



House of Commons

Select Committee on Statutory Instruments

Ninth Report of Session 2023–24

Drawing special attention to

*Post Office Compensation Schemes and Victims of Overseas Terrorism
Compensation Scheme (Tax Exemptions and Relief) Regulations 2024
(S.I. 2024/182)*

Customs (Miscellaneous Amendments) Regulations 2024 (S.I. 2024/194)

*Ordered by the House of Commons
to be printed 24 April 2024*

Select Committee on Statutory Instruments

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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

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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 Sue Beeby (Committee Operations Officer), Ines Nizigama (Committee Operations Officer) and Joe Watt (Clerk). Advisory Counsel: Sarita Arthur-Crow, Rupert Grist, Justin Leslie, Vanessa MacNair and Hannah Stewart.

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Instruments reported

At its meeting on 24 April 2024 the Committee scrutinised a number of instruments in accordance with Standing Orders. It was agreed that the special attention of the House of Commons should be drawn to two of those considered. The instruments and the grounds for reporting are given below. The relevant departmental memoranda are published as appendices to this report.

1 S.I. 2024/182: Reported for defective drafting

Post Office Compensation Schemes and Victims of Overseas Terrorism Compensation Scheme (Tax Exemptions and Relief) Regulations 2024

Procedure: Made negative

1.1 The Committee draws the special attention of this House to these Regulations on the ground that they are defectively drafted in one respect.

These Regulations specify certain compensation payments as “qualifying payments” for the purposes of Schedule 15 to the Finance Act 2020, resulting in them being exempt or relieved from tax. The enabling powers provide that the exemption or relief can take effect from a date before the regulations are made (paragraphs 3(5), 4(3)(c) and 5(7) of Schedule 15).

1.2 Regulation 1(2) provides, by reference to each compensation scheme, that “these Regulations” have effect from dates prior to the making of this instrument. The Committee asked His Majesty’s Revenue and Customs why the Regulations were made retrospective rather than specifying that the exemptions provided for in regulations 3, 4 and 5 have effect from the desired date, as provided by the enabling powers. The Committee drew the Department’s attention to wording used in S.I. 2023/1171, where the retrospection was limited to the regulation that designated the payment as a qualifying payment, rather than the Regulations in toto.

1.3 In a memorandum printed at Appendix 1, the Department asserts that the approach these Regulations have taken do not produce a wider retrospective effect than that achieved by S.I. 2023/1171. The Department further explains that the approach taken was to avoid repetition in regulations 3 to 5 and for consistency with two previous instruments.

1.4 The Committee accepts that the chosen drafting approach avoids some repetition, however, this has come at the price of clarity. The Department’s approach departs from the wording of the enabling power, which is to specify by regulations qualifying payments that are received, disposals that are made, or deaths that occur on or after such date as is specified in the regulations. The strongest discrepancy is in relation to regulation 1(2) (b), which specifies that the Regulations have effect from 1 August 2022 in relation to Group Litigation Order nominated individual compensation payments. These payments are relieved from inheritance tax by virtue of regulation 5. It is not clear from the wording in the instrument that the 1 August 2022 date is the date of death, as the power provides. Instead, it would appear from the drafting of regulations 1(2) and 2 that the date specified is the date the payment is received. Such a result would not align with the vires for that part of the instrument.

1.5 The Committee also considers that the instrument produces a wider retrospective effect than was necessary. The presumption against retrospection is a strong, long-standing presumption, and with it, the subordinate rule that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary (*Lauri v Renad* [1892] 3 Ch. 402 at 421). The enabling power only allows for a date to be specified by reference to when the payment is received, the disposal is made or the date of death. This is achieved by regulation 2(2) of S.I. 2023/1171 by the words “This regulation applies to payments received on or after 1st October 2023”. In contrast, the effect produced by this instrument is that more than simply the regulation in question will come into force at a date earlier than the commencement date. Whilst the Committee accepts that the implications of the wider retrospection do not appear to be significant, the Committee does not accept that avoiding repetition is a strong factor in this context. Both of these issues show that the instrument does not clearly align with the enabling power. **The Committee accordingly reports this instrument for defective drafting.**

2 S.I. 2024/194: Reported for failure to comply with proper legislative practice

Customs (Miscellaneous Amendments) Regulations 2024

Procedure: Made negative

2.1 The Committee draws the special attention of this House to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.

2.2 These Regulations amend the requirements relating to customs procedures and processes. The preamble cites section 23 of the Taxation (Cross-border Trade) Act 2018, which is contained in Part 1 of the Act. Section 28 of that Act provides that in exercising any function under any provision made by or under Part 1 of the Act, regard must be had to “international arrangements to which Her Majesty’s government in the United Kingdom is a party that are relevant to the exercise of the function”. Section 28 is not cited in the preamble, however, the Committee noted that the preamble states that the Commissioners for His Majesty’s Revenue and Customs considered that making regulation 4 would “facilitate the administration, collection and enforcement of a duty of customs”. This is a reference to section 25(1A) of the Customs and Excise Management Act 1979, another enabling power cited in the preamble. The Committee asked His Majesty’s Revenue and Customs why the preamble includes wording reflecting section 25(1A) of the 1979 Act but not section 28 of the 2018 Act.

2.3 In a memorandum printed at Appendix 2, the Department provides a lengthy explanation. It explains that it did not consider that a reference to section 28 was required and that the duty was more akin to the public sector equality duty in section 149 of the Equality Act 2010, which is not cited in preambles. The Department explains that the wording reflecting section 25(1A) of the 1979 Act was included as it was considered to be a condition that must exist before regulations can be made under that section.

2.4 The Committee does not agree that the duty in section 28 is similar to the duty in section 149 of the Equality Act 2010, as that section applies to all public authorities, exercising all of their functions, wherever found. The result would be that section 149 would always be cited in the preamble to every statutory instrument. By contrast, section

28 is limited to public bodies, and specifically HMRC (in section 28(1)(c)), exercising functions contained in Part 1 of the 2018 Act. Given that the preamble enables the reader to know that the matters upon which the instrument's validity relies have been fulfilled, the Committee cannot see why section 28 would not be cited in the preamble, particularly given that it has been cited in previous instruments.

2.5 The Department also draws a distinction between section 25(1A) of the 1979 and section 28 of the 2018 and contends that the former is a pre-condition that should be cited in the preamble. Section 25(1A) provides:

In any case where they consider it would facilitate the administration, collection or enforcement of any duty of customs, the Commissioners may by regulations—

- (a) specify conditions which must be met before an approval is granted, or
- (b) specify other conditions which they may, in any particular case, require to be met before an approval is granted.

2.6 The Committee does not consider a pre-condition to exist here but views the consideration that regulations would facilitate the administration, collection or enforcement of any duty customs to be integral to the power. If the Commissioners did not consider so, the power is not available. It is therefore strictly not a pre-condition as such, it is the enabling power.

2.7 Whilst the instrument and the Explanatory Memorandum are silent on whether the Commissioners for His Majesty's Revenue and Customs had regard to international agreements before these regulations were made, the Department's Memorandum appears to suggest that was the case. Had that not been so, this would have questioned the validity of the instrument. **The Committee accordingly reports the preamble for failure to comply with proper legislative practice.**

Instruments not reported

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

Annex

Instruments subject to annulment

S.I. Number	S.I. Title
S.I. 2024/167	Income Tax (Digital Requirements) (Amendment) Regulations 2024
S.I. 2024/287	Income Tax (Exemption of Social Security Benefits) Regulations 2024
S.I. 2024/303	Customs Tariff (Preferential Trade Arrangements) (Amendment) Regulations 2024
S.I. 2024/307	Value Added Tax (Increase of Registration Limits) Order 2024
S.I. 2024/356	Pensions (Abolition of Lifetime Allowance Charge etc) Regulations 2024
S.I. 2024/357	Finance Act 2004 (Registered Pension Schemes and Annual Allowance Charge) Order 2024

Appendix 1: Memorandum from His Majesty's Revenue and Customs

S.I. 2024/182

Post Office Compensation Schemes and Victims of Overseas Terrorism Compensation Scheme (Tax Exemptions and Relief) Regulations 2024

1. The Committee has asked HM Treasury for a memorandum on the following point(s):

Explain why regulation 1(2) provides that the Regulations have retrospective effect, rather than making provision for regulations 3, 4 and 5 to apply by reference to the specified dates (in a similar way to regulation 2(2) of S.I. 2023/1171).

2. This Memorandum has been prepared by His Majesty's Revenue and Customs on behalf of HM Treasury.

3. Regulation 1(2) provides the dates from which S.I. 2024/182 has effect in relation to various compensation scheme payments. These dates are the dates from which compensation scheme payments are to be regarded as qualifying payments for the purposes of paragraphs 3, 4 and 5 of Schedule 15 to the Finance Act 2020, as provided for by regulations 3, 4 and 5. That the qualifying payments only have effect in relation to a receipt, disposal or death can be seen from those provisions of that Act.

4. Regulation 2(2) of S.I. 2023/1171 provides the date from which regulation 2 applies to the receipt of payments under the only compensation scheme covered by those Regulations.

5. The effect of regulation 1(2) of S.I. 2024/182 and regulation 2(2) of S.I. 2023/1171 is the same; the retrospective effect is no wider here.

6. Regulation 1(2) was drafted in this way:

- a) so that the date from which regulations 3, 4 and 5 has effect is dealt with at the start of the SI and not repeated in each regulation, and
- b) for consistency with S.I. 2023/184 and S.I. 2023/1009, which also deal with Post Office Horizon related compensation schemes.

His Majesty's Revenue and Customs

26 March 2024

Appendix 2: Memorandum from His Majesty's Revenue and Customs

S.I. 2024/194

Customs (Miscellaneous Amendments) Regulations 2024

1. The Committee has asked His Majesty's Revenue and Customs (HMRC) for a memorandum on the following point(s):

Explain why the preamble does not cite section 28 of the Taxation (Cross-border Trade) Act 2018, in contrast to the reference to the making of regulation 4 (and bearing in mind the Committee's report in relation to S.I. 2022/613).

2. Statutory Instrument Practice (5th edition) (SIP), at paragraph 3.11, indicates that “a preamble is...the recitals of any enabling powers; the recital of any other matters on which its [the instrument's] validity depends; and...the words of enactment”.

3. Interpreted at its widest, a requirement to rehearse any matters on which an instrument's validity depends is not practicable. An instrument relies for its validity on an array of matters which are routinely taken as read: for example, compliance with general principles of public law, compliance with general statutory duties such as the public sector equality duty (“the PSED”) in section 149 of the Equality Act 2010 (“the 2010 Act”), and a host of others.

4. HMRC's view is that a reasonable way of drawing a line between matters that can be taken as read and matters that warrant express reference is for a preamble to only cite—

- a) preconditions that are factually contingent – i.e. things that may or may not have happened which the reader of the legislation cannot, or cannot easily, verify for themselves: for example, whether a consultation has taken place, or whether a particular report has been laid before Parliament;
- b) preconditions that are reasonably proximate to the making of regulations, such as a requirement to consider that particular provision being made would facilitate administration, collection or enforcement of any duty of customs.

5. HMRC's view is that section 28 of the Taxation (Cross-border Trade) Act 2018 (“TCTA”) does not fall within either of the above.

6. Section 28 TCTA imposes a general requirement on all public bodies, in exercising “any function under any provision made by [Part 1 of TCTA]” (emphasis added) to “have regard to international arrangements to which [HMG] is a party...”. The requirement is not particular to the making of regulations and the requirement is similar to the PSED, since that provision also confers a general requirement on public authorities to have regard to particular matters in the exercise of their functions. The PSED is not routinely cited in preambles to instruments, even where the instrument is made under the 2010 Act.

7. Although HMRC accept that section 28 of TCTA may have been cited in the past for consistency with other instruments made under Part 1 of that Act, in HMRC’s view, section 28 of TCTA specifies considerations to be taken into account when making regulations but not pre-conditions to the exercise of the power to make those regulations.

8. By contrast, section 25(1A) of the Customs and Excise Management Act 1979 (“CEMA”) provides that regulations may only be made in cases where the Commissioners for HMRC consider that doing so would “facilitate the administration, collection or enforcement of any duty of customs”. That is a particular condition that must exist before regulations can be made and it applies expressly to the making of regulations. HMRC’s view is that section 25(1A) of CEMA is much more proximate to the making of secondary legislation than section 28 of TCTA, and has therefore been cited in the preamble to this instrument.

9. HMRC acknowledge that the Explanatory Memorandum should have noted that regard was had to relevant international agreements in the making of this instrument, and the Department apologises for that omission.

His Majesty’s Revenue and Customs

26 March 2024

Formal Minutes

Wednesday 24 April 2024

Members present

Jessica Morden, in the Chair

Peter Grant

Paul Holmes

Report consideration

Draft Report (Ninth 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 2.7 read and agreed to.

Annex agreed to.

Papers were appended to the Report as an Appendix.

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

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

Adjournment

Adjourned to a day and time to be fixed by the Chair.