



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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**Fiftieth Report  
of Session 2017–19**

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**Drawing special attention to:**

*Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/90)*

*EU Export Credits Legislation (Revocation) (EU Exit) Regulations 2019 (S.I. 2019/102)*

*Animal Breeding (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/117)*

*Customs Safety and Security (Penalty) Regulations 2019 (S.I. 2019/121)*

*Ordered by the House of Lords  
to be printed 27 February 2019*

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## Joint Committee on Statutory Instruments

### Current membership

#### House of Lords

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[Lord Lexden](#) (*Conservative*)

[Baroness Meacher](#) (*Crossbench*)

[Lord Morris of Handsworth](#) (*Labour*)

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[Lord Rowlands](#) (*Labour*)

[Baroness Scott of Needham Market](#) (*Liberal Democrat*)

#### House of Commons

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### Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 73, available on the Internet via [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

### Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each 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 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 by Order of both Houses. All publications of the Committee are on the Internet at [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

### **Committee staff**

The current staff of the Committee are Jeanne Delebarre (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

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# Contents

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<b>Instruments reported</b>	<b>3</b>
1 S.I. 2019/90: Reported for defective drafting	3
Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019	3
2 S.I. 2019/102: Reported for defective drafting	4
EU Export Credits Legislation (Revocation) (EU Exit) Regulations 2019	4
3 S.I. 2019/117: Reported for making unexpected use of the enabling powers and for defective drafting	5
Animal Breeding (Amendment) (EU Exit) Regulations 2019	5
4 S.I. 2019/121: Reported for failure to comply with proper legislative practice and for requiring elucidation	7
Customs Safety and Security (Penalty) Regulations 2019	7
<b>Instruments not reported</b>	<b>8</b>
<b>Annex</b>	<b>8</b>
<b>Appendix 1</b>	<b>10</b>
S.I. 2019/90	10
Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019	10
<b>Appendix 2</b>	<b>11</b>
S.I. 2019/102	11
EU Export Credits Legislation (Revocation) (EU Exit) Regulations 2019	11
<b>Appendix 3</b>	<b>12</b>
S.I. 2019/117	12
Animal Breeding (Amendment) (EU Exit) Regulations 2019	12
<b>Appendix 4</b>	<b>14</b>
S.I. 2019/121	14
Customs Safety and Security (Penalty) Regulations 2019	14



# Instruments reported

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At its meeting on 27 February 2019 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to four of those considered. 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. 2019/90: Reported for defective drafting

### *Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019*

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in two respects.**

1.2 These Regulations amend retained direct EU legislation on genetically modified organisms (GMOs) to correct deficiencies arising from the withdrawal of the United Kingdom from the European Union.

1.3 Regulation 9 amends Council Decision 2002/813/EC: paragraph (2) inserts the term “constituent nation” and defines it to mean England, Wales, Scotland and Northern Ireland; paragraphs (6) and (7) amend the Annex to the Decision to ensure that its model forms are appropriate for use within the United Kingdom. The amendments to the Annex insert the defined term “constituent nation” but also insert a number of references to “the countries concerned”. The Committee asked the Department for Environment, Food and Rural Affairs to explain whether “countries” is intended to have the same meaning as “constituent nations”. In a memorandum printed at Appendix 1, the Department confirms that it is and undertakes to make the appropriate change at the next available opportunity. The Committee reiterates the importance of the principle of statutory construction that a change in language implies a change in meaning. Given the Department’s confirmed intention, the defined term should have been used consistently in the Annex. **The Committee accordingly reports regulation 9 for defective drafting, acknowledged by the Department.**

1.4 Regulation 10(4)(b) purports to amend Article 3(2) of Commission Decision 2003/701/EC by omitting its fourth paragraph. As Article 3(2) does not appear to contain four paragraphs, the Committee asked the Department to explain the reference in regulation 10(4)(b). In its memorandum, the Department accepts that these words have been included in error and undertakes to make the appropriate change at the next available opportunity. **The Committee accordingly reports regulation 10 for defective drafting, acknowledged by the Department.**

## 2 S.I. 2019/102: Reported for defective drafting

### *EU Export Credits Legislation (Revocation) (EU Exit) Regulations 2019*

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.**

2.2 These Regulations revoke four pieces of EU legislation, one of which is Directive 98/29/EC, which harmonises provisions concerning export credit insurance across the European Union. The Explanatory Notes that accompany the Regulations explain that they “revoke the above items of direct EU legislation as soon as they become part of domestic law when the United Kingdom leaves the European Union”. Direct EU legislation, so far as it is operative immediately before exit day, is incorporated into domestic law by section 3(1) of the European Union (Withdrawal) Act 2018 and defined in section 3(2); that definition does not expressly include Directives. The Committee therefore asked the Department for International Trade to identify the basis on which Directive 98/29/EC falls within the definition of direct EU legislation for the purposes of section 3(1) of the Withdrawal Act.

2.3 In a memorandum printed at Appendix 2, the Department accepts that the Directive is outside the scope of the definition and that revoking it is unnecessary. It suggests that the Directive was included in this instrument from an abundance of caution due to its specific application to a single body in the United Kingdom and the absence of any transposing legislation. The Committee is clear that including legislative propositions that do not in fact change the law is not a matter of caution but of confusion and is to be avoided. As the Directive will not form part of domestic law on exit day there is nothing to revoke, and this provision is therefore meaningless.

2.4 The Department refers to the possibility of Directives automatically conferring rights after exit day. This is of course recognised by section 4(1) of the Withdrawal Act, which saves rights and obligations that would not otherwise be included as retained EU law. The Committee notes, however, that purporting to revoke a Directive is not an effective, or sufficiently clearly effective, way of revoking any rights arising from it that are saved by section 4(1) (particularly where—as here—the explanatory documents do not suggest that this is the intended effect). **The Committee accordingly reports Regulation 2(b) for defective drafting.**

2.5 As to the last paragraph of the memorandum, having regard to the Committee’s First Special Report of 2017–19 on Transparency and Accountability in Subordinate Legislation, this is not a matter suitable for a correction slip.

### **3 S.I. 2019/117: Reported for making unexpected use of the enabling powers and for defective drafting**

#### ***Animal Breeding (Amendment) (EU Exit) Regulations 2019***

**3.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they make unexpected use of the enabling powers in one respect and defectively drafted in another respect.**

3.2 These Regulations amend Regulation (EU) 2016/1012, which will govern trade in and entry into the United Kingdom of purebred breeding animals and hybrid breeding pigs, to correct deficiencies in that instrument arising from the withdrawal of the United Kingdom from the European Union.

3.3 Article 12 of the Regulation sets out the process whereby a breed society or breeding operation approved in one member State may apply to operate a breeding programme in another and how communications will be managed at each stage of the process. Lines of communication are organised geographically: the breed society communicates only with the authority that originally recognised it (i.e. the competent authority for the member State in which the breed society has its head office); that authority then liaises with its counterpart in the member State into which the breed society wishes to expand—all inter-State communications are between counterpart authorities.

3.4 Regulation 4(7) substitutes a new Article 12 which amends that process as it will apply in the United Kingdom post-EU withdrawal. In the amended process, the EU breed society applies directly to a UK authority, and the UK authority responds—not to the breed society, but to the EU authority that recognised it. The Committee asked the Department for Environment, Food and Rural Affairs to explain whether it is intended that the UK authority must inform the breed society, as well as the authority that recognised it, of the results of its application and the reasons for any refusal, and if so how effect is given to that intention.

3.5 In a memorandum printed at Appendix 3, the Department explains that while it intends that this should happen in practice, it considers that the vires for introducing an explicit duty to inform the applicant are doubtful as the absence of such a duty cannot be said to be a deficiency arising from EU withdrawal. The Department states that there is no such express duty in the existing Article 12 or in parallel provisions of the Regulation but suggests that it is implicit in the current text that the applicant should be informed of decisions.

3.6 The Committee finds none of these arguments persuasive.

3.7 If it is appropriate—to correct a deficiency arising from withdrawal—to require a breed society to apply to a UK authority directly rather than through an intermediary, it must be the case that requiring the UK authority to respond directly to the applicant is a permissible consequential provision. The Committee notes that the Department has cited paragraph 21(1)(b) of Schedule 7 to the European Union (Withdrawal) Act 2018 in the preamble, which confers the power to make such consequential provision.

3.8 The Committee is also surprised at the Department's assertion that the current Regulation does not create an express duty to inform the applicant of the results of an application. The Department cites Articles 4, 6 and 12(4) of the Regulation, but Article 5(1) expressly requires that where an authority intends to refuse an application for recognition, it must give the applicant a reasoned explanation for doing so. If, on an application to reconsider, the authority decides to confirm its refusal, Article 5(2) again expressly requires it to give the applicant a reasoned explanation of its decision. And while, as noted above, inter-state communications under Article 12 are between the counterpart authorities, Article 12(6) expressly requires the recognising authority to inform the applicant of the result of its application to expand operations to another member State and, where the application is refused, to pass on the reasoned explanation it received from its counterpart authority in that other member State.

3.9 The Committee accepts that it is not within the enabling powers for the Secretary of State to impose legal obligations on the authorities of EU member States. But the Committee sees no reason why the new Article 12 should not have included a provision, analogous to existing Article 12(6), that imposes an express duty on the UK authority to inform the applicant directly of the results of its application. It seems to the Committee unreasonable to create a process in which person A submits an application to person B; person B is legally obliged to reply to person C, who was not hitherto involved; and person A must rely on the goodwill of persons B and C to take administrative steps to notify him of the results of his application. **The Committee accordingly reports regulation 4(7) for unexpected use of the enabling powers.**

3.10 Part 4 of this instrument amends Commission Implementing Regulation 2017/717, which lays down the rules for implementing the Regulation discussed above. Annex 1 to that Implementing Regulation contains model forms with detailed footnotes to assist the user. Regulation 26(3)(b) amends one of those footnotes to cite a piece of retained direct EU legislation, which it names "Regulation 2015/262". Paragraph (5)(b) amends another footnote to cite "Article 2(o) of Regulation 2015/262 or of Regulation (EU) 2015/262". The Committee asked the Department to explain the difference between Regulation 2015/262 and Regulation (EU) 2015/262, and where the latter is defined. In its memorandum, the Department acknowledges that there is an error in regulation 26(5)(b), that the difference between "Regulation 2015/262" (the instrument as it forms part of retained EU law) and "Regulation (EU) 2015/262" (the instrument as it applies in the European Union as amended from time to time) is not clear, and that the latter should have been defined. The Department undertakes to make the necessary amendments when a suitable opportunity arises. **The Committee accordingly reports regulation 26(5)(b) for defective drafting, acknowledged by the Department.**

## 4 S.I. 2019/121: Reported for failure to comply with proper legislative practice and for requiring elucidation

### *Customs Safety and Security (Penalty) Regulations 2019*

4.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they fail to comply with proper legislative practice in one respect and require elucidation in another respect.**

4.2 These Regulations make provision for civil penalties to be applied where a person contravenes a safety and security rule under the customs code set out in Regulation (EU) No 952/2013, which will form part of domestic law after exit day. The Regulations are made under section 2(2) of the European Communities Act 1972 and paragraph 1A of Schedule 2 to that Act. The Committee asked Her Majesty’s Revenue and Customs to explain why the preamble does not contain the express wording that is usually seen in instruments made under paragraph 1A, stating that it appears to the relevant person that it is necessary or expedient for references to EU instruments to be construed as references to those instruments as amended from time to time. In a memorandum printed at Appendix 4, the Department explains that paragraph 1A was relied on because the Commissioners considered that an ambulatory construction to such references in this instrument would be expedient and regrets that reference to this was omitted from the preamble. **The Committee accordingly reports the preamble to this instrument for failure to comply with proper legislative practice, acknowledged by the Department.**

4.3 Regulation 5 permits HMRC, when conducting a review, or a tribunal hearing an appeal, to reduce or increase a penalty to such amount as they think proper, but it prohibits them from taking into account the fact that the person liable to the penalty, or a person acting on that person’s behalf, has acted in good faith. The Committee asked the Department to explain by reference to examples what is intended by the reference to a person acting in good faith in this context. In its memorandum, the Department gives the following helpful examples of what good faith might mean in this context:

A person’s failure to comply with a relevant rule—

- a) on the mistaken assumption that someone had done so on their behalf;
- b) owing to a mistaken belief that goods would arrive in the UK later than they actually arrived;
- c) due to an unforeseen event, such as an illness;
- d) by mistakenly omitting relevant information from an exit/entry summary declaration.

4.4 **The Committee accordingly reports regulation 5(2) as requiring elucidation, provided by the Department’s memorandum.**

# Instruments not reported

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At its meeting on 27 February 2019 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

## Annex

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### Draft instruments requiring affirmative approval

<b>Draft S.I.</b>	Social Security Coordination (Council Regulation (EEC) No 1408/71 and Council Regulation (EC) No 859/2003) (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Social Security Coordination (Council Regulation (EEC) No 574/72) (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Social Security Coordination (Regulation (EC) No 987/2009) (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Animal Welfare (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Animal Feed (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Food and Feed Imports (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Licensing of Operators and International Road Haulage (Amendments etc.) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Aviation Noise (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Aviation Statistics (Amendment etc.) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Challenges to Validity of EU Instruments (EU Exit) Regulations 2019
<b>Draft S.I.</b>	European Structural and Investment Funds Common Provisions (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	European Structural and Investment Funds Common Provisions Rules etc. (Amendment etc.) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) (No. 2) Regulations 2019

<b>Draft S.I.</b>	Architects Act 1997 (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Detergents (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Detergents (Safeguarding) (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Organic Production and Control (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Environment, Food and Rural Affairs (Amendment) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Railway (Licensing of Railway Undertakings) (Amendment etc.) (EU Exit) Regulations 2019
<b>Draft S.I.</b>	Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019

### **Instruments subject to annulment**

<b>S.I. 2019/166</b>	Legal Services Act 2007 (Designation as a Licensing Authority) Order 2019
<b>S.I. 2019/180</b>	Plant Health etc. (Fees) (England) (Amendment) Regulations 2019
<b>S.I. 2019/190</b>	Genetically Modified Organisms (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
<b>S.I. 2019/194</b>	Driving Licences (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
<b>S.I. 2019/202</b>	Metrology, Health and Safety and Product Safety (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
<b>S.I. 2019/221</b>	Official Controls (Animals, Feed and Food) (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
<b>S.I. 2019/273</b>	Animal By-Products and Transmissible Spongiform Encephalopathies (Amendment) (Northern Ireland) (EU Exit) Regulations 2019

### **Instrument not subject to Parliamentary proceedings not laid before Parliament**

<b>S.I. 2019/249</b>	Universal Credit (Work-Related Requirements) In Work Pilot Scheme (Extension) Order 2019
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# Appendix 1

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## S.I. 2019/90

### ***Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019***

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following two points:

- a) explain whether, in regulation 9(6) and (7), “countries” is intended to have the same meaning as “constituent nations”, as defined in regulation 9(2);*
- b) explain the reference in regulation 10(4)(b) to paragraph 4 of paragraph 2 of Article 3 of Commission Decision 2003/701/EC.*

2. In relation to question (a), the Department understands the Committee’s question to relate to whether there is an inconsistency in use of terminology within regulation 9(6) and (7) of the instrument.

3. The Department notes, firstly, that there is little or no danger that a user of the Summary Notification Information Formats set out in Parts 1 and 2 of the Annex to Decision 2002/813/EC would be confused by the use of the word “countries” rather than “constituent nations”, in context.

4. Nevertheless, for the avoidance of doubt, the Department will make the appropriate change at the next available opportunity.

5. In relation to question (b), the Department accepts that these words have been included in error and shall make the appropriate change at the next available opportunity.

**Department for Environment, Food and Rural Affairs**

**19 February 2019**

# Appendix 2

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## S.I. 2019/102

### ***EU Export Credits Legislation (Revocation) (EU Exit) Regulations 2019***

1. The Joint Committee on Statutory Instruments (JCSI) considered the above named Statutory Instrument at its meeting on 13 February 2019 and requested a memorandum on the following:

*Identify the basis on which Directive 98/29/EC falls within the definition of direct EU legislation for the purposes of section 3(1) of the European Union (Withdrawal) Act 2018.*

#### **Background**

2. The directive (Directive 98/29/EC) highlighted by the committee as being out of scope of the definition of direct EU legislation applies only to UK Export Finance (UKEF) and no other bodies or individuals. At the time of its introduction (1998), it was not thought necessary to produce further UK legislation to implement it given its very narrow application.

3. UKEF has complied with the terms of the directive, for example by putting in place administrative notification processes in order to comply with the reporting requirements, so as to avoid any risk of challenge under the principle of direct effect.

#### **Argument**

4. UK Export Finance appreciates that the Withdrawal Act specifically carves out EU Directives in order to prevent them automatically conferring rights after Exit Day, but in this case due to the specific nature and application of the directive, and an abundance of caution, it was included in the Statutory Instrument. The provisions of the directive overlap in places with provisions under other direct EU legislation referred to in the SI.

#### **Next Steps**

5. While the inclusion of the Directive in the Statutory Instrument is unnecessary we would hope that it is immaterial. In the event that the JCSI requests that the Statutory Instrument should be amended, UKEF proposes to prepare the necessary correction note to append to the Statutory Instrument, if this would be agreeable to the JCSI.

#### **Department for International Trade**

**15 February 2019**

## Appendix 3

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### S.I. 2019/117

#### ***Animal Breeding (Amendment) (EU Exit) Regulations 2019***

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following points:

*1. In relation to new Article 12, as inserted by regulation 4(7), explain whether it is intended that the UK competent authority must inform the breed society or breeding operation, as well as the competent authority that recognised it, of the results of the notification and the reasons for any refusal, and if so how effect is given to that intention.*

*2. In regulation 26(5)(b), explain the difference between Regulation 2015/262 and Regulation (EU) 2015/262, and where the latter is defined.*

2. In relation to the first question, Article 12 as inserted by regulation 4(7) replaces the current text of Article 12 of Regulation (EU) 2016/1012. The Department's intention is that the UK competent authority dealing with an application for extension of an animal breeding programme to the UK will inform the applicant breed society or breeding operation ('the applicant') of the result of the decision. The Department's view is that although neither the current text of Article 12 nor parallel provisions elsewhere in this Regulation (Articles 4(3) and 6) state explicitly that the competent authority must inform the applicant of the decision, it is implicit in the current text of the Regulation that the applicant should be informed of the decision, either by the competent authority of the member State where the breeding society or breeding operation is recognised, on being informed by the competent authority of the other member State under Article 12(4), or directly by the latter. The absence of an express duty in Article 12(4) leaves it open to the competent authorities of the two member States to determine between them which of them will inform the applicant; but in so far as the text carries any implication that it should be one competent authority rather than the other, it is arguably the intention of the Regulation that it should, or could, be left to the competent authority which has recognised the breed society or breeding operation, following a notification to it under Article 12(4).

3. The Department considered that the vires for introduction of an explicit duty to inform the applicant of the decision into the new text of Article 12 would have been doubtful, as the lack of an explicit duty to inform the applicant of the decision, if it is a deficiency at all, is not a deficiency arising from EU withdrawal.

4. In relation to the second question, the Department acknowledges that there was an error in regulation 26(5)(b), which makes amendments to footnote 7 of Annex 1, Section D. The intention is that footnote (7) should refer to both Regulation (EU) 2015/262, as it applies in the European Union as amended from time to time, and to the form of that instrument retained in UK law. However, the Department accepts that, particularly given the definition of Regulation (EU) 2015/262 in regulation 26(3)(b), the difference between

“Regulation 2015/262” and “Regulation (EU) 2015/262” is not clear. The Department agrees that the latter expression should also have been defined and will make the necessary amendments when a suitable opportunity arises.

**Department for Environment, Food and Rural Affairs**

**19 February 2019**

# Appendix 4

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## S.I. 2019/121

### ***Customs Safety and Security (Penalty) Regulations 2019***

1. In its letter to Her Majesty's Revenue and Customs of 13th February 2019 the Committee requested a memorandum on the following points:

*1. Explain why the preamble to this instrument does not contain the usual express wording stating that it appears to the relevant person that it is necessary or expedient for references to EU instruments to be construed as references to those instruments as amended from time to time.*

*2. Explain by reference to examples what is intended by the reference to a person acting in good faith in regulation 5(2)(b).*

2. This memorandum has been prepared by Her Majesty's Revenue and Customs ("the Department").

#### **Response to question 1**

3. Paragraph 1A of Schedule 2 to the European Communities Act 1972 is cited as an enabling power because the Commissioners considered it expedient for references to EU instruments to be construed as references to those instruments as amended from time to time. The Department regrets that reference to this was omitted from the preamble.

#### **Response to question 2**

4. The Customs Safety and Security (Penalty) Regulations 2019 provide in regulation 3(1) that a person who contravenes a relevant safety and security rule ("a relevant rule") is liable to a civil penalty, this is subject to the exceptions in regulation 4.

5. Regulation 5(1) provides that where a person is liable to a penalty, the Department on review or the tribunal on appeal may reduce or increase the penalty as they think proper. However, under regulation 5(2), the Department and the tribunal are not entitled to take into account specified matters when exercising this discretion. One of the matters specified is "the fact that the person liable to the penalty, or a person acting on that person's behalf, has acted in good faith" (regulation 5(2)(b)).

6. As a result, whether a person has acted in good faith (e.g. honestly/without intending to contravene a relevant rule) is not a relevant consideration in determining whether a penalty should be increased or reduced under regulation 5(1).

7. A person could be liable to a penalty whilst acting in good faith if, for example, they have failed to comply with a relevant rule:

- a) on the mistaken assumption that a customs agent/someone else had done so on their behalf;

- b) owing to a mistaken belief that goods are arriving in the UK a week later than they actually arrive;
- c) due to an unforeseen event, such as an illness;
- d) by mistakenly omitting relevant information from an exit/entry summary declaration.

8. Regulation 5(2)(b) is similar to provision made by section 29(3)(c) of the Finance Act 2003 and regulation 5(3)(b) of the Export (Penalty) Regulations 2003. These provisions are part of the current customs import and export penalties regimes.

### **Her Majesty's Revenue and Customs**

**19 February 2019**