House of Commons

Select Committee on Statutory Instruments

Thirty-Second Report of Session 2019–21

Drawing special attention to:

Customs Transit Procedures (Amendment, etc) (EU Exit) Regulations 2020 (**S.I. 2020/1491**)

Tobacco Products (Traceability System and Security Features) (Amendments) (EU Exit) Regulations 2020 (**S.I. 2020/1496**)

Ordered by the House of Commons to be printed 3 February 2021

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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 Sue Beeby (Committee Operations Officer), Apostolos Kostoulas (Committee Operations Officer) and Luanne Middleton (Clerk). Advisory Counsel: Sarita Arthur-Crow, Klara Banaszak, Daniel Greenberg, and Vanessa MacNair.

Contacts

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Contents

Instruments reported

At the Committee's meeting on 3 February 2021 it scrutinised a number of instruments. It was agreed that the special attention of the House of Commons should be drawn to two of those considered in accordance with Standing Orders. The instruments and the grounds for reporting them are given below. The relevant departmental memoranda are published as an appendices to this report.

1 S.I. 2020/1491: Reported for defective drafting and for unusual or unexpected use of enabling powers

Customs Transit Procedures (Amendment, etc) (EU Exit) Regulations 2020

1.1 **The Committee draws the special attention of this House to these Regulations on the ground that they are defectively drafted in two respects and make unusual or unexpected use of the enabling powers in one respect.**

1.2 These Regulations, which are subject to the negative resolution procedure, amend several instruments relating to the customs transit procedures that apply to the movement of goods into Great Britain, now that it is no longer part of the EU Customs Union. Regulation 4 amends the Customs Transit Procedures (EU Exit Regulations) 2018 (S.I. 2018/1258) to require that specified documents be provided before goods are brought into Great Britain.

1.3 New sub-paragraph (A1) (inserted by regulation 4(2) and (5) at two places in Schedule 1 to the 2018 Regulations) provides that this requirement will apply "where the intended point of entry [or re-entry] … is at a location specified in a public notice published by HMRC … to a person listed in the notice, in the form and manner specified in the notice". Paragraph (A5)(a) requires a notice to "identify a location which is listed". The Committee asked Her Majesty's Revenue and Customs to explain the intended difference in meaning between a location being "specified" in sub-paragraph (A1) and a location being "listed" in sub-paragraph (A5)(a). In a memorandum printed at Appendix 1, the Department asserts that there is no intended difference in meaning and acknowledges that the terminology should have been consistent. **The Committee accordingly reports regulation 4(2) and (5) (inserted sub-paragraphs (A1) and (A5)(a)) for defective drafting, acknowledged by the Department.**

1.4 Sub-paragraphs (A2) and (A3) relate to timing: a notice must state the date on which a listing is made and the date on which it has effect; but a listing must not have effect until at least 30 days after it is made—except in cases of urgency. Sub-paragraph (A4) permits a listing to be varied or cancelled, but the regulations are silent on when such a variation or cancellation is intended to have effect. The Committee asked the Department to explain. In its memorandum, the Department does not answer the question directly but accepts that sub-paragraph (A4) ought to have contained similar provision as to timing. **The Committee accordingly reports regulation 4(2) and (5) (inserted sub-paragraph (A4)) for defective drafting, acknowledged by the Department.**

1.5 Sub-paragraph (A5)(b) requires a notice to be published "as soon as practicable after it is made". There is no requirement, however, for a notice to be published before it comes into effect. It appeared to the Committee that it would be possible for a listing to come into effect so close to publication as to provide little or no notice to the persons affected by it—or even before publication. It asked the Department to explain whether this is possible and consistent with the usual 30-day notice requirement. In its memorandum, the Department acknowledges that these scenarios are possible and asserts that this reflects the need to allow for exceptional circumstances—such as the expiry of the transition period, when the listing was published and had effect immediately. The Committee accepts that flexibility is required, but it is contrary to public law principles for a listing to have effect—and as a result for persons to be subject to new legal obligations—before it has been published, and express provision should have been made to prevent that possibility. **The Committee accordingly reports regulation 4(2) and (5) (inserted sub-paragraph (A5(b))) for unusual or unexpected use of the enabling powers.**

1.6 In its memorandum, the Department undertakes to correct the defects in sub-paragraphs (A1), (A4) and (A5)(a) at the earliest opportunity. The Department also asserts that no one will be adversely affected by the errors before they are corrected. The Committee refers the Department to its comments on S.I. 2019/983 in its Sixty-fifth Report of Session 2017–19 and trusts that its statement about avoiding adverse effects does not mean that the Department intends to operate the law in the form in which they wish it had been made, rather than in the form in which it was made.

2 S.I. 2020/1496: Reported for defective drafting

Tobacco Products (Traceability System and Security Features) (Amendments) (EU Exit) Regulations 2020

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

2.2 These Regulations, which are subject to the negative resolution procedure, make amendments to legislation relating to the tobacco products traceability scheme and the security feature scheme. Regulation 14(c) of Schedule 3 substitutes the words “primary repositories” for “the data repository” in paragraph 4(b) of regulation 16 of the Tobacco Products (Traceability and Security Features) Regulations 2019 (S.I. 2019/594). As the words to be substituted do not exist in the stated sub-paragraph, the Committee asked Her Majesty’s Revenue and Customs whether the intention had been to substitute wording in paragraph 4(a) of regulation 16. In a memorandum printed at Appendix 2, the Department confirms this was the intention. **The Committee accordingly reports regulation 14(c) 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

Instruments subject to annulment

S.I. 2020/1544	Value Added Tax (Miscellaneous Amendments to the Value Added Tax Act 1994 and Revocation) (EU Exit) Regulations 2020

Appendix 1

S.I. 2020/1491

Customs Transit Procedures (Amendment, etc) (EU Exit) Regulations 2020

1. In its letter to HM Treasury of 20 January 2021, the Joint Committee requested a memorandum on the following points:

In relation to regulation 4(2) and (5), explain:

> *(1) the intended difference in meaning between a location being "specified" in new sub-paragraph (A1) and a location being "listed" in new sub-paragraph (A5);*
>
> *(2) when the variation or cancellation of a listing under new sub-paragraph (A4) is intended to have effect; and*
>
> *(3) whether it is possible (and consistent with the policy intent of the usual 30-day notice period in new sub-paragraph (A3)) that a listing may come into effect before, on, or immediately after the day the notice is published in accordance with new sub-paragraph (A5).*

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

3. We thank you for bringing these points to our attention. There is no intended difference in the meaning between a location being "specified" in new sub-paragraph (A1) and a location being "listed" in new sub-paragraph (A5). We accept that we should have been consistent in our terminology and apologise for this oversight.

4. We also accept that new sub-paragraph (A4) should have included references like those in new sub-paragraphs (A2) and (A3). We apologise for this error.

5. We will correct these points by a further amending instrument at the earliest opportunity but can assure the Committee that no one will be adversely impacted by these errors.

6. In relation to paragraph (3), it is possible for a listing to come into effect as you have suggested. Whilst the policy intent is for a 30-day notice period to be given, in certain exceptional circumstances there may be a need for a listing to come into effect earlier than this. For example, this period could not be met before the expiry of the transition period and the listing that was published in those (urgent) circumstances had effect immediately.

Her Majesty's Revenue and Customs

25 January 2021

Appendix 2

S.I. 2020/1496

Tobacco Products (Traceability System and Security Features) (Amendments) (EU Exit) Regulations 2020

1. In its letter to Her Majesty's Revenue and Customs of 20 January 2021, the Committee requested a memorandum on the following point:

> *In relation to paragraph 14(c) of Schedule 3, confirm whether the substituted words should have been inserted into paragraph 4(a) of regulation 16 and not paragraph 4(b).*

2. Her Majesty's Revenue and Customs confirm that in relation to paragraph14(c) of Schedule 3, the substituted words should be inserted into paragraph 4(a) of regulation 16 of the Tobacco Products (Traceability and Security Features) Regulations 2019 (S.I. 2019/594) and not paragraph 4(b).Thank you for drawing this to our attention. We consider that in context the error is obvious, and the reader will be able to see what is meant(and, if necessary, the courts would exercise their judicial discretion to give a rectifying construction in accordance with the rule in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (HL)).

Her Majesty's Revenue and Customs

25 January 2021

Formal Minutes

Wednesday 3 February 2021

Virtual Meeting

Members present:

John Lamont (*in the Chair*)

Dr James Davies	Owen Thompson
Paul Holmes	Liz Twist

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 2.2 agreed to.

Annex agreed to.

Papers were appended to the Report as Appendices 1 to 2.

Resolved, That the Report be the Thirty-Second Report of the Committee to the House.

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

[Adjourned till Wednesday 10 February at 3.40 p.m.