# House of Commons

# Select Committee on Statutory Instruments

# Thirty-Fourth Report of Session 2019–21

**Drawing special attention to:**

*Trade Preference Scheme (EU Exit) Regulations 2020* (**S.I. 2020/1438**)

*Value Added Tax (Miscellaneous Amendments, Northern Ireland Protocol and Savings and Transitional Provisions) (EU Exit) Regulations 2020* (**S.I. 2020/1545**)

*Ordered by the House of Commons to be printed 24 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 24 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 appendices to this report.**

## 1 S.I. 2020/1438: Reported for defective drafting and for failure to comply with proper legislative practice

### *Trade Preference Scheme (EU Exit) Regulations 2020*

1.1 **The Committee draws the special attention of this House to these Regulations on the grounds that they are defectively drafted in three respects and fail to comply with proper legislative practice in one respect.**

1.2 These Regulations, which are subject to the negative resolution procedure, establish a UK trade preference scheme for developing countries (the Generalised Scheme of Preferences, or "GSP") to replace the corresponding EU scheme once the Brexit transition period has ended. The GSP comprises three frameworks, each of which covers different countries and goods and has different rules for determining the applicable rates of import duty.

1.3 Part 7 contains the main provisions governing the Enhanced Framework, including the criteria for eligibility and, at regulation 17, the process for applying to be part of that framework. Regulation 17(2) requires the Secretary of State to notify the applicant country of the outcome of its application in accordance with regulation 17(4), which envisages three possible outcomes: the applicant country (a) has not met the key criteria for eligibility; (b) has met them but is required to take further steps to participate; or (c) has met them and is not required to take any further steps. Where further steps are required, regulation 17(5) provides that the Secretary of State must notify the applicant country if it has satisfactorily taken those steps. Notifications under regulation 17(4)(a) and (c) must include reasons for the Secretary of State's decision; there is no similar requirement for notifications under regulation 17(4)(b) and (5). The Committee asked the Department for International Trade to explain the discrepancy. In a memorandum printed at Appendix 1, the Department explains that it requires reasons only when a final determination has been made and a country has reached the end of the application process. It asserts that regulation 17(4)(b) anticipates a further notification under regulation 17(4)(c) (presumably where regulation 17(5) applies, although the Department does not expressly say so), and that "it is expected that the Secretary of State will provide reasons for the determinations" in that notification. The Committee remains concerned that it is not sufficiently clear that the "further notification" to which regulation 17(5) refers is a notification with reasons in accordance with regulation 17(4)(c). It is also of the view that, as a matter of principle, it is as important for reasons to be given for an interim decision as for a final one. **The Committee accordingly reports regulation 17(4)(b) and (5) for defective drafting.**

1.4 Regulation 21 permits the Secretary of State to publish a suspension or a variation notice to suspend a country from the GSP, suspend the preferential import rate on specified goods from a GSP country or vary a preferential import rate. Regulation 26 sets out the procedure that must be followed before such a notice is published. Regulation 26(2)(b) creates an exception to this requirement "in a case where regulation 21(4) applies". The Committee asked the Department to explain what difference these words are intended to make, given that regulation 21(4) is an interpretation provision. In its memorandum, the Department acknowledges the error (the cross-reference should have been to regulation 21(2)(b)) and undertakes to correct it as soon as practicable. **The Committee welcomes the undertaking and accordingly reports regulation 26(2)(b) for defective drafting, acknowledged by the Department.**

1.5 The Committee also asked the Department to provide the paragraph number that appears to be missing at the end of paragraph 7(a) of Schedule 4 to the Regulations. In its memorandum, the Department acknowledges the error (the cross-reference should have been to paragraph 2 of Schedule 4) and undertakes to correct it as soon as practicable. **The Committee welcomes the undertaking and accordingly reports paragraph 7(a) of Schedule 4 for defective drafting, acknowledged by the Department.**

1.6 The Committee noticed a large number of minor errors in the instrument (as set out in the table in Annex 2). It asked the Department to explain why these were not identified and corrected at proofreading stage. The Department acknowledges and apologises for the errors, which it asserts were "due to the pressures of finalising legislation for the end of the Transition Period". It undertakes to rectify these errors, as appropriate, as soon as practicable. The Committee of course appreciates the enormity of the necessary preparations for the end of the Transition Period and the pressures on all involved. But pressure of time can never amount to an acceptable excuse for making bad law. Even obvious typographical and similarly small-scale errors can be a source of confusion and even misunderstanding for readers of legislation, who are entitled to expect that legislation will not be enacted until it has been thoroughly checked. **The Committee accordingly reports these Regulations for failure to comply with proper legislative practice due to the prevalence of minor drafting errors, acknowledged by the Department.**

1.7 (The Department also provides a helpful explanation of when regulation 11(5)(b) is intended to apply, in response to the Committee's question on that point.)

## 2 S.I. 2020/1545: Reported for defective drafting

### *Value Added Tax (Miscellaneous Amendments, Northern Ireland Protocol and Savings and Transitional Provisions) (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 three respects.**

2.2 These Regulations, which are subject to the negative resolution procedure, amend several pieces of VAT legislation to make changes that are necessary as a result of Brexit, and in particular to implement the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement between the United Kingdom and the European Union.

2.3 Regulation 30 amends the Value Added Tax (Special Provisions) Order 1995 (S.I. 1995/1268), including by amending article 12—which provides for VAT relief on imported works of art, antiques and collectors' items—and inserting a new article 12A. Article 12, as amended, excludes VAT relief where a person takes possession of those goods in Great Britain or the Isle of Man and they are removed to Northern Ireland. Article 12A modifies article 12 so that it applies where the goods are removed from Northern Ireland to Great Britain. The amendment and the modification are clearly incompatible, but there appeared to the Committee to be no express provision setting out the circumstances in which article 12A is intended to apply. It asked the Treasury to explain. In a memorandum printed at Appendix 2, Her Majesty's Revenue and Customs (replying on behalf of the Treasury), asserts that "the intention is that the modifications in new article 12A are to apply in the circumstances set out in that provision, namely where goods are removed from Northern Ireland to Great Britain". The Committee accepts that this must be the intention (and that a court would be forced to construe the conflicting provisions in that way), but the provision as drafted does not achieve it. It should have been expressly stated that where the goods in question are removed from Northern Ireland to Great Britain, the modifications in article 12A apply and not the amendments in article 12; the heading to new article 12A is inert and cannot achieve that substantive effect. Without such express provision, both the amendments to article 12 and the modifications to it made by new article 12A apply simultaneously and are contradictory. **The Committee accordingly reports regulation 30 for defective drafting.**

2.4 Regulation 74 amends the Value Added Tax Regulations 1995 (S.I. 1995/2518) by inserting a new Part 16ZA, which provides for importations, exportations and removals in respect of Northern Ireland. New regulation 133E provides for VAT relief on cars bought by "any person" in Northern Ireland and later exported. New regulation 133D makes similar provision for overseas visitors. Both new regulations contain the same definition of "overseas visitor". As the term itself is only used in regulation 133D, the Committee asked the Department to confirm that the definition in regulation 133E(3) is unnecessary. In its memorandum, the Department acknowledges the error and undertakes to correct it at the next available opportunity. **The Committee welcomes the undertaking and accordingly reports regulation 74 (inserted regulation 133E(3)) for defective drafting, acknowledged by the Department.**

2.5 New regulation 133G (also inserted by regulation 74) provides for the revocation of zero-rating where a taxable person: (a) fails to comply with an obligation; or (b) fails to provide correct information. The Committee asked the Department to confirm that the words "unless the taxable person can satisfy the Commissioners that there was a reasonable excuse for the failure to comply or the failure to provide the correct information, as appropriate" should appear after—rather than in—paragraph (b) so as to modify both paragraphs. In its memorandum, the Department acknowledges the error and undertakes to correct it at the next available opportunity. The Committee welcomes the undertaking and **accordingly reports regulation 74 (inserted regulation 133G) for defective drafting, acknowledged by the Department.**

# Instruments not reported

**The Committee has considered the instruments set out in Annex 1 to this Report, none of which was required to be reported.**

# Annex 1

## Instruments requiring affirmative approval

| | |
|---|---|
| **S.I. 2021/63** | The Customs Tariff (Establishment and Suspension of Import Duty) (EU Exit) (Amendment) Regulations 2021 |

## Instruments subject to annulment

| | |
|---|---|
| **S.I. 2020/1649** | International Tax Enforcement (Disclosable Arrangements) (Amendment) (No. 2) (EU Exit) Regulations 2020 |
| **S.I. 2021/13** | Stamp Duty Land Tax (Administration) (Amendment) Regulations 2021 |

# Annex 2

## *S.I. 2020/1438: TRADE PREFERENCE SCHEME (EU EXIT) REGULATIONS 2020*

Minor errors queried by the Committee:

| Provision | Error | Comments |
|---|---|---|
| Reg.2(1), definition of "Tariff Table" | "regulation 2(7)" should be "regulation 2(6)" | |
| Reg.2(1), definition of "agricultural duty rate" | "regulation 2(5)(b)(i)" should be "regulation 2(5)" | There is no regulation 2(5)(b)(i) in the Tariff Regulations |
| Reg.2(1), definition of "arms and ammunition" | "mean" should be "means" | |
| Regs.2(1) and 22(1) | "Ground" should be "ground" | For internal consistency (uppercase only when expressly referring to Ground A or Ground B) |
| Reg.2(2)(a) | "the rules of interpretation in regulation 3(1)" should be "the rules of interpretation referred to in regulation 3(1)" (or similar; with consequential amendment "and in Part 1 of Schedule 5") | Regulation 3(1) is a cross-reference only, as it itself recognises ("the rules contained in the following…") |
| Reg.9(b)(iv) | "particulars of relating to" is grammatically wrong | |
| Reg.10(3)(a) and (4)(a) | "of that Table" should be "of that table" | For consistency with regulation 10(3)(b) and (4)(b), and because the defined term is "GSP Specified Goods Table" |
| Regs.11(3) and (7), 12, 13, 14 | "GSP rate of import duty" should be "GSP rate" | "of import duty" is already comprised in definition of "GSP rate" (and in reg.11, for consistency with other references to "GSP rate" in that regulation) |
| Reg.11(6) | "where the rate is to be a nil rate" should be "where the GSP rate is to be a nil rate" | |
| Reg.14(2)(a)(ii) | "is represented by" should be "is represented only by" | Given that compound duty expression is dealt with by paragraph (iii), to ensure paragraph (ii) is construed consistently<br><br>with paragraph (i), which uses "is represented only by" |

| | | |
|---|---|---|
| Heading to reg.15 | "EF—general" should be "EF—general" | |
| Reg.18(1) | "has determined that the country to no longer be economically viable" is grammatically wrong | |
| Reg.18(2) | Superfluous comma in "the three year period, that begins" | |
| Reg.18(4)(d) | Superfluous comma in "from the 1st January, following"<br><br>"the last day of that period referred to" should be "the last day of the period referred to" | |
| Reg.20(2)(a) | Superfluous comma in "up-to-date stamps, or documents" | |
| Reg.24(2)(c) | Superfluous comma in "section 51, or section 56 of the Act" | |
| Reg.26(1)(a) | "paragraph 2" should be "paragraph (2)" | |
| Reg.26(3)(d) | Superfluous comma in "notice, continue to apply" | |
| Reg.26(3)(g) | Missing closing parenthesis | |
| Reg.29(5)(b) | Missing comma before " where appropriate" | |
| Sch.3, para.1(a) and (b) | Final comma should be semi-colon | For internal consistency |
| Sch.3, para.4(a) | Superfluous comma after "graduation notice" | |
| Sch.3, para.4(d) | Superfluous semi-colon after "act or acts" | |
| Sch.3, para.6(a) | "consecutive periods" should be "consecutive suspension periods" | |
| Sch.5, Part 2, entry for 0308 30 50 | Not clear why this is listed as an exception, given that it has same GF and EF codes as apply to chapter 3 generally | |
| Sch.5, Part 2, entry for 0821 90 | "video tune" should be "video tuner" | |

# Appendix 1

## S.I. 2020/1438

### *Trade Preference Scheme (EU Exit) Regulations 2020*

1. In its letter to the Department of 3 February 2021, the Committee requested a memorandum on the points below. The Department's response to the Committee's points are below.

> *(1) Explain, by reference to examples, when regulation 11(5)(b) is intended to apply, and in particular what "containing a monetary value" means.*

2. "Containing a monetary value" means a rate of import duty that includes "£x" per unit of quantity. Regulation 11(5)(b) is intended to apply when the reduction to the standard rate of import duty results in a GSP rate that is £2 or less when the monetary values per unit of quantity are combined. For example, if the standard rate of import duty is 0.50 GBP per percent of alcoholic strength by volume + 1.60 GBP per hectolitre, a reduction of 30% would be applied under regulation 13(2)(b)(ii). This would result in a rate of 0.35 GBP/%vol/hl + 1.12 GBP/hl and the GSP rate would be reduced to a nil rate of import duty because £0.35+£1.12 is less than £2.

> *(2) Explain whether it is intended that the Secretary of State must give reasons for the determinations described in regulation 17(4)(b) and (5), and why these provisions are not consistent with notifications under regulation 17(4)(a) and (c) [which mention reasons expressly].*

3. Regulation 17(4)(a) and (c) require the Secretary of State to provide reasons for the Secretary of State's determinations because these two sub-paragraphs apply when a country's application has reached the end of the process, and no further action by that country is required. Regulation 17(4)(b) provides for a notification to the country setting out that some further steps are required before a determination can be made under regulation 17(4)(c). Since 17(4)(b) anticipates that a further notification to be made under regulation17(4)(c), it is expected that the Secretary of State will provide reasons for the determinations when the subsequent notification under regulation17(4)(c) is issued.

> *(3) Explain what difference the words "except in a case where regulation 21(4) applies" in regulation 26(2)(b) are intended to make to the requirement that the Secretary of State follow the procedure in regulation 26(3) when issuing a suspension under regulation 21, given that regulation 21(4) only defines the terms "WTO Body" and "WTO Agreement" (which are used in regulation 21(2)(b)).*

4. The Department regrets that the reference in regulation 26(2)(b) to regulation 21(4) should correctly refer to regulation 21(2)(b). The Department apologies for this error and undertakes to rectify this as soon as practicable.

> *(4) Provide the paragraph number that appears to be missing at the end of paragraph 7(a) of Schedule 4.*

5. The Department regrets that at the end of paragraph 7(a) of Schedule 4, it should refer to paragraph 2 (of Schedule 4). The Department apologies for this error and undertakes to rectify this as soon as practicable.

> *(5) Confirm that the provisions identified in the table below contain typographical or similar errors as marked, and explain why these errors were not identified and corrected at proofreading stage.*

6. The Department regrets that the typographical or similar errors were not identified and corrected. This was due to the pressures of finalising legislation for the end of the Transition Period. The Department apologies for these and undertakes to rectify these, as appropriate, as soon as practicable.

**Department for International Trade**

**9 February 2021**

# Appendix 2

## S.I. 2020/1545

### *Value Added Tax (Miscellaneous Amendments, Northern Ireland Protocol and Savings and Transitional Provisions) (EU Exit) Regulations 2020*

1. In its letter to HM Treasury of 3rd February 2021, the Select Committee requested a memorandum on the following points:

> *(1) In relation to regulation 30(6), on the assumption that the intention is that the modifications in new article 12A are intended to apply in specified circumstances, identify those circumstances and explain why they are not mentioned in the provision.*
>
> *(2) In relation to regulation 74, confirm that-*
>
> *(a) inserted regulation 133E(3) is unnecessary; and*
>
> *(b) in inserted regulation 133G(b), the words "unless the taxable person can satisfy the Commissioners that there was a reasonable excuse for the failure to comply or the failure to provide the correct information, as appropriate" should appear after paragraph (b) (as modifying both paragraphs (a) and (b)) rather than forming part of paragraph (b).*

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

3. As to point (1), the intention is that the modifications in new article 12A are to apply in the circumstances set out in that provision, namely where goods are removed from Northern Ireland to Great Britain. The modification is necessary in light of amendments to the Value Added Tax Act 1994 ("VATA") to implement the Protocol on Ireland/Northern Ireland contained in the Withdrawal Agreement between the UK and the EU.

4. Article 12(1) of the Value Added Tax (Special Provisions) Order 1995 (S.I. 1995/1268) makes provision for a taxable person to choose to account for VAT on a supply of works of art, antiques and collectors' items and second-hand goods ("eligible goods") on that person's profit margin on the supply, rather than on the price paid.

5. The inserted article 12A modifies that provision to cater for the case where the supply of the eligible goods involves their removal from Northern Ireland to Great Britain. In that case, the supply of those goods is zero-rated by virtue of paragraph 3(1) of Schedule 9ZB to VATA, inserted by Schedule 2 to the Taxation (Post-transition Period) Act 2020. However, paragraph 3(2) of Schedule 9ZB imposes a separate charge to VAT on the removal of the goods from Northern Ireland to Great Britain. The modification to article 12(1) made by the new article 12A is thus required to ensure that the option to account for VAT on the profit margin on the supply will also apply where VAT is charged on the removal of the goods but not charged (at a positive rate) on the supply.

6. As to point (2)(a), Her Majesty's Revenue and Customs confirm that the inserted regulation 133E(3) is unnecessary.

7. As to point (2)(b), Her Majesty's Revenue and Customs confirm that the words quoted by the Committee should appear after paragraph (b) rather than forming part of paragraph (b).

8. Her Majesty's Revenue and Customs propose to correct the errors referred to in point (2) of the Committee's letter at the next available opportunity. Thank you for drawing these to our attention.

**Her Majesty's Revenue and Customs**

**9 February 2021**

# Formal Minutes

### Wednesday 24 February 2021

### Virtual Meeting

### Members present:

Jessica Morden (*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 2.5 agreed to.

Annexes 1 to 2 agreed to.

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

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

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

[Adjourned till Wednesday 3 March at 3.40 p.m.