



House of Lords House of Commons Joint Committee on Statutory Instruments

Second Report of Session 2003-04

Drawing special attention to:

Democratic Republic of the Congo (United Nations Sanctions)
(Isle of Man) Order 2003
S.I. 2003/2614

Democratic Republic of the Congo (United Nations Sanctions)
(Channel Islands) Order 2003
S.I. 2003/2616

Democratic Republic of the Congo (Restrictive Measures)
(Overseas Territories) Order 2003
S.I. 2003/2627

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Joint Committee on Statutory Instruments

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider all 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 do not fall to be considered by JCSI unless they are required to be laid before Parliament.

The Joint Committee is empowered to draw the special attention of both Houses to an instrument on any one of a number of grounds specified in the Standing Order under which it works; or on any other ground which does not impinge upon the merits of the instrument or the policy behind it.

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Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are available on the Internet from http://www.parliament.uk/parliamentary_committees/joint_committee_on_statutory_instruments.cfm.

Committee staff

The current staff of the Committee are Martyn Atkins (Commons Clerk), Anna Murphy (Lords Clerk), Jane Lauder (Committee Secretary) and Brian Dye (Committee Assistant).

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Instruments reported

The Committee has considered the following instruments, and has determined that the special attention of both Houses should be drawn to them on the grounds specified.

1 S.I. 2003/2614, S.I. 2003/2616: unexpected use of the enabling power

**Democratic Republic of the Congo (United Nations Sanctions) (Isle of Man) Order 2003
(S.I. 2003/2614) Democratic Republic of the Congo (United Nations Sanctions) (Channel Islands) Order 2003 (S.I. 2003/2616)**

1.1 The Committee draws the special attention of both Houses to these Orders on the ground that they make an unexpected use of the enabling power.

1.2 Article 3 of each Order provides that any person who, except under the authority of a licence, supplies or delivers, agrees to supply or deliver or does any act calculated to promote the supply or delivery of restricted goods to any person in the Democratic Republic of the Congo shall be guilty of an offence unless he proves that he did not know and had no reason to suppose that the goods in question were to be supplied to a person in that country. Article 4 of S.I. 2003/2614 provides that, except under the authority of a licence, restricted goods are prohibited to be exported from the Isle of Man to any destination in the Democratic Republic of the Congo or to any destination for the purpose of delivery, directly or indirectly, to or to the order of any person in the Democratic Republic of the Congo. Article 4 of S.I. 2003/2616 contains a similar prohibition in relation to the export of restricted goods from any of the Channel Islands.

1.3 Articles 3 and 4 correspond to similar provisions appearing in articles 5 and 6 of the Iraq (United Nations Sanctions) (Channel Islands) Order 2003 (S.I. 2003/1521) and the Iraq (United Nations Sanctions) (Isle of Man) Order 2003 (S.I. 2003/1522). In its Twenty-eighth Report of Session 2002-03, the Committee noted that both of the latter provisions would apply in relation to the prohibited export of restricted goods from the Channel Islands (or, as the case may be, the Isle of Man), resulting in two separate offences regimes for breach of the same prohibition. It considered that the duplication of the same prohibition in the same instrument, with different penalties for contravention, constituted an unexpected use of the enabling power, and it reported accordingly.

1.4 In relation to the present instruments, the Committee asked the Department for Constitutional Affairs whether it wished to add anything to the earlier response in the light of the Committee's Report. In a memorandum printed in Appendix 1, the Department accepts there is an overlap between articles 3 and 4, resulting in two offence regimes: one for breach of article 3 (set out in article 16 of each Order) and another for breach of article 4 contained in the local legislation. It indicates that the authorities in the Isle of Man and the Channel Islands have been apprised of the problem and are considering the way in which it should be resolved in relation to future Orders. Consistently with its earlier Report, the Committee considers that the duplication of the same prohibition in the same

instrument, with different penalties for contravention, is an unexpected use of the enabling power. **It reports both Orders accordingly.**

2 S.I. 2003/2627: unexpected use of the enabling power

Democratic Republic of the Congo (Restrictive Measures) (Overseas Territories) Order 2003 (S.I. 2003/2627)

2.1 The Committee draws the special attention of both Houses to this Order on the ground that it makes an unexpected use of the enabling power.

2.2 Article 3 provides that any person who, except under the authority of a licence, supplies or delivers, agrees to supply or deliver or does any act calculated to promote the supply or delivery of restricted goods to any person in the Democratic Republic of the Congo shall be guilty of an offence unless he proves that he did not know and had no reason to suppose that the goods in question were to be supplied or delivered to a person in that country. Article 4 provides that any person who, except under the authority of a licence, knowingly exports restricted goods from the Territory (that is, any of the territories specified in Schedule 1) to any destination in the Democratic Republic of the Congo or to any destination for the purpose of delivery, directly or indirectly, to or to the order of any person in the Democratic Republic of the Congo shall be guilty of an offence.

2.3 Articles 3 and 4 correspond to similar provisions appearing in articles 5 and 6 respectively of the Iraq (United Nations Sanctions) (Overseas Territories) Order 2003 (S.I. 2003/1516). In relation to the latter provisions, the Foreign and Commonwealth Office had indicated that there was no immediate need for article 6 in relation to the export of restricted goods to Iraq, given that article 5 contained a similar prohibition, and that article 6 had been included to ensure consistency with the provisions of other Orders. In its Twenty-eighth Report of Session 2002-03, the Committee considered that the duplication of prohibitions in the same instrument constituted an unexpected use of the enabling power, and it reported accordingly.

2.4 In relation to the present instrument, the Committee asked the Foreign and Commonwealth Office whether it wished to add anything to its earlier memorandum in the light of the Committee's Report. In a memorandum printed in Appendix 2, the Department states that, in addition to article 3, a provision is required to prohibit the exportation of restricted goods to enable their seizure and forfeiture and that in relation to similar Orders in the future consideration would be given to re-drafting article 4 so that it achieved this effect without an overlap with article 3. If an offence attached to such a provision, with the consequent possibility of duplication of offences arising, the Department would consider disapplying the ancillary offence. However, as the Department appears to accept, there is at present an overlap between articles 3 and 4 in that both make it an offence for a person knowingly to export restricted goods (without the authority of a licence) from the Territory to the Democratic Republic of the Congo. Consistently with its earlier Report, the Committee considers that the duplication of prohibitions in the same instrument constitutes an unexpected use of the enabling power. **It reports accordingly.**

Instruments not reported

The Committee has considered the instruments set out in the Annex to this Report and has determined that the special attention of both Houses does not require to be drawn to any of them.

Annex

Instruments to which the Committee does not draw the special attention of both Houses

- denotes that the written evidence submitted in connection with the instrument is printed with this Report
- denotes written evidence has been submitted but not printed

Draft instruments requiring affirmative approval

- Justice (Northern Ireland) Act 2002 (Amendment of section 46(1) and paragraph 7(2) of Schedule 8) Order 2003
- Extradition Act 2003 (Designation of Part 1 Territories) Order 2003
- Extradition Act 2003 (Designation of Part 2 Territories) Order 2003
- Extradition Act 2003 (Part 3 Designation) Order 2003
- Extradition Act 2003 (Police Powers: Code of Practice) Order 2003
- Conduct of Employment Agencies and Employment Businesses Regulations 2003

Instruments requiring affirmative approval

- **S.I. 2003/3039** Northern Ireland Act 1998 (Modification) Order 2003

Instruments subject to annulment

- S.I. 2003/2759** Export of Objects of Cultural Interest (Control) Order 2003
- S.I. 2003/2861** Merchant Shipping (Merchant Navy Reserve) (Revocation) Regulations 2003
- S.I. 2003/2901** European Communities (Designation) (No. 4) Order 2003
- S.I. 2003/2912** Feeding Stuffs, the Feeding Stuffs (Sampling and Analysis) and the Feeding Stuffs (Enforcement) (Amendment) (England) (No. 2) Regulations 2003
- S.I. 2003/2915** Prescription Only Medicines (Human Use) Amendment (No. 2) Order 2003
- S.I. 2003/2916** Judicial Pensions (Election against Benefits) Regulations 2003
- S.I. 2003/2918** Reading College and School of Arts and Design (Dissolution) Order 2003
- S.I. 2003/2921** Parliamentary Commissioner Order 2003
- S.I. 2003/2939** Education (Nursery Education and Early Years Development) (England) (Amendment) Regulations 2003
- S.I. 2003/2948** Town and Country Planning (Costs of Inquiries etc.) (Examination in Public) (England) (No. 2) Regulations 2003
- S.I. 2003/2949** Pig Carcase (Grading) (Amendment) (England) Regulations 2003
- S.I. 2003/2950** Merchant Shipping (Fire Protection) Regulations 2003
- S.I. 2003/2951** Merchant Shipping (Fire Protection) Regulations (Amendment) Regulations 2003
- **S.I. 2003/2957** Medicines (Products for Animal Use – Fees) (Amendment) Regulations 2003

S.I. 2003/2958 Social Security (Contributions) (Amendment No. 7) Regulations 2003

Instruments subject to annulment (Northern Ireland)

S.R. 2003/467 Births, Deaths and Marriages (Fees) Order (Northern Ireland) 2003

S.R. 2003/477 Magistrates' Courts (Amendment No. 2) Rules (Northern Ireland) 2003

Instruments not subject to parliamentary proceedings not laid before Parliament

S.I. 2003/2834 Channel Tunnel Rail Link (Nomination) (Amendment) (No. 2) Order 2003

S.I. 2003/2938 Local Government Act 2003 (Commencement No. 1 and Transitional Provisions and Savings) Order 2003

S.I. 2003/2944 Plymouth Primary Care Trust (Change of Name) Amendment Order 2003

S.I. 2003/2945 Lands Tribunal (Amendment) Rules 2003

S.I. 2003/2982 Companies (Forms) (Amendment) Regulations 2003

S.I. 2003/2985 Finance Act 2003, Part 3, (Appointed Day) Order 2003

Appendix 1

S.I. 2003/2614, S.I. 2003/2616: memorandum from the Department for Constitutional Affairs

**Democratic Republic of the Congo (United Nations Sanctions) (Isle of Man) Order 2003
(S.I. 2003/2614) Democratic Republic of the Congo (United Nations Sanctions) (Channel Islands) Order 2003 (S.I. 2003/2616)**

1. The Committee has requested that a Memorandum be submitted on the following point:

A person who (without the authority of a licence) knowingly exports restricted goods from the Isle of Man or any of the Channel Islands to the Democratic Republic of the Congo would contravene both articles 3 and 4 with the result that two separate offences regimes would apply for breach of the same prohibition. In relation to the corresponding provisions in articles 5 and 6 of S.I. 2003/1521 and 1522, the Department (in its memorandum of 21 July 2003) indicated that it will be a matter for the prosecuting authorities to decide for which offence a prosecution should be brought in each case. Does the Department wish to add anything to its earlier response on this point in the light of the Committee's Twenty-eighth Report of Session 2002-03?

2. The issue raised by the Committee is one which was previously raised in respect of the Iraq (United Nations Sanctions) (Channel Islands) Order 2003 (S.I. 2003/1521) and the Iraq (United Nations Sanctions) (Isle of Man) Order 2003 (S.I. 2003/1522). On that occasion the Foreign and Commonwealth Office (FCO) submitted two Memoranda on the matter, having consulted this Department.
3. The Committee considered that the duplication of the same prohibition in the same instrument, with different penalties for contravention, was an unexpected use of the enabling power and reported accordingly.
4. The Committee's report on those Orders was published after the Orders now in issue were made. We are grateful to the Committee for drawing our attention to the matters raised therein.
5. There is no dispute, as we understand it, as to the need for an effective sanction against persons who engage in the activities referred to in article 3 of these orders, even where there is no exportation from the jurisdiction.
6. Similarly, there is clearly a need to bring into play the powers of forfeiture already provided for in Crown Dependencies local legislation. This is secured by article 4. The local legislation is, in the Isle of Man, section 69 of the Customs and Excise Management 1986 (Act of Tynwald); in Guernsey, section 30 of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law 1972 and, in Jersey, section 37 of the Customs and Excise (Jersey) Law 1999.
7. We agree that where the forfeiture provisions are activated, a situation arises in which there are two offence regimes both potentially available to the local prosecutor: those for

breach of article 3 (set out in article 16 of both Orders) and another for article 4 (contained in the local legislation). It is in those circumstances, where both are applicable, that the prosecuting authorities would determine under which provision to proceed. Indeed, Isle of Man legislation (Criminal Law Act 1981 (of Tynwald)) currently provides that where two offence provision regimes exist, it *shall* (emphasis added) be for the prosecuting authorities to so decide.

8. We note that the corresponding UK Order (S.I. 2003/1519) to S.I. 2003/1521 and 1522, while containing similar provisions in articles 5 and 6, was not reported. The FCO acknowledged that one effect of the UK Order containing both articles was the existence of two offence provision regimes, both in the order and by triggering the forfeiture and ancillary offence provisions in section 68 of the Customs and Excise Management Act 1979 (CEMA). However, such a situation was envisaged by s.68 (6) of CEMA, which provides that, in such circumstances, the ancillary offence provisions in subsections 68(1) and (2) will be disapplied, leaving only the forfeiture provision in ss.68(1) and the offence regime in the Order to apply.

9. As we explained in the Memorandum on the earlier Orders in Council, neither the Isle of Man's, nor the Channel Islands' legislation contains a provision similar to s.68 (6). The Department for Constitutional Affairs has brought the Committee's concerns to the attention of the draftsmen in the Isle of Man and the Channel Islands and invited them to consider adopting a provision similar to s.68 (6) CEMA.

10. The Isle of Man will be considering amending their legislative provision along similar lines to s.68(6). The Channel Islands have indicated that they would be content that future, similar Orders should contain a provision which will have a similar effect.

11th November 2003

Appendix 2

S.I. 2003/2627: memorandum from the Foreign and Commonwealth Office

Democratic Republic of the Congo (Restrictive Measures) (Overseas Territories) Order 2003 (S.I. 2003/2627)

1. The Committee has requested that a memorandum be submitted on the following point:

Articles 3 and 4 are expressed in similar terms to articles 5 and 6 of S.I. 2003/1516 in respect of which the Department (in its memorandum of 7 July 2003) indicated that there is no immediate need for article 6, given article 5. Does the Department wish to add anything to its earlier response on this point in the light of the Committee's Twenty-eighth Report of Session 2002-03 on S.I. 2003/1516?

2. The regime adopted generally in Orders in Council stems from the background of the UK's legislation which is the Customs and Excise Management Act 1979 (CEMA). Section 68 of CEMA provides that where "exportation [of goods] would be contrary to any

prohibition or restriction for the time being in force with respect to those goods under or by virtue of any enactment”, the goods will be subject to forfeiture. This provision enables the seizure and forfeiture of restricted goods at the borders without the necessity of first identifying any person responsible for their attempted export.

3. Upon reviewing the issue raised by the Committee, it appears that there is a need for an offence such as article 3 of S.I. 2627, directed against the person, which may apply where there is no export from the United Kingdom. There is also an apparent need to prohibit the exportation of prohibited or restricted goods to enable their seizure and forfeiture at the borders of the United Kingdom. The method adopted in article 4 makes exportation by any person of prohibited or restricted goods an offence, with a view to consistency with related Orders in Council.

4. It appears that it may be more effective, and more consistent with related measures, if in future the prohibition of the exportation were to be directed at the goods to facilitate forfeiture, and to avoid any possible overlap. In the event that any offence attached to such prohibition, with the possibility of more than one applicable offence, consideration would be given to making provision for the disapplication of the ancillary offence, as occurs under subsection 68(6) of CEMA.

10 November 2003