House of Commons
Select Committee on Statutory Instruments

Eleventh Report of Session 2017–19

Drawing special attention to:

Customs (Import Duty) (EU Exit) Regulations 2018 (S.I. 2018/1248)
Customs Transit Procedures (EU Exit) Regulations 2018 (S.I. 2018/1258)
Excise Goods (Holding, Movement and Duty Point) (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/13)
Excise Duties (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/14)

Ordered by the House of Commons
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Select Committee on Statutory Instruments

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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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Instruments reported

At the Committee’s meeting on 13 February 2019 it scrutinised a number of instruments. It was agreed that the special attention of the House of Commons should be drawn to four 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. 2018/1248: Reported for requiring elucidation and for defective drafting

Customs (Import Duty) (EU Exit) Regulations 2018

1.1 The Committee draws the special attention of the House to these Regulations on the grounds that they require elucidation in five respects and are defectively drafted in three respects.

1.2 This instrument is one of a number made under the Taxation (Cross-border) Trade Act 2018 to establish a new stand-alone customs regime for the United Kingdom in preparation for its withdrawal from the European Union. These Regulations make provision regarding customs declarations and duties, valuation of chargeable goods, guarantees, and related matters.

1.3 The Committee asked Her Majesty’s Revenue and Customs a number of questions about: the enabling powers relied on for regulations 20 and 21; appeals, the giving of reasons and remedies in relation to regulations 63, 64, 87, 88 and 89; and the determination of the date on which a specified period expires for the purposes of regulation 69(1). In a memorandum printed at Appendix 1, the Department has provided helpful replies to those questions, and the Committee accordingly reports the provisions listed above for requiring elucidation, provided by the Department’s memorandum.

1.4 The Committee asked the Department to explain whether regulation 25(4) is intended to include things carried on a vehicle but not in it. In its memorandum, the Department confirms that this is the intent and undertakes to make a relevant amendment before exit day. The Committee accordingly reports regulation 25(4) for defective drafting, acknowledged by the Department.

1.5 The instrument also contains several apparent drafting errors, and the Committee asked the Department to explain the reasons for these. In its memorandum, the Department accepts that most of the matters raised are indeed drafting errors and regrets that they were not corrected during drafting or quality checking. The Committee hopes that the Department will correct these errors when it makes the amendment to regulation 25(4) and that it will take steps to ensure its processes for quality control of secondary legislation are more rigorously applied in future. The Committee accordingly reports regulations 4(5), 34(1), 36(2)(c), 86(1)(b) and (c), 2(2), 3(b) and (4)(a), 92(4), 94, 137(1) (b) and (c), 151, and 158(5) for defective drafting, acknowledged by the Department.
1.6 As regards the apparent errors in regulations 145(1) and 160(1): these provisions purport to impose an obligation by saying that HMRC “may notify a person to provide” evidence concerning specified matters. In response to the Committee's suggested alternative (“may by notice require a person to provide”), the Department asserts that it did intend to refer to notifications and not to notices. The Committee's reason for questioning the use of “notify” in this context, however, is not a terminological discrepancy between notification and notice. Rather, it is the more important substantive point that a power for HMRC to notify a person to provide information does not in itself create a duty for the person to comply with the notification. Whilst the Committee believes a court would likely be forced, by the context, to construe these provisions as the Department intends, it is good legislative practice both to empower a public authority to require information and separately to require the person on whom the requirement is served to comply with it. The Committee accordingly reports regulations 145(1) and 160(1) for defective drafting.

2 S.I. 2018/1258: Reported for requiring elucidation, for defective drafting and for failure to comply with proper legislative practice

Customs Transit Procedures (EU Exit) Regulations 2018

2.1 The Committee draws the special attention of the House to these Regulations on the grounds that they require elucidation in seven respects, are defectively drafted in two respects, and fail to comply with proper legislative practice in one respect.

2.2 Like S.I. 2018/1248, this instrument is made under the Taxation (Cross-border) Trade Act 2018 to establish a new stand-alone customs regime for the United Kingdom in preparation for its withdrawal from the European Union. These Regulations set out the details of the various transit procedures that will form part of that regime.

2.3 The Committee asked Her Majesty’s Revenue and Customs to explain the meaning of several provisions that are unclear on the face of the Regulations; these questions are set out along with the Department’s answers to each in a memorandum printed at Appendix 2. Consistent in the Department’s replies is that the provision in question has long been part of UK law under one or more EU Regulations, that the intention is to preserve the long-standing position, and that under regulation 2 the provision should be read to reflect the Convention on a common transit procedure.

2.4 This case raises an interesting point in relation to copy-out of EU legislation in domestic legislation that is intended to continue to have effect after exit day. The Committee has traditionally accepted copy-out as a reason for including in UK legislation material that does not satisfy domestic standards of clarity, up to a certain point, where attempting to clarify the material would carry with it a risk of failure to transpose in accordance with EU law. That justification will cease to apply in relation to domestic law after exit day even in relation to legislation that originally derives from EU law. The Committee expects, both in relation to retained EU law and more generally, that new domestic legislation will satisfy good drafting standards and be clear and justiciable. The Committee notes that Parliament appears, in paragraph 21(b) of Schedule 7 to the European Union (Withdrawal) Act 2018, to have acted on the same expectation in granting Ministers power to restate any retained EU law in a clearer or more accessible way.
2.5 On this occasion, however, the Committee notes the Government’s intention for the UK to accede, as a party in its own right, to the Convention underlying the original EU legislation as soon as possible after exit day. At this point an equivalent argument for copy-out will apply. In the circumstances, the Committee accepts that it would be unreasonable to expect more exacting domestic drafting standards to be applied for the sake of what is likely to be a brief interval between transposition of EU legislation and transposition of an international convention. The Committee accordingly reports the following paragraphs of Schedule 1 for requiring elucidation, provided by the Department’s memorandum: 5(2) and 7(3); 5(6), 6(2), and 18(2); 9(1) and 33(1); 10, 34 and 35; 10 to 12; 18(6)(b); 20(1) (c); 23(6)(c); 3(3) and 28(3).

2.6 The Department’s reliance on the wording of the original EU legislation and on the Convention does not explain the ambiguity of the phrase “which they have decided to approve, and have not decided to approve” in paragraph 23(6)(a), which appears to be an absurdity. This is not a faithful copy-out of the original EU provisions, which distinguish clearly between “seals of a special type in use and … seals of a special type that it has decided not to approve”. The Committee accordingly reports paragraph 23(6)(a) for defective drafting.

2.7 The Committee observed that many of the numbered sub-paragraphs in this instrument are further divided into unnumbered paragraphs (for instance, in paragraphs 1(1), 3(2), 4(3), 13(1), 16(3), 18(4), 19(1), and 20(4) of Schedule 1). The Committee asked the Department to explain why normal UK drafting practice, which assigns a number to each proposition, has not been followed consistently, the basis on which this decision was made, and in particular why this has been done in places where a specific proposition is followed by one of more general application. In its memorandum, the Department asserts that the numbering of each individual proposition is in accordance with domestic drafting standards. This is clearly not the case. The Committee accepts that the use of unnumbered sub-propositions is found extensively in EU legislation, but it has never accepted that copy-out or any other reason is sufficient to justify the use in domestic legislation of that unhelpful technique, which makes it difficult for readers to reference individual provisions. The Committee hopes that the Government does not intend to use copy-out in relation to retained EU legislation as a justification for importing large-scale use of unnumbered individual propositions into domestic legislation. The Committee accordingly reports these Regulations for failure to comply with proper legislative practice.

2.8 The Committee asked the Department to clarify the intended meaning of the phrase “or the carrier (see on behalf of the holder of the procedure”. In its memorandum, the Department apologises for the stray and meaningless typographical error “(see” and states that it should be disregarded pending correction of the provision. The Committee accordingly reports paragraph 28(4)(b) of Schedule 1 for defective drafting, acknowledged by the Department.
3 S.I. 2019/13 and S.I. 2019/14: Reported for failure to comply with proper legislative practice

Excise Goods (Holding, Movement and Duty Point) (Amendment etc.) (EU Exit) Regulations 2019; Excise Duties (Miscellaneous Amendments) (EU Exit) Regulations 2019

3.1 The Committee draws the special attention of the House to both of these Regulations on the ground that each set of Regulations fails to comply with proper legislative practice in one respect.

3.2 S.I. 2019/13 amends the Excise Goods (Holding, Movement and Duty Point) Regulation 2010, in particular, those parts that relate to movements of goods subject to excise duty between the UK and EU countries. S.I. 2019/14 makes further miscellaneous amendments to secondary legislation to address deficiencies arising from the withdrawal of the United Kingdom from the European Union without a withdrawal agreement.

3.3 Both instruments refer to provisions of customs legislation made in public notices certain of which have not yet been made. The Committee asked Her Majesty’s Revenue and Customs to explain why details are not given of where the public notices referred to in regulation 30(4)(b) of S.I 2019/13 and regulation 3(4)(b)(ii) and (c) and (5) of S.I. 2014/14 will be available.

3.4 In memorandums printed at Appendices 3 and 4, the Department acknowledges (in the case of S.I. 2019/13) that details of where the draft notice is available and where the finalised notice will be available should have been provided and (in the case of S.I. 2019/14) that it is the Department’s intention that the notices will be available, if and when finalised. The Committee considers that where documents that are yet to be finalised are referred to in an instrument, that instrument should make clear at the outset where those documents will be available when they are finalised. Departments should generally include availability details in Explanatory Notes or footnotes (see First Special Report of Session 2017–19, Transparency and Accountability in Subordinate Legislation at paragraph 4.8). The Committee is content that this can be done by correction slip (see paragraph 3.13 of the Special Report). The Committee accordingly reports both sets of Regulations for failure to comply with proper legislative practice, acknowledged by the Department.
Instruments not reported

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

Annex

Instruments requiring affirmative approval

S.I. 2019/73  Value Added Tax (Tour Operators) (Amendment) (EU Exit) Regulations 2019
S.I. 2019/113  Customs (Records) (EU Exit) Regulations 2019

Instruments subject to annulment

S.I. 2019/43  Value Added Tax (Finance) (EU Exit) Order 2019
S.I. 2019/59  Value Added Tax (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019
S.I. 2019/60  Value Added Tax (Accounting Procedures for Import VAT for VAT Registered Persons and Amendment) (EU Exit) Regulations 2019
S.I. 2019/83  Income Tax (Pay As You Earn) (Amendment) Regulations 2019
S.I. 2019/91  Value Added Tax and Excise Personal Reliefs (Special Visitors and Goods Permanently Imported) (Amendment) (EU Exit) Regulations 2019
Appendix 1

S.I. 2018/1248

Customs (Import Duty) (EU Exit) Regulations 2018

1. In its letter to Her Majesty’s Revenue and Customs of 30 January 2019, the Select Committee requested a memorandum on the following points:

1. Are paragraphs 15 and 16 of Schedule 2 relied upon as enabling powers given that regulations 20 and 21 specify goods that may be declared for a temporary customs procedure?

2. Explain whether regulation 25(4) is intended to include things carried on the vehicle but not in it, and how effect is given to that intention.

3. Explain why the appeal process that is available under regulation 88 in relation to a failure by HMRC to notify an applicant under regulation 87 has not been made available in relation to a similar failure under regulation 63, particularly given that the applications for remission or repayment of duty would generally be made on the basis of an error by someone other than the applicant.

4. Explain why reasons are expressly required by regulations 63(1)(b), 64(2)(b), 87(b), and 89(1)(b) and (3)(a) but not by regulations 63(2), 64(7) and 89(6).

5. Explain what remedy would be available to an applicant if, as a result of internal errors or failures, HMRC failed to reach a determination in accordance with regulation 64(5) or did not grant or refuse an application for approval under regulation 89, and the application was therefore deemed to be rejected under regulation 64(5) or treated as refused under regulation 89(6).

6. Explain how the date on which “the period within which a notification of liability to import duty may be given” expires will be determined for the purposes of regulation 69(1), in particular where notification of liability is presumed, or taken to be met by the doing of a specified act (e.g. as in regulation 40), or in cases where it is not required (i.e. as specified in regulations made under paragraph 3(c) of Schedule 6 to the Taxation (Cross-border Trade) Act 2018).

7. Explain the reasons for the following apparent errors:
<table>
<thead>
<tr>
<th>Provision</th>
<th>Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reg.4(5)</td>
<td>Use of “notice of importation” rather than “notification of importation”</td>
</tr>
<tr>
<td>Reg.34(1)</td>
<td>Use of “a particular case” rather than “any particular case”</td>
</tr>
<tr>
<td>Reg.36(2)(c)</td>
<td>Repetition of “were” in the phrase “a declaration for the free-circulation procedure where, were the declaration made and the goods to which it would have related were discharged from the procedure, the goods would be subject to the suspension of excise duty”</td>
</tr>
<tr>
<td>Reg.86(1)(b)</td>
<td>“that the previous approval was treated as if it had never been granted” rather than “that the previous approval is treated as if it had never been granted”</td>
</tr>
<tr>
<td>Reg.86(1)(c)</td>
<td>“three years of the date the notice” rather than “three years from the date of the notice”</td>
</tr>
<tr>
<td>Reg.86(1)(c), (2)(c), (3)(c)</td>
<td>In phrases expressing the duration of a period by reference to a specific date, use of “of the date” rather than “from the date” (e.g. “a period of one year of the date of the revocation”)</td>
</tr>
<tr>
<td>Reg.86(3)(c)</td>
<td>Omission of a full stop</td>
</tr>
<tr>
<td>Reg.86(4)(a), text after (ii) and reg.92(4)</td>
<td>“references to conditions . . . includes” rather than “reference to conditions . . . includes”</td>
</tr>
<tr>
<td>Reg.94, in definition of “guaranteeing association”</td>
<td>“as the case maybe” rather than “as the case may be”</td>
</tr>
<tr>
<td>Reg.137(1)(b) and (c)</td>
<td>“take of samples” rather than “take samples”</td>
</tr>
<tr>
<td>Regs.149(1), 150(1), 152(1)(a), 153(1)(a)(i), 156(1)(a)(i) and (ii), and 156(3)(c)</td>
<td>References to declaration of goods to a procedure rather than for a procedure (as in TCTA and earlier in these Regulations)</td>
</tr>
<tr>
<td>Reg.151</td>
<td>Use of “subject to the transit procedure” rather than “subject to a transit procedure”</td>
</tr>
<tr>
<td>Reg.158(5)</td>
<td>Repetition of “that” in the phrase: “it does not matter that in the course of the movement of goods from the customs territory of the Union that the goods may move temporarily outside the customs territory before their arrival in the United Kingdom”</td>
</tr>
<tr>
<td>Reg.145(1)</td>
<td>For “HMRC may notify a person to provide” substitute “HMRC may by notice require a person to provide”</td>
</tr>
<tr>
<td>Reg.160(1)</td>
<td>For “may notify any person” substitute “may by notice require any person”</td>
</tr>
</tbody>
</table>

2. Reference in the replies below to “the Act” means the Taxation (Cross-border Trade) Act 2018.
3. Concerning point 1, by section 3(5)(b) of the Act, provision which may be made by Schedule 1 to the Act includes the making of provision concerning Customs declarations. Paragraph 6(1) of Schedule 1 to the Act enables provision to be made by public notice for a Customs declaration to be made orally or by conduct. Regulations 20 and 21 make provision for a Customs declaration to be made orally where the declaration is for a temporary admission procedure. A Customs declaration is a declaration applicable to a Customs procedure, which includes a special Customs procedure, which includes a temporary admission procedure. See section 3(2) to (4) of the Act. Section 32(10) of the Act provides that provision which may be made by public notice under Part 1 of the Act may be made by regulations. Therefore, HMRC does not consider that the enabling powers at paragraphs 15 and 16 of Schedule 2 to the Act are required.

4. Concerning point 2, goods carried on a vehicle were intended to be included in this provision. In practice, HMRC would treat a validly made declaration in respect of goods in the vehicle as also applicable to goods on the vehicle. HMRC intends to make a relevant amendment to the provision before exit day such that the provision applies to goods carried by the vehicle.

5. Concerning point 3, a rejection of an application for remission or repayment (including a deemed rejection) would be a “relevant decision” under section 13A(2)(a)(iv) of the Finance Act 1994 and so be subject to review and appeal under sections 14 to 16 of, and Schedule 5 to, that Act (as amended by paragraphs 142 to 145 of Schedule 7 to the Act). Regulation 88 provides for an appeal where HMRC has failed to comply with regulation 87 which requires HMRC to determine whether or not an application or purported application falls to be determined. If HMRC fails to make a determination under regulation 87, there is no “relevant decision” under section 13A(2)(a)(iv) of the Finance Act 1994. A separate vires was obtained to deal with such a failure in section 23(3)(d) of the Act and is relied upon for regulation 88.

6. Concerning point 4, in respect of regulations 63(2), 64(7) 89(6), the provisions concern a deemed refusal where HMRC has not made a determination in time or at all. As such, the giving of reasons would not arise.

7. Concerning point 5, a deemed refusal under regulation 64(7) would be subject to review and appeal under the Finance Act 1994 as explained in respect of point 5. An application treated as refused under regulation 89(6) is covered by the amendment to Schedule 5 to the Finance Act 1994 in paragraph 145(3)(d) of Schedule 7 to the Act and so would also be subject to review and appeal under sections 14 to 16 of the Finance Act 1994.

8. Concerning point 6, paragraph 4 of Schedule 6 to the Act makes provision as to the period before the end of which a notification of liability to pay import duty must be given. In cases where a notification is presumed to be given, the date of notification is the date when the act occurs giving rise to the presumption. For regulation 40(1), it is the date of the release of the goods to the Customs procedure. No provision is made by the Regulations for cases where a notification of liability is not required.

9. Concerning the minor errors set out in the table at point 7, save for the following, these are accepted by HMRC and HMRC regrets that these were not corrected during the course of drafting or quality checking. HMRC does not though consider that any of those
minor errors affect the operation of the provisions in question. In row 7 (omission of a full-stop), HMRC considers that the provision referred to in the table should instead be to regulation 86(3)(b).

10. In row 11, (regulations 149(1), 150(1), 152(1)(a), 153(1)(a)(i), 156(1)(a)(i) and (ii), and 156(3)(c)), these provisions concern declarations under the existing customs regime of the Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and the Council of 9 October 2013) in relation to which “to a procedure” has commonly been used.

11. Concerning the last two rows of the table, it was not intended to refer to notices and HMRC did intend to refer to notifications.

Her Majesty’s Revenue and Customs

5 February 2019
Appendix 2

S.I. 2018/1258

Customs Transit Procedures (EU Exit) Regulations 2018

1. In its letter to Her Majesty’s Revenue and Customs of 30 January 2019, the Select Committee requested a memorandum on the following points.

   Confirm whether, if the conditions in paragraph 5(2) or 7(3) have been met, the carrier as well as the holder will be deemed to have complied with the obligations imposed by paragraph 4(4) – and similarly for the parallel provisions in Part 2.

2. This has long been a part of United Kingdom law under (EU) Regulations 952/2013 and 2015/2447, and their predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

3. The practical effect is as stated. The context is such that it is the time-limit that matters, so once the holder is deemed to comply with it there is no outstanding liability on the carrier.

   Explain who “the person concerned” refers to in paragraphs 5(6), 6(2) and 18(2) and which requirements the chapeaux of paragraphs 6(2) and 18(2) are referring to.

4. This has long been a part of United Kingdom law under (EU) Regulations 952/2013, 2015/2446, 2015/2447, and their predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

5. For paragraph 5(6), it is the person requesting the receipt in paragraph 5(5).

6. For paragraphs 6(2) and 18(2), it is the applicant in each respective paragraph.

7. The requirements are a range of factors that may impact upon the proportionality of any HMRC administrative measures necessary to secure compliance with the relevant customs rules. Examples are:

   - the benefits to the applicant of the procedure if the authorisation is granted
   - the frequency and type of transit journeys to which the authorisation would be relevant
   - the need of the applicant for HMRC support, or other HMRC administrative measures, to ensure that the relevant processes are carried out properly if the authorisation is granted.

   Confirm whether paragraphs 9(1) and 33(1) are intended to permit HMRC to carry out post-release controls to check accuracy as well as authenticity, given that paragraph 9(3) and 33(3) require both to be confirmed.
8. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

9. So the answer is no, since only authenticity is mentioned here. It is not though the complete picture.

10. The Convention additionally requires controls to be made “where doubts arise as to the accuracy ... of the information provided or where fraud is suspected.” This binds the United Kingdom.

11. The powers mentioned in paragraphs 9(1) and 33(1) reside outside the instrument and may be deployed in the ordinary, lawful way in order to give proper effect to the Convention. Examples of the powers are in or under the Customs and Excise Management Act 1979 and, in the context of EU exit, the Taxation (Cross-border Trade) Act 2018.

Given that paragraphs 10, 34 and 35 refer to documents that may be used as “alternative proof” that the customs transit procedure has ended, explain what main proof they are alternatives to.

12. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

13. They are alternatives to what is normal proof in a standard, common transit procedure movement of goods. In the ordinary course of events, the procedure ends in the circumstances reproduced in paragraphs 4(3), 7(3), 29(4) and 31(4). Those circumstances are the proof. Customs at the destination use the electronic transit system to send a message to Customs at departure stating that the goods have arrived, as reproduced in paragraphs 5(4) and 7(2) for HMRC (but not in Part 2 because this will generally be the responsibility of another customs authority).

Explain the meaning of “customs controls” and “control results” in paragraphs 10 to 12 and whether such results include the results of post-release controls as defined in paragraph 9.

14. Regulation 2 provides for this to have the same undefined meaning as in the Convention on a common transit procedure. The intention is to preserve the long-standing position.

15. Customs controls constitute, for example, those empowered by the Customs and Excise Management Act 1979 and, in the context of EU exit, the Taxation (Cross-border Trade) Act 2018. The control results are the outcomes of such controls.

16. In practice, and in the context of common transit, customs controls may include a physical examination of the vehicle in question, the customs seal, and the contents of the vehicle. They also involve a comparison of those contents with the description on the electronic transit system or the paper documentation. They may look for an excess or shortage of goods. Post-release controls, after the goods are placed - for example - under customs warehousing, may include an audit of the relevant business records.
17. The control results describe the controls carried out, and note any discrepancies or irregularities that have been found as a result.

18. The controls and results in paragraph 9 are distinct from those in paragraphs 10 to 12.

   Clarify what would constitute “a significant number” of flights for the purposes of paragraph 18(6)(b).

19. This has long been a part of United Kingdom law under (EU) Regulation 2015/2446, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

20. The air carrier must demonstrate that for the routes in question it has, or will have, sufficient flights to provide a viable and profitable operation. It must provide staff who have proper training and sufficient experience of the common transit procedure.

   Explain:

   a) why normal UK drafting practice, which assigns a number to each proposition, has not been followed consistently in these Regulations;

   b) the basis on which it was decided where to follow that practice and where not to; and

   c) in particular, why the practice has not been followed in places such as paragraph 20(4) of Schedule 1, where a specific proposition is followed by one of more general application.

21. Each proposition does have a number.

22. The Statutory Instrument Practice, 5th Edition, Section 3.22.1 states: “Schedules to SIs take many different forms and serve many different purposes.” This reflects long-standing practice that schedules may be adapted to circumstances rather than looking the same as the body of the instrument. So we have grouped the material for the benefit of the readers in the safe confines of a schedule.

23. The ‘copy out’ style has been normal for things similar to this for many years now. The advent of ‘retained direct EU legislation’ under the European Union (Withdrawal) Act 2018 means that in future, and in the context of EU exit, even the body of some UK legislation will look like EU legislation (and rather more so than does Schedule 1).

24. The United Kingdom legislation on common transit is currently widely dispersed around the four EU Regulations 952/2013, 2015/2446, 2015/2447 and 2016/341. Before these, it was dispersed around their predecessors. It is heavily diluted there, surrounded by very many pages of customs rules about other things. As such, it is very inaccessible.

25. As explained in the instrument’s explanatory note and accompanying explanatory memorandum, the plan is for the common transit procedure to operate in the same way after EU exit as it operates now. This will contribute to the smooth international trade in goods between the United Kingdom and the many members of the common transit area.
26. However, the explanatory memorandum also explains that the United Kingdom is in the process of negotiating to accede to the Convention on a common transit procedure (which it currently only benefits from as a member of the EU). Very early on in that process, a respectable draft of the instrument was required to demonstrate commitment to, and ease the process with, the Convention authorities.

27. As a result of paragraphs 25 and 26, we decided to reproduce the existing legislation governing common transit in the United Kingdom. This involved identifying the widely dispersed rules mentioned in paragraph 24, extracting them from the very many unrelated matters, putting them together in a logical sequence and as a coherent whole for the first time, and embedding them in the new Taxation (Cross-border Trade) Act 2018 (instead of in the vast EU customs union rules from where they originated). We had early positive feedback from the Convention authorities, and the UK’s accession to the Convention is now close.

28. We also decided to set things out in the usual sequence of common transit operations so far as possible, in order that the rules at each stage are largely self-contained and arise at the correct time on reading through the Schedule.

29. So, in paragraph 20(4), there is a unified concept of a prescribed route being at least partly entered by HMRC to the transit system. This sets the scene at the correct place for the related pre-UK departure acts required of HMRC (or a specially authorised person carrying out the HMRC function) in paragraphs 21(2), 26(2) and 28(8) (spanning about five pages, with a back-reference at the closing gate as a reminder). This avoids having to scroll or flick through very many pages only to find a petty statement such as paragraph 20(4), third indent.

Any legislation that HMRC take into account when setting a time-limit is, by definition, having an impact on setting the time-limit. The qualifying words in paragraph 20(1)(c) therefore appear to be circular. Clarify the intention of paragraph 20(1)(c), and in particular confirm whether it is intended to refer to other legislation which might have an impact on the time that will be required for the goods to reach the destination.

30. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

31. The time-limit will indeed depend on the time that the goods will require to reach the destination. Commercial journeys are expected to travel by the shortest route. Speed limits imposed in the UK or other countries may, for example, justify a longer journey-time. Some vehicles have a maximum speed of 54 mph, another factor in setting a time-limit. Commercial drivers are legally obliged to take regular breaks from driving, another factor in setting a time-limit.

32. If the vehicle is late, an enquiry procedure starts. So the time-limit must be set taking into account all the legal and other factors required by the Convention.

Clarify the intended meaning of the phrase “which they have decided to approve, and have not decided to approve” in paragraph 23(6)(a).
33. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

34. So the intended meaning is the same as the ostensible meaning, as can be seen in the light of the adjacent paragraph 23(6)(b) and, in light of regulation 2, the Convention from where it is drawn.

35. This means that HMRC must notify the other customs authorities about seals approved and in use under paragraph 18(7), and also about seals HMRC decides against approving because of irregularities or technical defects.

In relation to paragraph 23(6)(c), explain whom HMRC is required to conduct a consultation with, what the parties are expected to reach a common assessment about, and what HMRC must do if no common assessment can be reached.

36. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

37. So HMRC must consult with other customs authorities in the common transit countries to decide whether the seals are acceptable.

38. In the unlikely event that no common assessment can be reached:

- HMRC is bound by the Convention to accept seals approved by the customs authorities of another common transit country, unless it has information that the particular seal is not suitable for customs purposes, but

- once a member in its own right, HMRC may make representations about the problem as something for the Convention's Joint Committee to consider.

By the use of examples, give some illustration of the intended parameters of the open discretion in paragraphs 3(3) and 28(3), having regard to the principles enunciated by the Supreme Court in R (on the application of Public Law Project) v Lord Chancellor [2016] AC 1531.

39. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

40. It is not an open discretion, but limited to the context of the common transit procedure and the ordinary exercise of HMRC’s statutory powers in, for example, the Customs and Excise Management Act 1979 and, in relation to EU exit, the Taxation (Cross-border Trade) Act 2018.
41. In practice, HMRC investigates the incident to determine whether theft or substitution of the goods has occurred. They check whether the carrier was responsible and, separately, whether the carrier can be trusted to continue the journey. If HMRC consider that no revenue offence has taken place, the steps referred to may include practical measures such as applying new seals, instructing the carrier to repair a hole in the container, or agree a request to transfer the goods to another vehicle before allowing the common transit procedure to continue. HMRC will also note the pertinent details on the transit document, and notify customs at the destination. If appropriate, HMRC may notify a relevant police service.

   Clarify the intended meaning of the phrase “or the carrier (see on behalf of the holder of the procedure...”.

42. We assume the Committee asks about paragraph 28(4)(b).

43. This has long been a part of United Kingdom law under (EU) Regulation 2015/2447, and its predecessors. The intention is to preserve the long-standing position. Regulation 2 provides that it should be read to reflect the provisions of the Convention on a common transit procedure.

44. The intended meaning is the same as the ostensible meaning: “or the carrier on behalf of the holder of the procedure”.

45. The complementary provision at paragraph 3(4)(b), and the corresponding provision in the Convention, make this clear.

46. We are sorry about the stray and meaningless typographical error “(see” which should be disregarded pending its correction.

Her Majesty’s Revenue and Customs

5 February 2019
In its letter to Her Majesty’s Revenue and Customs of 30 January 2019 the Select Committee requested a memorandum on the following point:

1. Given the view expressed by the Committee in its First Special Report of Session 2017–19 at paragraphs 4.5 to 4.8, explain why details are not given of where the public notice referred to in regulation 30(4)(b) will be available? (see, for example, footnote (c) on page 2 of S.I. 2019/15).

This memorandum has been prepared by Her Majesty’s Revenue and Customs (“the Department”).

The Department acknowledges that details of where the draft notice is available and where the finalised notice will be available should have been provided. It considers that these details would most suitably have been included in the Explanatory Memorandum. The Department intends to amend or replace the Explanatory Memorandum to include these details.

The draft notice referred to in the present instrument is available at:


A hard copy of this draft, and of the finalised version when available, will be available on request from HM Revenue & Customs, 100 Parliament Street, London SW1A 2BQ.

Her Majesty’s Revenue and Customs

5 February 2019
Appendix 4

S.I. 2019/14

Excise Duties (Miscellaneous Amendments) (EU Exit) Regulations 2019

1. In its letter to Her Majesty’s Revenue and Customs of 30 January 2019 the Select Committee requested a memorandum on the following point:

1. Given the view expressed by the Committee in its First Special Report of Session 2017–19 at paragraphs 4.5 to 4.8, explain why details are not given of where the notices referred to in regulation 3(4)(b)(ii) and (c) and (5) will be available? (see, for example, footnote (c) on page 2 of S.I. 2019/15).

2. This memorandum has been prepared by Her Majesty’s Revenue and Customs (“the Department”).

3. The Committee’s attention is drawn to paragraphs 3.2 and 3.3 of the Explanatory Memorandum for this instrument, and to the latter paragraph in particular. The Memorandum explains that the supporting published notices referred to cannot be finalised or published until further details are available of the UK’s customs regime following exit from the EU. Indeed, for this reason, there is no draft notice that could be cited by footnote in the instances listed by the Committee.

4. If and when finalised, the Department’s intention is that the published notices in question will be available at the URL given in the Explanatory Note and in paragraph 12.3 of the Explanatory Memorandum, namely:


A hard copy will be available on request from HM Revenue & Customs, Excise & Environmental Taxes Policy, 3rd Floor West, Ralli Quays, 3 Stanley Street, Salford, M60 9LA.

Her Majesty’s Revenue and Customs

5 February 2019