House of Lords
House of Commons

Joint Committee on Statutory Instruments

Fifteenth Report of Session 2015-16

Drawing special attention to:

General Osteopathic Council (Constitution) (Amendment) Order 2015 **(S.I. 2015/1906)**
Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2015 **(S.I. 2015/1933)**
Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015 **(S.I. 2015/1970)**
Large Combustion Plants (Transitional National Plan) Regulations 2015 **(S.I. 2015/1973)**
Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2015 **(S.I. 2015/1977)**

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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, available on the Internet via www.parliament.uk/jcsi.

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 The Stationery Office 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 Amelia Aspden (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Nicholas Beach, Peter Milledge and John Crane *(Lords)*.

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Report

Instruments reported

At its meeting on 27 January 2016 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. 2015/1906: Reported for defective drafting

General Osteopathic Council (Constitution) (Amendment) Order 2015 (S.I. 2015/1906)

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

1.2 The Order amends the General Osteopathic Council (Constitution) Order 2009. Article 2(2) amends article 2 of the 2009 Order (which specifies the composition of the General Osteopathic Council) by reducing the composition of the General Council from 7 registrant members and 7 lay members to 5 registrant members and 5 lay members. The Committee asked the Department of Health why there appears to be neither any provision for determining which of the existing Members is to cease to be a Member nor any preservation of their position until expiry of the current membership of any of them. In a memorandum printed at Appendix 1, the Department "accepts that express provision should have been made in relation to (i) the process of identifying which of the existing Council members (if any) remained in post pursuant to the reduction in Council size and (ii) the preservation of the position of Council members pending expiry of the current membership". It undertakes to "consider necessary remedial action".

1.3 Article 3 provides: "The person who was chair of the General Council immediately before the coming into force of this Order shall, subject to article 3 of the General Osteopathic Council (Constitution) Order 2009, continue as chair of the General Council as constituted in accordance with this Order." The Committee asked the Department why it was considered necessary to include article 3, given that the Order does not appear to be a re-constitution and that the position of the chair, in the light of article 8 of SI 2009/263, does not appear to be affected by article 2(2). In its memorandum the Department "accepts that in the light of article 8 of SI 2009/263 the position of the chair is not affected by article 2 of the instrument and therefore it was not necessary to have included article 3". Again, the Department undertakes to "consider necessary remedial action".

1.4 The Committee suggests that, unless the need for clarity has been overtaken in practice by events, an early further order should be made and **accordingly reports articles 2 and 3 for defective drafting, acknowledged by the Department.**

2 S.I. 2015/1933: Reported for defective drafting

Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2015 (S.I. 2015/1933)

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

2.2 This Order amends the Export Control (Russia, Crimea and Sevastopol Sanctions) Order 2014. Article 5 of that Order, before amendment, read as follows:

> ***5.*** *A person who is knowingly concerned in an activity prohibited by any of the following Articles of the Russian Regulation with intent to evade a prohibition in those Articles commits an offence and may be arrested—*
>
> *(a) Article 4(1)(a) (prohibition on provision of technical assistance or brokering services related to the goods and technology listed in the Common Military List, to any natural or legal person, entity or body in Russia or for use in Russia);*
>
> *(b) Article 4(1)(b) (prohibition on the provision of financing or financial assistance related to the goods and technology listed in the Common Military List, to any natural or legal person, entity or body in Russia or for use in Russia).*

2.3 Article 2(3) of this Order amends article 5. Sub-paragraph (a) of the amending provision reads "[in article 5] the words before sub-paragraph (a) become paragraph (1)". Sub-paragraph (b) substitutes "Russia Sanctions Regulation" for "Russian Regulation" in the renumbered paragraph, and sub-paragraph (c) states "after that paragraph, insert [a paragraph numbered (2) which contains introductory words followed by sub-paragraphs numbered (a) to (c)]."

2.4 The effect of these amendments is that the renumbered paragraph (1) ends with the words "and may be arrested" but no longer makes any sense as there are no "following Articles of the Russia Sanctions Regulation" listed in the paragraph. Sub-paragraphs (a) and (b) of what was simply article 5 now appear after sub-paragraph (c) of article 5(2), but with no introductory text to give them any meaning.

2.5 It appeared clear to the Committee that the intention had been to renumber the whole of article 5 as article 5(1), and asked the Department for Business, Innovation and Skills why article 2(3)(a) did not do so. In a memorandum printed at Appendix 2, the Department states that it acknowledges that if article 2(3)(a) had renumbered article 5, this would have avoided any possible ambiguity as to whether [sub-]paragraphs (a) and (b) were in fact to be included in the new article 5(1). It considers, however, that the possibility that the Order as drafted will cause any confusion is low. It points out that article 11 of the 2014 Order is amended by article 2(5) by substituting references to article 5(1)(a) and (b) for references to article 5(a) and (b).

2.6 The Committee considers that the Order as drafted creates two provisions with no apparent meaning. The Committee does, nevertheless, accept that it should be clear to the moderately intelligent reader that a mistake was made in drafting article 2(3)(a) and also what the amendment was intended to achieve. The Department undertakes to correct its error as soon as a suitable opportunity arises, but the Committee considers that it would be

more appropriate to rectify the error more quickly by revoking and replacing article 5 of the 2014 Order (this is not a case where the issue of a correction slip would be acceptable). Such a course would also provide an opportunity to restructure what will become paragraph (1), even the previous text of which – presumably as a result of a probably unnecessary attempt to avoid a "sandwich" of indented provisions – read somewhat clumsily. **The Committee accordingly reports article 2(3)(a) for defective drafting, acknowledged by the Department.**

3 S.I. 2015/1970: Reported for doubt as to whether they are *intra vires*

Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015 (S.I. 2015/1970)

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there is a doubt as to whether they are *intra vires*.**

3.2 Section 21A of the Prosecution of Offenders Act 1985, introduced in 2015, obliges magistrates' courts to order persons convicted of offences before them to pay a charge in respect of relevant court costs subject among other things to section 21C, subsection (1) of which states that the charge must be of an amount specified by the Lord Chancellor by regulations. Regulation 3 of, and the Schedule to, the Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015 (S.I. 2015/796) set the amounts in question. These Regulations, made by the Lord Chancellor materially under section 21C(1) of that Act, remove those provisions from S.I. 2015/796. The Committee was concerned that elimination, as opposed to reduction, of the charges might go beyond what could validly be achieved under that section. It therefore asked what led to the conclusion that it was within the scope of section 21C(1) to remove the provisions in question.

3.3 In a memorandum printed at Appendix 3, the Ministry of Justice justifies its approach by means of six propositions:

- although section 21A(1) of the 1985 Act imposes a duty on magistrates' courts, section 21C(1) is ultimately a power, not a duty;
- the interplay between the two provisions is so drafted as to provide for section 21C(1) to trump section 21A(1);
- a power to impose a charge implies a power to remove it (Interpretation Act 1978, section 14) unless the contrary intention is shown;
- in the light of the above, there is no contrary intention;
- the criticisms of the previous arrangement made it desirable to bring them to an end pending a review;
- as it was common ground that the power could have been used to reduce the charge, it was illogical to distinguish between a lawful reduction to £1 and elimination.

3.4 The Committee regards the Department's fifth and sixth propositions as irrelevant. The fifth relates purely to the desirability of the policy and not to whether the policy could

validly be effected by the available secondary legislation as opposed to primary legislation. The sixth is based on the large assumption that it would be within powers to reduce the charge to an amount that would be nugatory (as opposed to substantial but less burdensome).

3.5 That leaves the first four propositions, which contain the nub of the Department's justification. It is crucial to that justification that section 21C is a power that, as a whole, may or may not be exercised. If it is, the Committee accepts that the rest falls into place. However, the Committee regards it as more tenable that it is a power that has to be exercised – otherwise magistrates' courts are put in breach of their obligation, imposed by Parliament, to charge. On that basis, what section 21C does is to impose on the Lord Chancellor the duty to set the levels of the charge, those levels alone being a matter of discretion, and there is therefore no discretion to remove them without replacement – to that extent there is indeed a contrary intention to the main proposition in section 14 of the Interpretation Act 1978. **Accordingly, the Committee reports the Regulations for a doubt as to whether they are *intra vires*.**

4 S.I. 2015/1973: Reported for doubt as to whether they are *intra vires*

Large Combustion Plants (Transitional National Plan) Regulations 2015 (S.I. 2015/1973)

4.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that there is a doubt as to whether they are *intra vires*.**

4.2 The Regulations, made under section 2(2) of the European Communities Act 1972 ("section 2(2)"), give effect to the exemptions permitted under Article 32 of Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (Recast). Under that Article combustion plants specified in a transitional national plan may be exempted from the requirement to comply with emission limit values for certain pollutants during the period beginning with 1 January 2016 and ending with 30 June 2020. By Article 4 of Commission Implementing Decision 2012/115/EU ("Article 4") a transitional national plan may be implemented only "upon acceptance by the [European] Commission". Section 2(2) of the 1972 Act, so far as is relevant, empowers the Secretary of State to make regulations for the purpose of implementing or dealing with measures arising out of or relating to EU obligations.

4.3 The Regulations were made on 2 December and, with one exception, came into force on 31 December 2015. The United Kingdom submitted its transitional national plan ("the plan") to the European Commission on 20 October 2015. The Commission accepted the plan on 17 December 2015.

4.4 Given the chronology, the Committee wondered whether, on 2 December 2015 when the Regulations were made (which was before the plan had been accepted by the Commission), there was power under section 2(2) to make an instrument for giving effect to the plan. It accordingly asked the Department for Environment, Food and Rural Affairs to explain why, given the terms of Article 4, it had concluded that there was power under section 2(2) to make the Regulations in advance of the approval of the plan by the Commission.

4.5 In a memorandum printed at Appendix 4, the Department states that it did not consider that the power in section 2(2) was unavailable on 2 December by virtue of the plan not having then been accepted. It explains that, in reliance on discussions with the Commission, it anticipated that approval would be forthcoming by 31 December when the Regulations were to come into force and that that did indeed turn out to be the case. The Department acknowledges that there would have been a problem had the plan not been accepted by 31 December but points out that that problem did not arise because it was in fact accepted a fortnight before that date. It also points out that, because the Regulations had to be in force before 1 January 2016 when the transitional period began, they needed to be made (and laid before Parliament) in early December in order to secure compliance with the 21 day rule. The Department also refers to other regulations made in 2013, which it considers justified and materially parallel.

4.6 The Committee would not want Departments to place too much stress on the need to comply with the 21 day rule in circumstances like these. The Committee considers that it is preferable to establish that there is a firm legal basis for the making of any statutory instrument before making it. Furthermore, the regulations made in 2013 cannot be relied on as a suitable precedent – they were not made under the same enabling power.

4.7 As to whether a firm legal base exists, the answer is that clearly it does if section 2(2) implies a power for the Secretary of State, before a clear EU obligation exists, to implement what (s)he anticipates the obligation will be, provided that – at the moment of coming into force – the implementation turns out to match the obligation. The Committee is unaware as to whether such a proposition has ever been tested, and would not rule out the possibility of an argument in its favour succeeding, there being *obiter dicta* in cases on section 2(2) favouring a broad interpretation. However, there appears to be one significant weakness in such an argument – the absence of anything equivalent, in relation to EU obligations anticipated but not yet in force, to section 13 of the Interpretation Act 1978.

4.8 The Committee therefore takes the view that it is not beyond doubt that there is power under section 2(2) to make an instrument where that depends on the United Kingdom meeting a condition which is not actually met at the time of its making, even it is does in fact turn out to have been met by the time of the instrument's commencement. Given that, it would in the Committee's opinion have been advisable to have awaited the Commission's approval of the plan before making the Regulations: it would have been consistent with past practice for the Committee to accept breach of the 21 day rule as an acceptable consequence of achieving such legal certainty. The Department may therefore wish to consider whether to achieve that certainty by revoking and re-enacting provisions of the Regulations that are still relevant, now that the power clearly exists. **The Committee accordingly reports the Regulations for a doubt as to whether they are *intra vires*.**

5 S.I. 2015/1977: Reported for defective drafting

Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2015 (S.I. 2015/1977)

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

5.2 Article 2 of the Order increases the fees payable under the Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003 (S.I. 2003/3363) ("the 2003 Order") in

connection with the recognition of professional bodies that license and regulate insolvency practitioners. Such bodies pay a one-off fee on applying for recognition and an annual fee in respect of the maintenance of that recognition. Article 2 increases the former from £4,500 to £12,000, and increases the latter from £300 to £360 for each member of the body authorised to act as an insolvency practitioner. By article 2(3) of the 2003 Order the fee for a year is calculated by reference to the number of such members on 1 January in the year.

5.3 Article 1 provides that the Order comes into force on 31 December 2015. Article 3 provides that the amendment of the annual fee "applies only in respect of [members] who are ... authorised [to act as insolvency practitioners] as at 1st January 2016 and each subsequent 1st January". The inclusion of article 3 perplexed the Committee which considered that it could either be unnecessary or alternatively secure an apparently odd result.

5.4 On one reading ("the assumed purposive reading") it adds nothing: given that, by article 1, article 2 comes into force on 31 December 2015 it seemed to the Committee arguably to go without saying that it applied only for the fees for 2016 and subsequent years. But on another reading ("the literal reading") it might be seen as appearing to allow the new annual fee payable by a body to be calculated by reference only to persons who were members of the body both on 1 January 2016 and on each subsequent 1 January (presumably until the first January of the year concerned), with the old fee surviving in relation to all who become members after 1 January 2016 – something which the Committee considered to be unlikely to be the intended result.

5.5 The Committee therefore asked the Department for Business, Innovation and Skills to explain the intended purpose of article 3 and how effect is given to that intention. In a memorandum printed at Appendix 5, the Department explains that article 3 was in fact included to make it clear that the increase in the per capita fee did not apply to amounts payable for years before 2016 should any such amounts not have been paid by the end of 2015. That was not a point that had occurred to the Committee from either the assumed purposive reading or the literal reading of article 3. The Committee is not entirely convinced that any special provision is needed to secure the Department's intended outcome given the terms of article 1 but feels that, if the Department thought that the point did need to be expressly addressed, it should have framed article 3 so as more clearly to reveal its intended purpose, possibly in a way that in terms excluded the application of the increase in the annual fee in respect of amounts payable for a year before 2016. For the future, the Department may wish in any event to amend the Order to eliminate the risks arising from the literal reading of article 3. **The Committee accordingly reports article 3 for defective drafting.**

Instruments not reported

At its meeting on 27 January 2016 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft Instrument requiring affirmative approval

Draft S.I.	Police and Crime Commissioner Elections (Amendment) Order 2016
Draft S.I.	Immigration and Nationality (Fees) Order 2016
Draft S.I.	Passenger and Goods Vehicles (Tachographs) (Amendment) Regulations 2016
Draft S.I.	Infrastructure Planning (Onshore Wind Generating Stations) Order 2016
Draft S.I.	State Pension (Amendment) Regulations 2016

Instruments subject to annulment

S.I. 2015/1958	General Medical Council (Legal Assessors and Legally Qualified Persons) Rules Order of Council 2015
S.I. 2015/1964	General Medical Council (Amendments to Miscellaneous Rules and Regulations) Order of Council 2015
S.I. 2015/1965	General Medical Council (Constitution of Panels, Tribunals and Investigation Committee) Rules Order of Council 2015
S.I. 2015/1967	General Medical Council (Constitution of the Medical Practitioners Tribunal Service) Rules Order of Council 2015
S.I. 2015/1980	Animal By-Products (Enforcement) (England) (Amendment) Regulations 2015
S.I. 2015/1981	Public Interest Disclosure (Prescribed Persons) (Amendment) (No. 2) Order 2015
S.I. 2015/1985	Pensions Act 2014 (Consequential, Supplementary and Incidental Amendments) Order 2015
S.I. 2015/1996	Plant Health (Fees) (England) (Amendment) Regulations 2015
S.I. 2015/1997	Common Agricultural Policy (Amendment) (No. 2) Regulations 2015
S.I. 2015/2022	Railways (Interoperability) (Amendment) Regulations 2015

S.I. 2015/2024 Vehicle Drivers (Certificates of Professional Competence) (Amendment) Regulations 2015

S.I. 2015/2025 National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2015

S.I. 2015/2032 Greater London Authority (Consolidated Council Tax Requirement Procedure) Regulations 2015

S.I. 2015/2048 Blood Tests (Evidence of Paternity) (Amendment) (Review) Regulations 2015

S.I. 2015/2049 Criminal Legal Aid (Remuneration etc.) (Amendment) (No. 2) Regulations 2015

S.I. 2015/2050 Alcoholic Liquor Duties (Alcoholic Ingredients Relief) Regulations 2015

S.I. 2015/2054 Employment Tribunals Act 1996 (Application of Conciliation Provisions) Order 2015

S.I. 2016/2 Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) (Amendment) Regulations 2016

S.I. 2016/9 Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) (Amendment) Order 2016

S.I. 2016/10 Criminal Justice Act 2003 (Alcohol Abstinence and Monitoring Requirement) (Prescription of Arrangement for Monitoring) (Amendment) Order 2016

S.I. 2016/11 Immigration Act 2014 (Commencement No. 6) Order 2016

S.I. 2016/15 Public Lending Right Scheme 1982 (Commencement of Variation) Order 2016

Draft Instruments subject to annulment

Draft. S.I. Elmbridge (Electoral Changes) Order 2016

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2015/1994 Immigration (Designation of Travel Bans) (Amendment No. 2) Order 2015

S.I. 2015/2014 United Nations Sanctions (Miscellaneous Amendments) Order 2015

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2015/1995 Wireless Telegraphy (Licence Charges) (Amendment) (No. 2) Regulations 2015

S.I. 2015/2023 Specified Diseases (Notification) (Amendment) (England) Order 2015

S.I. 2015/2029	Small Business, Enterprise and Employment Act 2015 (Commencement No. 3) Regulations 2015
S.I. 2015/2035	Finance Act 2015, Section 23 (Appointed Day) Regulations 2015
S.I. 2015/2055	Financial Services (Banking Reform) Act 2013 (Commencement No. 9) (Amendment) Order 2015
S.I. 2015/2058	Pensions Act 2014 (Commencement No.7) and (Savings) (Amendment) Order 2015
S.I. 2015/2066	Wireless Telegraphy (White Space Devices) (Exemption) Regulations 2015
S.I. 2015/2074	Deregulation Act 2015 (Commencement No. 4) Order 2015
S.I. 2016/1	Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Alcohol Abstinence and Monitoring Requirements) Piloting (Amendment) Order 2016

Appendix 1

S.I. 2015/1906: memorandum from the Department of Health

General Osteopathic Council (Constitution) (Amendment) Order 2015 (S.I. 2015/1906)

1. In its letter to the Department of 13 January 2016, the Committee requested a memorandum on the following points:

   "Explain, in relation to the reduction of Council Members achieved by Article 2(2)—

   (a) why there appears to be neither any provision for determining which of the existing Members is to cease to be a Member nor any preservation of their position until expiry of the current membership of any of them; and

   (b) why it was considered necessary to include article 3, given that this Order does not appear to be a re-constitution and that the position of the chair, in the light of article 8 of SI 2009/263, does not appear to be affected by article 2(2)."

2. The Department's response to the Committee's points is outlined below.

3. In relation to (a) and article 2 of the Order, the Department accepts that express provision should have been made in relation to (i) the process of identifying which of the existing Council members (if any) remained in post pursuant to the reduction in Council size and (ii) the preservation of the position of Council members pending expiry of the current membership.

4. In relation to (b) and article 3 of the Order, the Department accepts that in the light of article 8 of SI 2009/263 the position of the chair is not affected by article 2 of the instrument and therefore it was not necessary to have included article 3.

5. The Department will consider necessary remedial action.

Department of Health
19 January 2016

Appendix 2

S.I. 2015/1933: memorandum from the Department for Business, Innovation and Skills

Export Control (Russia, Crimea and Sevastopol Sanctions) (Amendment) Order 2015 (S.I. 2015/1933)

1. This memorandum is submitted in response to a question from the Joint Committee on Statutory Instruments to the Department for Business, Innovation and Skills on 16th December 2015.

2. The Committee asked:

   "If the existing article 5(a) and (b) of the 2014 Order are intended to form part of the renumbered article 5(1), explain why article 2(3)(a) does not simply renumber article 5."

3. The Department acknowledges that if article 2(3)(a) of the 2015 Order had renumbered article 5, this would have avoided any possible ambiguity as to whether paragraphs (a) and (b) were in fact to be included in the new article 5(1).

4. However, we consider that the possibility that the Order as drafted will cause any confusion is low. Article 2(5) of the 2015 Order makes clear that references to "5(a)" and "5(b)" where they appear in the 2014 Order, are to be replaced with references to article "5(1)(a)" and "5(1)(b)" respectively.

5. The Department thanks the Committee for bringing this issue to its attention and undertakes to correct it as soon as a suitable opportunity to do so arises.

Department for Business, Innovation and Skills
21 December 2015

Appendix 3

S.I. 2015/1970: memorandum from the Ministry of Justice

Prosecution of Offences Act 1985 (Criminal Courts Charge) (Amendment) Regulations 2015 (S.I. 2015/1970)

1. The Committee considered this instrument on 13 January 2016 and has asked for a memorandum on the following point.

   In the light of the observations of the House of Commons Justice Committee in paragraph 38 of its Second Report for this Session, the words "unless the contrary intention appears" in section 14 of the Interpretation Act 1978 and the mandatory language of sections 21A(1) and 21C(1) of the Prosecution of Offences Act 1985, explain why paragraph 3.2 of the Explanatory Memorandum indicates that the sections in question provide justification for revoking the charge specified in regulation 3 of and the Schedule to the Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015 (as opposed to reducing it).

2. Section 21A(1) is in mandatory form, directing courts to impose the charge. Section 21C(1) however is not drafted in mandatory form. The Department understands the Committee's question, and notes the stance of the Justice Committee, but considers that 21C(1) is ultimately a power to specify amounts not a duty. While section 21A(1) is in mandatory form, it is explicitly subject to section 21C. This way of drafting the interplay between 21A and 21C, it seems to the Department, gives the vires to act in the way it did. It is also clear to courts that no charge can be imposed where no amounts are set.

3. In the Department's view, this is not therefore a situation where the contrary intention is shown for the purposes of section 14 of the Interpretation Act.

4. The Department would accept that a power to act is not necessarily a power to act without limit. The question is whether this was a valid exercise of power. We think it was. In circumstances where the Department planned to review the whole area and in the light of the criticisms from various quarters, including a Parliamentary committee, it was open to the Lord Chancellor to revoke the regulations setting amounts pending the outcome of that review.

5. As the Committee suggests, one alternative would have been to reduce the amount of charge. That would no doubt be within vires. It would be an odd result if Parliament can be said to have intended that the Lord Chancellor could reduce the charge to £1, but not revoke it altogether.

Ministry of Justice
19 January 2016

Appendix 4

S.I. 2015/1973: memorandum from the Department for Environment, Food and Rural Affairs

Large Combustion Plants (Transitional National Plan) Regulations 2015 (S.I. 2015/1973)

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

   Explain why it was concluded that there was power under section 2(2) of the European Communities Act 1972 to make the Regulations in advance of the approval by the European Commission of the Transitional National Plan, given the terms of Article 4 of Commission Implementing Decision 2012/115/EU.

2. The Department notes that Article 4 of Commission Implementing Decision 2012/115/EU ("Article 4") reads as follows:

   In accordance with the second and third subparagraphs of Article 32(5) of Directive 2010/75/EU, a Member State may only implement its transitional national plan upon acceptance by the Commission.

3. On 17 December 2015 the European Commission adopted Commission Decision C(2015) 9317, formally accepting the UK Transitional National Plan ("the UK TNP"). The UK TNP was implemented with effect from 1 January 2016. It follows that the UK TNP is compatible with Article 4.

4. The Large Combustion Plants (Transitional National Plan) Regulations 2015 ("the Regulations") were made on 2 December 2015 under powers in section 2(2) of the European Communities Act 1972. Under section 2(2) the Secretary of State has power to make regulations for the purposes of implementing EU law, including derogations contained in Directives (the UK TNP is a derogation permitted under Article 32 of the Industrial Emissions Directive (Directive 2010/75/EU)). The majority of the provisions in the Regulations came into force on 31 December 2015.

5. The transposition deadline for the relevant provisions within the Industrial Emissions Directive (the provisions to be derogated from by virtue of the UK TNP) was 1 January 2016. Accordingly, domestic legislation implementing these provisions had been made so as to take substantive effect from 1 January 2016 (see, for example, paragraph 1(b) of Schedule 15A to the Environmental Permitting (England and Wales) Regulations 2010 as inserted by S.I. 2013/390).

6. Further, the Department notes that S.I. 2013/390 had already made provision (in respect of England and Wales) requiring the relevant regulators to exercise their relevant functions so as to ensure compliance with the provisions of Article 32(2) and (3) of the Industrial Emissions Directive, which relate only to Transitional National Plans. It was legitimate to include such provision in S.I. 2013/390, notwithstanding that at the date on which those regulations were made the European Commission had not accepted a plan submitted by the UK. This illustrates that it is legitimate to use purposive vires to implement provisions concerning Transitional National Plans in such circumstances. While the parent Act for S.I. 2013/390 is the Pollution, Prevention and Control Act 1999 rather than the European Communities Act 1972, the two sets of vires are both purposive in nature.

7. The Department considers that there was power to make the Regulations on 2 December 2015 under section 2(2) of the European Communities Act 1972 for the purpose of implementing the Industrial Emissions Directive (and, by extension, the derogation provided for by the UK TNP). The UK TNP had been submitted to the European Commission on 20 October 2015. The Department anticipated that the European Commission would accept the UK TNP in advance of 31 December 2015, and that there would therefore be no incompatibility between the UK TNP and Article 4. This view was informed by discussions between the Department and the European Commission on the subject. As detailed above, the UK TNP was accepted on 17 December 2015, and accordingly the Regulations properly and lawfully achieved their intended purpose when they came into force on 31 December 2015.

8. The Department does not consider that the power to make regulations for this purpose was unavailable by virtue of the UK TNP not having been accepted by the European Commission at that date. The Department notes that the definition of "Transitional National Plan" in regulation 2(1) of the Regulations identifies the plan by reference only to the preparation of the plan by the Secretary of State and the date on which it was submitted to the European Commission, so no issue of legal certainty arises from the fact that it had not been accepted by the European Commission on the date on which the Regulations were made.

9. The Department would acknowledge that, if the UK TNP had not been accepted, it would have been incompatible with Article 4 for the UK TNP to have been implemented (though if this issue had arisen, it could have been addressed by making a further instrument revoking the Regulations before the coming into force date). However, at the time at which the Regulations were made, the Department anticipated that acceptance would be forthcoming before 31 December 2015 and that there would accordingly be no such incompatibility when the Regulations took effect.

10. The Department notes that paragraph 7.1 of the Explanatory Memorandum published alongside the Regulations included acknowledgement that the UK TNP required the approval of the European Commission before it could be implemented and that such approval had not yet been forthcoming.

11. As a practical matter, the Department was mindful that in order to ensure that the Regulations were in force before 1 January 2016 (the coming into force date for the provisions to be derogated from by virtue of the UK TNP) while adhering to the 21 day rule, it was desirable for the Regulations to be made no later than early December 2015.

Department for Environment, Food and Rural Affairs
19 January 2016

Appendix 5

S.I. 2015/1977: memorandum from the Department for Business, Innovation and Skills

Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2015 (S.I. 2015/1977)

1. The Committee, by letter (sent by email) dated 13th January 2016, asked the Department to submit a memorandum on the following point in relation to the above instrument:

   Explain the intended purpose of article 3 and how effect is given to that intention.

2. In order to act as an insolvency practitioner, a person is required to be registered as a member of a professional body recognised as such by the Secretary of State. Each recognised professional body ("RPB") is required to pay an annual fee to the Secretary of State to maintain that recognition. The annual fee is calculated by reference to the number of insolvency practitioners registered with the RPB on 1st January in each year. The fee is due on the following 6th April in each year.

3. The per capita fee and calculation of the fee due to the Secretary of State is set out in article 2(2) of the Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003 ("the principal Order").

4. Article 2(b) of the above instrument increases the per capita fee.

5. The intention of article 3 is to ensure that the increase in the fee at article 2(b) only applies to the calculation of the fee by reference to the number of people authorised on 1st January 2016 and so authorised in subsequent years.

6. The effect is that the fee at the old rate applies to any fees for years prior to 2016 that have not been paid at the date that the new fee takes effect.

7. The Department wanted to avoid any implication that the increase might be retrospective having regard to the way in which article 2(2) of the principal Order is drafted.

Department for Business, Innovation and Skills
19 January 2016