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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 5 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 5 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-

Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

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

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 instrument-

Zootechnical Standards (Scotland) Regulations 2019 (SSI 2019/5).

4. The Committee's recommendations and conclusions in relation to this instrument 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

Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] (Justice)

Purpose

6. This instrument relates to EU Council Regulation 2001/2003, known as Brussels IIa, which is one of the main pieces of EU legislation on family law and concerns cross-border family cases. It provides EU rules on which member state's court should have authority to resolve a dispute.
7. The purpose of this instrument is to make provision in relation to Brussels IIa in case the UK leaves the EU without a negotiated settlement. As an EU Regulation, Brussels IIa is currently directly applicable in the UK as an EU member state.

Committee consideration

8. The Scottish Government has laid this instrument under the affirmative procedure and has categorised it as of medium significance under the SSI Protocol.
9. The Committee is content that the affirmative procedure is appropriate given that the instrument makes significant changes to primary legislation. The Committee is also content with the categorisation given that Ministers have limited policy choice but with significant implications for people involved in cross-EU border family law disputes.
10. The Committee noted the significant implications of this instrument and considered that the lead committee may wish to seek clarification around the issue of custody disputes. In particular, that there are no unintended consequences in relation to such disputes as a result of this instrument.

Recommendations

11. **The Committee recommends to the Justice Committee that the affirmative procedure is the appropriate scrutiny procedure for the draft Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.**
12. **The Committee recommends to the Justice Committee that the draft Jurisdiction and Judgments (Family, Civil Partnership and Marriage (Same Sex Couples)) (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 is**

appropriately categorised as Medium in terms of its significance under the SSI Protocol.

13. **The Committee considers that the Justice Committee may wish to seek further clarification in relation to the effect of this instrument on custody disputes.**

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

Purpose

14. The INSPIRE Directive (establishing an Infrastructure for Spatial Information in the European Community) aims to create a European Union spatial data infrastructure for the purposes of EU environmental policies. This instrument corrects deficiencies in the INSPIRE (Scotland) Regulations 2009 (the "2009 Scottish Regulations"), which mainly transpose the INSPIRE Directive in Scotland, arising from the UK's withdrawal from the EU.
15. The Scottish Government has laid the instrument under the affirmative procedure as required by the European Union (Withdrawal) Act 2018.

Committee Consideration

16. The instrument has been categorised by the Scottish Government as of low significance under the SSI Protocol on the grounds that the deficiencies corrected by the instrument are minor and technical in nature, do not seek to alter the underlying purpose and effect of the 2009 Scottish Regulations, and do not impose any new liabilities or obligations. The Committee is content with the categorisation of this instrument.

Recommendation

17. **The Committee recommends to the Economy, Energy and Fair Work Committee that the draft INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 are appropriately categorised as Low in terms of their significance under the SSI Protocol.**


Instruments subject to affirmative procedure

Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 [draft] (Economy, Energy and Fair Work)

Background and Purpose

18. At its meeting on 29 January 2019, the Committee considered this instrument under the terms of the SSI Protocol. At that meeting, the Committee recommended to the lead committee (the Economy, Energy and Fair Work Committee) that the Regulations be categorised as "high" in terms of their significance under the SSI Protocol.ⁱ
19. The general purpose of this instrument is to address deficiencies in retained EU law relating to public procurement which arise from the UK's withdrawal from the EU.
20. At this meeting, the Committee considered the technical aspects of the instrument to ensure that it is fit for purpose.

Committee consideration

21. The Committee did not raise any technical points on the instrument. However, the Committee noted that the Scottish Government published a Scottish Procurement Policy Note SPPN 1/2019 on 23 January 2019 which contained the undernoted statement:
22.  The requirement to have recourse to e-Certis, the EU's online database of documentary evidence required in each member State, would be removed, as would the references to the EU's state aid regime. Contracting authorities would no longer be required to exclude companies which have been convicted of fraud affecting the European Communities' financial interests.ⁱⁱ
23. The Committee considered that the lead Committee may wish to seek clarification of the consequences of contracting authorities no longer being required to exclude companies convicted of fraud affecting the European Communities' financial interests.

Recommendations

24. **The Committee determined that it did not need to draw the Regulations to the attention of the Parliament.**

ⁱ Delegated Powers and Law Reform Committee, [7th Report, 2019 \(Session 5\)](#)

ⁱⁱ [Scottish Procurement Policy Note SPPN 1/2019](#), paragraph 7.

25. **The Committee considers that the Economy, Energy and Fair Work Committee may wish to seek further clarification in relation to the effect of this instrument on the exclusion of companies convicted of fraud.**

Points raised: instruments subject to negative procedure

Zootechnical Standards (Scotland) Regulations 2019 (SSI 2019/5) (Rural Economy and Connectivity)

Purpose

26. These Regulations implement Regulation (EU) 2016/1012 on zootechnical and genealogical conditions for the breeding, trade in and entry into the EU of purebred breeding animals, hybrid breeding pigs and the germinal products thereof ("the Animal Breeding Regulation"). The Animal Breeding Regulation is directly applicable, and will become part of retained EU law following the UK's withdrawal from the EU.
27. These Regulations are subject to the negative procedure and come into force on 7 March 2019.

Committee consideration

28. The Committee noted that regulations 3 and 6 contain provisions that are already directly legally applicable, by virtue of the content of the EU "Animal Breeding Regulation" and, therefore, fail to follow proper drafting practice.
29. These issues were raised with the Scottish Government and its response is set out in the Annex to this report.

Recommendation

30. **The Committee draws the Regulations to the attention of the Parliament on the general reporting ground in respect of failure to follow proper drafting practice.**

No points raised

Economy, Energy and Fair Work

INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft]

Education and Skills

Continuing Care (Scotland) Amendment Order 2019 [draft]

Health and Sport

Community Care (Personal Care and Nursing Care) (Scotland) Amendment Regulations 2019 [draft]

National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2019 (SSI 2019/12)

National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2019 (SSI 2019/13)

Local Government and Communities

Asset Transfer Request (Designation of Relevant Authority) (Scotland) Order 2019 [draft]

Rural Economy and Connectivity

National Bus Travel Concession Scheme for Older and Disabled Persons (Scotland) Amendment Order 2019 [draft]

Annex

CORRESPONDENCE WITH THE SCOTTISH GOVERNMENT

Zootechnical Standards (Scotland) Regulations 2019 (SSI 2019/5)

On 22 January 2019, the Scottish Government was asked:

1. The Scottish Ministers are designated as the competent authority by regulation 2. Regulation 3 then provides that “[t]he Animal Breeding Regulation is enforced by the competent authority”.

Article 39(1) of the Animal Breeding Regulation already states, however, that:

“Member States shall designate the competent authorities with the responsibility for performing official controls for the verification of compliance of operators with the rules provided for in this Regulation, and for performing other official activities to ensure the application of those rules.”

Given the content of Article 39(1), once regulation 2 designates the Scottish Ministers as the competent authority, why is regulation 3 considered necessary?

2. Article 47(1) of the Animal Breeding Regulation obliges competent authorities to take action to determine the origin and extent of non-compliance, and to take appropriate measures to ensure the operators remedy it and prevent further occurrences. Competent authorities must then take such of 6 specified measures as they consider appropriate. These measures range from postponing the entry in breeding books of purebred breeding animals, to withdrawing the recognition of the breed society or breeding operation.

Separately, Article 52 of that Regulation provides, *“Member States shall lay down the penalties applicable to infringements of this Regulations and shall take all measures necessary to ensure that they are applied. Those penalties must be effective, proportionate and dissuasive.”*

Article 52 is implemented in regulation 6, which states,

“For the purposes of Article 52 of the Animal Breeding Regulation, where an operator fails to comply with an obligation under that Regulation or under these Regulations, the competent authority is to deal with that non-compliance in accordance with the provisions in Article 47 of the Animal Breeding Regulation (actions in the case of established non-compliance).”

Is it considered that the obligation placed on Member States to lay down penalties, as set out in Article 52 of the Animal Breeding Regulation, is satisfied by cross-referring to Article 47? Please could you also explain why it is necessary to cite the Article 47 actions for non-compliance in regulation 6?

The Scottish Government responded as follows:

1. The Scottish Government considers regulation 3 to be expedient for the purposes of clarity and the avoidance of doubt.

The Scottish Government recognises the effect of regulation 2 designating the Scottish Ministers as the competent authorities is to attract the responsibilities set out in Article 39(1). However, the Scottish Government considers that the power to enforce the Animal Breeding Regulation should be evident from the face of this instrument. This is achieved by regulation 3. This will assist the reader as it will make it easier to understand the instrument and how it interacts with the Animal Breeding Regulation.

The Scottish Government notes that this approach has been adopted by the Department for Environment, Food & Rural Affairs in The Zootechnical Standards (England) Regulations 2018 (2018 No. 1037) (“the English Regulations”) and by the Welsh Government in The Zootechnical Standards (Wales) Regulations 2018 (2018 No. 1152 (W. 234)) (“the Welsh Regulations”). It is the view of the Scottish Government that it is expedient for this instrument to follow the same approach to ensure that the Animal Breeding Regulation is consistently applied throughout the UK.

2. The opinion of the Scottish Government is that the obligation under Article 52 is satisfied by regulation 6.

It is the policy position of the Scottish Government that in the case of an infringement of the Animal Breeding Regulation the penalties which are to be applied are those provided for in Article 47 of the Animal Breeding Regulation.

The Scottish Government considers that a cross- reference to Article 47 is the most appropriate method of establishing this. This will ensure a uniform regime for enforcement and penalties under the Animal Breeding Regulation and this instrument. If the policy outcome was achieved in another way there may be a risk that the penalties would be interpreted in a different way than those provided for in Article 47. The Scottish Government therefore considers it appropriate to make a cross-reference to Article 47 in order to achieve the policy outcome with minimal risk of misinterpretation.

The Scottish Government notes that the English Regulations and the Welsh Regulations also establish the penalties for non-compliance with the Animal Breeding Regulation by reference to Article 47. It is the view of the Scottish Government that it is expedient for this instrument to follow the same approach to ensure that the Animal Breeding Regulation is consistently applied throughout the UK.

