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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 19 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 19 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-

Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84).

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-

Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84)

Sea Fish Licensing (Foreign Vessels) (EU Exit) (Scotland) Order 2019 (SSI 2019/87)

Sea Fishing (Licences and Notices) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/88)

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Amendment Regulations 2019 (SSI 2019/89).

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 (scrutiny procedure and categorisation)

Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84) (Environment, Climate Change and Land Reform)

Purpose

6. These Regulations amend the definition of “wild bird” in the Wildlife and Countryside Act 1981, so that when the UK leaves the EU, birds which are resident in, or visitors to, the United Kingdom will continue to be caught by the definition and will benefit from the protection which this status confers.

Committee consideration

7. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
8. The Committee is content that the negative procedure is appropriate. The Committee is also content with the categorisation given that the amendment being made is minor and technical in nature and ensures continuity of law with no policy change.

Recommendations

9. **The Committee recommends to the Environment, Climate Change and Land Reform Committee that the negative procedure is the appropriate scrutiny procedure for the Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84).**
10. **The Committee recommends to the Environment, Climate Change and Land Reform Committee that the Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

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

Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] (Health and Sport)

Purpose

11. This instrument amends the National Health Service (Scotland) Act 1978 and the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013. The changes remedy deficiencies in retained EU law relating to cross-border healthcare in circumstances where the UK leaves the EU without a withdrawal agreement in place (known as a “no-deal Brexit”).
12. It provides a mechanism for ensuring there is no interruption to healthcare arrangements for people accessing healthcare through Directive 2011/24/EU after exit day in those EEA Member States that agree to maintain the current arrangements in place with the UK for a transitional period until 31 December 2020. Those agreements are conducted at a UK level. However, the instrument extinguishes rights to reimbursement in countries where there is no reciprocity.
13. The instrument also makes transitional provision for patients who are in the process of obtaining cross-border healthcare on exit day. In addition, it provides for UK state pensioners and their families residing in the EEA on exit day to access NHS healthcare in Scotland free of charge for a period of up to one year from exit day.

Committee consideration

14. The instrument is laid under the mandatory affirmative procedure in paragraph 1(6) of schedule 7 of the European Union (Withdrawal) Act 2018. However, the Committee considered that the instrument should have been laid under paragraph 1(7) of schedule 7. This would have engaged the sift under the EU Exit SSI Protocol in respect of the choice of negative or affirmative parliamentary procedure.
15. In any event, the Committee considered that the affirmative procedure would have been the appropriate procedure if the instrument had been laid under paragraph 1(7). Accordingly, it concluded that the practical effect would be the same.
16. The Committee noted that the Scottish Government has categorised the instrument as having medium significance under the SSI Protocol. Some of the changes are technical in nature and are required in the event of a no deal Brexit. There are, however, some more significant provisions, particularly on transitional periods. Nevertheless, the Scottish Ministers’ policy discretion is limited in light of the wider UK approach to agreeing continued reciprocity with EEA states on a case by case basis.

Recommendation

17. **The Committee recommends to the Health and Sport Committee that the draft Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 is appropriately categorised as Medium in terms of its significance under the SSI Protocol.**

Points raised: Instruments subject to affirmative procedure

Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] (Health and Sport)

Purpose

18. As set out at paragraphs 11 to 13 above, this instrument amends the National Health Service (Scotland) Act 1978 and the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013.
19. The instrument is subject to the affirmative procedure.

Committee consideration

20. The Committee noted that the instrument contains the following error.
21. The reference to “Regulation (EC) No 883/2004” in regulation 5(8) of the instrument, inserting regulation 10A into the National Health Service (Cross-Border Health Care) (Scotland) Regulations 2013 (SSI 2013/292), should have captured the definition of “Regulation (EC) No 883/2004” that exists in regulation 10 of SSI 2013/292.
22. This issue was raised with the Scottish Government and the correspondence is reproduced at Annex A.

Recommendations

23. **The Committee draws the instrument to the attention of the Parliament under the general reporting ground, as it contains an error in regulation 5(8) as set out in paragraph 21 above.**
24. **The Committee calls on the Scottish Government to correct this error at the next legislative opportunity.**

Points raised: Instruments subject to negative procedure

Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84) (Environment, Climate Change and Land Reform)

Purpose

25. As set out at paragraph 6 above, these Regulations amend the definition of “wild bird” in the Wildlife and Countryside Act 1981.
26. This instrument is subject the negative procedure and will come into force on exit day (which is currently 29th March 2019).

Committee consideration

27. The Committee noted that the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
28. The Regulations were laid before the Parliament on 8 March 2019 and will come into force on 29 March 2019. This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.
29. The Scottish Government has explained in a letter to the Presiding Officer that the rule has been breached because it is necessary for the amendment contained in the Regulations to come into force before Exit Day. This correspondence is reproduced in Annex B.
30. Whilst the Committee accepted that it is necessary for the amendment to come into force before exit day, it considered that the Government had not explained why the instrument could not have been laid earlier, to avoid breaching the 28-day rule.

Recommendations

31. **The Committee draws the Regulations to the attention of the Parliament on reporting ground (j) as the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform Scotland Act 2010.**
32. **Given the exceptional circumstances of Brexit, the Committee finds that the failure to comply with section 28 is acceptable in this instance.**

Sea Fish Licensing (Foreign Vessels) (EU Exit) (Scotland) Order 2019 (SSI 2019/87) (Rural Economy and Connectivity)

Purpose

- 33. The purpose of this instrument is to prohibit foreign fishing boats fishing in the Scottish zone without first obtaining a licence from the Scottish Ministers. The Order is made in consequence of the UK's withdrawal from the EU to ensure that fisheries within the Scottish zone can be managed and controlled appropriately.
- 34. The Order is subject to the negative procedure and is due to come into force on exit day.

Committee consideration

- 35. The Committee noted that the Order fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
- 36. The Order was laid before the Parliament on 12 March and comes into force on exit day (which is scheduled for 29 March). This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.
- 37. The Scottish Government has explained its reasons for not complying with section 28(2) in a letter to the Presiding Officer. The correspondence is reproduced in Annex C.

Recommendations

- 38. **The Committee draws the instrument to the attention of the Parliament on reporting ground (j) as the Order fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
- 39. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances.**

Sea Fishing (Licences and Notices) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/88) (Rural Economy and Connectivity)

Purpose

- 40. These Regulations extend the application of the Sea Fishing (Licences and Notices) (Scotland) Regulations 2011 to licences granted by Scottish Ministers to foreign fishing boats.

41. The Regulations are subject to the negative procedure and are due to come into force on exit day.

Committee consideration

42. The Committee noted that the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
43. The Regulations were laid before the Parliament on 12 March and come into force on exit day (which is scheduled for 29 March). This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.
44. The Scottish Government has explained its reasons for not complying with section 28(2) in a letter to the Presiding Officer. The correspondence is reproduced in Annex C.

Recommendations

45. **The Committee draws the instrument to the attention of the Parliament on reporting ground (j) as the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
46. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances.**

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Amendment Regulations 2019 (SSI 2019/89) (Rural Economy and Connectivity)

Purpose

47. The purpose of the Regulations is to correct the drafting error in SSI 2019/73 which the Committee considered and reported on last week.ⁱ
48. The Regulations correct the error by revoking regulation 5(3)(a) and (b) of SSI 2019/73. They come into force on 27 March 2019, which is the day before the date that the error would otherwise have had effect.
49. The effect is to secure that it remains an offence in terms of the Beef and Veal Labelling (Scotland) Regulations 2010 to breach Article 15a of Regulation (EC) 1760/2000, which relates to requirements for the voluntary labelling of beef, on marketing. This also secures that those 2010 Regulations will comply with EU law (in relation to the offence provision) as it will be immediately before “exit day”.

ⁱ 12th Report, 2019.

Committee consideration

50. The Committee noted that the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
51. The Regulations were laid before the Parliament on 13 March and come into force on 27 March 2019. This does not respect the requirement that at least 28 days should elapse between the laying of an instrument which is subject to the negative procedure and the coming into force of that instrument.
52. The Scottish Government has explained its reasons for not complying with section 28(2) in a letter to the Presiding Officer. The correspondence is reproduced in Annex D.

Recommendations

53. **The Committee draws the Regulations to the attention of the Parliament on reporting ground (j) as the Regulations fail to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
54. **The Committee finds the failure to comply with section 28 to be acceptable in the circumstances.**

No points raised

Justice

Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Ordinary Cause Rules Amendment) (Taxation of Judicial Expenses) 2019 (SSI 2019/74)

Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (Miscellaneous) 2019 (SSI 2019/81)

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Regulation (EC) No. 44/2001) (Transitional Provisions) 2019 (SSI 2019/85)

Annex A

Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

On 13 March 2019, the Scottish Government was asked:

1. These draft Regulations are laid before the Parliament under paragraph 1(6) of schedule 7 of the European Union (Withdrawal) Act 2018 (mandatory affirmative) rather than paragraph 1(7) of that schedule, the latter of which would engage the sift under the Brexit SSI protocol. With reference to the criteria in paragraph 1(2) of that schedule, please explain why the mandatory affirmative procedure is considered to apply. Is the Scottish Government's position that it falls within paragraph 1(2)(b) of schedule 7 of the EUWA (fee in respect of a function exercisable by a public authority in the UK) insofar as the instrument relates to reimbursement of healthcare costs by local NHS boards? If so, does that relate to a "fee"?
2. Regulation 5(8) of the instrument inserts new regulation 10A into SSI 2013/292. Regulation 10A(4) provides that the term "member of the family" "has the meaning it had for the purposes of Regulation (EC) No 883/2004 immediately before exit day." Regulation (EC) No 883/2004 is defined in regulation 10 of SSI 2013/292. However, that definition applies only to regulation 10 (see regulation 10(4)(b)). Could the meaning of Regulation (EC) No 883/2004 be clearer in Regulation 10A of the instrument?
3. Is any corrective action proposed?

The Scottish Government responded as follows:

1. The Scottish Government's position is that the mandatory affirmative procedure applies because the Regulations fall within paragraph 1(2)(b) of schedule 7 of the EUWA (fee in respect of a function exercisable by a public authority in the UK) insofar as the instrument relates to reimbursement of healthcare costs by local NHS boards. The Scottish Government acknowledges that an alternative argument could be made that a "fee" is in some way distinct from a recovery of the costs of providing a service. However, the costs of providing the service include not only the cost of the healthcare personnel providing treatment, but also the costs of materials and overheads (the latter which will be based on recovery of the overall costs of running the service) so the amount recovered should be indistinguishable in its build up from the amount recovered as fees by, for example, a not for profit healthcare provider. Therefore, it is considered that the better view and safer course of action is that taken.
2. The Scottish Government thanks the Committee's legal advisers for drawing this matter to their attention and notes that for absolute clarity the definition of Regulation (EC) No 883/2004 in regulation 10 should have been extended to regulation 10A. However, the Scottish Government considers that the meaning of the reference to Regulation (EC) No 883/2004 is clear enough, and no corrective action is proposed.

Annex B

Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84)

Breach of laying requirements: letter to the Presiding Officer

The Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019, SSI 2019/84, was made by the Scottish Ministers under paragraph 1(1) and (3) of schedule 2 of the European Union (Withdrawal) Act 2018 and all other powers enabling them to do so on 7 March 2019. It is being laid before the Scottish Parliament today, 8 March and comes into force on Exit day.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) of that Act, this letter explains why.

The Regulations are required to address a deficiency arising from the withdrawal of the United Kingdom from the European Union. The deficiency relates to the definition of a wild bird as provided for Scotland at section 27(1) of the Wildlife and Countryside Act 1981 which is the principal Act transposing the requirement for a general system of protection for all wild birds under Council Directive 79/409/EEC on the conservation of wild birds. This definition currently only includes species which are ordinarily resident in, or are visitors to, any Member State or the European territory of any Member State. Should EU-exit occur, the Regulations will add the United Kingdom to this definition.

We apologise for breaching Standing Orders on this occasion, however it is considered that it is necessary that the definition is remedied ahead of exit day to ensure the ongoing protection of all wild bird species in Scotland.

Annex C

Sea Fish Licensing (Foreign Vessels) (EU Exit) (Scotland) Order 2019 (SSI 2019/87) and the Sea Fishing (Licences and Notices) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/88)

Breach of laying requirements: letter to the Presiding Officer

The Sea Fishing (Licences and Notices) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/88) and the Sea Fish Licensing (Foreign Vessels) (EU Exit) (Scotland) Order 2019 (SSI 2019/87) were signed on 12 March. They are being laid before the Scottish Parliament today, 12 March and comes into force on exit day. Exit day is 29th March 2019 (set out in section 20(1) of the European Union (Withdrawal) Act 2018).

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

The purpose of these SSIs is to put in place contingency measures in the event that the UK Fisheries Bill has not been passed into law by 29 March 2019. This is now a much more probable scenario. Amongst other provisions the bill makes provision for a licensing regime for foreign vessels in UK waters. However due to the delay in the passage of the bill we now find ourselves in the unenviable position of having to progress these alternative measures at very short notice. The Scottish Government has been working closely with Defra and other devolved administrations on these provisions to ensure a workable regime for licensing and enforcement in the event that the UK leaves the EU without any deal or withdrawal agreement in place.

It was only recently agreed that we would need to take this step, and to ensure a consistent approach we were required to work with Defra and the other devolved administrations on drafting these SSIs. It was therefore, not possible for us to lay these SSIs in advance of Defra's timetable. We apologise for this but it has been completely outwith our control.

The Scottish Government considers that it is necessary that these SSIs are in force for exit day to ensure the regulation of foreign fishing boats in the Scottish zone from day one in the event of a no deal EU exit. In order to operate an effective licensing regime it is unfortunately necessary for these SSIs to come into force ahead of the 28 day period set out in legislation.

Annex D

Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Amendment Regulations 2019 (SSI 2019/89)

Breach of laying requirements: letter to the Presiding Officer

The Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Amendment Regulations 2019, SSI 2019/89 were made by the Scottish Ministers under section 2(2) of the European Communities Act 1972.

They are being laid before the Scottish Parliament today, 13 March 2019, and come into force on 27 March 2019.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) of that Act, this letter explains why.

These Regulations correct an error in the Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (S.S.I. 2019/73) (the “2019 Regulations”), the relevant part of which comes into force on 28 March 2019.

The error was identified by the Delegated Powers and Law Reform Committee after the instrument was laid, and the Scottish Ministers undertook to correct it before that part of the 2019 Regulations came into force.

These Regulations revoke regulation 5(3)(a) and (b) of the 2019 Regulations, which amend regulation 4 of the Beef and Veal Labelling (S) Regulations 2010 (S.S.I. 2010/402) (the “2010 Regulations”). Regulation 4 of the 2010 Regulations provides for it to be an offence to fail to comply with the provisions in EU legislation specified in that regulation.

The failure to comply with section 28(2) of the 2010 Act is necessary both to comply with the undertaking given to the Parliament, and to ensure that it will continue to be an offence to fail to comply with Article 15a of Regulation (EC) No 1760/2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products.

