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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 22 January 2019



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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.



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Introduction

1. At its meeting on 22 January 2019, the Committee considered the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] under the protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using powers under the European Union (Withdrawal) Act 2018.
2. The Committee also agreed to draw to the attention of the Parliament the following instruments-
 - Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) (Scotland) Regulations 2018 (SSI 2018/391)
 - Foods for Specific Groups (Medical Foods) (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/392)
3. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
4. 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.

Instruments considered under the SSI Protocol in respect of EU withdrawal

[Insolvency \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2019 \[draft\]](#) (Economy, Energy and Fair Work)

5. The Scottish Government has chosen to lay this instrument under the affirmative procedure and has categorised it as Low in terms of significance under the SSI Protocol.
6. The Committee agreed to recommend to the Economy, Energy and Fair Work Committee that the affirmative procedure is the appropriate scrutiny procedure.
7. The Committee also agreed to recommend to the Economy, Energy and Fair Work Committee that this instrument could appropriately be categorised as Low in terms of its significance under the SSI Protocol.

Points raised: instruments subject to negative procedure

Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) (Scotland) Regulations 2018 (SSI 2018/391) (Environment, Climate Change and Land Reform)

Purpose

8. The policy note to this instrument explains that its primary purpose is to update out-of-date references and correct errors. This instrument updates references to a number of EU instruments referred to in domestic legislation, and makes consequential repeals and revocations of primary and secondary legislation due to updates in EU law.
9. The amendments made are to reflect relevant EU legislation on the date that it is proposed that the UK will leave the EU. There are further amendments which rectify omissions or errors in domestic legislation.
10. The instrument is subject to the negative procedure and is due to come into force on 28 February 2019.

Committee consideration

11. The Committee noted that the instrument contains some drafting errors as noted below. The Committee considers that these errors are relatively minor rather than appearing to be defective drafting.
 1. In regulation 10(3), there is a reference to "schedule 4" which should refer to schedule 4 of the Waste Management Licensing (Scotland) Regulations 2011, and
 2. Regulations 5(2)(b)(ii), 7(2)(a), 13(2)(a), 26(7) and 36 refer to certain EU legislation "as last amended by" subsequent EU legislation, but reference EU legislation which is not, in fact, the last amending EU legislation.
12. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex A. In regard to the drafting error in regulation 10(3), the Scottish Government indicated that it will amend the instrument at the earliest possible opportunity.

Recommendations

13. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground as it contains some drafting errors.**

14. **The Committee welcomes the Scottish Government's commitment to bring forward amending legislation to correct the error in regulation 10(3) at the earliest possible opportunity.**
15. **The Committee recommends that the references to EU legislation as amended should also be corrected suitably.**

Foods for Specific Groups (Medical Foods) (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/392) (Health and Sport)

Purpose

16. The main purpose of these Regulations is to make some technical provisions for enforcement powers, to underpin the directly applicable Commission Delegated Regulation (EU) No. 2016/128. That Regulation lays down rules on the specific compositional and information requirements for food for special medical purposes.
17. Regulation (EU) No. 2016/128 comes into force on 22 February 2019. It is the first delegated Regulation called for by Regulation (EU) 609/2013 on foods for specific groups, which was introduced to simplify existing rules covering foods for particular nutritional uses.
18. Regulation (EU) No. 2016/128 is directly applicable in EU Member States. To fulfil obligations to the EU domestic legislation is required to enable the enforcement of, and to provide penalties in the event of non-compliance with, the new EU law requirements.
19. The Regulations are subject to the negative procedure, and come into force on 22 February 2019.

Committee Consideration

20. The Committee noted that the instrument fails to follow proper drafting practice as follows:
 1. The first paragraph of the preamble should have also cited the powers in section 2(2) and paragraph 1A of schedule 2 of the European Communities Act 1972, which are relied upon in part to make the instrument.
 2. A paragraph is also omitted, to explain that an ambulatory reference is made within the instrument to specified provisions of Commission Delegated Regulation (EU) 2016/128, and that it appears to the Scottish Ministers that it is expedient for the reference to those provisions to be construed as a reference to the provisions as amended from time to time.

21. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex B. The omissions were acknowledged by the Scottish Government.

Recommendation

22. **The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, as the preamble to the instrument fails to follow proper drafting practice.**

No points raised

Economy, Energy and Fair Work

Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft].

Justice

Sheriff Court Simple Procedure (Limits on Award of Expenses) Amendment Order 2019 [draft]

Drug Driving (Specified Limits) (Scotland) Regulations 2019 [draft]

Local Government and Communities

Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations 2019 [draft]

Social Security

Scottish Social Security Charter [draft] (“Our Charter: What you can expect from the Scottish Government and Social Security Scotland”) (SG/2019/4)

Annex A

Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) (Scotland) Regulations 2018 (SSI 2018/391)

On 11 January 2019, the Scottish Government was asked:

Regs 5(2)(b)(ii) and 7(2)(a)

These regulations amend references in the Water Environment (Register of Protected Areas) (Scotland) Regulations 2004 and the Urban Waste Water Treatment (Scotland) Regulations 1994 to Directive 91/271/EC, stating the Directive was last amended by Regulation (EC) No 1137/2008. Should this state that the Directive was last amended by Directive 2013/64?

Regs 8(2)(a), 9(2)(a), 26(2)(b), 29(2)(c) and 30(2)(c)

Each of these regulations refers to Commission Regulation (EU) No 142/2011 (“142/2011”). Regulations 8(2)(a) and 9(2)(a) provide detail of the last piece of EU legislation which amended 142/2011. Regulations 26(2)(b), 29(2)(c) and 30(2)(c) omit any reference to the last piece of amending EU legislation. Can you please clarify why different approaches have been taken to the drafting of these provisions?

Reg 10(3)

New regulation 6(2)(c) of the Special Waste Regulations 1996 (“the 1996 Regs”) refers to schedule 4. There is no schedule 4 in the 1996 Regs. Should this refer to schedule 4 to the Waste Management Licensing (Scotland) Regulations 2011?

Reg 13(2)(a) – para (a) of new definition of “vehicle” - and 23(2)(a) – new definition of “Council Directive 2005/94/EC”

Reg 13(2)(a) refers to Directive 2007/46/EC “as last amended by Commission Regulation (EU) 2017/2400”, however, there appears to have been an amendment made by Commission Regulation (EU) 2018/1832 which applies from 1 January 2019.

Regulation 23(2)(a) refers to Council Directive 2005/94/EC “as last amended by Commission Implementing Decision (EU) 2018/662” which applies from 1 January 2019.

Can you please clarify why the reference to Directive 2005/94/EC in Reg 23(2)(a) includes reference to an amendment which did not occur until after this instrument was made but the reference to Directive 2007/46/EC in 13(2)(a) does not?

Reg 26(7) – new sub-para (d) of reg 23(1)

New sub-paragraph (d) refers to Regulation (EC) No 1760/2000 “as last amended by Regulation (EU) No 653/2014”. Should the last amendment be Regulation (EU) 2016/429?

Reg 36

Regulations 853/2004 and 854/2004 are both referred to “as last amended by Commission Regulation (EU) 218/2014”. For Regulation 853/2004 should the last amendment be

Commission Regulation (EU) 2016/355? For Regulation 854/2004 should the last amendment be Commission Regulation (EU) 2015/2285?

The Scottish Government responded as follows:

1. Regs 5(2)(b)(ii) and 7(2)(a)

Council Directive 2013/64/EU concerns Mayotte, an overseas department of France, and is addressed to France only, not to all member states. Therefore, the Scottish Government considers that as Council Directive 2013/64/EU does not apply to the United Kingdom, it should not be referred to. The last relevant amending instrument to Council Directive 91/271/EEC is Regulation (EC) No 1137/2008.

2. Regs 8(2)(a), 9(2)(a), 26(2)(b), 29(2)(c) and 30(2)(c)

Regulations 8(2)(a) and 9(2)(a) inserted new references to the 2011 Regulations so inclusion of the latest amending instrument was necessary to ensure the latest amendments were encapsulated.

As regards the changes to Regulations 26(2)(b), 29(2)(c) and 30(2)(c), the provisions describing the amendment by Commission Regulation (EU) No 717/2013 have been removed as this was not the latest instrument to amend Commission Regulation (EU) No 142/2011. The references to Commission Regulation (EU) No 717/2013 were not substituted for the latest amending EU instrument because the definitions for the 2011 Regulation in each of these provisions are ambulatory so a replacement was unnecessary.

3. Reg 10(3)

We thank the Committee for their comments and confirm that the reference is to schedule 4 of the Waste Management Licensing (Scotland) Regulations 2011. We will amend this issue at the earliest possible opportunity. In the meantime it is our view that there is sufficient context in the remainder of new regulation 6(2)(c) of the 1996 Regs to enable a court or another user of the Regulations to identify the relevant provisions should the need arise.

4. Reg 13(2)(a) – para (a) of new definition of “vehicle” - and 23(2)(a) – new definition of “Council Directive 2005/94/EC”

The reference in Regulation 23(2)(a) to the amendment to Directive 2005/94/EC by Commission Implementing Decision (EU) 2018/662 in Regulation 23(2)(a) was made because this amendment applies as of 1 January 2019 so came into force before Exit Day. This approach to drafting ensured that the most up to date version of this legislation is referred to prior to EU exit. The drafting reflects the policy intention, namely, to reflect operative amendments to the relevant EU Regulation so far as those will on the date which the United Kingdom withdraws from the European Union, be retained EU law by virtue of section 3 of the European Union (Withdrawal) Act 2018.

Regulation 13(2)(a) inserts a new definition of “vehicle” into the End-of-Life Vehicles (Storage and Treatment) (Scotland) Regulations 2003 with reference to Annex II of Directive 2007/46/EC as last amended by Commission Regulation 2017/2400. That Directive has since been amended by Regulation 2018/662 which came into force on 1 January 2019, but that Regulation does not amend or impact on Annex II of the Directive. A reference to that Regulation is not therefore considered necessary.

5. Reg 26(7) – new sub-para (d) of reg 23(1)

The drafting reflects the policy intention, namely, to reflect operative amendments to the relevant EU Regulation so far as those will on the date which the United Kingdom withdraws from the European Union, be retained EU law by virtue of section 3 of the European Union (Withdrawal) Act 2018.

6. Reg 36

The amendments to Regulations 853/2004 and 854/2004 made by Commission Regulation (EU) 218/2014 are the last amendments relevant to provisions of schedule 2 of the Welfare of Farmed Animals (Scotland) Regulations 2010 (“the 2010 Regulation”), which regulation 36 of this instrument amends.

Regulation 853/2004 is defined in paragraph 1 and referred to in paragraph 14 of schedule 2 of the 2010 Regulations. The reference in paragraph 14 is to Section III (food chain information) of Annex II to Regulation 853/2004 only. The last amendments to Section III of Annex II were made by Commission Regulation (EU) 218/2014. Regulation 854/2004 is defined in paragraph 1 and referred to in paragraphs 1 and 15 of schedule 2 of the 2010 Regulations. Paragraph 1 refers to the meaning of “official veterinarian” and paragraph 15 refers to an official veterinarian conducting controls under Regulation 854/2004 in relation to chickens. The last amendments to Regulation 854/2004 affecting these provisions were made by Commission Regulation (EU) 218/2014.

Regulations 853/2004 and 854/2004 have been amended subsequent to Commission Regulation (EU) 218/2014. However those amendments are not relevant to provisions of schedule 2 of the Regulations 2010 and therefore are not included in regulation 36 of this instrument.

Annex B

Foods for Specific Groups (Medical Foods) (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/392)

On 9 January 2019, the Scottish Government was asked:

(1) Regulation 4(2)(d)(ii), which amends regulation 2(4) of the Foods for Specific Groups (Scotland) Regulations 2016 (SSI 2016/190), appears to have the effect of making an ambulatory reference, that any reference to a provision of the Commission Delegated Regulation (EU) 2016/128 specified in schedule 1 of those 2016 Regulations is a reference to that provision as amended from time to time.

What is the effect of not including in the preamble a paragraph to confirm that the Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972, and that (we presume) it appears to the Scottish Ministers that it is expedient for any reference to specified provisions of Commission Delegated Regulation (EU) 2016/128 to be construed as a reference to those provisions as amended from time to time?

(2) In view of that, is it considered that (similarly to the approach taken in the first paragraph of the preamble to SSI 2016/190) the first paragraph of the preamble should also have cited the powers in section 2(2) and paragraph 1A of schedule 2 of the 1972 Act? If not, why not?

(3) Is any corrective action proposed?

The Scottish Government responded as follows:

Thank you for bringing this matter to the attention of the Scottish Government.

(1) Scottish Ministers consider that it is expedient for any reference to specified provisions of Commission Delegated Regulation (EU) 2016/128 to be construed as a reference to those provisions as amended from time to time. It is not considered that there is any legal effect of not including in the preamble the citation of section 2(2) and paragraph 1A of schedule 2 of the European Communities Act 1972. We think that the general enabling powers in the preamble – “...and all other powers enabling them to do so” can be relied upon to invoke section 2(2) and paragraph 1A of schedule 2.

The meaning of regulation 2(4) is clear and we don't think there is any doubt as to its effect. Reference is also made to *Vibixa Ltd v Komori UK Ltd & Ors* [2006] EWCA Civ 536 and in particular to the Court of Appeal's conclusion at paragraph 13 that:

“... *General enabling words*

General enabling words in the preamble to a statutory instrument may be interpreted as referring to an enabling power, not expressly invoked, in situations such as the following:

(i) where, in order for the SI to have effect, the maker of the instrument must necessarily have invoked that power, or

(ii) where the operative provisions of the SI make it clear that its maker must have invoked that power...”.

(2) The Scottish Government agrees that the preferable drafting approach would have been to cite the powers in section 2(2) and paragraph 1A of schedule 2 of the 1972 Act.

(3) The Scottish Government does not propose any corrective action as it considers that the omission of citing section 2(2) and paragraph 1A of schedule 2 in the preamble has no legal effect.

