



House of Commons
Select Committee on
Statutory Instruments

**Seventeenth Report
of Session 2017–19**

Drawing special attention to:

Trade Remedies (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/1076)

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Select Committee on Statutory Instruments

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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 Luanne Middleton (Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, and Vanessa MacNair.

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London SW1A 0AA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

Contents

Instruments reported	3
1 S.I. 2019/1076: Reported for defective drafting and for requiring elucidation	3
Trade Remedies (Amendment) (EU Exit) Regulations 2019	3
Instruments not reported	5
Annex	5
Appendix	6
S.I. 2019/1076	6
Trade Remedies (Amendment) (EU Exit) Regulations 2019	6

Instruments reported

At the Committee’s meeting on 2 October 2019 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 ground for reporting it is given below. The relevant Departmental memorandum is published as an appendix to this report.

1 S.I. 2019/1076: Reported for defective drafting and for requiring elucidation

Trade Remedies (Amendment) (EU Exit) Regulations 2019

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

1.2 These Regulations amend two instruments made under the Taxation (Cross-border Trade) Act 2018 to establish the trade remedies system that will apply in the United Kingdom after Brexit. Regulation 10 inserts new transitional provisions into the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019, establishing a “transition review” process to assess and amend as necessary the trade remedies to be applied by the United Kingdom a post-Brexit context.

1.3 New regulation 94(1) defines “appropriate date” by reference to different events depending on the context in which that transition review takes place. Under regulation 94(1)(b)(i), the appropriate date is the date on which the Secretary of State publishes a notice under regulation 101C(2)(a) giving effect to a recommendation by the Trade Remedies Authority (“TRA”). That notice must specify the new UK trade remedy measures that will apply and the period during which they will apply—beginning with the appropriate date. It appeared to the Committee that in those circumstances, the new UK trade remedy measures would begin to apply on the same the day that notice of the measures was published and therefore—assuming they began to apply at the beginning of that day—they could come into effect with no notice at all. The Committee therefore asked the Department for International Trade to explain why “appropriate date” is defined by reference to the date of publication of the notice. In a memorandum printed as an Appendix, the Department acknowledge that the definition should refer to the day after the notice publication date rather than the notice publication date and undertake to remedy the error at the earliest opportunity. **The Committee accordingly reports new regulation 94(1)(b)(i), as inserted by regulation 10, for defective drafting, acknowledged by the Department.**

1.4 New regulation 100(1) requires the TRA to make a recommendation to the Secretary of State following a transition review. New regulation 101C(2)(a) requires the Secretary of State to issue a public notice if he or she accepts such a recommendation. New Part 12 contains numerous cross-references, sometimes to these two regulations, and sometimes to regulations 101(1) and 102C(2)(a). It appeared to the Committee that, given the context, the latter were typographical errors. Two of the cross-references also seemed to duplicate a defined term. The Committee therefore asked the Department to confirm that the

references to regulation 101(1) in new regulations 96A(4), 96C(1), 101A(1), and 101B(1) and the references to regulation 102C(2)(a) in regulations 94A(2) and (3), 94B(1), 94C(1), and 97C(2) are wrong, and that in regulations 96A(4)(a) and 96C(1), the words “made under regulation 101(1)” are also unnecessary. In its memorandum, the Department acknowledge the errors and undertake to correct them at the earliest opportunity. **The Committee accordingly reports new regulations 96A(4), 96C(1), 101A(1), 101B(1), 94A(2) and (3), 94B(1), 94C(1), and 97C(2) for defective drafting, acknowledged by the Department.**

1.5 When the TRA makes a recommendation under new regulation 100(1), that recommendation must be for the Secretary of State either to vary or to revoke the application of the anti-dumping amount or the countervailing amount imposed by the measures under review. The Committee asked the Department to clarify why no status quo option was available. In its memorandum, the Department explain that in their analysis, it would not be possible for the TRA to recommend that an anti-dumping amount or a countervailing amount applies in the UK industry context without varying at least one of the elements which make up that amount. **The Committee accordingly reports new regulation 100(1) as requiring elucidation, provided by the Department’s memorandum.**

1.6 Under new regulation 100(2)(b)(iv), where the TRA makes a recommendation to the Secretary of State, it must include the reasons for its recommendation. If the Secretary of State rejects the recommendation, he or she must give the reasons for doing so (see new regulation 101A(2)(a)(iv)). But there is no requirement to give reasons where the Secretary of State accepts the recommendation (see new regulations 101B and 101C). The Committee asked the Department whether it is possible for the Secretary of State to accept the TRA recommendations for reasons other than those given by the TRA, and if so, to explain why there is no requirement in new regulation 101B or 101C for the Secretary of State to give reasons for accepting the recommendations. In its memorandum the Department assert that the Secretary of State has no discretion to accept a recommendation for reasons that depart from those provided by the TRA. **The Committee notes the Department’s assertion and accordingly reports new regulations 101B and 101C as 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 were required to be reported.

Annex

Draft instrument requiring affirmative approval

Draft S.I. The Local Loans (Increase of Limit) Order 2019

Appendix

S.I. 2019/1076

Trade Remedies (Amendment) (EU Exit) Regulations 2019

1. The Department for International Trade provides this memorandum at the request of the Select Committee on Statutory Instruments following its consideration of the abovenamed instrument.

2. The Department for International Trade proposes to remedy the drafting errors acknowledged in this memorandum by statutory instrument at the earliest opportunity (expected mid-October).

3. NB: References below are to regulations in the substitute Part 12 inserted by regulation 10 of the abovenamed instrument.

(a) the definition in regulation 94(1) of “appropriate date” references the notice publication date rather than the date the recommendation takes effect

4. The Department for International Trade acknowledges the definition in regulation 94(1) of “appropriate date” should refer at paragraph (b)(i) to the day after the notice publication date rather than to the notice publication date.

5. The “appropriate date” in relation to a transition review completed after replacement of EU trade duty is to be broadly consistent with paragraph 18(2)(b) of Schedule 4 to the Taxation (Cross-border Trade) Act 2018, which provides that the period recommended by the TRA for which the anti-dumping amount or the countervailing amount is to apply must begin on the day after the notice publication date.

(b) the references to regulation 101(1) in regulations 96A(4), 96C(1), 101A(1) and 101B(1)

6. The Department for International Trade acknowledges that regulations 101A(1) and 101B(1) include defective drafting. Regulations 101A(1), 101B(1), and 101C(1) should read “This Regulation applies if the Secretary of State rejects [accepts] under regulation 101(1)...”.

7. The references to regulation 101(1) in regulations 96A(4) and 96C(1) are addressed at section (d) below.

(c) the references to regulation 102C(2)(a) in regulations 94A(2) and (3), 94B(1), 94C(1), and 97C(2)

8. The Department for International Trade acknowledges the references to regulation 102C(2)(a) in regulations 94A(2) and (3), 94B(1), 94C(1), and 97C(2) are wrong. The correct reference is to regulation 101C(2)(a).

(d) the use of “under regulation 101(1)” in regulations 96A(4)(a) and 96C(1)

9. The Department for International Trade acknowledges the syntax of regulations 96A(4)(a) and 96C(1) is undesirable. A more well-formed sentence reads: “...the Secretary of State accepts under regulation 101(1) a recommendation of...”.

(e) regulation 100(1) does not provide for the option of recommending maintaining the application of the anti-dumping amount or the countervailing amount

10. This is a policy matter.

11. The application of an anti-dumping amount or a countervailing amount comprises three elements (see regulation 96A(2)(c)):

- a) the anti-dumping amount or the countervailing amount;
- b) a list of goods or a description of goods to which the amount applies;
- c) the period for which the amount applies.

12. The Department for International Trade analysis is that it is not possible for the TRA following a transition review to recommend that an anti-dumping amount or a countervailing amount applies without varying at least one of the three elements. This is because the TRA is obliged under regulation 99A to assess in a transition review the application of an anti-dumping amount or a countervailing amount in the UK industry context.

(f) inability for the Secretary of State to accept a TRA recommendation of variation or revocation for reasons different to those given by the TRA

13. This is a policy matter.

14. The TRA is a proposed independent body for the purpose of providing the Secretary of State with expert and impartial advice. The technical expertise of the TRA may be critically undermined if the Secretary of State is able to provide reasons for accepting a recommendation that depart from the reasons of the TRA for making the recommendation.

Department for International Trade

11 September 2019