



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

---

**Second Report  
of Session 2010-11**

---

**Drawing special attention to:**

*Audiovisual Media Services Regulations 2010 (S.I. 2010/419)*

*Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (S.I. 2010/653)*

*Town and Country Planning (Compensation) (England) Regulations 2010 (S.I. 2010/655)*

*Environmental Permitting (England and Wales) (Amendment) Regulations 2010 (S.I. 2010/676)*

*Train Driving Licences and Certificates Regulations 2010 (S.I. 2010/724)*

*Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (S.I. 2010/725)*

*Schedule 39 to the Finance Act 2002 and Recovery of Taxes etc Due in Other Member States (Amendment) Regulations 2010 (S.I. 2010/792)*

*Ordered by the House of Lords to be printed*

*21 July 2010*

*Ordered by the House of Commons to be printed*

*21 July 2010*

**HL Paper 23**

**HC 354-ii**

Published on 27 July 2010  
by authority of the House of Lords  
and the House of Commons  
London: The Stationery Office Limited  
£0.00

# Joint Committee on Statutory Instruments

## Current membership

### House of Lords

Lord Campbell of Alloway (*Conservative*)  
Lord Clinton-Davis (*Labour*)  
Baroness Eccles (*Conservative*)  
Earl of Mar and Kellie (*Liberal Democrat*)  
Lord Rees Mogg (*Crossbench*)  
Baroness Stern (*Crossbench*)

### House of Commons

Mr George Mudie MP (*Labour, Leeds East*) (Chairman)  
Mr Robert Buckland MP (*Conservative, South Swindon*)  
Michael Ellis MP (*Conservative, Northampton North*)  
John Hemming MP (*Liberal Democrat, Birmingham, Yardley*)  
Mr Ian Liddell-Grainger MP (*Conservative, Bridgwater and West Somerset*)  
Toby Perkins MP (*Labour, Chesterfield*)

## 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, available on the Internet via [www.parliament.uk/jcsi](http://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](http://www.parliament.uk/jcsi).

## Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Christine Cogger and Daniel Greenberg (*Commons*); Allan Roberts, Peter Milledge and Nicholas Beach (*Lords*).

## Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: [jcsi@parliament.uk](mailto:jcsi@parliament.uk).

# Contents

---

<b>Report</b>	<i>Page</i>
<b>Instruments reported</b>	<b>2</b>
1 S.I. 2010/419: Reported for doubtful <i>vires</i> and unexpected choice of parliamentary procedure	2
2 S.I. 2010/653: Reported for requiring elucidation	4
3 S.I. 2010/655: Reported for defective drafting and doubtful <i>vires</i>	4
4 S.I. 2010/676: Reported for failing to comply with <i>Statutory Instrument Practice</i>	5
5 S.I. 2010/724: Reported for doubtful <i>vires</i>	5
6 S.I. 2010/725: Reported for defective drafting	7
7 S.I. 2010/792: Reported for defective drafting	8
<b>Instruments not reported</b>	<b>9</b>
<b>Annex</b>	<b>9</b>
<b>Appendix 1A</b>	<b>12</b>
S.I. 2010/419: first memorandum from the Department for Culture, Media and Sport	12
<b>Appendix 1B</b>	<b>14</b>
S.I. 2010/419: second memorandum from the Department for Culture, Media and Sport	14
<b>Appendix 2</b>	<b>15</b>
S.I. 2010/653: memorandum from the Department for Communities and Local Government	15
<b>Appendix 3</b>	<b>16</b>
S.I. 2010/655: memorandum from the Department for Communities and Local Government	16
<b>Appendix 4</b>	<b>17</b>
S.I. 2010/676: memorandum from the Department for Environment, Food and Rural Affairs	17
<b>Appendix 5</b>	<b>18</b>
S.I. 2010/724: memorandum from the Department for Transport	18
<b>Appendix 6</b>	<b>20</b>
S.I. 2010/725: memorandum from the Department for Work and Pensions	20
<b>Appendix 7</b>	<b>21</b>
S.I. 2010/792: memorandum from HM Revenue and Customs	21

## Instruments reported

---

At its meeting on 21 July 2010 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 seven 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. 2010/419: Reported for doubtful *vires* and unexpected choice of parliamentary procedure

<i>Audiovisual Media Services Regulations 2010 (S.I. 2010/419)</i>
--

1.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that there is a doubt that they are *intra vires* in one respect and that (in the same respect) the choice of parliamentary procedure to which they are subject is unexpected.

1.2 These Regulations were made on 22 February 2010 under section 2(2) of the European Communities Act 1972 and came into force on 18 March 2010. By virtue of section 2(4) of that Act they can, for purposes connected with implementation of EU obligations, include any provision that might be made by Act of Parliament, but that is qualified by Schedule 2. In particular they cannot make provision—

- imposing or increasing taxation (paragraph 1(1)(a)), or
- taking effect from a date earlier than that of making the Regulations (paragraph 1(1)(b)).

1.3 Regulation 9 inserts a new section 368NA into the Communications Act 2003 and confers a power on the relevant regulatory authority and the Office of Communications (OFCOM) to require a provider of an on-demand programme service to pay them a fee to cover costs of exercising regulatory functions. Regulation 13(2) to (6) contains transitional provisions which modify the application of section 368NA for the purpose of calculating costs incurred and the amount of fees to be paid in relation to the period from 19 December 2009 to 31 March 2010. Accordingly fees payable for that period include fees for functions exercised before the Regulations came into force.

1.4 In a memorandum printed at Appendix 1A the Department for Culture, Media and Sport addresses concerns raised by the Committee regarding the compatibility of these provisions with the restrictions in paragraph 1(1)(a) and (b) of Schedule 2 to the 1972 Act, by means of explanations that, in outline, run as follows—

- the Regulations do not have any effect before they were made, for the actual power to charge (albeit relating to some activities undertaken in the past) only applies once the Regulations are in force;

- the Regulations do not increase or impose taxation, taxation being of a general nature and therefore not embracing the costs of undertaking specific activities for specific purposes, as here.

1.5 The Committee notes that the Department's first point appears to be compatible with a literal reading of paragraph 1(1)(b) of Schedule 2 to the 1972 Act and that its second point appears to be compatible with the meaning of “taxation” as covered by the case law identified in paragraphs 1 to 30 of Appendix 3 to the Committee’s 32nd Report of Session 2002-03, which the Committee printed without comment. However what the Committee implicitly accepted in printing those paragraphs without comment was that a fee chargeable for (and representing a reasonable assessment of the cost of) the exercise of a function *taking place after the charging instrument came into force* did not comprise taxation.

1.6 The position where a charge is made for the exercise of a function *predating the charging instrument* is far harder to reconcile with Schedule 2. For if this is a new charge for past services, then it could be said to “take effect from” the time of the past services. If, however, it is a new charge not linked to past services, then it appears difficult to see how it could be anything other than the taxation of those charged.

1.7 It follows that the Committee does not regard the Department's arguments as secure, and accordingly **the Committee reports regulations 9 and 13, in so far as they cover a past period, for doubt as to whether they are *intra vires*.**

1.8 The same provisions in the Regulations also gave rise to concerns of the Committee as to procedure. Under paragraph 2(2) of Schedule 2 to the 1972 Act, instruments under section 2(2) are either subject to the draft affirmative resolution procedure in both Houses or subject to the negative resolution procedure. The Committee asked the Department why these Regulations were made subject to the negative resolution procedure, given that an affirmative resolution procedure (Commons only) applied where an order was made under powers conferred by section 102(3) or (4) of the Finance (No. 2) Act 1987, and that these Regulations (by imposing charges for functions exercised in a past period) appeared—in so far as they were *intra vires*—to make the sort of fee provision which would have fallen within that section, had the recipients of the fees been required to pay them into the Consolidated Fund.

1.9 In a memorandum printed at Appendix 1B the Department states that it regards its use of the negative resolution procedure as unexceptional in view of what it perceives to be the uncontroversial nature of the regulations and the fact that associated regulations (S.I. 2009/2979) were made subject to that procedure.

1.10 The Committee accepts that the scope for controversy, assuming all significant issues are exposed, is a reasonable starting point for choosing between the alternative procedures. However it notes that, as the negative resolution procedure was used, and there was no prayer against the Regulations, there is no indication whether the past element for charging would have given rise to controversy, had it been expressly referred to in debate. It follows that, in this case, the Committee considers that the comparability of procedures required in related cases depending on other enabling powers is a better starting point. The memorandum does not contain any indication that consideration was given to the relevance of the 1987 Act provision to the transitional provision inserted by regulation

13(2) to (6) and, in the absence of that indication, **the Committee reports these Regulations for making an unexpected use of the negative resolution procedure.**

## 2 S.I. 2010/653: Reported for requiring elucidation

*Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (S.I. 2010/653)*

2.1 **The Committee draws the special attention of both Houses to this Order on the ground that it requires elucidation.**

2.2 Article 2(2) substitutes class C2A (secure residential institutions) in Part C of the Schedule to the Town and Country Planning (Use Classes) Order 1987. The substituted text is the same as the earlier text. According to the Explanatory Note to this Order, the restatement is to clarify that this Class is not confined to Crown land. It was not apparent to the Committee why that should be the case, and it accordingly sought an explanation from the Department for Communities and Local Government. In a memorandum printed at Appendix 2 the Department provides clarification, though the Committee observes that paragraph 3 of the memorandum should have referred to the Town and Country Planning (Use Classes) Order 1987, not 1989. **The Committee reports this Order for requiring the elucidation largely provided in the Department’s memorandum.**

## 3 S.I. 2010/655: Reported for defective drafting and doubtful *vires*

*Town and Country Planning (Compensation) (England) Regulations 2010 (S.I. 2010/655)*

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that the preamble is defectively drafted, leading to a doubt as to whether regulation 2 is *intra vires* in one respect.**

3.2 Regulation 2 (which the Committee notes is wrongly numbered 2(1)) depends on powers conferred by section 108(2A)(a) and (3C)(a) of the Town and Country Planning Act 1990, but the preamble to the Regulations omits to include section 108(2A)(a) as an enabling power. In a memorandum printed at Appendix 3 the Department for Communities and Local Government acknowledges this error. It has already taken corrective action by means of S.I. 2010/1220 which revokes and replaces these Regulations. The Committee welcomes this, given the comments in paragraph 22 of the Court of Appeal judgment in *Vibixa Ltd v Komori UK Ltd and others* ([2006] EWCA Civ 536), which indicate that an instrument may be invalid to the extent that it is not made under the enabling powers specified in the preamble. **The Committee accordingly reports the preamble for defective drafting, acknowledged by the Department, leading to a doubt as to the *vires* of regulation 2 in so far as section 108(2A)(a) of the Act is not included in the preamble.**

## 4 S.I. 2010/676: Reported for failing to comply with *Statutory Instrument Practice*

*Environmental Permitting (England and Wales) (Amendment) Regulations 2010 (S.I. 2010/676)*

4.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with *Statutory Instrument Practice*.

4.2 The sole function of these Regulations is to correct an error in S.I. 2010/675. In a memorandum printed at Appendix 4 the Department for Environment, Food and Rural Affairs acknowledges that these Regulations should have been made available free of charge to all known recipients of the earlier instrument, and should have borne an italic headnote to that effect, in accordance with paragraphs 3.4.11 and 3.4.14 of *Statutory Instrument Practice*. The memorandum explains the arrangements being made to rectify the position. **The Committee accordingly reports these Regulations for a failure to comply with *Statutory Instrument Practice*, acknowledged by the Department.**

## 5 S.I. 2010/724: Reported for doubtful *vires*

*Train Driving Licences and Certificates Regulations 2010 (S.I. 2010/724)*

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

### *Background*

5.2 These Regulations are made under section 2(2) of the European Communities Act 1972 and implement, for Great Britain, Directive 2007/59/EC of the European Parliament and of the Council on the certification of train drivers operating locomotives and trains on the railway system in the Community. The form of a train driving licence required by the Directive and issued by the Office of Rail Regulation (ORR) under the Regulations must comply with the requirements set out in Schedule 2 (see regulation 5(1)). That Schedule includes a sub-heading stating that it substantially reproduces the provisions of Annex I to the Directive. Paragraph 2 of the Schedule sets out the contents of the licence that are specifically required (sub-paragraphs (a) to (f)). Sub-paragraph (g) adds: “additional information, or medical restrictions for use imposed by the ORR in accordance with Schedule 1, in Code Form”. A further sentence, separated from that text but still within the same sub-paragraph, adds the following: “The codes shall be decided by the Commission, in accordance with the regulatory procedure referred to in article 32(2) of the Directive and on the basis of a recommendation from the [European Railway] Agency”.

5.3 In a memorandum printed at Appendix 5 the Department for Transport explains that paragraph 2(g) of Schedule 2 is intended to refer to any codes for medical restrictions in train driving licences which may be prescribed by the EU for use in such licences *from time to time*; two such codes are prescribed in Commission Regulation (EU) No. 36/2010. The Department accepts that paragraph 2(g) might have been drafted differently, so as to look

less like an ambulatory provision having substantive effect, but argues that paragraph 2(g) as currently drafted is *intra vires* the 1972 Act and does not cause any difficulty in understanding. The memorandum adds the additional argument that the reference in question “informs the reader of the fact that the Directive provides for the Commission to set the codes in accordance with the regulatory procedure referred to in article 32(2) of the ... Directive” and that “the codes apply in the UK by virtue of the exercise by the Commission, by directly applicable EU Regulation, of those powers, not because of the effect of paragraph 2(g) of Schedule 2 to our Regulations”.

#### *Characterisation of paragraph 2(g) of Schedule 2*

5.4 The additional argument in the memorandum appears to the Committee to depend on characterisation of the queried provision as informative rather than operative. The Committee does not accept that characterisation. While the sub-heading of the Schedule refers to substantial reproduction of Annex I to the Directive, the link to regulation 5(1) clearly renders the content of the Schedule as operative (i.e. forming part of obligations imposed by the Regulations) and no part of paragraph 2(g) of Schedule 2 is either included in a conventional location for purely informative or referential material (i.e. in a footnote or in the Explanatory Note) or presented sufficiently distinctly to render it clear that it is intended to be merely informative or referential. On the face of it, the provision is an operative one, appearing to require the codes to be decided by the Commission and to be used in the licence.

#### *Restriction on sub-delegation*

5.5 As respects the restriction on sub-delegation in paragraph 1(1)(c) of Schedule 2 to the 1972 Act, the Committee concurs with the Department’s conclusion that this is not a problem, but for a different reason. That provision does not appear to the Committee to cover EU legislation because the concept of “subordinate instrument” in paragraph 1(1)(c) looks inapt to extend to such legislation.

5.6 The Department’s memorandum did not address the question as to whether the use of section 2(2) of the 1972 Act is subject to the normal common law presumption against sub-delegation, in addition to the specific restriction in paragraph 1(1)(c) of Schedule 2 to that Act. But the Committee does not propose to take issue on that point, given the wide-ranging terms of section 2(4) of the Act.

#### *Restriction on implementing future obligations*

5.7 The Department argues that paragraph 2(g) of Schedule 2 to the Regulations does not itself give effect to a future obligation, because the reference is a statement of fact, intended simply to describe the existence of the codes; the codes apply in this country by virtue of the Commission’s directly applicable EU Regulation. For the reasons given above, the Committee does not accept that argument.

5.8 The Committee also points out that the regulatory procedure referred to in Article 32(2) of the Directive does not specify the form of EU measure to be used. Consequently it is possible that future codes decided on by the Commission may not be contained in an EU Regulation.

5.9 Furthermore, the Committee is aware of no authority for the proposition that, where EU legislation itself confers a power or imposes a duty on an EU institution to take non-amending subordinate measures, a reference to those measures before they are taken comes within the scope of section 2(2) of the European Communities Act 1972. When section 28 of the Legislative and Regulatory Reform Act 2006 was made to cover ambulatory references in the case of amending measures (whether subordinate or not), the occasion was not taken to deal with non-amending subordinate measures expressly, and the question whether they ought to be treated as covered implicitly has not been addressed by the Department. In the absence of convincing argument **the Committee considers that there is a doubt as to whether paragraph 2(g) of Schedule 2 is *intra vires*. It reports accordingly, while recognising that, to the extent that the provision is *ultra vires*, it is inevitably non-operative.**

## 6 S.I. 2010/725: Reported for defective drafting

*Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (S.I. 2010/725)*

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

6.2 Regulation 4(3) inserts a new paragraph (3A) into regulation 2 of the Occupational Pension Schemes (Employer Debt) Regulations 2005. That new paragraph contains definitions of “exiting employer” and “receiving employer”. The latter definition reads as follows:

*“receiving employer” means an employer who, on the date on which there is a restructuring within regulation 6ZB or 6ZC, is—*

- (a) an employer in relation to the same multi-employer scheme as the exiting employer,*
- (b) either—*
  - (i) associated ... with the exiting employer, or*
  - (ii) the new legal status of the exiting employer,*
- (c) employing at least one active member of the scheme in respect of whom defined benefits are accruing, and*
- (d) an employer in respect of whom a relevant event has not occurred.*

6.3 The Committee asked the Department for Work and Pensions to explain the intended effect of paragraph (b)(ii) of that definition, which did not appear to fit structurally with the rest of it.

6.4 In a memorandum printed at Appendix 6 the Department states that the intended effect of that provision is to provide that an employer which changes its legal status is capable of being a receiving employer. It accepts that the provision is not felicitously phrased, but the wording is intended to be a succinct way of capturing the idea that although the employer is unchanged for practical purposes, it has a new legal status so is legally a different employer. The Department suggests that in the context of the

Regulations the paragraph in question has a sufficiently clear meaning despite the unusual structure.

6.5 The Committee disagrees. Paragraph (b)(ii) does not fit grammatically with the opening words of the definition, and it cannot readily be determined from the Regulations (or from the Department's memorandum) what the wording of that paragraph should be. The Committee considers that the meaning of the definition is unclear as a result and that the definition needs to be amended. **It accordingly reports regulation 4(3) of these Regulations for defective drafting, acknowledged in part by the Department.**

## 7 S.I. 2010/792: Reported for defective drafting

*Schedule 39 to the Finance Act 2002 and Recovery of Taxes etc Due in Other Member States (Amendment) Regulations 2010 (S.I. 2010/792)*

7.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that the preamble is defectively drafted.**

7.2 These Regulations are expressed to be made under section 2(2) of the European Communities Act 1972. Regulation 4(a) replaces an ambulatory definition of an EC Directive in regulation 2(l) of the Recovery of Duties and Taxes Etc Due in Other Member States (Corresponding UK Claims, Procedure and Supplementary) Regulations 2004 with a new ambulatory definition of Regulation (EC) No. 1179/2008, (which has replaced that Directive). In a memorandum printed at Appendix 7 HM Revenue and Customs acknowledges that the preamble to these Regulations should have included reference to paragraph 1A of Schedule 2 to the 1972 Act as an enabling power, together with a statement as to the necessity or expediency of relying upon it.

7.3 The Department expresses its view that the legal position is not in doubt and that an immediate correction is not required, though it expects that an opportunity to rectify the omission may well be forthcoming. The Committee accepts that paragraph 22 of the Court of Appeal judgment in *Vibixa Ltd v Komori UK Ltd and others* ([2006] EWCA Civ 536), which indicates that an instrument may be invalid to the extent that it is not made under the enabling powers specified in the preamble, is arguably inapt here, for the primary power to make the instrument has been cited. Even so, failure to recite the condition required to include the relevant provision (the maker's opinion) in the preamble renders the question whether that opinion was in fact formed a matter of potential dispute rather than implicit on the surface. Any such dispute is resolved by the Department's memorandum rather than by the Regulations themselves. **The Committee reports the preamble for defective drafting, acknowledged in principle by the Department.**

## Instruments not reported

---

At its meeting on 21 July 2010 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 Instruments requiring affirmative approval

- Draft S.I.** Electricity and Gas (Carbon Emissions Reduction) (Amendment) Order 2010
- Draft S.I.** Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010

### Instruments subject to annulment

- S.I. 2010/740** Detergents Regulations 2010
- S.I. 2010/752** Council Tax and Non-Domestic Rating (Amendment) (England) Regulations 2010
- S.I. 2010/1485** Safety of Sports Grounds (Designation) Order 2010
- S.I. 2010/1504** Rail Passengers' Rights and Obligations Regulations 2010
- S.I. 2010/1507** Non-Domestic Rating (Collection and Enforcement) (Local Lists) (Amendment) (England) Regulations 2010
- S.I. 2010/1511** Seed Potatoes (England) (Amendment) Regulations 2010
- S.I. 2010/1513** Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010
- S.I. 2010/1514** Civil Enforcement of Parking Contraventions Designation (No. 3) Order 2010
- S.I. 2010/1531** Dartford-Thurrock Crossing (Amendment) Regulations 2010
- S.I. 2010/1532** Electoral Law (Polling Station Scheme) (Northern Ireland) Regulations 2010
- S.I. 2010/1536** Local Justice Areas Order 2010
- S.I. 2010/1552** European Communities (Designation) (No. 2) Order 2010
- S.I. 2010/1554** Pyrotechnic Articles (Safety) Regulations 2010
- S.I. 2010/1584** Football Spectators (Seating) Order 2010
- S.I. 2010/1585** Rice Products from the United States of America (Restriction on First Placing on the Market) (England) (Revocation) Regulations 2010
- S.I. 2010/1593** Health and Social Care Act 2008 (Consequential Amendments) (Wales) Order 2010

- S.I. 2010/1614** General Pharmaceutical Council (Appeals Committee Rules) Order of Council 2010
- S.I. 2010/1615** General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010
- S.I. 2010/1619** Pharmacy Order 2010 (Registration—Transitional Provisions) Order of Council 2010
- S.I. 2010/1620** Pharmacy Order 2010 (Approved European Pharmacy Qualifications) Order 2010
- S.I. 2010/1621** Pharmacy Order 2010 (Commencement No. 2) Order of Council 2010
- S.I. 2010/1651** Social Security (Disability Living Allowance) (Amendment) Regulations 2010
- S.I. 2010/1655** Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Order 2010
- S.I. 2010/1664** Safety of Sports Grounds (Designation) (No. 2) Order 2010
- S.I. 2010/1668** Zoonoses and Animal By-Products (Fees) (England) Regulations 2010
- S.I. 2010/1673** Medicines for Human Use (Prescribing by EEA Practitioners) (Amendment) Regulations 2010
- S.I. 2010/1675** Export Control (Burma) (Amendment) Order 2010
- S.I. 2010/1676** Social Security (Claims and Payments) Amendment (No. 3) Regulations 2010
- S.I. 2010/1727** National Health Service (Charges for Drugs and Appliances) and (Travel Expenses and Remission of Charges) Amendment Regulations 2010
- S.I. 2010/1769** Merchant Shipping (Ship-to-Ship Transfers) (Amendment) Regulations 2010

#### **Instruments not subject to Parliamentary proceedings laid before Parliament**

- S.I. 2010/1510** Plant Health (England) (Amendment) Order 2010
- S.I. 2010/1635** Land Registration (Proper Office) Order 2010

#### **Instruments not subject to Parliamentary proceedings not laid before Parliament**

- S.I. 2010/1277** Constitutional Reform and Governance Act 2010 (Commencement No. 1) Order 2010
- S.I. 2010/1278** Parliamentary Standards Act 2009 (Commencement No. 4) Order 2010
- S.I. 2010/1484** Wireless Telegraphy (Automotive Short Range Radar) (Exemption) (No. 2) (Amendment) Regulations 2010
- S.I. 2010/1550** Inspectors of Education, Children's Services and Skills (No. 3) Order 2010
- S.I. 2010/1640** Saving Gateway Accounts Act 2009 (Revocation of Commencement) Order 2010
- S.I. 2010/1705** Mortgage Repossessions (Protection of Tenants etc) Act 2010 (Commencement) Order 2010

**S.I. 2010/1726** Northern Ireland Assembly Members Act 2010 (Commencement) Order 2010

## Appendix 1A

---

### S.I. 2010/419: first memorandum from the Department for Culture, Media and Sport

*Audiovisual Media Services Regulations 2010 (S.I. 2010/419)*

1. This memorandum is in response to the Committee's request dated 17 March 2010.

2. The Committee has asked:

Given that—

- (a) exercise of functions throughout the period from 19 December 2009 to 31 March 2010 may be the subject of a fee referable to new section 368NA of the Communications Act 2003 inserted by regulation 9 (see regulation 13(2)), and
- (b) these Regulations were made on 22 February 2010 and come into force on 18 March 2010,

explain how—

- (1) in relation to the period from 19 December 2009 to 21 February 2010, regulation 13(2) is reconciled with the European Communities Act 1972, Schedule 2, paragraph 1(1)(a) and (b), and
- (2) in relation to the period from 22 February 2010 to 17 March 2010, regulation 13(2) is reconciled with paragraph 1(1)(a) of that Schedule.

3. The Department's response is as follows.

#### General

4. Section 368NA of the Communications Act 2003 inserted by regulation 9 of S.I. 2010/419 comes into force on 18 March 2010. The date when the provision in section 368NA(2), enabling the authority to require payment of a fee, takes effect is 18 March 2010. The requirement to pay a fee applies only to a person who is a provider of an on-demand programme service on or after that date. Section 368NA(12) defines a financial year as a period of 12 months ending with 31 March. The transitional provisions in regulation 13(2) – (6) modify the application of section 368NA for the purpose of calculating costs incurred and the amount of fees to be paid in relation to the period from 19 December 2009 to 31 March 2010. The effect of regulation 13(2) in particular is to specify that the period mentioned is treated as if it were a financial year. The effect is not that a fee must be paid by a person providing a service before the regulations come into force on 18 March 2010, nor that a fee might be payable by a person who is no longer providing a service on that date. This is because the modifications do not affect section 368NA(2), the power for an authority to require a provider to pay a fee, as that power is not framed by reference to a financial year.

Response to question (1)

5. Schedule 2 paragraph 1(1)(a) of the European Communities Act 1972 provides that the power in section 2(2) of that Act cannot be used *"to make any provision imposing or increasing taxation"*. The Department's view is that the fee payable by the provider of an on-demand programme service to the authority is not a form of taxation. The fee is not imposed for a general public purpose or on an identified section of the public. Neither is it a general revenue raising measure. It is a charge made to cover the carrying out of specified regulatory functions which are designed to secure that the requirements prescribed in Directive 2007/65/EC (which were required to be and were implemented in domestic legislation by 19 December 2009) are satisfied. The regulatory functions were conferred on the appropriate regulatory authority on 19 December 2009 under the Audiovisual Media Services Regulations 2009 (S.I. 2009/2979). Regulation 13(5)(a) of SI 2010/419 limits the power of an authority to charge to an aggregate amount of fees which is sufficient to enable it to meet but not exceed the estimated costs of carrying out its relevant functions. The fee does not involve a profit or a contribution to funds used for other purposes. It is a fee payable as a requirement for carrying on a particular activity and does not have to be paid by someone who does not provide an on-demand programme service. The Department therefore considers that regulation 13(2) is not affected by the restriction in Schedule 2 paragraph 1(1)(a) of the European Communities Act 1972 in relation to the period from 19 December 2009 to 21 February 2010.

6. Schedule 2 paragraph 1(1)(b) provides that section 2(2) may not be used *"to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision"*. As set out in paragraph 4, the effect of regulation 13(2) is that it enables the authority to charge fees in respect of costs incurred in carrying out, or preparing to carry out, regulatory functions from 19 December 2009 to 31 March 2010, but the power to charge a fee does not take effect until it comes into force on 18 March 2010. The costs basis for calculating the fee payable begins from 19 December 2009, as that is when the regulatory regime began, but the obligation to pay the fee does not. Regulation 13(2) does not enable the authority retrospectively to charge a fee to a provider of on-demand programme service who was no longer providing such a service on 18 March 2010. The Department considers that regulation 13(2) is not affected by the restriction in Schedule 2 paragraph 1(1)(b) of the 1972 Act in relation to the period from 19 December 2009 to 21 February 2010.

Response to question (2)

7. The Department considers regulation 13(2) is not affected by the restriction in Schedule 2 paragraph 1(1)(a) of the European Communities Act 1972 in relation to the period from 22 February 2010 to 17 March 2010 for the same reasons as set out in paragraph 5 of this Memorandum in relation to the period of 19 December 2009 to 21 February 2010.

Department for Culture, Media and Sport  
23 March 2010

## Appendix 1B

---

### S.I. 2010/419: second memorandum from the Department for Culture, Media and Sport

<i>Audiovisual Media Services Regulations 2010 (S.I. 2010/419)</i>
--

1. This memorandum is in response to the Committee's request dated 31 March 2010.

2. The Committee has asked:

*Given that an affirmative resolution procedure applies where an order is made under powers conferred by section 102(3) or (4) of the Finance (No 2) Act 1987, and that regulation 9 as applied by regulation 13(2) of these Regulations appears to make the sort of fee provision which would have fallen within that section had the recipients of the fees been required to pay them into the Consolidated Fund, explain why these Regulations are made subject to the negative resolution procedure.*

3. The Department's response is as follows.

4. The Regulations are made under section 2(2) of the European Communities Act 1972. Schedule 2 to that Act provides that regulations made under section 2(2) can be made subject to either the negative or affirmative resolution procedure. In this case, the Secretary of State exercised his discretion in favour of using the negative procedure in view of what the Department perceives to be the uncontroversial nature of the regulations. New section 368NA, inserted by regulation 9, is as close as possible to the existing provision at section 347 of the Communications Act 2003, which sets out a statement of charging principles for fees payable under Broadcasting Act licences for recovery of Ofcom's costs. Schedule 2 paragraph 1(1)(c) to the European Communities Act 1972 provides that the powers conferred by section 2(2) of that Act do not include the power "to confer any power to legislate" so section 368NA does not mirror exactly the provisions of section 347.

5. It had originally been the Department's intention to include new section 368NA of the Communications Act 2003 as part of the main Audiovisual Media Services Regulations 2009 S.I. 2979 ("the 2009 regulations") which were also made subject to the negative resolution procedure. The decision was taken in October 2009, perhaps erring on the side of caution, that section 368NA should not be part of the 2009 regulations but instead be notified in draft to the European Commission as a technical standard, in accordance with Directive 98/34/EC as amended by Directive 98/48/EC. The provision was notified in draft in November 2009 and published on the Commission's website. The obligatory 3 month standstill period was observed. No objections to the provision were received.

6. The proposed fee regime was discussed with industry stakeholders and the general principle that regulated entities should pay for the regulatory system themselves did not seem controversial. Ofcom and the designated appropriate regulatory authority, the Association of Television on Demand (“ATVOD”) have launched an extensive consultation on the charging of fees so that the views of industry can be fully taken into account. That consultation document can be found here:-

[http://www.ofcom.org.uk/consult/condocs/vod\\_proposals/vod\\_proposal.pdf](http://www.ofcom.org.uk/consult/condocs/vod_proposals/vod_proposal.pdf)

The previous self-regulatory scheme for video-on-demand that ATVOD has administered for a number of years was also funded by contributions from industry members.

Department for Culture, Media and Sport  
8 April 2010

## Appendix 2

---

### **S.I. 2010/653: memorandum from the Department for Communities and Local Government**

***Town and Country Planning (Use Classes) (Amendment) (England) Order 2010 (S.I. 2010/653)***

1. The Committee has requested a memorandum on the follow point –

*“What causes the restatement of Class C2A in article 2(2) to have the effect described in the third paragraph of the Explanatory Note?”.*

2. Part 7 of the Planning and Compulsory Purchase Act 2004 applied the planning Acts<sup>1</sup> to the Crown. Section 88 provides a power for the Secretary of State to apply relevant subordinate legislation to the Crown, with or without modifications. The Town and Country Planning (Application of Subordinate Legislation to the Crown) Order 2006<sup>2</sup> (the 2006 Order) was made using this power.
3. Article 5(1) of the 2006 Order provides that the Town and Country Planning (Use Classes) Order 1989 “applies to the Crown with, in England, the following modifications”. Article 5(2) inserts class C2A into the Use Classes Order.

---

<sup>1</sup> The Town and Country Planning Act 1990, the Planning (Hazardous Substances) Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990.

<sup>2</sup> S.I. 2006/1282.

4. The intention was that class C2A would apply to any use for the provision of secure residential accommodation (and not just to use for that purpose by the Crown) – and for that reason section 55(2)(f) of the Town and Country Planning Act 1990 was cited as one of the enabling provisions for the 2006 Order. However, the wording of article 5(1) casts doubt on whether that intention was achieved by the 2006 Order. For that reason class C2A was reinserted by S.I. 2010/653.

Department for Communities and Local Government  
9th April 2010

## Appendix 3

---

### **S.I. 2010/655: memorandum from the Department for Communities and Local Government**

<i>Town and Country Planning (Compensation) (England) Regulations 2010 (S.I. 2010/655)</i>
--

1. The Committee has requested a memorandum on the follow point –  
  
*“Given regulation 2, explain why section 108(2A)(a) is not cited among the enabling powers in the preamble.”*
2. This was an error for which the Department apologises. The Town and Country Planning (Compensation) (No. 2) (England) Regulations 2010 (S.I. 2010/1220), which come into force on 3rd May 2010, correct the error.

Department for Communities and Local Government  
9th April 2010

## Appendix 4

---

### S.I. 2010/676: memorandum from the Department for Environment, Food and Rural Affairs

***The Environmental Permitting (England and Wales) (Amendment) Regulations 2010 (S.I. 2010/676)***

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:  
Has the Department made arrangements (in accordance with paragraph 3.4.11 of *Statutory Instrument Practice*) for copies of this instrument to be made available free of charge to all known recipients of S.I. 2010/675? If not, explain why not. If so, explain why this instrument does not bear a headnote to that effect (see paragraph 3.4.14 of *Statutory Instrument Practice*).
2. The Department is now making the necessary arrangements, as set out below; not having applied the free issue requirement originally was an oversight.
3. The Department has contacted the SI Registrar to explain the omission. Consequently, the SI Registrar has requested TSO to reimburse anyone who purchased a copy of the SI and to ensure that any future reprints bear the correct headnote. The Department will write to the affected industry sector to notify them of the situation and will offer to provide a copy of the SI to the industry, and anyone else requesting a copy, free of charge. The Department apologises for the oversight and for the fact that the instrument did not bear the required headnote.

Department for Environment, Food and Rural Affairs  
12 April 2010

## Appendix 5

---

### S.I. 2010/724: memorandum from the Department for Transport

<i>Train Driving Licences and Certificates Regulations 2010 (S.I. 2010/724)</i>
---

By a letter dated 31<sup>st</sup> March 2010 the Committee has asked for a memorandum on the following points—

1. *With respect to the second sentence of Schedule 2, paragraph 2(g), has the Commission already decided any codes and, if so, by what instrument(s)?*
2. *If so, why is the provision not limited to such codes?*
3. *Alternately, is it intended that this provision should fasten on future EU legislation? If so, how does that fit with the enabling power for these Regulations?*

#### **Response to question 1**

Yes. The Commission has prescribed two codes for medical restrictions as follows:-

“b1 – Mandatory use of glasses /lenses;

b2 – Mandatory use of hearing aid/communication aid.”

1. These codes are prescribed in Commission Regulation (EU) No. 36/2010<sup>a</sup>, (at Annex 1, paragraph 3(d) item (9b)).

#### **Response to question 2**

Because the EU could issue further codes.

#### **Response to question 3**

Yes. Paragraph 2(g) of Schedule 2 to the Regulations is intended to refer to any codes for medical restrictions in train driving licences which may be prescribed by the EU for use in such licences from time to time.

Schedule 2 to our Regulations substantially reproduces Annex 1 (Community Model Licence and Harmonised Complementary Certificate) to the Train Driving Licensing

---

<sup>a</sup> O.J. No. L 13, 19.1.2010, p. 1.

Directive<sup>b</sup>. The reference in question informs the reader of the fact that the Directive provides for the Commission to set the codes in accordance with the regulatory procedure referred to in article 32(2) of the Train Driving Licensing Directive. The codes apply in the UK by virtue of the exercise by the Commission, by directly applicable EU Regulation, of those powers, not because of the effect of paragraph 2(g) of Schedule 2 to our Regulations.

We believe the provision is within the enabling power. This is because the approach taken is that the reference is a statement of fact, intended simply to describe the existence of the codes. In the view of the Department, it does not itself give legal effect to a future obligation, because as explained above the EU Regulation is directly applicable, nor does it sub-delegate a power in breach of the restriction against sub-delegation in Schedule 2 paragraph 1(c) of the European Communities Act 1972 (“ECA”), because the EU Regulation does not purport to say what a licence must contain, but merely provides the codes to be used.

Even if paragraph 2(g) were taken to involve a sub-delegation of the power to set codes, the Department considers that the ECA Schedule 2 paragraph 1(c) restriction on sub-delegation would not apply here as the setting of codes would be a “direction as to a matter of administration” within the meaning of paragraph 1(2) of Schedule 2 to the ECA.

Train driving licences are to be recognised in all Member States and will take the form of a small plastic card analogous to a modern EU road vehicle driving licence. As space on the licence will be limited it makes sense to indicate any medical restriction to which a driver’s licence is subject in the form of a code, using a code which can be recognised and understood in all Member States. The substantive requirement, i.e. the medical restriction on the licence, would be imposed by the Office of Rail Regulation, as licensing authority. But in recording that restriction on the licence the ORR would be obliged to use the EU recognised code.

Although the Department accepts that paragraph 2(g) might have been drafted differently, so as to look less like an ambulatory provision having substantive effect, we believe that paragraph 2(g) as currently drafted is *intra vires* and, in the context of the implementation of the Directive, is useful to the reader and does not cause any difficulty in understanding. Guidance is being developed on our Regulations, and that will in any event refer to the EU Regulation and how it supplements, in further detail, the requirements set out in our Regulations for the production of train driving licences and certificates.

Department for Transport  
9<sup>th</sup> April 2010

---

<sup>b</sup> Directive 2007/59/EC. O.J. No. L 315, 3.12.2007, p. 51.

## Appendix 6

---

### S.I. 2010/725: memorandum from the Department for Work and Pensions

***Occupational Pension Schemes (Employer Debt and Miscellaneous Amendments) Regulations 2010 (S.I. 2010/725)***

1. In its letter to the Department of 31<sup>st</sup> March 2010, the Joint Committee requested a memorandum on the following point:

*As respects regulation 4(3), explain the intended effect of paragraph (b)(ii) of the definition of “receiving employer” (in new paragraph (3A)), which does not appear to fit structurally with the rest of that definition.*

2. The Department’s response to the Committee’s point is outlined below.
3. The intended effect of paragraph (b)(ii) of the definition of “receiving employer” is to provide that an employer which changes its legal status is capable of being a receiving employer. For example, a charity set up as a trust may want to become a charitable incorporated organisation. When the charity set up as a trust ceases to exist, it stops participating in the pension scheme which may mean it has to pay a debt to the scheme (even though the charitable incorporated organisation it becomes starts participating in the scheme). The intention is that the charity set up as a trust could fall within the definition of “exiting employer” and the charitable incorporated organisation could fall within the definition of “receiving employer”. This would allow them to use the new procedures introduced by the Regulations, which would prevent a debt arising.
4. The new definition reads “ “receiving employer” means an employer who ... is ... the new legal status of the exiting employer”. The Department accepts that this is not felicitously phrased, but the wording is intended to be a succinct way of capturing the idea that although the employer is unchanged for practical purposes, it has a new legal status so is legally a different employer. The Department suggests that in the context of the Regulations, the paragraph in question has a sufficiently clear meaning despite the unusual structure.
5. The Department also suggests that the other paragraphs in the definition fit with the paragraph in question (using paragraph (a) as an example, the charitable incorporated organisation can be an employer in relation to the same multi-employer scheme as the charity set up as a trust).

## Appendix 7

---

### S.I. 2010/792: memorandum from HM Revenue and Customs

<p><i>Schedule 39 to the Finance Act 2002 and Recovery of Taxes etc Due in Other Member States (Amendment) Regulations 2010 (S.I. 2010/792)</i></p>
---

1. The Joint Committee has requested a memorandum to be submitted on the following point–

Given regulation 4(a) which makes an ambulatory reference to Regulation (EC) No 1179/2008 in new regulation 2(l) of S.I. 2004/674, explain why the preamble does not cite paragraph 1A of Schedule 2 to the European Communities Act 1972 as an enabling power.

2. The Regulations (at regulation 4) insert a definition of “Regulation (EC) No 1179/2008” to the Recovery of Duties and Taxes etc Due in Other Member States (Corresponding UK Claims, Procedure and Supplementary) Regulations 2004 (S.I. 2004/674) – “the 2004 Regulations”. As the Committee has noted, the reference to Regulation (EC) No 1179/2008 is ambulatory. Such provision was made in reliance of paragraph 1A of Schedule 2 to the European Communities Act 1972 (ECA) and this provision and the necessity or expediency of relying upon it should have been cited in the preamble to the Regulations. HMRC regrets that this statement was omitted.

3. The ambulatory reference to Regulation (EC) No 1179/2008 is clearly set out in the definition in that it provides that references to Regulation (EC) No 1179/2008 are to be read “as amended from time to time”. The definitions of the forerunner Directive to Regulation (EC) No 1179/2008, as well as Council Directive 2008/55/EC which it implements, were also ambulatory in the 2004 Regulations given the number of times they had previously been amended, such ambulatory effect was made in reliance of paragraph 1A of Schedule 2 to the ECA and it was intended to maintain this position following this latest change of the European legislation. This is why the ambulatory reference is necessary or expedient.

4. In the circumstances it is HMRC’s view that the legal position is not in doubt and an immediate correction is not required. However, HMRC will include such provision when the 2004 Regulations are next re-made or amended. It is likely that a suitable opportunity will be forthcoming as further changes to Council Directive 2008/55/EC are being considered by member States which may necessitate further amendments to the 2004 Regulations.