



The Scottish Parliament
Pàrlamaid na h-Alba

Published 2 May 2018
SP Paper 309
19th Report, 2018 (Session 5)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 1 May 2018



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

| | |
|--|----------|
| Introduction | 1 |
| Points raised: Instruments subject to negative procedure | 2 |
| Common Agricultural Policy (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/122) (Rural Economy and Connectivity) | 2 |
| No points raised | 3 |
| Annex | 4 |

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Tom Arthur
Scottish National Party



Neil Findlay
Scottish Labour



Alison Harris
Scottish Conservative
and Unionist Party

Introduction

1. At its meeting on 1 May 2018, the Committee agreed to draw to the attention of the Parliament the following instrument—

Common Agricultural Policy (Miscellaneous Amendments) (Scotland)
Regulations 2018 (SSI 2018/122)

2. The Committee's recommendations and conclusions in relation to this instrument are set out in the following section of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Points raised: Instruments subject to negative procedure

Common Agricultural Policy (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/122) (Rural Economy and Connectivity)

Purpose

4. The instrument mainly makes various technical provisions to implement Regulation (EU) No. 2017/2393. That EU Regulation includes a series of measures aimed at further simplifying the Common Agricultural Policy.
5. The instrument is subject to the negative procedure and comes into force on 15 May 2018.

Consideration

6. There is a drafting error in the new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, as inserted by regulation 4 of the Regulations.
7. The provision defines "established local practices" for the purposes of paragraph (2)(b) of the new regulation 5, but the definition is contained in paragraph (2)(a).
8. The matter was raised in correspondence with the Scottish Government, which is reproduced in the Annex. The Government has indicated that it will correct the error by way of a correction slip.

Recommendations

9. **The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, as there is a drafting error in the new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, as inserted by regulation 4 of the Regulations.**
10. **The Committee notes that the Scottish Government intends to correct the error by means of a correction slip.**

No points raised

Economy, Jobs and Fair Work

Bankruptcy Fees (Scotland) Regulations 2018 (SSI 2018/127)

Health and Sport

National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 Amendment Regulations 2018 (SSI 2018/123)

Justice

Act of Sederunt (Fees of Messengers-at-Arms, Sheriff Officers and Shorthand Writers) (Amendment) 2018 (SSI 2018/126)

Annex

Common Agricultural Policy (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/122)

On 20 April 2018, the Scottish Government was asked:

1. The new regulation 5(2)(c) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, as inserted by regulation 4 of this instrument, transposes provision in the second sentence of the second sub-paragraph of Article 4(1) of the "Direct Payments Regulation" (EU) No. 1307/2013. It appears that that second sentence provides that "from 1 January 2018 parcels of land lying fallow which have been accepted as arable land under this subparagraph *in 2018* shall become permanent grassland in 2023, or thereafter, if the conditions set out in point (h) are met".

Please explain how the new regulation 5(2)(c) is considered to properly implement that second sentence, given that the subparagraph does not mention the requirement for acceptance as arable land in 2018 (as a condition of the land to become permanent grassland), or whether it is considered that the provision could more clearly implement that second sentence?

2. Is it agreed that there is an error in the new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, in respect that the provision defines "established local practices" for the purposes of paragraph (2)(b), but the definition is contained in paragraph (2)(a)?

3. Is corrective action proposed?

The Scottish Government responded as follows:

1. Regulation (EU) 1307/2013 prior to amendment contained provision, so far as relevant, as follows:

"arable land" was defined at Article 4(1)(f) as land cultivated for crop production or available for crop production but lying fallow. This reflects farming practice of leaving parcels of land uncultivated for a period of time, depending on crop rotation, but eventually re-establishing crops there. This definition prevents such land from being reclassified as permanent grassland whilst lying fallow.

"permanent grassland" was defined at article 4(1)(h) as land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for 5 years or more.

The effect of these two definitions was that where land reached the point that it had been lying fallow for 5 years or more, it would be re-classified as permanent grassland. 2018 is particularly pertinent given that the current CAP started in 2014; 2018 being the fifth calendar year after 2014.

Regulation (EU) 1307/2013 amends the definitions for arable land and permanent grassland and, in particular, inserts a new second sub-paragraph to Article 4(1) stating that MS may continue to accept fallow land as arable land and, in its second sentence, that "From 1 January 2018, parcels of fallow land which have been accepted as arable under

this sub-paragraph *in 2018* shall become permanent grassland in 2023, or thereafter, if the conditions set out in point (h) are met.”.

Whilst the Scottish Government agrees that the effect of this provision must be to bite on land lying fallow which is accepted by the Scottish Ministers only in 2018 as arable land, it must also be intended to bite on land on the land described in regulation 5(2)(c) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015.

Recital 25 to Regulation (EU) 2017/2393 (which amends Regulation (EU) 1307/2013 of European Parliament and of the Council) says “In order to clarify the classification prior to 2018 of land lying fallow as arable land, where it had been in place for 5 years or more, and provide certainty to farmers concerned, MS should be able to maintain its classification as arable land in 2018.” This recital is clear that the purpose of the amendment is to allow fallow land which has been accepted, prior to 2018 as arable land, to maintain its status as arable land. Therefore, it is the Scottish Government’s position that where the second sentence of new Article 4(1), second sub-paragraph, states “parcels of fallow land which have been accepted as arable under this sub-paragraph *in 2018*” it must also be intended to include parcels of fallow land which prior to 1 January 2018 have been accepted as arable and, in 2018, are still able to be considered as arable, notwithstanding the definition of permanent grassland. Indeed the Scottish Government understands the EU’s rationale to be that any land put into fallow should continue to be part of the managed agricultural rotation of the holding for a longer period.

If this was not the intended effect of these words, there would have been no need for the second sentence of new Article 4(1), second sub-paragraph: the “standard” definitions of arable land and permanent grassland (still found at Articles 4(1)(f) and (h), respectively) would bite so that fallow land accepted as arable in 2018 would, after 5 years of lying fallow and not having been ploughed up, be considered permanent grassland. Indeed, the words “Notwithstanding points (f) and (h) of the first sub-paragraph” also strengthen this view.

Accordingly, new regulation 5(2)(c) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015 makes provision for the definition of permanent grassland to *include* fallow land which prior to 1 January 2018 has been accepted as (or “constitutes”) arable land but which on or after 1st January 2023 meets the conditions for permanent grassland as set out in Article 4(1)(h). Where fallow land is accepted only in 2018 as arable land the directly applicable “standard” definition of permanent grassland at article 4(1)(h) bites to re-classify the land as permanent grassland in 2023 – this does not need to be implemented in the domestic regulations.

2. It is agreed that there is an error in new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, in respect that the provision defines “established local practices” for the purposes of paragraph (2)(b), but that the definition is contained in paragraph (2)(a). The Scottish Government is grateful for this being drawn to its attention.

3. In respect of question 2, the Scottish Government will take corrective action by way of a correction slip.

