House of Commons

Select Committee on Statutory Instruments

Thirteenth Report of Session 2021–22

Drawing special attention to:

Value Added Tax (Distance Selling and Miscellaneous Amendments) Regulations 2021 (**S.I. 2021/1164**)

Report, together with formal minutes relating to the Report

Ordered by the House of Commons to be printed 12 January 2022

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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)*

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

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 12 January 2022, 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. 2021/1164: Reported for doubtful *vires*

Value Added Tax (Distance Selling and Miscellaneous Amendments) 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 two respects**.

1.2 These Regulations, which are made under the negative resolution procedure, amend the Value Added Tax Act ("VATA") and other pieces of VAT legislation. They are made partly under the VATA and partly under section 51 of the Taxation (Cross-border Trade) Act 2018. In its Eleventh Report of Session 2021–22 (published after these Regulations were made), the Committee had noted in relation to S.I. 2021/715 that a strict construction of section 51 requires any instrument that (a) is made under that section and (b) amends an Act of Parliament must be subject to the made affirmative procedure. Given that this instrument falls into the same category, the Committee asked Her Majesty's Treasury whether it had anything to observe as to the appropriate procedure. In a memorandum printed as an Appendix, the Department states that it is still giving careful consideration to the Committee's report and has no observations at this time. **The Committee accordingly reports this instrument for doubt as to whether it is *intra vires***.

1.3 Regulation 5(3) amends Schedule 9ZD to VATA by setting out how to determine the gross amount of VAT due under the One Stop Shop scheme on goods supplied from Northern Ireland to the EU. For a supply treated as being made in the United Kingdom, that amount is calculated by reference to two matters specified in new sub-paragraph (4) and "any other matter that the Commissioners may specify by regulations". The Committee asked the Department to identify the power relied on to confer this power to legislate. In its memorandum, the Department asserts that it relies on section 40A VATA, which allows the Treasury to amend Schedule 9ZD by regulations. Section 40A clearly authorises amendments to the Schedule, but the Committee disagrees that it allows the Treasury to sub-delegate a regulation-making power to a third party. As the Committee has observed several times (see, for instance, paragraphs 11 to 22 of its special report Rule of Law Themes from COVID-19 Regulations, published jointly with the House of Lords), there is a strong presumption against legislative sub-delegation, which requires express words or necessary implication to be displaced. That presumption is not rebutted by a mere power to amend. It is worth noting, too, that section 40A expressly allows regulations to confer discretion and to make provision by reference to things specified in a public notice. The absence, in that context, of express authority to confer a power to make regulations is further evidence that it was not Parliament's intent. **The Committee accordingly reports regulation 5 for doubt as to whether it is *intra vires***.

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. 2021/1417	Plastic Packaging Tax (Descriptions of Products) Regulations 2021

Draft Instruments requiring affirmative approval

Draft	Local Government Finance Act 1988 (Non-Domestic Rating Multipliers) (England) (No.2) Order 2021

Instruments subject to annulment

S.I. 2021/1282	Excise Duties (Removal of Alcoholic Liquor to Northern Ireland and Miscellaneous Amendments) Regulations 2021
S.I. 2021/1341	Income Tax (Exemption of Social Security Benefits) Regulations 2021

Appendix

S.I. 2021/1164

Value Added Tax (Distance Selling and Miscellaneous Amendments) Regulations 2021

1. The Committee has asked HM Treasury for a memorandum on the following points:

> *Confirm whether the Department has anything to observe as to the appropriate procedure for this instrument in light of the Committee's Eleventh Report of Session 2021–22 (in so far as it raised a doubt as to whether S.I. 2021/715 is intra vires).*
>
> *Explain the power relied on in regulation 5 to sub-delegate to the Commissioners the power to specify by regulations matters that are relevant when calculating the gross amount of VAT due under the One Stop Shop scheme.*

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, this instrument was made and laid before the House of Commons on 25 October 2021, before the Select Committee's letter to HM Treasury regarding S.I. 2021/715, which was dated 27 October 2021, and before the Committee's Eleventh Report of 2021–22. We are still giving the Committee's recent report careful consideration and do not yet have any further observations to make. The power in section 51 of the Taxation (Cross-border Trade) Act 2018 will have expired on 1 April 2022.

4. In relation to the second point, the provision was made on the basis of section 40A of the Value Added Tax Act 1994. This section provides HM Treasury with the power to amend Schedule 9ZD to the Value Added Tax Act 1994 by regulations.

Her Majesty's Revenue and Customs

14 December 2021

Formal Minutes

Wednesday 12 January 2022

Members present:

Jessica Morden *(in the Chair)*

James Davies
Liz Twist
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 1.3 agreed to.

Annex agreed to.

A Paper was appended to the Report.

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

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

[Adjourned till Wednesday 26 January at 2.45 pm