House of Commons

Select Committee on Statutory Instruments

Sixth Report of Session 2019–21

Drawing special attention to:

Trade Remedies (Amendment) (EU Exit) Regulations 2020 **(S.I. 2020/99)**

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Select Committee on Statutory Instruments

Current membership

Jessica Morden MP *(Labour, Newport East) (Chair)*

Dr James Davies MP *(Conservative, Vale of Clwyd)*

Paul Holmes MP *(Conservative, Eastleigh)*

John Lamont MP *(Conservative, Berwickshire, Roxburgh and Selkirk)*

Sir Robert Syms MP *(Conservative, Poole)*

Owen Thompson MP *(Scottish National Party, Midlothian)*

Liz Twist MP *(Labour, Blaydon)*

Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151, available on the Internet via https://www.parliament.uk/business/publications/commons/standing-orders-public11/.

The Select Committee on Statutory Instruments (SCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. It carries out the same duties as the Joint Committee on Statutory Instruments in respect of those instruments laid before and subject to proceedings in the House of Commons only.

The role of the SCSI, whose membership is drawn from the House of Commons, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of the 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 or on 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 in print by Order of the House. All publications of the Committee are available on the Internet from www.parliament.uk/scsi.

Committee staff

The current staff of the Committee are Liz Booth (Committee Assistant) and Luanne Middleton (Clerk). Advisory Counsel: Klara Banaszak, Daniel Greenberg, and Vanessa MacNair.

Contacts

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Contents

Instruments reported

At the Committee's meeting on 18 March 2020 it scrutinised a number of instruments. It was agreed that the special attention of the House of Commons should be drawn to one of those considered in accordance with Standing Orders. The instrument and the grounds for reporting it are given below. The relevant departmental memorandum is published as an appendix to this report.

1 S.I. 2020/99: Reported for doubtful *vires* and for defective drafting

Trade Remedies (Amendment) (EU Exit) Regulations 2020

1.1 **The Committee draws the special attention of this House to these Regulations on the grounds that there is doubt as to whether they are *intra vires* in one respect and that they are defectively drafted in three respects.**

1.2 These Regulations are made under the Taxation (Cross-border Trade) Act 2018 ("the 2018 Act") and make provision in relation to the trade remedies that the United Kingdom may impose once it operates its own trade policy after the implementation period has ended.

1.3 Regulation 6 (inserted regulation 35B(8)) prohibits the Trade Remedies Authority ("the TRA") from varying a tariff rate quota by reducing the applicable rate of import duty or varying the period for which the quota applies. It appeared to the Committee that this limited a discretion expressly provided for by the 2018 Act. It asked the Department for International Trade to explain what power was relied on to do so. In a memorandum printed as an Appendix, the Department acknowledges the error and asserts that the preamble should have cited paragraph 21(6) of Schedule 5 to the 2018 Act as the enabling power for this provision. The Committee is not persuaded that this would have been sufficient to remedy the error. In paragraph 21(9), Parliament expressly permits the TRA to make five types of recommendation by virtue of regulations under paragraph 21(6). New regulation 35B(8) forbids the TRA from making two of them. It therefore directly contradicts paragraph 21(9) and is in effect, if not in form, a modification of the 2018 Act that fetters the TRA's discretion in a way the Committee does not believe Parliament intended. Were paragraph 21(9) to have been amended directly, it appears to the Committee that this instrument would have had to be made using the affirmative resolution procedure under section 51(5) of the 2018 Act. (In any event, as a result of the decision of the Court of Appeal in *Vibixa Ltd and another v Komori UK Ltd and others* [2006] EWCA Civ 536, the Department's acknowledgment of a missing citation in the preamble raises a doubt as to *vires*.) **The Committee accordingly reports regulation 6 for doubt as to whether it is *intra vires*.**

1.4 The Committee asked the Department to explain why regulations 10 (inserted regulation 42B(3)(b)(ii)) and 20 (inserted regulation 88B(3)(b)(ii)) refer to the Secretary of State publishing notice under regulations 42G(3) and 88G(4) given that those regulations provide for the TRA to publish that notice. In its memorandum, the Department acknowledges the errors and undertakes to correct them at the next available opportunity. **The Committee accordingly reports regulations 10 and 20 for defective drafting, acknowledged by the Department.**

1.5 The Committee asked the Department to confirm that regulation 15 (inserted regulation 86A) purports to make a substitution by reference to a word that does not appear in the provision being modified. In its memorandum, the Department acknowledges and undertakes to correct the error. **The Committee accordingly reports regulation 15 for defective drafting, acknowledged by the Department.**

1.6 Regulation 35 inserts a new Schedule 5A into S.I. 2019/450. Paragraph 2 of that new Schedule sets out the information that must be included in a notice of determination. Regulation 34 (inserted regulation 141A) modifies that new Schedule during a transitional period. It appeared to the Committee that the modifications purported to omit words from the heading of paragraph 2 that did not appear there; and it was not clear to the Committee why it was necessary for the modifications to remove a duty to include the date of the determination from the notice. The Committee asked the Department to confirm that the first modification was made in error and to explain the second. In its memorandum, the Department acknowledges that both modifications were made in error and undertakes to correct them. **The Committee accordingly reports regulation 34 for defective drafting, acknowledged by the Department.**

Instruments not reported

The Committee has considered the instruments set out in the Annex to this Report, none of which was required to be reported.

Annex

Draft instrument requiring affirmative approval

Draft S.I.	Major Sporting Events (Income Tax Exemption) Regulations 2020

Instruments subject to annulment

S.I. 2020/194	Taxes (Interest Rate) (Amendment) Regulations 2020
S.I. 2020/199	Van Benefit and Car and Van Fuel Benefit Order 2020
S.I. 2020/209	Value Added Tax (Finance) Order 2020

Appendix

S.I. 2020/99

Trade Remedies (Amendment) (EU Exit) Regulations 2020

1. The Department for International Trade provides this memorandum at the request of the Select Committee on Statutory Instruments following its consideration of the abovenamed instrument.

2. The Department for International Trade proposes to correct the errors in the instrument identified by the Select Committee when next amending the instrument.

(a) Power relied on to make regulation 6 (inserted regulation 35B(8))

3. The preamble should have cited paragraph 21(6) of Schedule 5 to the Taxation (Cross-border Trade) Act 2018 (c. 22) as a power the Secretary of State exercised to make the regulations. This is because new regulation 35B(8) is a provision in connection with a recommendation as to the variation of a tariff rate quota.

(b) References to Secretary of State in regulations 10 (inserted regulation 42B(3)(b)(ii)) and 20 (inserted regulation 88B(3)(b)(ii))

4. The Department for International Trade acknowledges that inserted regulations 42B(3)(b)(ii) and 88B(3)(b)(ii) are inaccurate. The cross-references to inserted regulations 42G(3) and 88G(4) in sub-paragraphs (b) should have been referred to in sub-paragraphs (a) as the referenced notices are made by the TRA.

(c) Purported substitution by regulation 15 (inserted regulation 86A)

5. The Department for International Trade acknowledges that regulation 15 purports to make a substitution by reference to a word that does not appear in the provision being modified. Regulation 86A should not have been made.

(d) Modifications by regulation 34 (inserted regulation 141A)

6. The Department for International Trade acknowledges that regulation 141A(a) purports to make a substitution by reference to a word that does not appear in the heading being modified and acknowledges that regulation 141A(b) is an error. Regulation 141A should not have been made.

Department for International Trade

10 March 2020

Formal Minutes

Wednesday 18 March 2020

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.6 agreed to.

Annex agreed to.

A Paper was appended to the Report as an Appendix.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.