

HOUSE OF LORDS

Merits of Statutory Instruments Committee

First Report of Session 2008-09

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE	The Lord James of Blackheath CBE
The Lord Crisp KCB	The Lord Lucas
The Baroness Deech DBE	The Baroness Maddock
The Viscount Eccles CBE	The Lord Rosser
The Lord Filkin CBE (<i>Chairman</i>)	The Baroness Thomas of Winchester

Registered interests

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Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

First Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

None.

INSTRUMENTS OF INTEREST

Draft Bradford & Bingley plc Compensation Scheme Order 2008

Draft Heritable Bank plc (Determination of Compensation) Order 2008

Draft Kaupthing Singer & Friedlander Limited (Determination of Compensation) Order 2008

1. HM Treasury (HMT) have laid three affirmative orders relating to compensation arising out of earlier transfer orders made under the Banking (Special Provisions) Act 2008. In September of this year, HMT made the Bradford & Bingley plc Transfer of Securities and Property etc. Order 2008 (SI 2008/2546), on which we commented in our 28th Report of Session 2007-08. The draft Bradford & Bingley plc Compensation Scheme Order 2008 enables the amount of any compensation payable to former shareholders of Bradford & Bingley as a result of SI 2008/2546 to be determined by an independent valuer. In October of this year, HMT made the Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008 (SI 2008/2644), and also the Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008 (SI 2008/2674). We commented on these in our 29th Report of last Session (HL Paper 178). The draft Heritable Bank plc (Determination of Compensation) Order 2008, and the draft Kaupthing Singer & Friedlander Limited (Determination of Compensation) Order, provide that the amount of any compensation payable by HMT to the respective concerns as a result of SI 2008/2644 (for Heritable), and SI 2008/2674 (for Kaupthing Singer & Friedlander), is determined as nil. In the Explanatory Memorandum, HMT set out their reasons for this determination.

Draft Christmas Bonus (Specified Sum) Order 2008

Christmas Bonus (Relevant Week) Order 2008 (SI 2008/3064)

Draft Child Benefit (Rates) (Amendment) Regulations 2008

2. Following the Chancellor's announcement in the Pre-Budget Report (PBR), the two Christmas Bonus Orders fulfil his undertaking that, in addition to the £10 Christmas bonus, each pensioner and certain children receiving disability benefits will be paid an extra £60. These additional payments are one-off and most of them will be paid in January 2009. The draft Child

Benefit (Rates) (Amendment) Regulations increase the amounts of child benefit, as set out in the PBR, including raising the rate payable in respect of the first, only or eldest child to £20 a week. A separate order is to be laid to implement the commitment given in the PBR providing for the new rates to come into force in January 2009 (rather than April).

Draft European Parliamentary Elections (Amendment) Regulations 2009

3. These draft Regulations update the previous legislation to reflect changes to electoral laws since the last European Parliament elections were held in 2004. These include the changes to electoral procedures made by the Electoral Administration Act 2006 and the inclusion of Gibraltar in the UK South West constituency. The next European Parliamentary election is due to take place on 4 June 2009.

Draft Gambling Act 2005 (Gaming Machines in Bingo Premises) Order 2008

4. Following representations from the industry, the draft Order proposes to double the number of gaming machines allowed in Bingo Halls from four to eight. This is to help provide additional income to the many small clubs which are struggling in the current economic climate. The Government see this small focused increase in gaming as compatible with their overall objective of protecting the public, because they accept the industry's case, supported by a number of MPs, that Bingo Halls also serve a community function. Adult gaming centres (arcades) have made a similar application which has not been granted.

Education (Special Educational Needs Co-ordinators) (England) Regulations 2008 (SI 2008/2945)

5. The Department for Children, Schools and Families (DCSF) have laid these Regulations. They provide that, from 1 September 2009, all Special Educational Needs Coordinators (SENCOs) in maintained schools in England must be qualified teachers, head teachers or acting head teachers; and that school governing bodies are to determine the role of the SENCO in relation to the leadership and management of the school, to determine the key responsibilities of the SENCO and to monitor the effectiveness of the SENCO in carrying them out. We note that, in the Explanatory Memorandum, DCSF say that responses from governor interests to consultation on the Regulations said that the requirement for governing bodies to monitor specific SENCO activities was burdensome and went against the grain of a move to a more strategic governor role in relation to school management. We sought further information from DCSF and this is printed at Appendix 1. We have a general concern about the cumulative impact of secondary legislation on schools, which we are pursuing through our current inquiry. While we understand the reasons which have led DCSF to take forward the proposals embodied in these Regulations, we are equally clear that the Department must listen carefully to the voices of schools' representatives in making changes to statutory requirements.

Takeover Code (Concert Parties) Regulations 2008 (SI 2008/3073)

6. HM Treasury have laid these Regulations, which provide that certain persons are not considered to be “persons acting in concert” under Rule 9 of the Takeover Code simply by virtue of the Treasury’s shareholdings as a result of the exercise of powers under the Banking (Special Provisions) Act 2008 (in relation to Northern Rock plc and Bradford & Bingley plc), or participation in the recapitalisation scheme (in relation to The Royal Bank of Scotland Group plc, and the prospectively merged HBOS plc / Lloyds TSB plc). We sought further information from HMT to explain why they were unable to lay the Regulations before Parliament sooner than one hour before the Regulations were brought into force. The information is printed at Appendix 2.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Bradford & Bingley plc Compensation Order 2008
Child Benefit (Rates) (Amendment) Regulations 2008
Christmas Bonus (Specified Sum) Order 2008
Companies (Disclosure of Address) Regulations 2008
European Parliament (Disqualification) (United Kingdom and Gibraltar) Order 2009
European Parliamentary Elections (Amendment) Regulations 2009
Gambling Act 2005 (Gaming Machines in Bingo Premises) Order 2008
Gambling Act 2005 (Variation of Monetary Limit) Order 2008
Heritable Bank plc (Determination of Compensation) Order 2008
Kaupthing Singer & Friedlander Limited (Determination of Compensation) Order 2008
Local Government (Structural Changes) (Areas and Membership of Public Bodies in Bedfordshire and Cheshire) Order 2008
Registrar of Companies and Applications for Striking Off Regulations 2008

Instruments subject to annulment

SI 2008/2936 Medical Devices (Amendment) Regulations 2008

- SI 2008/2938 Case Tribunals (England) Regulations 2008
- SI 2008/2940 Children Act 1989 (Contact Activity Directions and Conditions: Financial Assistance) (England) Regulations 2008
- SI 2008/2942 Armed Forces and Reserve Forces (Compensation Scheme) (Amendment No. 3) Order 2008
- SI 2008/2945 Education (Special Educational Needs Co-ordinators) (England) Regulations 2008
- SI 2008/2946 Medicines (Pharmacies) (Applications for Registration and Fees) Amendment Regulations 2008
- SI 2008/2947 Judicial Pensions and Retirement Act 1993 (Addition of Qualifying Judicial Offices) (No. 2) Order 2008
- SI 2008/2987 Housing Benefit and Council Tax Benefit (Amendment) (No.3) Regulations 2008
- SI 2008/2989 Local Government Pension Scheme (Amendment) (No. 2) Regulations 2008
- SI 2008/2992 Rodbaston College, Cannock Chase Technical College and Tamworth and Lichfield College (Dissolution) Order 2008
- SI 2008/2999 Charges for Residues Surveillance (Amendment) Regulations 2008
- SI 2008/3000 Companies Act 2006 (Annual Return and Service Addresses) Regulations 2008
- SI 2008/3006 Companies (Company Records) Regulations 2008
- SI 2008/3007 Companies (Fees for Inspection of Company Records) Regulations 2008
- SI 2008/3008 Race Relations Act 1976 (Amendment) Regulations 2008
- SI 2008/3010 Mutual Recognition of Driving Disqualifications (Great Britain and Ireland) Regulations 2008
- SI 2008/3013 Removal, Storage and Disposal of Vehicles (Prescribed Sums and Charges) (Amendment) (England) Regulations 2008
- SI 2008/3019 Excise Duties (Road Fuel Gas) (Reliefs) (Revocation) Regulations 2008
- SI 2008/3045 Electricity (Exemption from the Requirement for a Generation Licence) (Little Cheyne Court) (England and Wales) Order 2008
- SI 2008/3046 Electricity (Exemption from the Requirement for a Generation Licence) (Gunfleet Sands II) (England and Wales) Order 2008
- SI 2008/3053 Definition of Financial Instrument Order 2008
- SI 2008/3064 Christmas Bonus (Relevant Week) Order 2008
- SI 2008/3073 Takeover Code (Concert Parties) Regulations 2008

Instruments subject to annulment (Northern Ireland)

- SR 2008/439 Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Full-Time) (Severance) (Amendment) Regulations 2008
- SR 2008/444 Pensions Appeals Tribunals (Northern Ireland) (Amendment) Rules 2008
- SR 2008/452 Prison and Young Offenders Centre (Amendment) Rules (Northern Ireland) 2008
- SR 2008/457 Victims of Mentally Disordered Offenders Information (Northern Ireland) Scheme 2008
- SR 2008/466 Family Proceedings (Amendment No. 3) Rules (Northern Ireland) 2008

APPENDIX 1: EDUCATION (SPECIAL EDUCATIONAL NEEDS CO-ORDINATORS) (ENGLAND) REGULATIONS 2008 (SI 2008/2945)

Further information from the Department for Children, Schools and Families on the consultation process

1. [As regards responses from governor interests to the 2008 consultation] there were seven responses with comments, of which one requested confidentiality - a small proportion of the 434 responses to the consultation overall, but one which, nevertheless, we felt it was fair to draw out in our analysis.

2. [DCSF have prepared] a note for governing bodies to explain the regulatory provisions in relation to the monitoring function of the governing body. The note is now available on Governornet, Teachernet and has been circulated to key stakeholders, including the National Governors' Association.

3. As you can see, the impetus for the provisions sprang from the concerns of the then Education and Skills Committee in 2006 about the role and status of Special Educational Needs Co-ordinators (SENCOs) in schools. [We] would refer you to paragraphs 319-323 of the Committee's Report on Special Educational Needs, published on 6 July 2006 (especially 322 and 323 which contain recommendations and appear in bold), and paragraphs 20-23 of the Government's response, published in October 2006 (Cm 6940).

4. The Government's response to the Committee included specific commitments in relation to the qualifications and training required of SENCOs. The legal responsibility for ensuring that SENCOs must be qualified teachers and for defining their role in relationship to the leadership and management of schools must fall to governing bodies: it cannot fall to head teachers.

5. The Committee also recommended that firmer guidelines are required rather than the Government asking schools to "have regard to" the SEN Code of Practice, and that SENCOs are adequately monitored and supported in their vital roles. The Government response made it clear that Regulations would be made relating to the role and responsibilities of SENCOs, and consideration given to the way SENCO functions are currently carried out in schools. The Regulations provide that the governing body must determine the key responsibilities of the SENCO and monitor the effectiveness of the way the responsibilities are carried out. The list of responsibilities in regulation 5 reflects the role of the SENCO, as described in the SEN Code of Practice. The note makes it clear that in most schools the governing body is already taking a close interest in what the SENCO is doing as a matter of good practice and that the monitoring function is not intended to be burdensome. It offers some suggestions on how the function might be carried out by relatively straightforward steps.

6. The Committee had further recommended that the SENCO should be in a senior management position in the school, as suggested by the SEN Code of Practice, and it had been Ministers' original intention to require SENCOs to be members of school senior leadership teams. In informal consultation with teacher and head teacher representative organisations, concerns were expressed about the practicalities - there is no requirement for schools to have a particular management structure, for instance. In the light of these concerns, Ministers decided not to pursue a regulatory route, but instead to recommend in guidance that, where the SENCO is not a member of the senior leadership team, a member of the team should be designated as champion of SEN and disability issues within the school.

7. The Department does listen carefully to the views of governing bodies, particularly where concerns are expressed in relation to requirements being impractical or

burdensome, and we endeavour to make changes and compromises where we can. However we are sure the Merits Committee will understand that, in this instance, the Education and Skills Committee were directly critical of existing arrangements, which they felt were too lax and thus failing to serve the interests of pupils with SEN. Amongst other things, they expressly recommended adequate monitoring of the SENCO role as described in the Code of Practice (see their paragraph 323), and the action taken by the Department was designed to address their concerns.

December 2008

APPENDIX 2: TAKEOVER CODE (CONCERT PARTIES) REGULATIONS 2008 (SI 2008/3073)

Further information from HM Treasury

1. This memorandum has been prepared by Her Majesty's Treasury ("the Treasury") in relation to the Takeover Code (Concert Parties) Regulations 2008 ("the Regulations"). It supplements the Explanatory Memorandum that was laid before Parliament by Command of Her Majesty when the Regulations were made and laid before Parliament.
2. This memorandum contains further information as to why it was not possible in the case of these Regulations to comply with the 21 day rule according to which relevant instruments are laid before Parliament for at least 21 days prior to coming into force.
3. In summary, it was not possible to comply with the 21 day rule due to the need to explore fully with the Panel how it would apply the Takeover Code in these circumstances. In particular, it was necessary to discuss with the Panel whether it would be appropriate for the Panel to determine that the concert party presumptions did not apply in this case before the Treasury made the Regulations. Discussions with the Panel continued into the week beginning 24 November 2008. In addition, the actions the Panel might wish to take under the Takeover Code, the implications of those actions and the importance of resolving the matter by 1 December 2008 only became fully apparent in recent discussions with the Panel. These issues are discussed further below.
4. The Treasury became the sole shareholder in Northern Rock on 22 February 2008. The Treasury became the sole holder of the ordinary shares in Bradford & Bingley plc on 29 September 2008.
5. The Treasury announced its willingness to make commercial investments in UK banks and building societies to stabilise their position and support the long-term strength of the economy on 8 October 2008. On 13 October 2008, the Treasury announced its plans to implement those arrangements by making capital investments in The Royal Bank of Scotland Group plc, and upon successful merger, HBOS plc and Lloyds TSB Group plc.
6. It was therefore apparent from 13 October 2008 that the Treasury, Northern Rock plc, Bradford & Bingley plc, The Royal Bank of Scotland Group plc and Lloyds TSB Group plc might be considered as concert parties for the purposes of Rule 9 of the Takeover Code ("Rule 9").
7. However, it was not possible for the Treasury to make the Regulations in compliance with the 21 day rule for the following reasons.
8. The possibility of the Treasury, Northern Rock plc and Bradford & Bingley plc being presumed to be concert parties for the purposes of Rule 9 did not give rise to practical difficulties for a number of reasons. First, the acquisition by the Treasury of the shares in Northern Rock plc and Bradford & Bingley plc took place by operation of law (an order under the Banking (Special Provisions) Act 2008) and so did not itself engage Rule 9. Second, given the limited range of circumstances in which Northern Rock plc and Bradford & Bingley plc would acquire an interest in any other company's shares, Rule 9 did not give rise to practical implications in relation to the ongoing operation of those entities. Accordingly, the potential application of the concert party presumptions in respect of Rule 9 would not have impeded the commercial freedom of those entities. (It is the acquisition of shares which triggers the application of Rule 9.)
9. However, the Treasury's proposal to invest in The Royal Bank of Scotland Group plc, HBOS plc and Lloyds TSB Group plc did give rise to the potential for difficulty. This

was because the Treasury's acquisition of shares in these banks has been (in the case of The Royal Bank of Scotland Group plc) and will be (in the case of HBOS plc and Lloyds TSB Group plc) effected via commercial means in the form of placings and open offers rather than by operation of law. Thus the Treasury's acquisition of shares in these banks would, prima facie, engage Rule 9. For this reason, the Treasury and the banks agreed that shareholder consent to the respective transactions should be obtained. (Under the Takeover Code, the Panel will normally waive the obligation to make a mandatory offer under Rule 9 if the person acquiring an interest in shares obtains the consent of independent shareholders to the transaction – known as a “whitewash” procedure.)

10. In addition, given the nature of the activities of these banks, it is more likely that these banks will acquire interests in shares (in each other or otherwise) on a commercial basis. Thus the application of the concert party presumptions had the potential to have an impact on the commercial freedom of these banks.

11. The Treasury have discussed the application of Rule 9 with the Panel. In particular, the Treasury and the Panel have discussed how the concert party presumptions would apply in these circumstances and whether it would be appropriate for the Panel to determine that the concert party presumptions did not apply in relation to the relevant banks. Had the Panel felt able to make such a determination, it would not have been necessary for the Treasury to legislate.

12. The discussions with the Panel continued into the week beginning 24 November 2008. The Treasury considered that it was appropriate to explore fully the matter with the Panel before legislating.

13. It emerged relatively late in discussions with the Panel that there was a pressing need to resolve the matter as quickly as possible (and, in any event, by 1 December 2008, the date on which the shares in The Royal Bank of Scotland Group plc were issued to the Treasury). This is because the Panel considered that, as soon as the new shares in The Royal Bank of Scotland Group plc had been issued to the Treasury, there would be a risk that, if The Royal Bank of Scotland Group plc was presumed to be acting in concert with the Treasury from that point, any additional interests in shares in HBOS plc or Lloyds TSB Group plc acquired by The Royal Bank of Scotland Group plc may be in excess of the final whitewashed position of the Treasury (as approved by the banks' respective shareholders). This could, in principle at least, have carried Rule 9 consequences and thereby potentially prejudiced the proposed investment by the Treasury in HBOS plc and Lloyds TSB Group plc. The effect of the legislation is to ensure that the acquisition of shares in HBOS plc or Lloyds TSB Group plc by The Royal Bank of Scotland Group plc does not affect the whitewash procedure in relation to the Treasury's proposed investment in those banks or otherwise trigger other Rule 9 consequences.

14. In addition, as noted in the Explanatory Memorandum to the Regulations, the Panel has indicated that, in line with its usual practice, it was minded imminently to request the banks not to deal in each other's shares so as to avoid a transaction taking place to which Rule 9 would apply.

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