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Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 12 March 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 12 March 2019 the Committee considered the following instrument 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-

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

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

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [draft]

Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/59)

Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/70)

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73)

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.

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

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

Purpose

6. The purpose of these Regulations is to correct deficiencies in Scottish forestry legislation arising as a result of the UK's withdrawal from the EU. The Regulations concern forestry plant health, forest reproductive materials, and environmental impacts assessments for forestry development.
7. The reasons for, and effect of, the proposed change are to ensure that Scottish legislation which protects forestry plant health and the environment will continue to be operable and enforceable after the UK leaves the EU, particularly in a situation where a withdrawal agreement is not in place.
8. The instrument is required under the European Union (Withdrawal) Act 2018 to be laid under the affirmative procedure.

Committee consideration

9. The Committee noted that the Scottish Government has categorised the instrument as low because the amendments being made are minor and technical in nature and ensure continuity of law with no policy change.

Recommendation

10. **The Committee recommends to the Rural Economy and Connectivity Committee that the draft Forestry (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 be categorised as Low in terms of their significance under the SSI Protocol.**

Points raised: Instruments subject to the affirmative procedure

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [draft SI] (Environment, Climate Change and Land Reform)

Purpose

11. This Order in Council ensures that the Scottish Ministers will have certain functions, which they may exercise concurrently with the Secretary of State, relating to the assessment of the environmental impact of electricity generating stations situated in the Scottish part of the Renewable Energy Zone.
12. The Order is subject to affirmative procedure in each House at Westminster, and the affirmative procedure in the Parliament. It will come into force on the day after it is made by Her Majesty in Council (after Parliamentary approval).

Committee consideration

13. The Committee noted that the instrument contains a minor drafting error in article 4(1).
14. The article refers to section 117 of “the 1998 Act”, which should specify the Scotland Act 1998.
15. This issue was raised with the Scottish Government and the correspondence is reproduced at Annex A.

Recommendations

16. **The Committee draws the instrument to the attention of the Parliament under the general reporting ground, as it contains a minor drafting error in article 4(1) as set out in paragraph 14 above.**
17. **The Committee notes that action is not currently considered necessary to correct this error. However if in future this Order requires to be amended, the Scottish Government has undertaken to work with the UK Government with a view to adjusting the provision.**

Points raised: Instruments subject to the negative procedure

Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/59) (Rural Economy and Connectivity)

Purpose

18. This instrument amends a number of marketing regulations for seed and plant propagating materials that apply in Scotland. These regulations transpose EU directives prescribing processes to ensure minimum quality standards and traceability for marketed seed and plant propagating material.
19. This instrument is made under both section 2(2) of the European Communities Act 1972 and the power conferred on the Scottish Ministers to correct deficiencies in the European Union (Withdrawal) Act 2018.
20. This instrument is subject to the negative procedure.

Committee consideration

21. The Committee agreed that the instrument engages the following reporting grounds:
 1. Reporting ground (h), on the basis that the meaning of Regulation (EC) 1829/2003 could be clearer in regulation 3(1) of the Vegetable Seeds Regulations 1993 insofar as the definition inserted by regulation 9(2)(a)(ix) of the instrument is superfluous because of the definition of “the Food and Feed Regulation” inserted by regulation 9(2)(a)(iii).
 2. The general reporting ground, in respect of the following issues:
 - a. The reference to “Directive 2008/62/EC” in regulation 16(7)(a) of the instrument, amending regulation 7(2) of the Seed Potatoes (Scotland) Regulations 2015, does not attract the definition of “Commission Directive 2008/62/EC” in regulation 7(5) of the 2015 Regulations.
 - b. Regulation 13(5)(c) of the instrument should have substituted regulation 6(6) of the Cereal Seed (Scotland) Regulations 2005, with the provision made in regulation 13(5)(d) of the instrument being unnecessary.
22. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex B. The Scottish Government has undertaken to rectify the errors in regulations 9(2)(a)(ix) and 16(7)(a) of the instrument at the next available opportunity.
23. Furthermore, Part 3 of the instrument inserts provisions into a number of the marketing regulations for seed and plant propagating materials that refer to “*legislation recognised by the Scottish Ministers to have equivalent effect*” to various Regulations.

Recommendations

24. **The Committee draws the instrument to the attention of the Parliament on reporting ground (h) and on the general reporting ground as set out in paragraph 21(1) and (2) above.**
25. **The Committee welcomes the Scottish Government's undertaking to rectify the errors in regulations 9(2)(a)(ix) and 16(7)(a) of the instrument at the next available opportunity. However, the Committee calls on the Government to use that opportunity also to amend regulation 13(5)(c) and (d) of the instrument.**
26. **The Committee welcomes the Government's intention to amend the relevant provisions in the marketing regulations for seed and plant propagating materials to insert appropriate references to any specific legislation recognised as equivalent for the purposes of these provisions.**

Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/70) (Education and Skills)

Purpose

27. The purposes of these Regulations are:
 - to enable access to student support for persons who have been granted discretionary leave to remain in the UK as victims of modern slavery (including human trafficking),
 - to secure that all categories of students who are currently eligible for home fee status and student support (including eligible EU students) will continue to be eligible in the event that the UK exits the EU, whether or not a withdrawal agreement is in place,
 - to extend postgraduate student support to enable students undertaking Research Masters courses to access tuition fee and living cost loans, and
 - to allow more frequent data on employer deductions to be shared between the Student Loans Company and HMRC, to help reduce the instances of over-repayments of student loans.
28. The Regulations will come into force on 6 April 2019. This aligns the loan repayment changes with instruments being made by the other devolved administrations. The proposed changes to the student support residency criteria will take effect at the start of the 2019/20 academic year, in August.

29. The Regulations do not propose changes to “retained EU law” under the European Union (Withdrawal) Act 2018. They are made by virtue of powers contained in the Education (Scotland) Act 1980 and the Education (Fees and Awards) Act 1983.

Committee consideration

30. The Committee noted that the instrument contains the following drafting errors in regulation 9(2), which amends some interpretation provisions in regulation 2 of the Education (Fees) (Scotland) Regulations 2011.
31. Two references to paragraph 6D(a)(iii) and (b) and 6E(1)(c) of schedule 1 of those 2011 Regulations are errors, as those provisions do not exist. It appears that reference should have been made to paragraph 6D(1)(c), as inserted by regulation 9(3) of this instrument.
32. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex C.

Recommendations

33. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground as there are drafting errors in regulation 9(2), which amends some interpretation provisions in regulation 2 of the Education (Fees) (Scotland) Regulations 2011 as set out in paragraph 31 above.**
34. **The Committee notes that the Scottish Government has undertaken to correct the references the next time it makes regulations in the area of student support.**

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73) (Rural Economy and Connectivity)

Purpose

35. These Regulations correct technical deficiencies that will arise in some domestic secondary legislation related to agriculture, in a situation where the UK leaves the EU without a withdrawal agreement in place. This aims to ensure that those Regulations will continue to operate effectively following exit day, and not reflecting a change in policy.
36. The instrument is subject to the negative procedure, and the majority of the provisions come into force on “exit day”. A couple of provisions, which update references to EU legislation, come into force the day before.

Committee consideration

37. The Committee noted that provision in the instrument appears to be defectively drafted.
38. Regulation 5(3)(a) is contrary to the Scottish Government's intention, as the paragraph removes an offence provision. It is intended that it should remain an offence to fail to comply with Article 15a of EU Regulation 1760/2000, which provides rules for the voluntary labelling of beef, on marketing.
39. Regulation 5(3)(b) purports to revoke a provision which has already been revoked.
40. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex D. The Scottish Government has undertaken to make an amending instrument, to correct the errors timeously before the provisions in question come into force on 28 March 2019.

Recommendation

41. **The Committee draws the instrument to the attention of the Parliament on reporting ground (i), as regulation 5(3) appears to be defectively drafted as set out in paragraphs 38 and 39 above.**

No points raised

Justice

Act of Sederunt (Taxation of Judicial Expenses Rule) 2019 (SSI 2019/75)

Legal Aid and Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/78)

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Sanctions and Anti-Money Laundering) 2019 (SSI 2019/72)

Local Government and Communities

Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment (No. 2) Order 2019 (SSI 2019/77)

Rural Economy and Connectivity

Motor Sport on Public Roads (Scotland) Regulations 2019 [draft]

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

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

Animal Health (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/71)

Annex A

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [SI/draft]

On 1 March 2019, the Scottish Government was asked:

Article 4(1) (general modification of enactments) refers to section 117 of “the 1998 Act” but this term is not defined in the Order (although it is defined in line 1 of the explanatory note, for the purposes of the note).

(1) What is the effect of this lack of definition considered to be?

(2) Is any corrective action proposed?

The Scottish Government responded as follows:

(1) The Scottish Government thanks the Committee for drawing this point to its attention and acknowledges that it would have been preferable had the reference to “the 1998 Act” been defined in the Order. However, for the reasons set out below the Scottish Government does not consider that this omission affects the operation of the Order or its legal effect.

Firstly, the title of the Order makes clear that the focus of the Order is the Scotland Act 1998. The Order is entitled: The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019.

Secondly, the enabling powers of the Order are specified as being contained within the Scotland Act 1998, and article 2(1) also references the Scotland Act 1998. Both of these factors serve to emphasise that the Order is concerned with the Scotland Act 1998. Moreover, no other Acts from the year 1998 are referred to within the Order. Therefore, in the view of the Scottish Government, it is highly unlikely that any confusion could arise as to which “1998 Act” the reference in article 4(1) of the Order refers.

Thirdly, the reference in article 4(1) of the Order to “the 1998 Act” is a specific reference to section 117 of that Act and this reference includes both the crossheading and the title of that provision (general modification of enactments: Ministers of the Crown). In addition, the reference in article 4(1) of the Order to section 117 of the 1998 Act contains footnote (f), which specifies that section 117 is amended by the Scotland Act 2012 (c.11) section 12(1) and (2)(a). These descriptions provide context which confirms that the reference in article 4(1) of the Order to “the 1998 Act” could only be a reference to the Scotland Act 1998.

Finally, the Scotland Act 1998 is defined within the Explanatory Note to the Order as “the 1998 Act.”

Taking these four factors into account, the Scottish Government is of the view that it is clear that the reference to “the 1998 Act” within article 4(1) of the Order can only be construed as a reference to the Scotland Act 1998. The Scottish Government does not consider that the omission of a definition results in any confusion or ambiguity or has any effect on the proper operation of the Order.

(2) As the Scottish Government is of the view that this omission does not have any effect on the proper operation of the Order, it does not propose to take any immediate corrective action. If in the future the Order requires to be amended, the Scottish Government undertakes to work with the UK Government with a view to including a definition of “the 1998 Act” as regards article 4(1) at that time.

Annex B

Seed and Propagating Material (EU Exit) (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/59)

On 28 February 2019, the Scottish Government was asked:

1. Section 2(2) of the European Communities Act 1972 is the enabling power cited in respect of the provisions made in Part 2 of the instrument. A number of the provisions in Part 2 of the instrument (see e.g., regulation 2(6)) make provision for seed imported from outside the EU to be labelled with a label approved by the OECD, for the Scottish Ministers to certify the quality of seed intended for export, and for any seed exported to be labelled with a label approved by the OECD. Please explain how this falls within the vires of section 2(2), by identifying what EU obligation this relates to while the UK is still a member of the EU.

2. Regulation 9(2)(a)(ix) of the instrument inserts a definition of Regulation 1829/2003 into regulation 2(1) of the Vegetable Seeds Regulations 1993. That definition includes the words “as last amended by Regulation (EC) No 298/2008 [...]”. Regulation 9(2)(a)(iii) of the instrument inserts a definition of “the Food and Feed Regulation”, which means Regulation 1829/2003 but without reference to being amended by Regulation 298/2008. Please explain whether it is intended that there are two similar definitions of the same EU Regulation, with one as amended and the other not.

3. In Part 3 of the instrument, reference is made in a number of places (see e.g., regulation 9(10), inserting new regulation 11A into the Vegetable Seeds Regulations 1993) to “legislation recognised by the Scottish Ministers to have equivalent effect” to various Regulations. Similarly, provision is made in a number of places in Part 3 of the instrument for “such quantity as the Scottish Ministers consider is sufficient to sow 10 hectares” (see e.g., regulation 12(8)(c)).

a. Are these instances of sub-delegation to the Scottish Ministers and, if so, please explain how they are authorised?

b. Please explain how one is to establish what legislation has been recognised by the Scottish Ministers, or the quantity the Scottish Ministers consider is sufficient to sow 10 hectares.

c. Are these provisions sufficiently clear, or should they be made clearer?

4. Regulation 12(8)(e) of the instrument omits “or, as the case may be, Switzerland” from regulation 8A(10) of the Oil and Fibre Plant Seed (Scotland) Regulations 2004. Footnote (b) cross-refers to amendments to regulation 8A(10) made by Part 2 of the instrument. However, it does not appear that regulation 8A(10) of the 2004 Regulations expressly includes reference to Switzerland, whether amended by Part 2 of the instrument or otherwise. Please explain how the reference to Switzerland exists to be omitted by regulation 12(8)(e) of the instrument. (See also regulation 13(8)(e), and, along similar lines, regulation 14(26)(h)(iii)(dd), (ee) and (ff)).

5. Regulation 13(5)(c) of the instrument inserts paragraph (6) into regulation 6 of the Cereal Seed (Scotland) Regulations 2005. There is already a regulation 6(6) of the 2005

Regulations. Regulation 13(5)(d) of the instrument omits paragraph (6) (of regulation 6 of the 2005 Regulations).

a. Given the ordering of the provision made in regulation 13(5)(c) and (d) of the instrument, is it sufficiently clear which regulation 6(6) of the 2005 Regulations is being omitted (i.e. the existing one or the one inserted by the instrument)?

b. Should regulation 13(5)(c) instead make a substitution of regulation 6(6) of the 2005 Regulations, with regulation 13(5)(d) of the instrument being unnecessary?

6. Regulation 16(7)(a) of the instrument amends regulation 7(2) of the Seed Potatoes (Scotland) Regulations 2015. It substitutes in the words “Article 14 of Directive 2008/62/EC” (among other words). Existing regulation 7(5) of the 2015 Regulations contains a definition of “Commission Directive 2008/62/EC” (part of the words substituted out by regulation 16(7)(a) of the instrument). Is there an error, insofar as the new reference to “Article 14 of Directive 2008/62/EC” no longer attracts the definition in regulation 7(5)?

Is any corrective action proposed?

The Scottish Government responded as follows:

1. In relation to the provisions inserting references to imports and exports and labelling of OECD seed, this reflects requirements reflected in EU law as regards trading in seed produced in third countries. For example, Council Decision 2013/17/ECⁱ sets out the requirements for recognition of non-EU countries seeking to trade with the EU as providing equivalent guarantees of quality as EU produced seed. This includes, for example, requirements in Annex B of that Decision that following official certification of the seed in the relevant third country, the seed shall be labelled in accordance with the national rules for the application of the applicable OECD schemes. The OECD schemes, which the EU has signed up to, provide a basis for international trade in seedⁱⁱ. The Scottish Government is therefore satisfied that the relevant provisions relate to existing EU obligations and are therefore within the vires of section 2(2) of the European Communities Act 1972.

2. In relation to regulations 9(2)(a)(iii) and (ix) of the instrument, these relate in particular to the provisions concerning marketing of seed containing genetically modified material following exit day which has been authorised both in relation to the applicable EU law as contained in Regulation 1829/2003 as it applied prior to exit day (in relation to all EU Member States including the United Kingdom) and, following exit day, so far as it will continue to apply specifically in relation to the United Kingdom as retained EU law. The Scottish Government did not intend that there should be 2 separate definitions and accepts that this is an error which should be corrected (to amend the definition inserted by regulation 9(2)(a)(iii) and to remove the superfluous definition inserted by regulation 9(2)(a)(ix)) at the next available opportunity. We are grateful to the Committee for drawing it to our attention.

3. In relation to the relevant provisions in Part 3:

ⁱ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1551441845951&uri=CELEX:02003D0017-20181202> See also: https://ec.europa.eu/food/plant/plant_propagation_material/equivalence_requirements_non-eu_en

ⁱⁱ <http://www.oecd.org/tad/code/seeds.htm>

(a) Provisions concerning “legislation recognised by the Scottish Ministers to have equivalent effect”

The context of provisions such as regulation 9(10) inserting a new regulation 11A into the Vegetable Seeds Regulations 1993 is to specifically address the position of Crown Dependencies following the United Kingdom’s exit from the EU. Under EU law as it currently stands, whilst the Crown Dependencies are neither part of the United Kingdom nor members of the EU in their own right, technically the relevant provisions of EU law in relation to seed marketing automatically apply to them by virtue of Regulation (EEC) No 706/73ⁱⁱⁱ without the need for express provision.

Whilst in practice, as things currently stand, the Crown Dependencies do not market certified seed and propagating material in the UK and do not currently have equivalent legislation, following discussion with the Crown Dependencies and the other UK administrations, it was agreed that following the UK’s exit from the EU it would be desirable to legislate for a mechanism to facilitate the future marketing throughout the UK of seed which may be produced in Crown Dependencies. This would be to ensure that Crown Dependencies are not, following exit day, automatically treated as third countries.

The Scottish Government considers that the provisions seek to address a potential failure of retained EU law to operate effectively within the meaning of paragraph 1(1)(a) of schedule 2 of the European Union (Withdrawal) Act 2018 (“the 2018 Act”), given how EU law currently applies to the Crown Dependencies and also bearing in mind section 8(5) of the 2018 Act^{iv}, as that provision applies by virtue of paragraph 1(3) of schedule 2 of the 2018 Act. So the provisions are considered to be within the scope of the relevant powers in the 2018 Act.

In the event that Crown Dependencies sought to market certified seed and propagating material in the UK in the future and develop legislation to pave the way for that, it is intended through the planned UK Common Framework to agree a consistent and transparent process for determining what legislation would be equivalent. This would be to avoid inadvertently creating any internal barriers to trade within the UK. In that event, taking on board the Committee’s comments it would be the Scottish Government’s intention to specifically amend the relevant provisions in the various seed marketing SSIs in order to insert appropriate references to any legislation considered as equivalent for the purposes of those provisions.

(b) Provisions for “such quantity as the Scottish Ministers consider is sufficient to sow 10 hectares”.

The amendment made by Regulation 12(8)(c) simply replicates the effect of an existing provision in Article 7 of Commission Decision 2004/842/EC^v in the context of seed tests and trials authorisations and limitations on the quantities of seed in respect of such authorisations. Although regulation 8A(6) of the Oil and Fibre Plant Seed (Scotland) Regulations 2004 currently cross-refers to that Decision and the latter will, following exit day, become retained EU law in consequence of section 3 of the 2018 Act, the Scottish

iii <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1551438221285&uri=CELEX:01973R0706-19860424>

iv Which provides that regulations under section 8(1) may make any provision that could be made by an Act of Parliament.

v <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1551440011387&uri=CELEX:0372004D0842-20170401>

Government considered that it would be clearer simply to replicate the effect of the provision. After exit day the references in that Decision to “Member State” continue to reflect the exercise of the relevant functions in practice by the Scottish Ministers in relation to Scotland and the frame of reference for the quantity restrictions being the United Kingdom as a whole. The Scottish Government does not consider that this amounts to sub-delegation and, in any event, is within the scope of paragraph 21(b) of schedule 7 of the 2018 Act (which includes restatement of retained EU law in a clearer or more accessible way).

The exercise of the relevant functions by the Scottish Ministers will therefore continue to operate as currently. In practice, the Scottish Ministers only occasionally receive requests to authorise the placing on the market of seed belonging to varieties for which an application for entry in the national catalogue of varieties of agricultural plant species or vegetable species has been submitted, the amounts are generally small and are for tests and trial purposes only. It is relatively straightforward in practice to ascertain that the quantity involved is less than 0.1% of the seed of the same species used in the United Kingdom as a whole by reference to existing census data on areas of a crop grown in the United Kingdom from which it can be readily extrapolated average seed production rates to calculate a value for the tonnage of seed utilised in the United Kingdom. This can then be used to calculate, in the context of this particular provision, the 0.1% figure. Similarly, the quantity of seed required sufficient to sow 10 hectares can be readily calculated by reference to existing available data on typical seed production rates. So the Scottish Government considers that the amended provisions are sufficiently clear.

4. In relation to the omissions of references to Switzerland in Part 3 of the instrument, the Scottish Government sets out in each case the relevant provisions in Part 2 of the instrument which inserted such references in the first place and the amendments in Part 3 must be read in the light of those:

- Regulation 12(8)(e) – see regulation 3(5) of the instrument;
- Regulation 13(8)(e) – see regulation 4(5) of the instrument;
- Regulation 14(26)(h)(ii)(dd), (ee) and (ff) – see regulation 5(7) of the instrument.

5. In relation to regulation 13(5)(c), the intention is to omit the existing regulation 6(6) of the 2005 Regulations and replace it and the Scottish Government considers that this is sufficiently clear from the context. However, the Scottish Government accepts that it would have been clearer to have simply substituted regulation 6(6) and that regulation 13(5)(d) would not then have been necessary.

6. In relation to regulation 16(7)(a), the intention is to refer to Article 14 of Commission Directive 2008/62/EC which, as the Committee has noted, is already a defined term in existing regulation 7(5) of the 2015 Regulations. Whilst the Scottish Government considers that the provision is sufficiently clear as drafted when read in the context of the whole provision, the Scottish Government will amend the provision at the next available opportunity.

Finally, in relation to proposed corrective action, the Scottish Government refers to its comments in relation to paragraphs 2 and 6 above.

Annex C

Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/70)

On 28 February 2019, the Scottish Government was asked:

1. Regulations 3(b), 4(b), 5(b), 6(3)(b), 7(5)(c), 8(3)(b) and 9(3)(b) amend various Regulations so that the eligibility criteria relating to student funding and tuition fees under those Regulations will continue to apply to the same categories of persons after the UK's withdrawal from the European Union. Each of those paragraphs refers in two places to "exit day", but it appears that that expression is not defined within the various Regulations which are amended, nor by the Education (Scotland) Act 1980 or the Education (Fees and Awards) Act 1983 under which this instrument is made, nor by this instrument.

So is there an omission (or please explain otherwise)?

2. Regulation 9(2) amends regulation 2(3) and (4) of the Education (Fees) (Scotland) Regulations 2011 to insert (among other references) reference to paragraphs 6D(a)(iii) and (b) and 6E(1)(c) of schedule 1 (fees-excepted students) of the Education (Fees) (Scotland) Regulations 2011. That regulation 2(3) and (4) sets out rules as to the ordinary residence of students who move from other parts of the UK or the Channel Islands to Scotland. However, regulation 9(3) only inserts a paragraph 6D into schedule 1, in relation to students who have been granted discretionary leave to remain in the UK due to being a victim of modern slavery.

So are there errors in regulation 9(2) (or please explain otherwise)?

3. Is corrective action proposed?

The Scottish Government responded as follows:

1. The Scottish Government notes the Committee's observations on the references to "exit day" in various regulations. The Scottish Government intends to rely on sections 5 and 23 of the Interpretation Act 1978 and the definition of "exit day" that has been inserted into schedule 1 of that Act, which applies to these Regulations as well as the primary legislation under which they are made. Paragraph 1 of schedule 1 was amended by paragraph 22(e) of schedule 8(2) of the European Union (Withdrawal) Act 2018, and now states that: "'Exit day" (and related expressions) have the same meaning as in the European Union (Withdrawal) Act 2018 (see section 20(1) to (5) of that Act)." "Exit day" is currently defined as 29 March 2019 at 11.00p.m. The Committee may find it helpful to note that it is not the Scottish Government's intention for these provisions to be commenced on exit day. They will come into force on 6 April 2019 and they simply aim to ensure that the status quo is maintained for the academic year commencing on 1 August following exit day. In the event that the existing definition of "exit day" is amended by further UK legislation, the provisions in the Regulations will have no practical effect until the academic year commencing after the revised exit day.

2. The Scottish Government is grateful to the Committee for drawing its attention to this point and agrees that the reference to paragraph 6E(1)(c) of schedule 1 of the Education (Fees) (Scotland) Regulations 2011 ("the 2011 Regulations"), which regulation 9(2) of the SSI inserts into regulations 2(3) and (4) of the 2011 Regulations, is a drafting oversight.

3. The Scottish Government will correct the misplaced reference to paragraph 6E(1)(c) of schedule 1 of the 2011 Regulations the next time it makes regulations in the area of student support. In the meantime, the Scottish Government does not consider that the reference has any legal effect, in the absence of a paragraph 6E in schedule 1 of the 2011 Regulations.

Note: The Committee will wish to note that the Scottish Government has previously made a commitment to consolidate and update the various instruments of secondary legislation which regulate student fees and student support in the higher education sector in Scotland with a view to ensuring greater clarity and consistency. The Scottish Government remains committed to doing so at the earliest opportunity and continues to work on ascertaining the extent of any amendments which are likely to be necessary as a result of the student support review and the UK's exit from the European Union.

Annex D

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73)

On 28 February 2019, the Scottish Government was asked:

Regulation 41(3) of the Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) (Scotland) Regulations 2018 has, with effect from 28 February 2019, substituted heads (vii) and (viii) of regulation 4(1)(a) (offences under European legislation) of the Beef and Veal Labelling (Scotland) Regulations 2010 with a new head (vii).

1. Is it an error therefore that regulation 5(3)(b) of this instrument purports to omit regulation 4(1)(a)(viii) with effect from 28 March 2019? Otherwise, please explain.

2. Is any corrective action proposed?

The Scottish Government responded as follows:

1. There is an error, and the Scottish Government is grateful to the Scottish Parliament for drawing this issue to our attention.

Regulation 41(3) of the Environment, Food and Rural Affairs (Miscellaneous Amendments and Revocations) (Scotland) Regulations 2018 (the “2018 Regulations”) amend the Beef and Veal Labelling (Scotland) Regulations 2010 (the “2010 Regulations”).

With effect from 28 February 2019 the 2018 Regulations substituted the current subparagraph (vii) of regulation 4(1)(a) of the 2010 Regulations for the previous subparagraphs (vii) and (viii) of that regulation.

Regulation 4 of the 2010 Regulations makes it an offence to fail to comply with any the provisions in EU instruments that are specified in that regulation. The change in the 2018 Regulations had the effect of removing references to Articles 16(4) and 17(1) of EU Regulation 1760/2000, and substituting a reference to Article 15a of that Regulation.

It follows that neither regulation 5(3)(a) nor (b) of this SSI have the intended effect, although only regulation 5(3)(a) will actually amend the law on 28 March 2019 given that regulation 4(1)(a)(viii) of the 2010 Regulations has already been revoked (as set out above).

Regulation 5(3)(a) of this SSI will unless revoked remove the reference to Article 15a of EU Regulation 1760/2000, which is an error as it is indeed intended that it should be an offence to fail to comply with that Article.

2. The Scottish Ministers intend to make an amending instrument to come into force on 27 March 2019, which will correct this error before it would otherwise have effect.

