



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Twentieth Report
of Session 2021–22**

Drawing special attention to:

Competition Act 1998 (Carbon Dioxide) (Public Policy Exclusion) Order 2021 (S.I. 2021/1169)

Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No.16) Regulations 2021 (S.I. 2021/1179)

Tribunal Procedure (Amendment No. 2) Rules 2021 (2021/1183)

Channel Tunnel (Arrangements with the Kingdom of the Netherlands) (Amendment) Order 2021 (2021/1190)

Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2021 (2021/1196)

*Ordered by the House of Lords
to be printed 12 January 2022*

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Joint Committee on Statutory Instruments

Current membership

House of Lords

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[Baroness Gale](#) (*Labour*)

[Lord Haskel](#) (*Labour*)

[Baroness Newlove](#) (*Conservative*)

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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. 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

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The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

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 12 January 2022 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 five 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. 2021/1169: Reported for defective drafting

Competition Act 1998 (Carbon Dioxide) (Public Policy Exclusion) Order 2021

1.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.**

1.2 This Order, which is subject to the negative resolution procedure, excludes from the application of the prohibition in Chapter 1 of the Competition Act 1998 agreements between distributors relating to coordination or information sharing (regarding the allocation, movement and distribution of CO₂ to consumers and, in particular, essential users) for the purpose of preventing or mitigating the disruption to the supply of CO₂ to distributors, consumers and, in particular, essential users in any part of the UK. Article 2 defines essential user as “a consumer who requires CO₂ for the purpose of maintaining the supply of essential goods or services, such as goods or services relating to animal welfare, energy, food, water or health.” The Committee asked the Department for Business, Energy and Industrial Strategy to explain, in addition to the examples listed, what criteria will be applied in deciding what are essential goods and services. In a memorandum printed at Appendix 1, the Department explains that they expect distributors “to take a common-sense approach” to the meaning of essential goods and services and that in practice there would not be any material legal uncertainty as to whether the exclusion applied. An expectation that people will apply common sense is not an adequate substitute for providing objective and justiciable criteria for legislative duties, so that people affected can be reasonably certain that their construction accords with the legislative intent and will be applied by the courts and others. It would not have been difficult to include at least indicative criteria for the test of what is and is not essential in these circumstances, as the requirements of reasonable legislative certainty require. **The Committee accordingly reports Article 2 for defective drafting.**

2 S.I. 2021/1179: Reported for requiring elucidation and for unusual and unexpected use of enabling powers

Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No.16) Regulations 2021

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 make an unusual or unexpected use of the enabling power in another respect.**

2.2 These Regulations, which are subject to the negative resolution procedure, introduce a further option for eligible travellers, arriving from non-red list countries, to allow them to

complete a lateral flow test on or before day 2 of their arrival in England, as an alternative to a PCR test. This will be followed up with a mandatory confirmatory PCR test where a person receives a positive test result from the lateral flow test. (The Committee notes that these provisions were removed by the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 21) Regulations 2021 which came into force on 30 November 2021.)

2.3 The Committee asked the Department of Health and Social Care to explain why (in regulation 5(3) (inserted regulation 3K(4A)) it was not thought necessary to define “confirmatory test”, in particular, that it is a PCR test. In a memorandum printed at Appendix 2, the Department explains that a definition is unnecessary, since the Secretary of State will provide the appropriate test. In the context, the Committee accepts that explanation and **accordingly reports regulation 5(3) for elucidation, provided by the Department’s memorandum.**

2.4 The Committee also asked the Department to explain, in relation to the photograph required to be provided to the test provider (regulation 10(7)(b) (inserted paragraphs (3)(b) and (3C)), how a provider verifies that the test shown in the photograph was taken by the relevant passenger and that the photograph has been provided within 15 minutes of the test’s read time. In its memorandum, the Department explains that it is the responsibility of relevant passengers to take the day 2 test themselves and to comply with all the obligations in relation to that test and that they commit an offence if they fail to comply with those obligations absent a reasonable excuse. In the absence of criteria for verification, it is difficult to see how anyone can be expected to prove—or indeed disprove—compliance. The Committee does not believe that Parliament intended offences to be created that are so unlikely to be capable of being enforced. **The Committee accordingly reports regulation 10(7)(b) for making an unusual or unexpected use of the enabling power.**

3 S.I. 2021/1183: Reported for defective drafting

Tribunal Procedure (Amendment No. 2) Rules 2021

3.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in three related respects.**

3.2 These Rules, which are subject to the negative resolution procedure, set out to amend the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (S.I. 2009/1976). This is sought to be achieved by rule 3. The Committee asked the Ministry of Justice to confirm that the heading to rule 3, rule 3(1) and the relevant footnote refer to the incorrect title and instrument number. In a memorandum printed at Appendix 3, the Department provides this confirmation, and **the Committee accordingly reports rule 3 for defective drafting acknowledged by the Department.**

4 S.I. 2021/1190: Reported for requiring elucidation

Channel Tunnel (Arrangements with the Kingdom of the Netherlands) (Amendment) Order 2021

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

4.2 This Order, which is subject to the negative resolution procedure, amends the Channel Tunnel (Arrangements with the Kingdom of the Netherlands) Order 2020 (S.I. 2020/916) in order to set out officers' powers, including those of arrest and detention, exercisable at controls in the Netherlands for trains travelling between the Netherlands and the United Kingdom via the Channel Tunnel.

4.3 The enabling power, section 11 of the Channel Tunnel Act 1987, confers the power to make orders on "the appropriate Minister". This is defined as meaning "the Minister in charge of any Government department concerned with that matter..." (section 13(1)). The preamble only states that the Order is made by the "Secretary of State", whilst other instruments made under the power have included the Department or included wording that the Secretary of State is "acting as the appropriate Minister". Given the inconsistent practice, the Committee asked the Home Office to explain why the preamble only cites the Secretary of State in this Order.

4.4 In a memorandum printed at Appendix 4, the Department acknowledges that there has been inconsistent practice and that it would be helpful to the reader to stipulate that the power is conferred upon the appropriate Minister and to identify that Minister in the preamble. The Department helpfully sets out wording that it will endeavour to use in future instruments. The Committee is grateful to the Department for acknowledging this issue of inconsistency and for preparing a route to its resolution for the future. **On that basis the Committee reports the preamble for elucidation, provided by the Department's memorandum.**

5 S.I. 2021/1196: Reported for requiring elucidation

Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2021

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

5.2 This Order, which is subject to the negative resolution procedure, raises precisely the same issue as S.I. 2021/1190 and **the Committee refers to its report on that instrument above.**

Instruments not reported

At its meeting on 12 January 2022 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. 2021/1404** Burundi (Sanctions) Regulations 2021
- S.I. 2021/1435** Health Protection (Coronavirus, Restrictions) (Entry to Venues and Events) (England) (Amendment) Regulations 2021

Draft Instruments requiring affirmative approval

- Draft** Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations 2022
- Draft** Trade Union (Levy Payable to the Certification Officer) Regulations 2022
- Draft** Trade Union (Power of the Certification Officer to Impose Financial Penalties) Regulations 2022
- Draft** Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2022
- Draft** Misuse of Drugs Act 1971 (Amendment) Order 2022

Instruments subject to annulment

- S.I. 2021/1235** Trade Marks and International Trade Marks (Amendment) (EU Exit) Regulations 2021
- S.I. 2021/1239** Football Spectators (Seating) Order 2021
- S.I. 2021/1242** Road Vehicle Carbon Dioxide Emission Performance Standards (Cars and Vans) (Miscellaneous Amendments) Regulations 2021
- S.I. 2021/1252** Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2021
- S.I. 2021/1258** Copyright and Performances (Application to Other Countries) (Amendment) (No. 2) Order 2021
- S.I. 2021/1267** National Security and Investment Act 2021 (Procedure for Service) Regulations 2021
- S.I. 2021/1283** Universal Credit (Work Allowance and Taper) (Amendment) Regulations 2021
- S.I. 2021/1286** Tax Credits and Child Benefit (Miscellaneous Amendments) Regulations 2021

S.I. 2021/1288	Taking Control of Goods (Fees) (Amendment) Regulations 2021
S.I. 2021/1289	Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 18) Regulations 2021
S.I. 2021/1319	State Pension Debits and Credits (Revaluation) Order 2021
S.I. 2021/1320	State Pension Revaluation for Transitional Pensions Order 2021
S.I. 2021/1323	Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 19) Regulations 2021
S.I. 2021/1331	Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 20) Regulations 2021
S.I. 2021/1339	Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 21) Regulations 2021

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/1234	General Optical Council (Continuing Professional Development) Rules Order of Council 2021
S.I. 2021/1236	Pension Schemes Act 2021 (Commencement No. 4) Regulations 2021
S.I. 2021/1290	Free Zone (Customs Site No. 1 Teesside) Designation Order 2021

Appendix 1

S.I. 2021/1169

Competition Act 1998 (Carbon Dioxide) (Public Policy Exclusion) Order 2021

1. The Committee has asked the Department for Business, Energy & Industrial Strategy for a memorandum on the following point:

In relation to the definition of “essential user” in article 2, in addition to the examples listed, explain what criteria will be applied in deciding what are essential goods and services.

2. The term “essential user” is defined as meaning “a consumer who requires CO₂ for the purpose of maintaining the supply of essential goods or services, such as goods or services relating to animal welfare, energy, food, water or health”. The term is used in the provision defining the activities which qualify for an exclusion from the Chapter 1 prohibition. In Article 3(2)(b) the qualifying activity is “sharing information and coordination as regards the allocation, movement and distribution of CO₂ to consumers and, in particular, essential users during the Chapter I exclusion period”. The term also appears in Article 4 which sets out the purpose for which agreements relating to qualifying activities are to be entered into by the relevant companies, namely “to prevent or mitigate disruption to the supply of CO₂ to distributors, consumers and, in particular, essential users in any part of the United Kingdom during the Chapter I exclusion period”. In each case, the requirement is not a bright-line one intended to capture supply only to “essential users”; distribution to all consumers qualifies but the companies concerned are expected to give some priority to those customers providing essential goods or services.

3. The companies are intended to have a discretion in determining which of their customers require CO₂ for the purpose of maintaining the supply of essential goods or services. The companies referred to in the Order are well aware of the uses to which CO₂ is put in different sectors in the UK. It has an important role in ensuring animal welfare in the meat processing sector, stunning animals before slaughter. It is also extensively used more widely in the food industry:

- to keep packaged products fresh for longer
- to regulate the temperature and humidity of food products during storage and transportation (CO₂ is used in the form of dry ice and snow)
- to carbonate water, soft drinks and alcoholic drinks.

4. CO₂ is used in other sectors as well. The NHS is a consumer of CO₂, which is used, for example, during some invasive surgeries to stabilise body cavities and to stimulate breathing. CO₂ is also used by the energy sector for cooling nuclear power plants. The list in the definition of “essential users” covers all of the important sectors of which government was aware and in which it was thought the impact from a disruption to supplies could be severe. The list is not exhaustive to provide some flexibility and so that goods or services in additional sectors which were analogous in their importance to society could also be given priority. The list is, however, intended to give a good indication of the types of goods and services considered to be critical.

5. Whilst no criteria are specified for what constitutes an “essential” product or service beyond the indicative list of sectors, we would expect the companies to understand that in the context of an Order made by government for exceptional and compelling reasons of public policy, they should prioritise consumers supplying goods and services which are the most important to society and disruption of which would have the most harmful effects. In other words, we would expect them to take a common-sense approach to the meaning of essential goods and services in the circumstances of the crisis affecting various sectors at the point Ministers were deciding to exercise their powers to make the Order and following discussions between the four companies concerned and government departments at the time. For example, it seems clear that in the context of the Order the supply of CO₂ for stunning animals, continued supplies of fresh food to supermarkets, supplies to the NHS and for nuclear reactors would be more important and be more critical in terms of the impact of a shortage of CO₂ than supplies for the purposes of carbonating soft or alcoholic drinks. In all the circumstances, we did not think that there would be any material legal uncertainty as to whether coordination or information sharing by the companies concerned as regards distribution of CO₂ to customers would qualify for the exclusions in the Order.

Department for Business, Energy & Industrial Strategy

10 December 2021

Appendix 2

S.I. 2021/1179

Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No.16) Regulations 2021

1. The Committee has asked the Department of Health and Social Care for a memorandum on the following points:

1. In regulation 5(3)(inserted regulation 3K(4A)), explain why it was not thought necessary to define “confirmatory test”, in particular, that it is a PCR test.

2. In relation to the photograph required to be provided to the test provider (regulation 10(7)(b) (inserted paragraphs (3)(b) and (3C)), explain how a provider verifies that the test shown in the photograph was taken by P and that the photograph has been provided within 15 minutes of the test’s read time.

2. The Department’s response is as follows.

3. These questions are raised in respect of the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 16) Regulations 2021 (S.I. 2021/1179) (“the No. 16 Regulations”).

4. The No. 16 Regulations made amendments to the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 (S.I. 2021/582) (“the International Travel Regulations”). They also amended other secondary legislation which is not relevant to these questions.

5. The No. 16 Regulations introduced the option for international arrivals to take LFD testing for the purposes of a “day 2 test” as defined in the International Travel Regulations. Travellers continued to be able to take PCR testing for the purposes of a “day 2 test”. All provisions giving effect to this policy were removed by the Health Protection (Coronavirus, International Travel and Operator Liability) (England) (Amendment) (No. 21) Regulations 2021 (S.I. 2021/1339) which came into force on 30 November 2021. Accordingly the provisions discussed in this memorandum are no longer part of the International Travel Regulations.

Question 1

6. Throughout the International Travel Regulations (and their predecessor, the Health Protection (Coronavirus, International Travel) England) Regulations 2020 (S.I. 2020/568)), there is no stipulation on the type or standards of a test provided by a public provider. A public provider is a provider of testing who provides or administers a test under the National Health Service Act 2006 or one of the equivalents of that Act in the devolved nations. This is the situation where the Secretary of State is providing a diagnostic COVID-test using his powers in the National Health Service Act 2006.

7. For example, in Schedule 8 to the International Travel Regulations, paragraph 6 provides that a “day 2 test”¹ will be a compliant test for the purposes of those regulations where:

- a) it is provided by a public provider, or
- b) it is provided by a private provider and the test complies with the requirements of paragraph 6(2) of Schedule 8.

8. The Department considers that there is no need to define or prescribe the standards for a test provided by a public provider. The Secretary of State has duties in the interest of public health and as such will provide the test which is appropriate for the purpose of that test.

9. The value of a confirmatory PCR test is twofold: (1) a positive LFD test result is not as conclusive as a positive PCR test and (2) following up with a PCR test enables a diagnostic laboratory to sequence the sample and detect whether a harmful variant is present.

10. Further, the Department considers that there would be no confusion as to what in practice is meant by “confirmatory test” because:

- a) new paragraph 11A of Schedule 8, which was inserted by the No. 16 Regulations, prescribed the forms of text to be sent by the private provider to a passenger who tests positive using their testing service, and that form notes:

“You must obtain, take and return a free follow up PCR test from NHS Test and Trace to confirm this. You can obtain your confirmatory PCR test by visiting gov.uk/get-coronavirus-test or by calling 119. This test will be free of charge and will be sent to you as a home test kit. You must take this test in accordance with this notice. If this confirmatory test is negative, you no longer need to self-isolate”;

- b) the Explanatory Memorandum describes this confirmatory test as a PCR at paragraphs 7.1, 7.5 and 7.8;
- c) “confirmatory test” is a commonly understood term in the domestic sphere: this language has been used in government guidance and in the media for several months to mean a PCR test provided by the Department.

Question 2

2. In relation to the photograph required to be provided to the test provider (regulation 10(7)(b) (inserted paragraphs (3)(b) and (3C)), explain how a provider verifies that the test shown in the photograph was taken by P and that the photograph has been provided within 15 minutes of the test’s read time.

¹ Defined in regulations 3J(10)(a) and 6(12)(a) as a test which complies with paragraph 6 of Schedule 8 and is undertaken in the circumstances prescribed in paragraph 10 of Schedule 8.

11. At the time this provision had effect, the traveller was under an obligation both to book a compliant day 2 test in advance (regulation 3J(2)) and to take the test themselves (regulation 3J(6)). It was an offence for the traveller to fail to comply with either of these obligations, absent some reasonable excuse (regulation 19(1)(c)).

12. For the traveller’s test to be one which meets the definition of a “day 2 test”, it must be undertaken in the circumstances described in paragraph 10 of Schedule 8. The No. 16 Regulations updated paragraph 10 to include that one of those circumstances was the provision by the traveller of certain information within 15 minutes of the test’s read time (paragraph 10(3)(b)), that information including a photograph showing the test device, the traveller’s reference number, and the test result (paragraph 10(3C)(a)).

13. If the traveller does not comply with these requirements, then the test will not be a compliant day 2 test, and the traveller will have committed an offence under regulation 19(1)(c) (absent a reasonable excuse).

14. Accordingly the responsibility of undertaking the test lawfully and complying with these obligations in the International Travel Regulations sits on the individual passenger, and enforcement may be taken against the individual passenger if they fail to comply.

15. The Department considers that the drafting establishes clear obligations in this respect and offences on the part of the traveller who does not comply with those obligations.

Department of Health and Social Care

14 December 2021

Appendix 3

S.I. 2021/1183

Tribunal Procedure (Amendment No. 2) Rules 2021

1. In consideration of the above instrument, the Committee requested a memorandum on the following point:

Confirm that rule 3 was intended to amend rule 10(4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules (S.I. 2009/1976) and that the heading to rule 3, rule 3(1) and the relevant footnote refer to the incorrect title and instrument number.

2. The Department is grateful to the Committee for raising this point, which has highlighted typographical errors at rule 3 and within the relevant footnote. The Department confirms that rule 3 was intended to amend rule 10(4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (S.I. 2009/1976). The Department is considering the most appropriate route in which to make these corrections and will endeavour to do so at the earliest opportunity.

Ministry of Justice

13 December 2021

Appendix 4

S.I. 2021/1190

Channel Tunnel (Arrangements with the Kingdom of the Netherlands) (Amendment) Order 2021

1. The Committee has asked the Home Office for a memorandum on the following point:

Given the apparently inconsistent practice between different instruments made under section 11 of the Channel Tunnel Act 1987 and that the definition of “the appropriate Minister” in section 13 requires a Minister to be identified, explain why the preamble only cites the Secretary of State.

2. The vires under section 11 of the Channel Tunnel Act 1987 (“the 1987 Act”) are broad, given the complex nature of the construction and operation of the Channel Fixed Link and the interest of various Government departments as a result.

3. Accordingly, section 11 confers powers on “the appropriate Minister”, defined in section 13(1) of the 1987 Act as follows (see also the footnote to the preamble in the Order):

Subject to subsection (2) below, in sections 11 and 12 of this Act “the appropriate Minister” means, in relation to any matter, the Minister in charge of any Government department concerned with that matter or, where more than one such department is concerned with that matter, the Ministers in charge of those departments, acting jointly.

4. There is, in the Department’s view, no express statutory requirement under the 1987 Act, in section 13 or otherwise, to identify the appropriate Minister in the preamble to an instrument made under section 11 of the 1987 Act.

5. It is clear from the preamble and signature block of the instrument in question that the Order is made by the Home Department and it is right that the power to make the Order is exercised by the Secretary of State of the Home Department, who is the appropriate Minister in respect of this instrument.

6. Having analysed the preambles of all instruments made under section 11, prompted by the Committee’s helpful correspondence, it is clear that there has been inconsistency of approach between departments and, indeed, within this Department over the years.

7. In respect of this particular instrument, the drafter relied on recent precedent and ensured that the preamble matched that of the Order that this instrument amends, with the aim of being consistent across the two Orders.

8. That being said, the Department acknowledges that it is helpful to the reader to stipulate that the vires are conferred upon the appropriate Minister and to identify that Minister in the preamble in the formulation used in the Channel Tunnel (Carriers’ Liability) Order 1998 (S.I. 1998/1015) and will endeavour to follow this style in future instruments:

In exercise of the powers conferred on the appropriate Minister by section 11 of the Channel Tunnel Act 1987, the Secretary of State for the Home Department hereby makes the following Order.

Home Office

14 December 2021

Appendix 5

S.I. 2021/1196

Channel Tunnel (International Arrangements and Miscellaneous Provisions) (Amendment) Order 2021

1. The Committee has asked the Home Office for a memorandum on the following point:

Given the apparently inconsistent practice between different instruments made under section 11 of the Channel Tunnel Act 1987 and that the definition of “the appropriate Minister” in section 13 requires a Minister to be identified, explain why the preamble only cites the Secretary of State.

2. The vires under section 11 of the Channel Tunnel Act 1987 (“the 1987 Act”) are broad, given the complex nature of the construction and operation of the Channel Fixed Link and the interest of various Government departments as a result.

3. Accordingly, section 11 confers powers on “the appropriate Minister”, defined in section 13(1) of the 1987 Act as follows (see also the footnote to the preamble in the Order):

Subject to subsection (2) below, in sections 11 and 12 of this Act “the appropriate Minister” means, in relation to any matter, the Minister in charge of any Government department concerned with that matter or, where more than one such department is concerned with that matter, the Ministers in charge of those departments, acting jointly.

4. There is, in the Department’s view, no express statutory requirement under the 1987 Act, in section 13 or otherwise, to identify the appropriate Minister in the preamble to an instrument made under section 11 of the 1987 Act.

5. It is clear from the preamble and signature block of the instrument in question that the Order is made by the Home Department and it is right that the power to make the Order is exercised by the Secretary of State of the Home Department, who is the appropriate Minister in respect of this instrument.

6. Having analysed the preambles of all instruments made under section 11, prompted by the Committee’s helpful correspondence, it is clear that there has been inconsistency of approach between departments and, indeed, within this Department over the years.

7. In respect of this particular instrument, the drafter relied on recent precedent and ensured that the preamble matched that of the Order that this instrument amends, with the aim of being consistent across the two Orders.

8. That being said, the Department acknowledges that it is helpful to the reader to stipulate that the vires are conferred upon the appropriate Minister and to identify that Minister in the preamble in the formulation used in the Channel Tunnel (Carriers’ Liability) Order 1998 (S.I. 1998/1015) and will endeavour to follow this style in future instruments:

In exercise of the powers conferred on the appropriate Minister by section 11 of the Channel Tunnel Act 1987, the Secretary of State for the Home Department hereby makes the following Order.

Home Office

14 December 2021

Formal Minutes

Wednesday 12 January 2022

Virtual meeting

Members present:

Jessica Morden (*in the Chair*)

Dr James Davies John Lamont

Baroness D’Souza Baroness Scott of Needham Market

Baroness Gale Lord Smith of Hindhead

Lord Haskel Richard Thomson

Paul Holmes Liz Twist

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 5.2 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 5.

Resolved, That the Report be the Twentieth 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 19 January at 3.40 p.m.]