



House of Commons
Select Committee on Statutory
Instruments

**Eleventh Report of
Session 2021–22**

**Drawing special attention
to:**

*Value Added Tax (Amendment) (EU Exit) Regulations 2021
(S.I. 2021/715)*

*Report, together with formal minutes
relating to the Report*

*Ordered by the House of Commons
to be printed 17 November 2021*

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*)

[Richard Thomson MP](#) (*Scottish National Party, Gordon*)

[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

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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), 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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Instruments reported

At the Committee’s meeting on 17 November 2021, 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 is given below. The relevant departmental memorandum is published as an appendix to this report.

1 S.I. 2021/715: Reported for doubtful *vires*, for requiring elucidation and for defective drafting

Value Added Tax (Amendment) (EU Exit) Regulations 2021

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

1.2 These Regulations, which were made by the negative resolution procedure, amend several pieces of legislation relating to Value Added Tax.

1.3 The enabling powers cited in the preamble include both provisions of the Value Added Tax Act 1994 (“VATA”) and section 51 of the Taxation (Cross-border Trade) Act 2018 (“TCTA”). The latter provides for the made affirmative resolution procedure to apply to “a statutory instrument containing regulations under this section that amends or repeals any Act of Parliament”. Regulations 2 to 4 of this instrument amend the VATA. And regulation 43, although it does not directly change the words of any Act of Parliament, expressly changes the operation of section 16 VATA by specifying exceptions to its general rule about the enactments that apply in relation to VAT. The Committee asked Her Majesty’s Treasury to confirm that, consequently, this instrument attracted the made affirmative procedure under section 51(5) TCTA.

1.4 In a memorandum printed as an Appendix, Her Majesty’s Revenue and Customs (replying on behalf of HM Treasury) explains in relation to the amendment made by regulation 43 that it does not consider section 51(5) TCTA to require the affirmative procedure where the operation of primary legislation is disapplied or modified, but only where primary legislation is amended or repealed. The Committee considers it wrong in principle that an instrument which makes significant changes to the application and effect of primary legislation should escape greater scrutiny merely by making those changes indirectly, by deeming provision, instead of changing the words of the Act. The Committee does not draw special attention to the point in this case, however, because the changes made by regulation 43 would have attracted the negative resolution procedure had they been made under section 16(3) VATA.

1.5 In relation to regulations 2 to 4, the Department merely notes that they are made under the VATA and so do not fall within scope of section 51(5) TCTA. The Committee disagrees. Section 51(5) TCTA provides that the affirmative resolution procedure applies to a *statutory instrument ... that amends or repeals any Act*, not to a statutory instrument containing *regulations under section 51 that amend or repeal any Act*. This is a statutory

instrument that amends an Act. And while the regulations which do so are not regulations under section 51, that is not the trigger for affirmative resolution. The Committee concedes that this apparent quirk may not have been the drafter's intent, but it remains the fact that under section 51(5) TCTA as enacted by Parliament, any instrument which (a) contains regulations made under that section *and (b) amends or repeals an Act of Parliament* is subject to the made affirmative resolution procedure. **The Committee accordingly reports these Regulations for doubt as to whether they are *intra vires*.**

1.6 The Committee noticed that new regulations 133AF and 133AH, inserted into the Value Added Tax Regulations 1995 (S.I. 1995/2518) by regulation 43, both apply adaptations to Articles 89 and 110 of the Union Customs Code in the same circumstances. It asked the Department to explain how the new provisions are intended to interact and why it was not possible to include all the adaptations in a single regulation. In its memorandum, the Department explains that the adaptations are intended to apply simultaneously, and that they were kept separate because replicating the old structure of regulations 121A and 121C of the 1995 Regulations was thought to be of more help to the reader in understanding the changes being made. **The Committee accordingly reports regulation 43 (new regulations 133AF and 133AH) as requiring elucidation, provided in the Department's memorandum.**

1.7 The Committee also asked the Department to explain inconsistencies in regulation 43, where the inserted regulations appear to use several terms interchangeably to mean the same thing: in one case the terms are "prescribed adaptation(s)", "adaptations" and "modifications"; in the other, "security" and "guarantee". In its memorandum, the Department accepts that such inconsistencies could cause confusion and undertakes to consider how best to ensure clarity at the next suitable legislative opportunity. **The Committee accordingly reports regulation 43 for defective drafting in two respects, 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 requiring affirmative approval

- S.I. 2021/1165 Value Added Tax (Distance Selling and Miscellaneous Amendments No. 2) Regulations 2021
- S.I. 2021/1191 Customs Tariff (Establishment and Suspension of Import Duty) (EU Exit) (Amendment) (No. 2) Regulations 2021

Instruments subject to annulment

- S.I. 2021/1076 Income Tax (Digital Requirements) Regulations 2021

Appendix

S.I. 2021/715

Value Added Tax (Amendment) (EU Exit) Regulations 2021

1. In its letter to HM Treasury of 27th October 2021, the Select Committee requested a memorandum on the following points:

1. Confirm that this instrument attracted the made affirmative procedure under section 51(5) of the Taxation (Cross-border Trade) Act 2018 (“TCTA”) because—

(a) it is an instrument that contains regulations under section 51 of the 2018 Act, and it amends an Act of Parliament (notwithstanding that the amending provisions, regulations 2 to 4, are not made under section 51); and

(b) the effect of regulation 43 is to amend the operation of section 16 of the Value Added Tax Act 1994 (as substituted by the 2018 Act), and consequently the operation of the Acts of Parliament listed in new regulations 133AB and 133AE (inserted by regulation 43).

Questions (2) to (4) relate to regulation 43—

2. Explain the intended difference in meaning between being subject to “prescribed adaptation(s)” (in new regulations 133AF, 133AG and 133AI), “adaptations” (in new regulations 133AE and 133AH) and “modifications” (in new regulation 133AJ, which is under the heading “Adaptations...”).

3. Given that new regulations 133AF and 133AH apply adaptations to Articles 89 and 110 of the Union Customs Code in the same circumstances, explain how the provisions are intended to interact, and why it was not possible to include all the adaptations in a single regulation.

4. Confirm that the references to “security” in new regulations 133AH and 133AI should have been references to “guarantee”, for consistency with both the provisions of EU legislation which those regulations adapt and new regulations 133AF and 133AG.

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

3. In relation to the first point, section 51(5) TCTA provides:

“A statutory instrument containing regulations under this section that amends or repeals any Act of Parliament must be laid before the House of Commons, and, unless approved by that House before the end of the period of 28 days beginning with the date on which the instrument is made, ceases to have effect at the end of that period”.

4. Section 51(8) TCTA provides:

“A statutory instrument containing regulations under this section to which subsection (5) does not apply is subject to annulment in pursuance of a resolution of the House of Commons.”

5. Regulations 2 to 4 are made under powers given by section 30(4) of the Value Added Tax Act 1994 (“VATA”). Section 97(5) of that Act provides that such regulations are subject to annulment in pursuance of a resolution of the House of Commons. Regulations 2 to 4 are, therefore, not within scope of section 51(5).

6. Regulation 43 does not amend or repeal an Act of Parliament and so, in the Department’s view, section 51(5) does not apply. There is nothing in section 51(5) to suggest that it applies where the operation of primary legislation is disapplied or modified, it only applies where the regulation amends or repeals an Act of Parliament. It is also noteworthy that section 16(3) VATA provides a power to provide for exceptions from the effect of section 16(1) or for that section to have effect with modifications specified in regulations. Such regulations would be subject to the negative procedure by virtue of section 97(5) VATA. Whilst it would have been possible to cite this power in making these Regulations the Department took the view that it was more appropriate to cite the power provided by section 51 in light of the wide variety of amendments made by the Regulations.

7. As section 51(5) is therefore not engaged in relation to either regulations 2 to 4 or 43 the Department takes the view that the correct parliamentary procedure for those regulations is the negative procedure by virtue of section 97(5) VATA and section 51(8) TCTA respectively.

8. Questions (2) and (4) relate to the use of consistency of language, specifically the terms “prescribed adaptation(s)”, “adaptions” and “modifications” in question (2) and “security” and “guarantee” in question (4). The Department accepts that the interchangeable use of terms, with the same intended meaning, could be liable to cause confusion. The Department will consider how this can best be clarified at the next suitable legislative opportunity.

9. Question (3) relates to the interaction of new regulations 133AF and 133AH. The adaptations made by new regulations 133AF and 133AH are not contrary and are intended to both be applied. Whilst the adaptations could have been contained in a single regulation, it was decided to keep them separate as new regulations 133AF and 133AH replicate regulations 121A and 121C of the Value Added Tax Regulations 1995 respectively for Northern Ireland. Replicating the old structure of the regulations was intended to assist the reader in understanding the changes made.

Her Majesty’s Revenue and Customs

2 November 2021

Formal Minutes

Wednesday 17 November 2021

Members present:

Jessica Morden (*in the Chair*)

Dr James Davies John Lamont

Paul Holmes Richard Thomson

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 1.7 agreed to

Annex agreed to.

A Paper was appended to the Report.

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

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

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