House of Commons

Select Committee on Statutory Instruments

Fifteenth Report of Session 2021–22

Drawing special attention to:

Grants to the Churches Conservation Trust Order 2022 (**Draft S.I**)

Customs and Value Added Tax (Managed Transition Procedure) (EU Exit) Regulations 2021 (**S.I. 2021/1375**)

Ordered by the House of Commons to be printed 9 February 2022

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Select Committee on Statutory Instruments

Current membership

Jessica Morden MP *(Labour, Newport East) (Chair)*

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John Lamont MP *(Conservative, Berwickshire, Roxburgh and Selkirk)*

Sir Robert Syms MP *(Conservative, Poole)*

Richard Thomson MP *(Scottish National Party, Gordon)*

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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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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.

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Instruments reported

At the Committee's meeting on 9 February 2022, 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 Draft S.I.: Reported for defective drafting

Grants to the Churches Conservation Trust Order 2022

1.1 **The Committee draws the special attention of the House to this Order on the ground that it is defectively drafted in one respect**.

1.2 This draft Order, which was laid for approval of the House in accordance with the draft affirmative resolution procedure, provides the statutory basis for the Government's financial support of the Churches Conservation Trust. Paragraph 6.3 of the Explanatory Memorandum states that the new funding order will cover the period beginning with 1 April 2022 and ending with 31 March 2025. However, article 2 of the Order states the period as beginning with 1 April 2022 and ending with 31 March 2023. The Committee asked the Department for Digital, Culture, Media and Sport to explain the discrepancy. In a memorandum printed at Appendix 1, the Department acknowledges the error in article 2 and confirms that the funding period should end with 31 March 2025. The Department has withdrawn and re-laid the draft instrument with the error corrected. **The Committee accordingly reports article 2 for defective drafting, acknowledged by the Department**.

2 S.I. 2021/1375: Reported for requiring elucidation

Customs and Value Added Tax (Managed Transition Procedure) (EU Exit) Regulations 2021

2.1 **The Committee draws the special attention of the House to these Regulations on the ground that they require elucidation in one respect**.

2.2 These Regulations, which are made in accordance with the negative resolution procedure, make transitory provision relating to customs and value added tax in connection with the withdrawal of the United Kingdom from the European Union. They are made under section 51 of the Taxation (Cross-border Trade) Act 2018; section 51(5) requires the affirmative resolution procedure where an instrument "amends or repeals any Act of Parliament." Regulation 5(2) modifies the effect of section 16(2) of the Value Added Tax Act 1994 by way of non-textual gloss. The Committee asked Her Majesty's Revenue and Customs (on behalf of Her Majesty's Treasury) to explain why it was thought appropriate to change the effect of an Act by way of non-textual gloss and thereby circumvent the arrangements for affirmative Parliamentary scrutiny. In a memorandum printed at Appendix 2, the Department explains that it could have relied on alternative vires to make regulation 5(2) namely section 16(3)(b) of the Value Added Tax Act 1994 and had it done so the negative parliamentary procedure would have applied; section 16(3)(b) clearly contemplates modifying the effect of section 16(2) by way of regulations. The Department also argues that it could not have been Parliament's intention that a restricted gloss to the effect of the legislation be treated as an amendment for the purposes of section 51(5). The Committee accepts that the same provision could have been achieved under alternative vires: but the Committee has to consider the requirements of the enabling powers that the Department did choose to use, not the requirements of other powers that it might have chosen to use. The powers that are relied on to make this instrument require affirmative resolution for provisions amending an Act. The difference between a textual amendment and a non-textual gloss is merely a stylistic choice of the drafter: it is a matter of mere form and not of substance. It is undesirable that a stylistic choice should be determinative of the extent of Parliamentary scrutiny of an instrument. That, however, is the effect of the enabling Act. The Committee is concerned that the distinction set by provisions of this kind should not be abused, by the use of non-textual glosses to make changes of a kind that Parliament might reasonably have expected to be made by textual amendment and therefore subject to affirmative resolution scrutiny. On the basis of the explanation in the Department's memorandum, however, in this context **the Committee is content to report these regulations for requiring elucidation, provided by the Department's memorandum**.

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

HC 1080	Local Government Finance Report (England) 2022 to 2023
HC 1081	Referendums Relating to Council Tax Increases (Principles) (England) Report 2022/23
HC 1084	Police Grant Report (England and Wales) 2022/23

Draft Instruments requiring affirmative approval

Draft	Major Sporting Events (Income Tax Exemption) (UEFA Women's EURO 2022 Finals) Regulations 2022

Instruments subject to annulment

S.I. 2021/1347	Customs and Excise Border Procedures (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2021
S.I. 2021/1422	Van Benefit and Car and Van Fuel Benefit (No. 2) Order 2021

Appendix 1

Draft S.I.

Grants to the Churches Conservation Trust Order 2022

1. The Committee has asked the Department for Digital, Culture, Media and Sport for a memorandum on the following point:

> *Explain the discrepancy between paragraph 6.3 of the Explanatory Memorandum which states that the new funding order will cover the period beginning with 1st April 2022 and ending with 31st March 2025 and article 2 of the Order which states that the period ends on 31st March 2023.*

2. With apologies to the Committee, this memorandum sets out the reasons for the discrepancy highlighted above, followed by the remedial actions that the Department intends to take.

3. The discrepancy is an accidental error and article 2 in the Order should read that the period ends on 31st March 2025, as it does in the Explanatory Memorandum.

4. We understand, in light of this error, that it is a procedural and legal necessity to withdraw the SI and EM that were laid on 19 January and to relay them both. Therefore, we have taken and are taking the following remedial actions:

5. We have withdrawn and relaid the measure on 31st January, and ensured that the correct version of the SI was submitted.

6. Please note that the current funding order for 2021–22 for the CCT will run out on 31st March 2022, so this funding order will need to be in place by this point in order to ensure that the Government can provide the CCT with its statutory funding.

Department for Digital, Culture, Media and Sport

1 February 2022

Appendix 2

S.I. 2021/1375

Customs and Value Added Tax (Managed Transition Procedure) (EU Exit) Regulations 2021

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

> *Having regard to the comments of the Committee in its Eleventh and Thirteenth Reports of Session 2021–22 in relation to S.I. 2021/715 and S.I. 2021/1164, explain why it was thought appropriate to change the effect of section 16(2) of the Value Added Tax Act 1994 by way of non-textual gloss and thereby circumvent the arrangements for affirmative Parliamentary scrutiny for instruments amending primary legislation.*

2. This memorandum is prepared by Her Majesty's Revenue and Customs (HMRC) on behalf of HM Treasury.

3. HMRC does not consider that the drafting of S.I. 2021/1375 circumvents the arrangements for affirmative Parliamentary scrutiny for instruments amending primary legislation for the reasons given below.

4. In its Eleventh Report of Session 2021–22 in relation to S.I. 2021/715, the Committee considered 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*". However, the power in both section 51 of the Taxation (Cross-border Trade) Act 2018 (TCTA) and the alternative vires section 16 of the Value Added Tax Act 1994 (VATA) permit non-textual modifications and for the reasons explained below HMRC does not believe that drafting in this way circumvents the arrangements for Parliamentary scrutiny.

5. The Committee's Thirteenth Report of Session 2021–22, which was published after S.I. 2021/1375 was made, reports S.I. 2021/1164 for doubt as to whether it is intra vires on the basis that a strict construction of section 51 TCTA requires that any instrument that (a) is made under that section and (b) amends an Act of Parliament, must be subject to the made affirmative procedure. S.I. 2021/1164 contains provisions which amend primary legislation; the current Regulations under consideration contain no such provisions and for the reasons explained below HMRC is of the view that the drafting of S.I. 2021/1375 is intra vires and uses the correct parliamentary procedure.

6. HMRC took the view that the most appropriate vires to make regulation 5(2) of S.I. 2021/1375 is section 51(1) and (3)(a) TCTA on the basis that the provision is made as a result of the withdrawal of the UK from the EU and it is appropriate, in consequence of withdrawal, to ensure that the UK's VAT system continues to function as intended following the UK's exit from the EU. This provision forms part of HMRC's value added tax EU Exit legislation and is clearly identified as such by the EU Exit subject heading and title identifier.

7. Section 51(3)(a) TCTA permits regulations under the section to make such provision as might be made by Act of Parliament. Section 51(5) 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.*"

8. Regulation 5(2) of S.I. 2021/1375 does not amend or repeal an Act of Parliament and so section 51(5) TCTA does not apply and under section 51(8) the correct parliamentary procedure is the negative procedure.

9. HMRC could have relied on an alternative vires, namely section 16(3)(b) VATA, to make regulation 5(2) of S.I. 2021/1375. Had it done so the negative parliamentary procedure would have applied under section 97(5) VATA.

10. Section 16 VATA concerns the application of customs enactments in relation to any VAT chargeable on the importation of goods into the UK and permits the Commissioners by regulations to provide for exceptions from the effect of the section or for the provision made by the section to have effect with modifications.

11. Modifying the effect of section 16(2) VATA by way of regulations is clearly contemplated by Parliament. Section 16(3) VATA allows HMRC to restrict or modify the application of customs enactments to import VAT in a limited way which avoids extensive textual amendments to the Act. In HMRC's view, it could not have been Parliament's intention that such a restricted gloss to the effect of the legislation be treated as an amendment for the purposes of section 51(5) TCTA.

12. Whilst HMRC could have relied on section 16(3)(b) VATA, as per paragraph 6 above, there were good reasons for preferring section 51 TCTA. HMRC remains of the view that the correct parliamentary procedure was used.

Her Majesty's Revenue and Customs

31 January 2022

Formal Minutes

Wednesday 9 February 2022

Members present:

Jessica Morden, in the Chair

Dr James Davies

John Lamont

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 2.2 agreed to.

Annex agreed to.

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

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

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

Adjourned till Wednesday 23 February at 2.45 p.m.