission. In its memorandum, the Department acknowledges that the omission is in error and undertakes to correct it. **The Committee accordingly reports paragraph 1(2) to (6) of Schedule 1 for defective drafting, acknowledged by the Department**.

1.8 Schedules 7 and 8 set out the procedure for appeals before the Scottish Land Court and the Planning Appeals Commission (Northern Ireland). Paragraph 2 of each Schedule provides for the deadline by which an appeal must be made: in Scotland, "the appropriate form must be sent … before the expiry of the period of 28 days beginning with the date of the decision"; in Northern Ireland, "a notice of appeal … must be given before the expiry of the period of 47 days beginning with the date on which the decision of the Regulator takes effect". The Committee asked the Department to explain how these deadlines will be calculated where an appeal is made in relation to a notice under the provisions listed in article 65(2), and how the appellant will be aware of "the date of the decision" or "the date on which the decision of the Regulator takes effect". In its memorandum, the Department asserts that these dates "are indicated in the provisions referred to in article 65(2)" and that they include, *inter alia*, "the expiry of a specified time period (deemed withdrawal of application), specific notices (information notices, penalty notices) … and the date of issue of plans or conditions applicable to plans". It states: "A notice which provides a decision provides a definite and fair point in time on which to base the date on which the decision takes effect." While the Committee agrees with this statement as a matter of principle, it remains concerned that the relevant paragraphs are not sufficiently clear for the purposes of the civil right of appeal. The Committee does not agree that either the date of the Regulator's decision or the date that decision takes effect is necessarily clear from the provisions specified in article 65(2) (and it is not clear that these are necessarily the same date). Article 24(3), for example, merely provides that an Emissions Monitoring Plan may include any conditions the Regulator considers necessary to give proper effect to the requirements of the Order; it is left to be inferred, and nowhere expressly stated, that here "the date of the decision" (or the date the decision takes effect) is the date of the notice that contains the relevant conditions. Under articles 31(2) and 33(1), the Regulator is required first to decide a matter or calculate a figure and separately to inform the aeroplane operator of its decision or the figure it has calculated; the drafting of these provisions suggests that the date of the decision or calculation and the date the operator is informed of it may be different. Articles 50(1), 52(1) and 53(2) and (6) allow the Regulator to give an information notice, an enforcement notice or a civil penalty notice on a person, each of which must include a deadline for compliance; it is not clear whether the "date the decision takes effect" is the date of the notice or the date of the deadline for compliance with it. While it may be possible to infer what the deadlines are in practice by reference to the notices actually given by the Regulator, the Committee considers that deadlines for the exercise of fundamental civil rights should be clear and unambiguous. It would have been preferable for the deadlines in Schedules 7 and 8 to be expressed by reference to the date of the relevant notice for appeals made under article 65(1)(b). **The Committee accordingly reports paragraph 2 of Schedule 7 and paragraph 2 of Schedule 8 for defective drafting**.

1.9 The preamble recites that the Order was made with the consent of the Treasury, as required by the enabling Act. The Committee asked the Department to explain why that consent was not also included in the signature block. In its memorandum, the Department explains that while the Treasury's consent would usually be reflected in a signature, the Department followed the precedent set by the Air Navigation Order 2016. The Committee reiterates the comments it made in its Fourth Report of Session 2021–22, in relation to S.I. 2021/486: inconsistency among different instruments as to whether the precondition of consent by a separate Department is both recited in the preamble and reflected by signature is an unnecessary and unhelpful source of confusion, and the Committee expects the Government to be consistent in following its own practice as set out in paragraph 3.20 of Statutory Instrument Practice. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice**.

1.10 Article 28(3) of and paragraph 4(3) and (7) of Schedule 4 to the Order refer to "the relevant aeroplane operator documentation" in relation to obligations on the aeroplane operator to determine fuel density values to calculate fuel mass. The Committee asked the Department to explain what this was intended to refer to. In its memorandum, the Department explains that this is intended to cover any documentation that the aeroplane operator holds which is relevant to establishing fuel density; it lists several examples. **The Committee accordingly reports article 28(3) and paragraph 4(3) and (7) of Schedule 4 for requiring elucidation, provided in the Department's memorandum**.

1.11 The Committee also asked the Department to confirm whether, in Schedule 6, cross-references in paragraphs 2(8) and (9) and 3(23) are incorrect. In its memorandum, the Department acknowledges that they are and undertakes to correct them. **The Committee accordingly reports paragraphs 2(8) and (9) and 3(23) of Schedule 6 for defective drafting, acknowledged by the Department**.

## 2 S.I. 2021/619: Reported for defective drafting

### *Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations 2021*

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

2.2 These Regulations, which are subject to the negative resolution procedure, establish a new dispute resolution procedure in relation to a tenant's request for the landlord's consent to an activity that is restricted by the terms of their agricultural holding tenancy agreement, or to a variation of the terms. The purpose of the consent is to enable the tenant to apply for new financial assistance schemes or to meet a statutory obligation.

2.3 The procedure requires the tenant to provide the landlord with notice setting out certain information, including details of the request being made. After a certain period, the tenant may refer the matter to an arbitrator or a third party. Regulation 3(7) states that the arbitrator or third party may modify the tenant's notice "if necessary and justified to do so taking into consideration all the relevant circumstances". The Committee asked the Department for Environment, Food and Rural Affairs to explain the purpose of the power to modify the notice given that the notice appears to be a preliminary step pre-dating the involvement of the arbitrator or third party and what criteria would be applied in determining whether the modification is necessary or justified.

2.4 In a memorandum printed at Appendix 2, the Department explains that whilst the arbitrator or third party is not bound to only consider the request but may make "such other award or determination as the arbitrator or third party considers reasonable and just" (regulation 4(1)), the power to modify the notice was included following consultation and is intended to deal with situations where the notice is not, or no longer, accurate and ought to be amended to reflect what the arbitrator or third party is being asked to consider. The purpose is to avoid wasted costs and time. The Committee considers that the policy intention of restricting the power to circumstances where the notice requires amending at the tenant's request due to a lack of accuracy should have been incorporated into the provision. Given that the award or determination may include conditions restricting the tenant's ability to make any subsequent reference to arbitration or third party determination in respect of the same request and in relation to the same tenancy (regulation 4(2)(c)), it is particularly important that the regulations provide clarity as to the intended parameters of the power to modify the notice **The Committee accordingly reports regulation 3(7) for defective drafting**.

## 3 S.I. 2021/681: Reported for requiring elucidation

### *Official Controls (Temporary Measures) (Coronavirus (Amendment) (No. 2) Regulations 2021*

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

3.2 These Regulations, which are subject to the negative resolution procedure, extend the period during which the competent authorities responsible for sanitary and phytosanitary controls in England, Scotland and Wales may enact or maintain temporary measures in response to the coronavirus pandemic. They are made by the Secretary of State with consent from the Scottish Ministers and the Welsh Ministers, as required by Article 3(2B) of EUR 2017/625. That consent is recited in the preamble but not reflected in the signature block. The Committee asked the Department for Environment, Food and Rural Affairs to explain the omission (having regard to the paragraphs relating to S.I. 2021/486 in its Fourth Report of Session 2021–22). In a memorandum printed at Appendix 3, the Department explains that in its view, the statement in Statutory Instrument Practice that approval from Senedd Cymru should only be recited in the preamble and not indicated by signature applies to all the devolved administrations (on the basis that the reference to Senedd Cymru is a reference to the devolved executive—now the Welsh Ministers—rather than to the devolved legislature). The Department acknowledges, however, that Government practice in this regard has been inconsistent; it asserts that steps will be taken across the Government Legal Department to introduce a more consistent approach and clarify Statutory Instrument Practice on this point. The Committee welcomes the undertaking and **accordingly reports these Regulations for requiring elucidation, provided in the Department's memorandum**.

## 4 S.I. 2021/766: Reported for purporting to have retrospective effect without express authority and for requiring elucidation

### *Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 4) Regulations 2021*

4.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they purport to give retrospective effect in one respect and require elucidation in one respect**.

4.2 These Regulations, which are subject to the negative resolution procedure, amend the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (S.I. 2021/582). Regulation 16(1) states that any amendment does not apply to a person who arrived in England before that amendment came into force. The exceptions to this include regulations 7 and 14.

4.3 Regulation 7 removes the requirement for an operator to ensure a passenger has completed a passenger locator form and has notification of a negative test if the passenger falls within certain categories (extradition, prisoner repatriation or deportation). The Committee asked the Department for Transport to explain why this provision was made retrospective. In a memorandum printed at Appendix 4, the Department explains that it was not the policy intention for operators to incur liability in these cases and whilst no enforcement action has been taken against operators for bringing such persons to England, the Department acknowledged a potential retrospective effect. Subordinate legislation can lawfully have retrospective effect only if the enabling power provides for it expressly or by necessary implication. In this case, if there is no practical effect of making the provision retrospective then the retrospection is unnecessary, while if it will or may have practical effect it is improper. In the absence of an identified power to make regulation 7 have retrospective effect **the Committee reports regulation 16(1) on the ground that it purports to give regulation 7 retrospective effect where the parent statute confers no express authority so to provide**.

4.4 Regulation 14 substitutes the onboard announcement message. The Committee asked the Department to explain why regulation 14 was expressly excluded from regulation 16(1), which states that the amendment does not apply in relation to a person who arrived in England before the amendment came into force. In its memorandum, the Department explains that "the desired effect is instead provided by regulation 16(2), which states that the amendment made by regulation 14 does not apply in relation to any passenger on a conveyance that departed for England before its coming into force". Whilst the Committee considers that a natural conclusion in this instance is for the latter category to encompass those that have arrived in England, the Committee considers that it would have been clearer to not exclude regulation 14 from the general stipulation in regulation 16(1). In this instance **the Committee reports regulation 16(1) for requiring elucidation**.

# Instruments not reported

**At its meeting on 15 Septembers 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. 2021/988** | Heavy Commercial Vehicles in Kent (No. 2) (Amendment) Order 2021 |

## Draft Instruments requiring affirmative approval

| | |
|---|---|
| **Draft** | Airports Slot Allocation (Alleviation of Usage Requirements) (No. 2) Regulations 2021 |
| **Draft** | Internal Market Information System Regulation (Amendment etc.) Regulations 2021 |
| **Draft** | Water and Sewerage Undertakers (Exit from Non-household Retail Market) (Consequential Provision) Regulations 2021 |
| **Draft** | Food (Promotion and Placement) (England) Regulations 2021 |
| **Draft** | Charities Act 2011 (Exempt Charities) (British Council) Regulations 2021 |
| **Draft** | Heavy Commercial Vehicles in Kent (No. 1) (Amendment) Order 2021 |
| **Draft** | National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021 |
| **Draft** | National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 |

## Instruments subject to annulment

| | |
|---|---|
| **S.I. 2021/614** | Aviation Safety (Amendment) (No. 2) Regulations 2021 |
| **S.I. 2021/677** | Education (Student Loans) (Repayment) (Amendment) (No. 2) Regulations 2021 |
| **S.I. 2021/698** | Sea Fisheries (Amendment etc.) Regulations 2021 |
| **S.I. 2021/738** | Child Support (Collection and Enforcement and Maintenance Calculation) (Amendment) Regulations 2021 |
| **S.I. 2021/763** | Child Support (Collection and Enforcement and Maintenance Calculation) (Amendment No. 2) Regulations 2021 |
| **S.I. 2021/780** | Hydrocarbon Oil and Biofuels (Northern Ireland Private Pleasure Craft) Regulations 2021 |
| **S.I. 2021/781** | Childcare Payments (Miscellaneous Amendment) Regulations 2021 |

| | |
|---|---|
| **S.I. 2021/805** | Teachers' Pensions (Miscellaneous Provisions) (Amendment) Regulations 2021 |
| **S.I. 2021/806** | School Teachers' Pay and Conditions (England) (Coronavirus) (Amendment) Order 2021 |
| **S.I. 2021/818** | Merchant Shipping (Prevention of Pollution from Noxious Liquid Substances in Bulk and Prevention of Oil Pollution) (Amendment) Regulations 2021 |
| **S.I. 2021/824** | M6 Motorway (Junction 19) (40 Miles Per Hour Speed Limit) Regulations 2021 |
| **S.I. 2021/841** | Home Loss Payments (Prescribed Amounts) (England) Regulations 2021 |
| **S.I. 2021/845** | Education (School Inspection) (England) (Coronavirus) (Amendment) Regulations 2021 |
| **S.I. 2021/852** | Education (Pupil Registration) (England) (Coronavirus) (Amendment) Regulations 2021 |
| **S.I. 2021/857** | Occupational Pension Schemes (Climate Change Governance and Reporting) (Miscellaneous Provisions and Amendments) Regulations 2021 |

## Draft Instruments subject to annulment

| | |
|---|---|
| **Draft** | North Kesteven (Electoral Changes) Order 2021 |
| **Draft** | Central Bedfordshire (Electoral Changes) Order 2021 |

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

| | |
|---|---|
| **S.I. 2021/706** | United Kingdom Internal Market Act 2020 (Commencement No. 2) Regulations 2021 |
| **S.I. 2021/712** | NHS (Charitable Trusts Etc) Act 2016 (Commencement) Regulations 2021 |
| **S.I. 2021/739** | Financial Services Act 2021 (Commencement No. 2) Regulations 2021 |

# Appendix 1

## S.I. 2021/534

### *Air Navigation (Carbon Offsetting and Reduction Scheme for International Aviation) Order 2021*

1. In its letter to the Department of 14th July 2021, the Committee requested a memorandum on the following points:

> *1. Explain why the signature block to this instrument does not record the Treasury's consent recited in the preamble (having regard to the paragraphs relating to S.I. 2021/486 in our Fourth Report of Session 2021–22).*
>
> *2. Explain—*
>
> *(a) the difference between notifying a proposal for modification of an Emissions Monitoring Plan under article 26(1) and notifying a modification of an Emissions Monitoring Plan under article 27(1); and*
>
> *(b) by reference to examples, the intended effect in practice of article 27(1) and how it compares to the obligation in article 26(1).*
>
> *3. Explain what "the relevant aeroplane operator documentation" is intended to mean in article 28 and paragraph 4(3) and (7) of Schedule 4.*
>
> *4. In article 37(7), explain—*
>
> *(a) who is intended to be subject to the duty to use the data provided ICAO for the purposes specified in that paragraph; and*
>
> *(b) where "Sectoral Growth Factor" is defined, or whether it is the same as the "Sector's Growth Factor" to which the tables in Schedule 1 refer.*
>
> *5. In relation to article 48(1), explain—*
>
> *(a) why it is necessary to confer a power on the judge to "authorise a Regulator to designate an authorised person to exercise the power in article 47(1)(a)", given that article 45(1) allows the Regulator to authorise a person to exercise the Regulator's powers under Part 5; and*
>
> *(b) why it does not confer a power on the judge to issue a warrant that allows a Regulator to exercise a power of entry directly, given that article 47(1)(a) applies to "a Regulator or an authorised person".*
>
> *6. Explain what notice is required to be issued under article 26(2), for the purposes of the right to appeal under article 65(1)(b) and the effect of the appeal under article 67(2)(c).*
>
> *7. Explain why paragraph 1(2) to (6) of Schedule 1 only requires the compliance of aeroplane operators and Regulators, given that several of the requirements*

*listed in the timeline and set out in the Order are imposed on the Secretary of State, and given that the corresponding Appendix of the Chicago Convention requires the compliance of "aeroplane operators and States".*

*8. Confirm whether in Schedule 6—*

*(a) in paragraph 2(8) and (9), references to sub-paragraph (11) should be to sub-paragraph (10); and*

*(b) in paragraph 3(23), the reference to sub-paragraphs (5) to (7) should be to sub-paragraph (4), so as to reflect the cross-references in equivalent provisions of the Chicago Convention.*

*9. Explain how the deadlines in paragraph 2 of Schedule 7 and paragraph 2 of Schedule 8 will be calculated where the appeal is made in relation to a notice under the provisions listed in regulation 65(2), and in particular how an appellant will be aware of "the date of the decision" (in Scotland) or "the date on which the decision of the Regulator takes effect" (in Northern Ireland).*

2. The Department's response to each of these points is as follows.

3. "**Explain why the signature block to this instrument does not record the Treasury's consent recited in the preamble (having regard to the paragraphs relating to S.I. 2021/486 in our Fourth Report of Session 2021–22)**."

4. Compliance with the precondition of consent required under s.60(3)(p) of the Civil Aviation Act 1982 was properly achieved by obtaining the requisite consent and recording that consent in the preamble, as presented in the Order. The consent is set out in the preamble in the form prescribed under the Statutory Instrument Practice (SIP) for instruments going before the Privy Council.

5. The Department notes the paragraphs relating to S.I. 2021/486 in the Committee's Fourth Report of Session 2021–22. It recognises that whilst it is not a requirement in order that the instrument be lawfully made, the Treasury's consent to the Order would usually be reflected in a signature. The Parliamentary Unit at HM Treasury determined that, as HM Treasury consent was not required on the face of the instrument, Treasury Commissioners' signatures were not required, and accordingly provided consent in the form of an e-mail dated 26/03/2021. The Parliamentary Unit took the same approach that was taken with the Air Navigation Order 2016, which Treasury Commissioners did not sign.

6. "**Explain—**

**(a) the difference between notifying a proposal for modification of an Emissions Monitoring Plan under article 26(1) and notifying a modification of an Emissions Monitoring Plan under article 27(1); and**

**(b) by reference to examples, the intended effect in practice of article 27(1) and how it compares to the obligation in article 26(1).**"

7. The Department's position is that article 26(1) requires modifications for an Emissions Monitoring Plan to be submitted to the regulator for approval. Article 27(1) supplements

Article 26(1) in enabling minor, non-significant, modifications to be simply notified to the regulator, giving the Regulator a discretion to allow for a quicker process for changes that are not significant.

8. Examples of significant changes are provided in article 27(4). The Department considers that non-significant modifications include rectifying typographical errors and other changes analogous to those changes to a statutory instrument which can be effected by a correction slip.

9. "**Explain what "the relevant aeroplane operator documentation" is intended to mean in article 28 and paragraph 4(3) and (7) of Schedule 4.**"

10. The Department considers the words "relevant aeroplane operator documentation" to have their ordinary English meaning. Namely, that they cover any documentation that the aeroplane operator holds which is relevant to establishing fuel density, such as fuel specifications documentation, technical certifications of the fuels against international standards, blending ratios, invoices, etc, and any other documentation the aeroplane operator has in relation to the fuels being uplifted to their aircraft that are relevant to establishing the fuel's density.

11. "**In article 37(7), explain—**

**(a) who is intended to be subject to the duty to use the data provided ICAO for the purposes specified in that paragraph; and**

**(b) where "Sectoral Growth Factor" is defined, or whether it is the same as the "Sector's Growth Factor" to which the tables in Schedule 1 refer**."

12. In including article 37(7) in this instrument, the Department sought to implement Annex 16, Volume IV, paragraph 2.5.2:

13. "**2.5.2 State**

> *2.5.2.1 If the aeroplane operator does not provide its annual Emissions Report in accordance with the timeline as defined in Appendix 1, then the State to which it is attributed shall engage with the aeroplane operator to obtain the necessary information. If this proves unsuccessful, then the State shall estimate the aeroplane operator's annual emissions using the best available information and tools, such as the ICAO CORSIA CO2 Estimation and Reporting Tool (CERT) as described in Appendix 3.*
>
> *2.5.2.2 If the State does not provide its annual aggregated Emissions Report to ICAO in accordance with the timeline as defined in Appendix 1, then the data provided by ICAO shall be used to fill these gaps and calculate the total sectoral CO2 emissions in a given year and the Sectoral Growth Factor, as defined in Chapter 3.*"

14. However, the Department notes that there is no one other than the International Civil Aviation Organisation (ICAO) who will need to calculate the total sectoral CO2 emissions or the Sectoral Growth Factor, so the onus is therefore on ICAO to fill any gaps in reports submitted by a State, and any sanction for non-compliance is a matter for ICAO.

Accordingly, and as the Department does not purport to impose obligations on ICAO, an international body, article 37(7) should be omitted from the instrument. Provision will be included in an amending Order accordingly.

15. "**In relation to article 48(1), explain—**

**(a) why it is necessary to confer a power on the judge to "authorise a Regulator to designate an authorised person to exercise the power in article 47(1)(a)", given that article 45(1) allows the Regulator to authorise a person to exercise the Regulator's powers under Part 5; and**

**(b) why it does not confer a power on the judge to issue a warrant that allows a Regulator to exercise a power of entry directly, given that article 47(1)(a) applies to "a Regulator or an authorised person".**

16. The Department is grateful to the Committee for these questions and agrees that article 48(1) might have been drafted more clearly. The Department's intention, in making this provision, was to be consistent with the approach taken in the Greenhouse Gas Emissions Trading Scheme Order 2020 which covers the UK's domestic emissions trading scheme for aviation carbon emissions. The article should properly refer to the power of a judge to issue a warrant to authorise "the regulator or an authorised person" to exercise the power in article 47(1)(a). Provision to amend this article will be included in an amending Order.

17. "**Explain what notice is required to be issued under article 26(2), for the purposes of the right to appeal under article 65(1)(b) and the effect of the appeal under article 67(2)(c).**"

18. The Department acknowledges that there is no relevant notice that is required to be issued under Article 26(2) for the purposes of the right to appeal under article 65(1)(b) or the effect of the appeal under article 67(2)(c). Article 26(2) enables the aeroplane operator to resubmit an Emissions Monitoring Plan. Pursuant to articles 27(1) and (2), the modified Emissions Monitoring Plan is subject to a regulator decision to approve or confirm that the changes are not significant. As a right of appeal would lie against a regulator's decision with regard to such resubmitted plans, the references to article 26(2) in articles 65(1)(b) and 67(2)(c) should instead refer to article 27(2). The Department commits to making the appropriate amendment.

19. "**Explain why paragraph 1(2) to (6) of Schedule 1 only requires the compliance of aeroplane operators and Regulators, given that several of the requirements listed in the timeline and set out in the Order are imposed on the Secretary of State, and given that the corresponding Appendix of the Chicago Convention requires the compliance of "aeroplane operators and States"**".

20. The Department acknowledges that paragraphs 1(2) to (6) of Schedule 1 should also refer to the compliance of the Secretary of State with the relevant requirements. The Department commits to making the appropriate amendment.

21. "**Confirm whether in Schedule 6—**
**(a) in paragraph 2(8) and (9), references to sub-paragraph (11) should be to sub-paragraph (10); and**

**(b) in paragraph 3(23), the reference to sub-paragraphs (5) to (7) should be to sub-paragraph (4), so as to reflect the cross-references in equivalent provisions of the Chicago Convention.**"

22. The Department acknowledges that references to sub-paragraph (11) in paragraphs 2(8) and (9) of Schedule 6 are in error. In paragraph 2(8) of Schedule 6, the cross-reference should be to sub-paragraphs "(10) to (13)". In paragraph 2(9) of Schedule 6, the cross-reference to sub-paragraph (11) should also be to sub-paragraph (10).

23. Further the Department acknowledges that in paragraph 3(23), the reference to sub-paragraphs (5) to (7) are in error.

24. The Department commits to making the appropriate amendments.

25. "**Explain how the deadlines in paragraph 2 of Schedule 7 and paragraph 2 of Schedule 8 will be calculated where the appeal is made in relation to a notice under the provisions listed in regulation 65(2), and in particular how an appellant will be aware of "the date of the decision" (in Scotland) or "the date on which the decision of the Regulator takes effect" (in Northern Ireland).**"

26. The aeroplane operators that are administered by the regulators in Scotland and Northern Ireland will be subject to the provisions of Schedules 7 and 8, respectively. The dates of the decision or when the decision takes effect are indicated in the provisions referred to in article 65(2). They are case specific but include, for example, the expiry of a specified time period (deemed withdrawal of application), specific notices (information notices, penalty notices), a decision that the regulator may be asked to make (in determining confidentiality of information), calculations and estimates made to specific timeframes (specified in Schedule 1), and the date of issue of plans or conditions applicable to plans. The purpose of including these Schedules was to be consistent with the approach taken in the Greenhouse Gas Emissions Trading Scheme Order 2020 which covers the UK's domestic emissions trading scheme for aviation carbon emissions. A notice which provides a decision provides a definite and fair point in time on which to base the date on which the decision takes effect.

**Department for Transport**

**20 July 2021**

# Appendix 2

## S.I. 2021/619

### *Agricultural Holdings (Requests for Landlord's Consent or Variation of Terms and the Suitability Test) (England) Regulations 2021*

1. In its letter to the Department for Environment, Food and Rural Affairs of 14 July 2021 the Joint Committee requested a memorandum on the following points:

> *Explain—*
>
> *(1) the purpose and effect of the power contained in regulation 3(7) to modify the tenant's notice, given that the notice appears to be a preliminary step pre-dating the involvement of the arbitrator; and*
>
> *(2) by reference to what criteria the question of whether the modification is necessary or justified is intended to be determined.*

2. In respect of question (1), there was considerable consultation with industry representatives in the preparation of this instrument. As part of that consultation, we were advised that from their experience it would be beneficial to save time and costs in certain circumstances to include provision dealing with the situation where the request set out in the tenant's notice is not, or is no longer, accurate and ought to be amended to reflect the request that the arbitrator or third party is being asked to consider.

3. For example, where the request is made in order to access relevant financial assistance, regulation 3(6)(d) requires the notice to describe the activities proposed on the holding if the application for financial assistance is successful. If these should change between the giving of the notice and the point at which the arbitrator or third party is to make their award or determination, perhaps for reasons outside the tenant's control to do with the terms of the financial assistance, it may be necessary and justified to amend the notice to reflect accurately the request being made and the proposed actions on the holding that are to be considered by the arbitrator or third party notwithstanding the provisions of regulation 4 (which do not restrict the arbitrator or third party to making the award or determination sought in the original notice).

4. A decision was therefore taken to include such a provision to enable the arbitrator or third party, as applicable, to modify the tenant's notice to amend or redefine the request they are being asked to consider in order to reflect the request accurately. This is for the purpose of avoiding wasted costs and time but is limited to those modifications which are necessary and justified.

5. In respect of question (2), our view was that as this is a narrow power intended for use in respect of manifest corrections being required, no additional specific criteria were needed (particularly given the general principles set out in section 1 of the Arbitration Act 1996, the general duty of the tribunal set out in section 33 and the terms of third party determination agreements). There are also existing, analogous duties placed on the

arbitrator or third party to be found in the Agricultural Holdings Act 1986, for example, under section 6(2), to consider what is reasonable and just between landlord and tenant when determining written terms of the tenancy.

**Department for Environment, Food and Rural Affairs**

**19 July 2021**

# Appendix 3

## S.I. 2021/681

### *Official Controls (Temporary Measures) (Coronavirus (Amendment) (No. 2) Regulations 2021*

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

> *Explain why the signature block to this instrument does not record the consent of the Scottish Ministers and the Welsh Ministers as recited in the preamble (having regard to the paragraphs relating to S.I. 2021/486 in our Fourth Report of Session 2021–22).*

2. Article 141 of the Official Controls Regulation (EUR 2017/625) ("OCR") provides that:

> "Where the appropriate authority has evidence of a serious disruption in a control system of any of the constituent territories of the British Islands and such disruption may constitute a widespread risk to human, animal or plant health, animal welfare or, as regards GMOs and plant protection products, also to the environment, or result in a widespread infringement of the rules referred to in Article 1(2), the appropriate authority must make regulations adopting one or more of the following measures, to be applied until such disruption is eliminated:…".

3. The "appropriate authority" is defined in Article 3(2B) of the OCR as being the Secretary of State:

> *"(a) in relation to any functions exercisable in relation to a matter which is outside devolved competence; or*
>
> *(b) in any other case, if consent is given—*
>
> *(i) in the case of functions conferred, or any provision in regulations applying, in relation to Wales, by the Welsh Ministers;*
>
> *(ii) in the case of functions conferred, or any provision in regulations applying, in relation to Scotland, by the Scottish Ministers".*

4. In seeking to exercise these powers to make the Official Controls (Temporary Measures) (Coronavirus) (Amendment) (No. 2) Regulations 2021, the Secretary of State sought the consent of the Welsh Ministers and the Scottish Ministers as set out in Article 3(2B). Having obtained that consent, the Secretary of State was the "appropriate authority" empowered to make regulations under Article 141.

5. The Department does not consider that there is a requirement for regulations made under Article 141, in circumstances where the devolved administrations have given their consent for the regulations to apply in relation to a matter within devolved competence,

to be made jointly with ministers from the devolved administration. The power in these circumstances rests with the "appropriate authority", which in this case is the Secretary of State.

6. The Department also considers there to be no requirement that consent must be established by signature. It is the Department's view that the need to obtain consent in Article 3(2B) does not create a requirement for that consent to be evidenced by the inclusion of a signature in the signature block. Confirmation that consent has been obtained can be achieved, after properly obtaining the requisite consent, by recording that consent in the preamble in accordance with legislative practice. If the evidence for the consent of the devolved administrations is in question in a vires challenge, it can of course be provided.

7. Paragraphs 3.20.2 and 3.20.3 of Statutory Instrument Practice states the following on multiple signatures:

> *"3.20.2 Instruments are sometimes required to be made by more than one Minister or Department, or require the confirmation, approval or consent of some further Minister or Department.*
>
> *3.20.3 Where an SI requires only the agreement of the National Assembly for Wales this approval does not need to be indicated by a signature. Approval should be recited in the preamble, in the same way as the approval of Parliament on affirmative resolution instruments."*

8. The Department considers that this indicates that consent from the devolved administrations does not need to be included in the signature block. The phrase "Minister or Department" in paragraph 3.20.2 clearly refers to a Minister of the Crown or a Department of Her Majesty's Government. The Welsh Ministers and the Scottish Ministers are not a "Minister or Department" in this sense. Moreover, the Welsh Ministers are the statutory successor to the National Assembly for Wales in the context of paragraph 3.20.3.

9. The Department notes that in both the Official Controls, Plant Health, Seeds and Seed Potatoes (Amendment etc.) Regulations 2021 (S.I. 2021/426), and the Official Controls (Exemptions from Controls at Border Control Posts) (Amendment) Regulations 2021 (S.I. 2021/453), the Secretary of State exercised powers as the "appropriate authority" and cited consent from the devolved administrations in accordance with the preconditions in Article 3(2B) of the OCR, in the preambles to those instruments without including the signatures of Ministers from the devolved administrations.

10. The Department therefore considers that it was sufficient to recite the fact of the consent in the preamble and that no further steps were needed to give legal effect to the instrument. However, the Department would acknowledge that there may be a lack of consistency across Government on this issue. In respect of this, the Department has engaged with the SI Hub in the Government Legal Department, which will take steps with a view to introducing a more consistent approach, and clarifying Statutory Instrument Practice, on the point.

**Department for Environment, Food and Rural Affairs**

**19 July 2021**

# Appendix 4

## S.I. 2021/766

### *Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 4) Regulations 2021*

1. By a letter dated 14 July 2021, the Joint Committee on Statutory Instruments requested a memorandum on the following points:

> *"(1) Explain the reference to regulation 14 in regulation 16(1).*
>
> *(2) Explain why the operation of regulation 7 is made retrospective (in contrast to most of the regulations) by regulation 16(1), so as to remove liability that has already been incurred."*

2. Regulation 14 is excluded from the transitional effect of regulation 16(1) because the desired effect is instead provided by regulation 16(2), which states that the amendment made by regulation 14 does not apply in relation to any passenger on a conveyance that departed for England before its coming into force.

3. While regulation 16(2) is most obviously intended to deal with conveyances that have departed for England before regulation 14's coming into force and will not arrive until after that time, the description within it encompasses every person in relation to whom such an amendment could theoretically have any effect (a passenger on a conveyance that has departed for England while the principal Regulations are in force) other than a passenger on a conveyance that will depart for England at or after the amendment's coming into force.

4. In relation to regulation 7, it was never the Department's intention that operators should incur liability in relation to prisoners, etc., who could or would not comply with the passenger requirements in the principal Regulations and no enforcement action has been taken against operators for bringing such persons to England. In the circumstances, the Department considered that retaining liability would serve no practical purpose but acknowledges that doing so would have avoided any potential retrospective effect and (due to the lack of enforcement) caused no practical difficulties for operators.

**Department for Transport**

**20 July 2021**

# Formal Minutes

### Wednesday 15 September 2021

Virtual meeting

Members present:

Jessica Morden (*in the Chair*)

| | |
|---|---|
| Dr James Davies | Baroness Newlove |
| Baroness Gale | Lord Rowe-Beddoe |
| Lord Haskel | Baroness Scott of Needham Market |
| Paul Holmes | Liz Twist |
| John Lamont | |

Draft Report, proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 4.4 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 4.

*Resolved*, That the Report be the Eleventh Report of the Committee to both Houses.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till Wednesday 22 September at 3.40 p.m.