



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Twenty-Third Report of Session 2021–22

Drawing special attention to:

Transfer of Functions (Secretary of State for Levelling Up, Housing and Communities) Order 2021 (S.I. 2021/1265)

Private Storage Aid for Pigmeat (England) Regulations 2021 (S.I. 2021/1269)

*Ordered by the House of Lords
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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in [House of Commons Standing Order No. 151](#) and [House of Lords Standing Order No. 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 2 February 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 two 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. 2021/1265: Reported for requiring elucidation

Transfer of Functions (Secretary of State for Levelling Up, Housing and Communities) Order 2021

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

1.2 This Order, which is subject to the negative resolution procedure, makes provision in connection with the creation of the Department for Levelling Up, Housing and Communities. Article 7 transfers functions of the Minister for the Cabinet Office under section 2(2)(b) of the Political Parties, Elections and Referendums Act 2000, and provides for those functions to be exercisable concurrently with any Minister of the Crown in the Department for Levelling Up, Housing and Communities with responsibilities in relation to the constitution. As paragraph 15 of Schedule 2 to the Order consequentially amends section 2(2)(b) of the 2000 Act, the Committee wondered why it did not include an amendment cross-referring to the provision for concurrent exercise, as a navigational tool for readers (who otherwise see nothing on the face of the 2000 Act to advert to the concurrent power). The Committee asked the Department for Levelling Up, Housing and Communities to explain. In a memorandum printed at Appendix 1, the Department acknowledges that a parenthetical cross-reference could have been inserted; but it explains that it was thought unnecessary to make the change, as all the present provisions are expected to be consolidated by the Elections Bill presently before Parliament. The Committee accepts that explanation and **accordingly reports paragraph 15 of Schedule 2 for elucidation, provided by the Department's memorandum.**

2 S.I. 2021/1269: Reported for requiring elucidation

Private Storage Aid for Pigmeat (England) Regulations 2021

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

2.2 These Regulations, which are subject to the negative resolution procedure, enable a Private Storage Aid scheme to operate in support of the pigmeat sector in the face of ongoing market disruption. They are made under several enabling powers, among them Article 18(2)(a) of Regulation (EU) No 1308/2013, which allows the Secretary of State to make Regulations that grant private storage aid. It was not clear to the Committee that the Regulations, in themselves, granted such aid rather than permitting it to be granted in specified circumstances and up to a specified threshold. The Committee asked the Department for Environment, Food and Rural Affairs to explain why the preamble

cites paragraph (2)(a) and not (1) or (2)(b), which permit the laying down of conditions under which, and restrict the circumstances in which, such aid may be granted. In a memorandum printed at Appendix 2, the Department asserts that by adding necessary details to a wider administrative framework, these Regulations do in effect grant private storage aid. It sets out its view of the way the enabling powers in Article 18 are intended to operate, with reference to existing legislation made under corresponding provisions in EU law, to explain its reliance on paragraph (2)(a). The Committee finds this explanation helpful and **accordingly reports the preamble for requiring elucidation, provided in the Department’s memorandum.**

2.3 Regulation 3(3) provides that private storage aid may be provided in respect of up to 14,000 tonnes of pigmeat. Applications submitted after that threshold has been reached must be rejected under regulation 7(2)(c) (inserted paragraph 2A), which also sets out rules for determining applications that were submitted before but “would have been decided after” the threshold is met (inserted paragraph 2B). The Committee asked the Department to explain how, when there are several such undecided applications, it will be determined when each “would have been decided”. In its memorandum, the Department explains that in practice, applications are decided in the order in which they have been received and that this is also the case for applications submitted close to the threshold. **The Committee accordingly reports regulation 7(2)(c) for requiring elucidation, provided in the Department’s memorandum.**

Instruments not reported

At its meeting on 2 February 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. 2022/72 Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) Regulations 2022

Draft Instruments requiring affirmative approval

Draft	Early Legal Advice Pilot Scheme Order 2022
Draft	Genetically Modified Organisms (Deliberate Release) (Amendment) (England) Regulations 2022
Draft	Airports Slot Allocation (Alleviation of Usage Requirements) Regulations 2022
Draft	Cumbria (Structural Changes) Order 2022
Draft	Goods Vehicles (Licensing of Operators) (Amendment) Regulations 2022
Draft	North Yorkshire (Structural Changes) Order 2022
Draft	Scotland Act 2016 (Social Security) (Adult Disability Payment and Child Disability Payment) (Amendment) Regulations 2022
Draft	Somerset (Structural Changes) Order 2022

Instruments subject to annulment

S.I. 2021/1380	Rent Officers (Housing Benefit and Universal Credit Functions) (Amendment and Modification) Order 2021
S.I. 2021/1388	Financial Services and Markets Act 2000 (Consequential Amendments of References to Rules) Regulations 2021

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2021/410	Civil Partnership (Registration and Records) (Amendment) Regulations 2021
S.I. 2021/412	Registration of Marriages (Amendment) Regulations 2021
S.I. 2021/1409	Finance Act 2021, Part 2 etc. (Plastic Packaging Tax) (Appointed Day) Regulations 2021

S.I. 2021/1421 Income Tax (Indexation of Blind Person's Allowance and Married Couple's Allowance) Order 2021

Appendix 1

S.I. 2021/1265

Transfer of Functions (Secretary of State for Levelling Up, Housing and Communities) Order 2021

1. The Committee has asked the Department for Levelling Up, Housing and Communities for a memorandum on the following point:

Explain why paragraph 15 of Schedule 2 to this Order does not take the opportunity to amend section 2(2)(b) of the Political Parties, Elections and Referendums Act 2000 to advert to the provision for concurrent exercise made by article 7(1)(b) and (c).

2. The Department acknowledges that a parenthetical cross-reference to article 7(1)(b) and (c) of the Order could have been added into section 2(2)(b) to draw attention to the concurrency provision. However, the Department was aware that article 7(1)(b) and (c) would likely be temporary in nature, as the Department's intention is for article 7(1)(b) and (c) to be revoked and replaced with a new concurrency provision within section 2 of the 2000 Act as a result of (what is currently) clause 16 of the Elections Bill. Once amended, section 2 of the 2000 Act will be clear as to the existence and nature of the concurrent exercise of the Secretary of State's function under section 2(2)(b).

3. Therefore, on this occasion the Department did not include such a cross-reference within the amendment made by paragraph 15 of Schedule 2 to the Order.

Department for Levelling Up, Housing and Communities

25 January 2022

Appendix 2

S.I. 2021/1269

Private Storage Aid for Pigmeat (England) Regulations 2021

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

(1) Given that these Regulations do not, in themselves, grant private storage aid but can be said either to lay down conditions under which such aid may be granted or to restrict the circumstances in which such aid can be granted (e.g., by providing that aid cannot be provided for products already in storage or above the PSA threshold), explain why the preamble cites Article 18(2)(a) EUR 1308/2018, but not Article 18(1) or (2)(b).

(2) In relation to regulation 7(2)(c) (inserted paragraph 2B), where several applications made before the PSA threshold is met remain to be decided, and the threshold will be met before all are considered, explain how it will be determined which of those applications would have been decided after that threshold is met.”

Question 1

2. Regulation 3(1) of the Private Storage Aid for Pigmeat (England) Regulations (**the Regulations**) enables the Secretary of State to pay a fixed amount of private storage aid in respect of certain pigmeat products. The remaining provisions of the Regulations, together with the existing detailed framework in retained EU legislation—in particular the legislation made under EUR 2013/1308—set out how applications are to be made and processed, the circumstances in which that aid can be paid and how the scheme is to be administered overall. In the broadest sense, the Regulations, by providing for the payment of the PSA and adding the necessary details to the overall administrative framework, effectively grant that aid. Regulation 3(1) of the Regulations is in effect doing what was done by Article 1(1) of EUR 2015/360 in which the European Commission (**the Commission**) established a similar scheme.

3. It is the Department’s view that Article 18(1) and Article 18(2) of EUR 1308/2013 provide the Secretary of State with two separate regulation making powers. The first, in Article 18(1), allows the Secretary of State to set out general conditions which are to apply for the purposes of determining whether or not circumstances exist such that the provision may be made to enable the granting of private storage aid in any particular case. This replaced the power of the Commission to adopt delegated acts for the purposes set out in Article 18(1). The second, in Article 18(2), allows the Secretary of State to make regulations, having taken account of any such general conditions, to grant private storage aid in respect of any of the products listed in Article 17 of EUR 1308/2013. This replaced the power of the Commission to adopt implementing acts for the purpose set out in Article 18(2).

4. The purpose of the Regulations was not to set out general conditions that would be used to determine whether or not it would be appropriate to grant private storage aid in

relation to any or all of the products listed in Article 17 of EUR 1308/2013, or indeed to set out general conditions which would need to be satisfied before the Secretary of State could consider the making of regulations providing for the grant of private storage aid for pigmeat. So, in effect, the Regulations were not intended to do what the Commission might previously have done by a delegated act under Article 18(1). Rather the purpose of the Regulations was to make provision specifically for the grant of private storage in respect of pigmeat in response to the specific circumstances set out in the declaration made by the Secretary of State on 11 November 2021 under section 20 of the Agriculture Act 2020. The Regulations were doing what would have previously been done by the Commission in exercise of its power to make an implementing act, such as EUR 2015/360, to set out specific provision for granting private storage aid in response to the prevailing market conditions.

5. Consequently, it is the Department's view that it would have been incorrect to have cited Article 18(1) of EUR 1308/2013 as a power under which the Regulations were made.

6. The provision made for the grant of private storage aid is made in exercise of a combination of powers in retained EU law and also the Agriculture Act 2020, and not only in reliance on the provisions of Article 18 of EUR 1308/2013. For example, Article 39 of EUR 2016/1240 provides specifically for the regulations to deal with the treatment of products which have already been placed into storage, the particular products (together with CN Codes) in respect of which aid was to be granted and the minimum quantity per application for private storage aid. Article 20 of EUR 1308/2013 makes clear that provision can be made fixing the maximum storage capacity and the duration of private storage periods. The Department's view is that the provisions cited in the preamble are appropriate in connection with the provisions made in the Regulations.

7. It is the Department's view that Article 18(2)(b) of EUR 1308/2013 would be relevant where provision had been made for the grant of private storage aid and the scheme was opened but could run indefinitely. In such circumstances, the power in Article 18(2)(b) is intended to provide a mechanism to close that scheme (see for example EUR 2015/725—which fixed the end date for application for private storage aid for pigmeat under Regulation EUR 2015/360).

Question 2

8. Under the administrative framework which exists under retained EU law, applications for private storage aid the amount of which is fixed in advance are processed in the order in which they are received. This process is well understood in relation to such schemes.

9. By way of illustration, if applications A B and C are received in that order, application A falls to be determined first. If application A is admissible, it must, as set out in Article 2 of EUR 2016/1240, be accepted, subject to the specific rules in Article 45 of that Regulation as modified by the Regulations. If the acceptance of application A means that the PSA threshold is met, applications B and C have to be rejected. Both of these applications fall to be determined after the PSA threshold has been met.

Department for Environment, Food and Rural Affairs

24 January 2022

Formal Minutes

Wednesday 2 February 2022

Virtual meeting

Members present:

Jessica Morden, in the Chair

Lord Beith

Lord Chartres

Baroness D’Souza

Lord Haskel

Paul Holmes

John Lamont

Baroness Newlove

Lord Smith of Hindhead

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 2.3 read and agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 2.

Resolved, That the Report be the Twenty-Third 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 9 February at 3.40 p.m.