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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 26 February 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.



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



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Introduction

Instruments considered under the European Union (Withdrawal) Act 2018

1. At its meeting on 26 February 2019, the Committee considered the following instruments under the protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018-

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft]

Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Food and Feed Safety and Hygiene (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/52)

Food Composition, Labelling and Standards (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/53)

Nutrition (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/54)

Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/55)

Genetically Modified Organisms (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/57)

2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.

Technical scrutiny of instruments

3. The Committee agreed to draw to the attention of the Parliament the following instruments-

Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/26)

Equine Animal (Identification) (Scotland) Regulations 2019 (SSI 2019/30)

Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2019 (SSI 2019/32).

4. The Committee's recommendations and conclusions in relation to these instruments are set out in the following sections of this report.
5. 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 under the European Union (Withdrawal) Act 2018 (scrutiny procedure and categorisation)

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] (Justice)

Purpose

6. EU laws currently provide a framework to allow lawyers from one country to practice in other countries on the basis of the professional qualifications gained in their home state. The arrangements apply to EU and European Free Trade Association (EFTA) countries.
7. The Regulations end the preferential practising rights of EU and EFTA lawyers in Scotland, to realign the position of those lawyers with other "third country" lawyers. This is subject to transitional provision, up to 31 December 2020, to give certain EU and EFTA lawyers more flexibility to make changes to the way they practise, to comply with the new regulatory framework.
8. The instrument also reflects provisions of the UK-Swiss withdrawal agreement of December 2019 that are applicable to legal services.
9. The Regulations revoke the European Communities (Services of Lawyers) Order 1978 and the European Communities (Lawyer's Practice) (Scotland) Regulations 2000, but have various transitional arrangements. These deal with issues such as ongoing disciplinary proceedings and applications to join the legal profession in Scotland. They also contain consequential amendments of the Solicitors (Scotland) Act 1980.
10. The instrument also makes provision in case the UK exits the EU without a withdrawal agreement.

Committee consideration

11. The Scottish Government has laid this instrument under the affirmative procedure and has categorised it as of medium significance under the SSI Protocol.
12. The Committee is content that the affirmative procedure is appropriate given that the Regulations would remove existing individual rights under EU law to practise and establish in Scotland and would amend the Solicitors (Scotland) Act 1980.
13. The Committee is also content with the categorisation given that Ministers have a limited policy choice but with more significant implications as they remove some existing individual rights.

Recommendations

14. **The Committee recommends to the Justice Committee that the affirmative procedure is the appropriate scrutiny procedure for the draft Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.**
15. **The Committee recommends to the Justice Committee that the draft Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 are appropriately categorised as Medium in terms of their significance under the SSI Protocol.**

Food and Feed Safety and Hygiene (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/52) (Health and Sport)

Purpose

16. The purpose of the Regulations is to make minor, technical amendments to 11 food and feed safety and hygiene focused SSIs, to ensure that they continue to function as required after exit day, and without change in policy.

Committee Consideration

17. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol
18. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument makes changes that are minor and technical in nature and without change in policy.

Recommendations

19. **The Committee recommends to the Health and Sport Committee that the negative procedure is the appropriate scrutiny procedure for the Food and Feed Safety and Hygiene (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/52).**
20. **The Committee recommends to the Health and Sport Committee that the Food and Feed Safety and Hygiene (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/52) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

Food Composition, Labelling and Standards (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/53) (Health and Sport)

Purpose

21. The purpose of these Regulations is to make minor technical amendments to five SSIs in relation to food composition, labelling and standards, to ensure that they continue to operate effectively following the date of the UK's exit from the EU, in the event that a withdrawal agreement is not reached.

Committee Consideration

22. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
23. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument makes changes that are minor and technical in nature.

Recommendations

24. **The Committee recommends to the Health and Sport Committee that the negative procedure is the appropriate scrutiny procedure for the Food Composition, Labelling and Standards (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/53).**
25. **The Committee recommends to the Health and Sport Committee that the Food Composition, Labelling and Standards (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/53) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

Nutrition (EU Exit)(Scotland) (Amendment) Regulations 2019 (SSI 2019/54) (Health and Sport)

Purpose

26. The instrument makes minor and technical amendments to six SSIs related to nutrition that implement EU law requirements in relation to this subject matter. The instrument ensures that these SSIs continue to operate effectively in the event that the UK exits from the EU without a withdrawal agreement on 29 March 2019.

Committee consideration

27. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.

28. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument makes changes that are minor and technical in nature, does not involve any change to policy and ensures continuity of law.

Recommendations

29. **The Committee recommends to the Health and Sport Committee that the negative procedure is the appropriate scrutiny procedure for the Nutrition (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/54).**
30. **The Committee also recommends to the Health and Sport Committee that the Nutrition (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/54) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/55) (Environment, Climate Change and Land Reform)

Purpose

31. The purpose of this instrument is to amend domestic legislation relating to marine planning, licensing and conservation, to make necessary corrections to ensure that the law continues to operate effectively from the date of the UK's exit from the EU.

Committee consideration

32. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
33. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument makes changes that are minor and technical in nature, to secure the continued functioning of the legislation and without policy change.

Recommendations

34. **The Committee recommends to the Environment, Climate Change and Land Reform Committee that the negative procedure is the appropriate scrutiny procedure for the Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/55).**
35. **The Committee recommends to the Environment, Climate Change and Land Reform Committee that the Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/55) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

Genetically Modified Organisms (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/57) (Rural Economy and Connectivity)

Purpose

36. The purpose of this instrument is primarily to correct deficiencies in the Genetically Modified Organisms (Deliberate Release) (Scotland) Regulations 2002 (“the 2002 regulations”) arising as a result of the UK’s exit from the EU. The instrument also makes minor and technical pre-exit day amendments to the 2002 regulations using the powers in the European Communities Act 1972.

Committee consideration

37. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
38. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument makes changes that are minor and technical in nature, with no significant change to the policy outcomes of the legislation it amends.

Recommendations

39. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Genetically Modified Organisms (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/57).**
40. **The Committee recommends to the Rural Economy and Connectivity Committee that the Genetically Modified Organisms (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/57) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

Instruments considered under the SSI Protocol under the European Union (Withdrawal) Act 2018 (categorisation)

Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] (Environment, Climate Change and Land Reform)

Purpose

41. The purpose of this instrument is primarily to correct deficiencies in the Conservation (Natural Habitats, &c.) Regulations 1994 (“the 1994 regulations”) and to make minor amendments to two pieces of salmon conservation subordinate legislation to ensure their operability after the UK’s exit from the EU.
42. The 1994 regulations deliver the protected areas and species requirements of the EU Habitats Directive and the protected areas requirements of the EU Wild Birds Directives. The intention of the Scottish Government is to ensure that current protections and standards continue to operate in the same or an equivalent way.
43. The instrument is required under the European Union (Withdrawal) Act 2018 to be laid under the affirmative procedure.

Committee consideration

44. The Scottish Government has categorised the instrument as low because it is technical in nature, allows continuity in the law and does not amount to a policy change.
45. However, the Committee considered that the instrument should be categorised as medium on the grounds that, whilst it is predominantly concerned with technical detail and there is limited policy choice, there are significant implications from the instrument that warrant subject committee scrutiny. The instrument transfers significant oversight functions from the European Commission to the Scottish Ministers in nature conservation, and this has been identified as a high-risk area by stakeholders in terms of Brexit and environmental protection.

Recommendation

46. **The Committee recommends to the Environment, Climate Change and Land Reform Committee that the draft Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 be categorised as Medium in terms of their significance under the SSI Protocol.**

Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] (Rural Economy and Connectivity)

Purpose

47. The purpose of the instrument is to correct deficiencies in domestic legislation and retained direct EU legislation relating to plant health which will otherwise arise on the UK's withdrawal from the EU, in the event that a withdrawal agreement is not reached.
48. The Regulations primarily amend the Plant Health (Scotland) Order 2005. That Order sets out obligations for the control and management of plant health risks arising from the import from third countries and movement within the EU single market of plant material in order to protect biosecurity and the value of plant material to the economy and society.
49. The instrument is required under the European Union (Withdrawal) Act 2018 to be laid under the affirmative procedure.

Committee consideration

50. The Scottish Government has categorised the instrument as of medium significance under the SSI protocol given that it creates new offences.
51. The Committee also considered that the creation of new offences justified categorising the instrument as of medium significance under the protocol.

Recommendation

52. **The Committee recommends to the Rural Economy and Connectivity Committee that the draft Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 are appropriately categorised as Medium in terms of their significance under the SSI Protocol.**

Points raised: Instruments subject to the negative procedure

Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/26) (Environment, Climate Change and Land Reform)

Purpose

53. These Regulations correct deficiencies in legislation relating to environmental protection, industrial pollution control, water, water industry, waste and bathing waters arising as a result of the UK's exit from the EU.
54. The instrument is subject to the negative procedure and is due to come into force on exit day.
55. The amendments made by this instrument are to ensure that environmental licensing and enforcement powers continue to operate, and that environmental standards continue to apply, after the UK's exit from the EU.
56. The Policy Note states that the changes made by this instrument will provide clarity and certainty for regulators, regulated businesses and the public.

Committee consideration

57. The Committee noted that the instrument contains some drafting errors.
58. Firstly, in regulation 13(4)(a), the words "other than wood" are erroneously included in paragraph (j)(v) of the new definition of Chapter III combustion plant and paragraph (b)(v) of the new definition of Chapter IV plant, both to be inserted into the Pollution and Prevention Control (Scotland) Regulations 2012. The error is repeated in regulation 14(2) which inserts a definition of Chapter III combustion plant into regulation 2(1) of the Sulphur Content of Liquid Fuels (Scotland) Regulations 2014.
59. Secondly, regulation 13(24)(a)(ii) erroneously provides that for the purposes of schedule 2 of the 2012 regulations, article 5(1) of the Industrial Emissions Directive is to be read as if "or Union law" was omitted. The word "law" should not have been included in the words to be treated as if omitted.
60. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex A. In regard to the drafting error in regulation 13(24)(a)(ii) (set out in paragraph 59 above), the Scottish Government has indicated that it will correct this error by correction slip.

Recommendations

61. **The Committee draws the instrument to the attention of the Parliament on the general ground as it contains some drafting errors as detailed in paragraphs 58 and 59 above.**
62. **The Committee welcomes the Scottish Government's commitment to correct the error in regulation 13(24)(a)(ii) by correction slip.**
63. **The Committee recommends that the remaining errors set out in paragraph 58 above be corrected by amending instrument.**

Equine Animal (Identification) (Scotland) Regulations 2019 (SSI 2019/30) (Rural Economy and Connectivity)

Purpose

64. The purpose of the Regulations is to make provision for the enforcement of Commission Implementing Regulation (EU) 2015/262, which is concerned with the identification of equine animals (also known as the “Horse Passport Regulation”). That Regulation seeks to enhance controls on the issue, use and quality of horse passports in response to issues identified after the 2013 horse meat scandal. This was where, in parts of Europe, foods advertised as containing beef were found to contain undeclared or improperly declared horse meat.
65. The Regulations revoke and replace the Horse Identification (Scotland) Regulations 2009. They are subject to the negative procedure and will come into force on 28 March 2019.

Committee consideration

66. The Committee noted that the form of regulation 11(4) (implantation of transponders) could be clearer. This regulation provides: “For the purposes of Article 19(1), any transponder implanted into an equine animal by a veterinary surgeon must display a code unique to that transponder.” Regulation 17(h) provides that failure to comply with this requirement is a criminal offence.
67. When imposing legal duties, the breach of which constitutes an offence, it is important that the drafting makes it clear on whom the duty falls. There are two parties involved in the implantation of the transponder: the issuing body which issues the equine identification document, and the vet, who physically implants the transponder. The duty in regulation 11(4) is a duty to ensure that a transponder implanted into an equine animal displays a code unique to that transponder.
68. The use of the passive voice in this provision renders it unclear as to whether that obligation falls on the veterinary surgeon who implants the transponder, or upon the issuing body. The Scottish Government has confirmed that the duty falls upon the issuing body. However, the Committee considered that this is not clear on the face of the instrument.

69. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex B.

Recommendations

70. **The Committee draws the instrument to the attention of the Parliament under reporting ground (h) in respect of the instance where the form of regulation 11(4) could be clearer.**
71. **Given that this matter concerns an offence provision, the Committee recommends that the Scottish Government brings forward an amendment at the earliest opportunity.**

Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2019 (2019/32) (Health and Sport)

Purpose

72. The instrument amends the Materials and Articles in Contact with Food (Scotland) Regulations 2012 to provide for the execution and enforcement in Scotland of two European Commission Regulations:
- a. Commission Regulation (EU) No. 2016 1416 (the revised Plastics Regulation), and
 - b. Commission Regulation (EU) No. 2018/213 on the use of bisphenol A (BPA) in varnishes and coatings intended to come into contact with food and in plastic food contact materials (the BPA Regulation).
73. The instrument is subject to the negative procedure and comes into force on 28 March 2019.

Committee consideration

74. The Committee noted that the instrument contains the following error.
75. New regulation 15 provides that “The competent authorities for the purposes of Regulation 10/2011 are – (a) Article 8 (general requirement on substances), and (b) Article 16(1) (supporting documents), are Food Standards Scotland and each food authority in its area.”
76. However, it is not correct that the competent authorities are articles 8 and 16. Instead, the competent authorities for the purposes of articles 8 and 16(1) of Regulation 10/2011 are Food Standards Scotland and each food authority in its area.
77. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex C.

Recommendations

78. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground in respect of the error in regulation 4, substituting regulation 15 of the Materials and Articles in Contact with Food (Scotland) Regulations 2012 as set out in paragraphs 75 and 76 above.**
79. **The Committee recommends that the Scottish Government corrects this error at the next legislative opportunity.**

No points raised

Economy, Energy and Fair Work

Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 [draft]

Education and Skills

Teachers' Superannuation and Pension Scheme (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/48)

Environment, Climate Change and Land Reform

Conservation (Natural Habitats, &c.) (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft]

Wildlife and Countryside Act 1981 (Keeping and Release and Notification Requirements) (Scotland) Amendment Order 2019 (SSI 2019/37)

Wildlife and Countryside Act 1981 (Prohibition on Sale etc. of Invasive Animal and Plant Species) (Scotland) Order 2019 (SSI 2019/38)

Marine Environment (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/55)

Finance and Constitution

Budget (Scotland) Act 2018 Amendment Regulations 2019 [draft]

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2019 (SSI 2019/58)

Health and Sport

National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2019 (SSI 2019/50)

Food Composition, Labelling and Standards (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/53)

Local Government and Communities

Non-Domestic Rates (Levying) (Scotland) Regulations 2019 (SSI 2019/39)

Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Regulations 2019 (SSI 2019/40)

Non-Domestic Rates (Telecommunication Installations) (Scotland) Amendment Regulations 2019 (SSI 2019/41)

Non-Domestic Rating (Telecommunications New Fibre Infrastructure) (Scotland) Order 2019 (SSI 2019/42)

Non-Domestic Rates (Telecommunications New Fibre Infrastructure Relief) (Scotland) Regulations 2019 (SSI 2019/43)

Non-Domestic Rates (Transitional Relief) (Scotland) Amendment Regulations 2019 (SSI 2019/44)

Rural Economy and Connectivity

Forestry (Exemptions) (Scotland) Regulations 2019 [draft]

Forestry and Land Management (Scotland) Act 2018 (Consequential Amendments) Regulations 2019 [draft]

Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Genetically Modified Organisms (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/57)

Annex A

Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/26)

On 7 February 2019, the Scottish Government was asked:

1. Regulations 7(2)(b), 8(2)(a)(iii), 9(2)(c), 10(2)(d) and 11(2)(a)(ii) substitute definitions various regulations. Each new definition refers to section 75(2)(a) of the Environmental Protection Act 1990 (“the EPA”) *“as read with section 75A of that Act”*.

Should this be a reference to section 78A?

2. Regulation 13(4)(a) inserts definitions of “Chapter III combustion plant” and “Chapter IV plant” into the Pollution Prevention and Control (Scotland) Regulations 2012 (“the 2012 Regulations”). The definitions are based on Articles 28 and 42 of the Industrial Emissions Directive (“the Directive”) respectively.

Articles 28(j) and 42(2)(a)(i) provide that combustion plants which use any solid or liquid waste as a fuel, other than certain types of biomass listed in Article 3(31)(b), are not Chapter III combustion plants or Chapter IV plants. Article 3(31)(b)(v) lists *“wood waste with the exception of wood waste which may contain...”*.

Paragraph (j)(v) of the definition of Chapter III combustion plant and paragraph (b)(v) of the definition of Chapter IV plant appear to incorporate this exception to the exception directly into the 2012 Regulations. However, they each refer to *“wood waste, other than wood with the exception of wood waste which may contain...”*.

What is the effect of the inclusion of the words “other than wood” on the meanings of paragraphs (j)(v) of the definition of Chapter III combustion plant and paragraph (v) of the definition of Chapter IV plant. Is corrective action proposed?

3. Regulation 13(24)(a)(ii) provides that for the purposes of schedule 2 of the 2012 Regulations the Directive is to be read as if in Article 5(1) “or Union law” were omitted? Should the word “law” have been included? Is corrective action proposed?

The Scottish Government responded as follows:

1. Section 75A of the Environmental Protection Act 1990 (“EPA”) is due to be inserted into that Act by The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019. This is an affirmative UK SI. It was notified to the Parliament under the Protocol agreed for obtaining approval of the Scottish Parliament to the exercise of powers by UK ministers under the European Union (Withdrawal) Act 2018, and the Scottish Parliament agreed to devolved matters being included in the instrument on 5 December 2018. It was laid on 17 December 2018, and was considered by the House of Lords Secondary Legislation Scrutiny Committee on 14th January, where no concerns were raised. It is currently with the Commons for consideration.

In accordance with regulation 1(2) of that UK SI section 75A will come into force on exit day, as will the amendments given effect to by these regulations.

2. Paragraph (j)(v) of the definition of Chapter III combustion plant and paragraph (b)(v) of the definition of Chapter IV plant, inserted into regulation 3A of the Pollution Prevention &

Control (Scotland) Regulations 2012 by regulation 13(4)(a), should read “wood waste, with the exception of wood waste which may contain halogenated organic compounds or heavy metals as a result of treatment with wood preservatives or coating”. The words “other than wood” should not have been included. The Government thanks the Committee’s advisers for drawing this to its attention. It is proposed to correct these by correction slip as self-evident minor errors which can only be interpreted one way.

3. Regulation 13(24)(a)(ii) should provide, that for the purposes of schedule 2 of the Pollution Prevention & Control (Scotland) Regulations 2012, the Industrial Emissions Directive is to be read as if in Article 5(1) “or Union” were omitted. The word “law” should not have been included in the words to be omitted. The Government thanks the Committee’s advisers for drawing this to its attention. It is proposed to correct this by correction slip as a self-evident minor error which can only be interpreted one way.

Annex B

Equine Animal (Identification) (Scotland) Regulations 2019 (SSI 2019/30)

On 14 February 2019, the Scottish Government was asked:

Regulation 11(4) (implantation of transponders) provides: - “For the purposes of Article 19(1), any transponder implanted into an equine animal by a veterinary surgeon must display a code unique to that transponder.”

Article 19 of Commission Implementing Regulation (EU) 2015/262 places a duty on member States to lay down rules to ensure the uniqueness of the codes displayed by the transponders implanted by issuing bodies where they are issuing identification documents.

Regulation 17(h) provides that it is an offence to fail to comply with regulation 11(4).

1. On whom does the duty in regulation 11(4) fall? If it is the veterinary surgeon, will the veterinary surgeon be in a position to know whether the code displayed is unique to the transponder that is being implanted?

2. Do you consider that it is sufficiently clear who can commit the offence in regulation 17(h)?

The Scottish Government responded as follows:

Regulation 11(4) provides that for the purposes of Article 19(1) of Commission Implementing Regulation (EU) 2015/262 (the EU Regulation), any transponder implanted into an equine animal by a veterinary surgeon must display a code unique to that transponder.

Article 19(1) of the EU Regulation requires Member States to lay down rules, in accordance with the standards referred to in point (n)(i) of Article 2, to ensure the uniqueness of the codes displayed by the transponders implanted by issuing bodies referred to in Article 5(1) where they issue identification documents in accordance with Article 9.

Therefore it is the Scottish Government’s position that Article 19(1) clearly imposes the duty to ensure the uniqueness of the codes displayed by the transponders on issuing bodies, and as such we think it is similarly clear that the offence referred to in regulation 17(h) can only be committed by the relevant issuing body.

Regulation 11(4) provides that the person responsible for physically implanting the transponder in the equine animal is a veterinary surgeon, who is the person designated as qualified or entrusted to carry out such operations on behalf of the issuing body, in terms of Article 18(3) of the EU Regulation and regulation 11(2) of these Regulations.

Annex C

Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2019 (SSI 2019/32)

On 13 February 2019, the Scottish Government was asked:

1. The preamble cites “2(a)” of the Food Safety Act 1990 as an enabling power. Is it intended that this should be a reference to subsection “(2)(a)” of section 26 of the 1990 Act? Could this be clearer?

2. Regulation 4 substitutes regulation 15 of the Materials and Articles in Contact with Food (Scotland) Regulations 2012 (the “2012 Regulations”). New regulation 15 provides that “The competent authorities for the purposes of Regulation 10/2011 are – (a) Article 8 (general requirement on substances), and (b) Article 16(1) (supporting documents), are Food Standards Scotland and each food authority in its area.”

Could it be clearer that the competent authorities for the purposes of Articles 8 and 16(1) of Regulation 10/2011 are Food Standards Scotland and each food authority in its area?

3. Regulation 5 inserts new regulation 17B into the 2012 Regulations. This prohibits the placing on to the market of certain materials or articles. It comes into force on 28 March 2019. This prohibition is stated to be subject to Article 6 (of Regulation 2018/213).

Article 6 of Regulation 2018/213 applies to certain materials and articles that *were lawfully placed* on the market *before 6 September 2018* (i.e. before Regulation 2018/213 began to apply). It provides that those materials and articles *may remain* on the market until exhaustion of stocks.

Given that Article 6 of Regulation 2018/213 relates to products already placed on the market, please explain in what sense new regulation 17B of the 2012 Regulations, prohibiting placing on the market, is subject to Article 6.

4. Is corrective action proposed?

The Scottish Government responded as follows:

1. Thank you for bringing this issue to our attention. The enabling powers relied upon in this instance are sections 16(2), 17(1) and (2), 26(1)(a), (2)(a) and (3) and 48(1) of the Food Safety Act 1990 (1990 Act). We note that the “2” of subsection (2)(a) was not placed between brackets. We don’t think there is any doubt that subsection (2)(a) of the 1990 Act is being relied on though. This is because the enabling powers are cited sequentially as they appear in the 1990 Act, and the “2” without brackets comes between citation of section 26(1)(a) and (3) of the 1990 Act. Also, there is no section 2(a) of the 1990 Act.

2. Thank you also for bringing this point to our attention. It is noted that regulation does include the word “are” after “Regulation 10/2011” where it appears in the opening words of the regulation. Whilst it is accepted that the regulation could have been clearer, it is not considered that there is any doubt as to the meaning of the provision. The legal effect is to make Food Standards Scotland and each food authority in its area the competent authorities for the purposes of Articles 8 and 16(1) of Regulation 10/2011.

3. Thank you for bringing this matter to our attention. It is agreed that Article 6 of Regulation 2018/213 does only apply to certain materials and articles that were lawfully placed on the market before 6 September 2018. Such materials and articles may remain on the market until exhaustion of stocks.

In practice it is understood that such materials and articles can be on the market for years to come. Whilst not strictly necessary it is considered the wording “Subject to Article 6” provides useful signposting given that relevant materials and articles placed on the market prior to 6 September 2018 may remain on the market for some years to come.

4. For the reasons given above we do not propose taking any corrective steps.

