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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 24 November 2020



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 24 November 2020, the Committee considered the following instruments under the [SSI 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) Regulations 2020 (SSI 2020/draft);
 - Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/372);
 - Agriculture (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/368)
 - Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft);
 - Common Agricultural Policy (Less Favoured Area Support) (EU Exit) (Scotland) Amendment Regulations 2020 (SSI 2020/draft);
 - Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft); and
 - Trade in Animals and Related Products (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft).
2. The Committee's recommendations in relation to these instruments are set out in the following section of this report.
3. The Committee agreed to draw the following instrument to the attention of the lead committee:
 - Direct Payments to Farmers (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/draft).
4. The Committee's recommendation in relation to this instrument is set out later in the report.
5. The Committee also 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 European Union (Withdrawal) Act 2018

Cross-border Health Care (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Purpose

6. This instrument amends the Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019.

Committee consideration of the scrutiny procedure under which it has been laid and the categorisation applied by the Scottish Government

7. The instrument has been laid under the affirmative procedure and has been categorised by the Scottish Government as of medium significance under the SSI Protocol.

8. The Committee is content that the use of the affirmative procedure is appropriate in these circumstances.

9. The Committee is also content that the instrument should be categorised as medium in terms of its significance under the SSI Protocol.

Food and Feed (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Purpose

10. This instrument amends 8 instruments, including 5 previous EU Exit instruments in the field of food and feed regulation.

Committee consideration of the scrutiny procedure under which it has been laid and the categorisation applied by the Scottish Government

11. The instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance under the SSI Protocol.

12. The Committee is content that the use of the negative procedure is appropriate in these circumstances because of the technical nature of the deficiency-correcting provisions.

13. The Committee is also content that the instrument should be categorised as low in terms of its significance under the SSI protocol.

Agriculture (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Purpose

14. The Regulations make technical amendments to various Scottish statutory instruments in the field of agriculture market measures; in particular, legislation relating to eggs and chicks, fruit and vegetables, poultrymeat and school milk. They also amend legislation relating to Common Agricultural Policy schemes in Scotland.

Committee consideration of the scrutiny procedure under which it has been laid and the categorisation applied by the Scottish Government

15. The instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance under the SSI Protocol.

16. The Committee is content that the use of the negative procedure is appropriate as it contains minor and technical amendments and does no more than is necessary to ensure continuity of law and operability at the end of the implementation period.

17. The Committee is also content that the instrument should be categorised as low in terms of its significance under the SSI protocol.

Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Purpose

18. The instrument amends previous regulations, including the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016, which currently implement the EU Procurement Directives in domestic legislation. It also revokes and replaces a number of EU Exit SSIs before they come into force.

Committee consideration on how the instrument has been categorised by the Scottish Government

19. The instrument has been categorised by the Scottish Government as of high significance under the SSI Protocol.

20. The Committee is content that the instrument should be categorised as high in terms of its significance under the SSI protocol. Although it deals with a large amount of technical detail, it transfers a number of functions, including legislative powers, to the Scottish Ministers.

Common Agricultural Policy (Less Favoured Area Support) (EU Exit) (Scotland) Amendment Regulations 2020 (SSI 2020/draft) (re-laid)

Purpose

21. The Regulations are made under the enabling powers in two separate Acts:
 - The deficiency-correcting power in the European Union (Withdrawal) Act 2018
 - Sections 2, 3 and 4 of the Agriculture (Retained EU Law and Data) (Scotland) Act 2020.
22. The Committee only looked at the deficiency-correcting element of the instrument, which is a very minor element of the whole instrument
23. The deficiency being corrected is in the Less Favoured Area Support Scheme (Scotland) Regulations 2010.

Committee consideration on how the instrument has been categorised by the Scottish Government

24. The instrument has been categorised by the Scottish Government as of low significance under the SSI Protocol.

25. The Committee is content that the instrument should be categorised as low in terms of its significance under the SSI protocol.

Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (SSI 2020/draft)

Purpose

26. These Regulations correct deficiencies in various pieces of domestic legislation which implements Regulation (EU) 2016/2031 and Regulation (EU) 2017/625 and associated EU legislation relating to plant health and official controls. The Regulations also fix deficiencies in related fees legislation and legislation relating to forestry Environmental Impact Assessments before the end of the transition period. Furthermore, the Regulations make provision to update domestic legislation relating to plant health before it becomes retained EU law.

Committee consideration on how the instrument has been categorised by the Scottish Government

27. The instrument has been categorised by the Scottish Government as of medium significance under the SSI Protocol.

28. The Committee is content that the instrument should be categorised as medium in terms of its significance under the SSI protocol.

Trade in Animals and Related Products (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Purpose

29. These Regulations make changes to the Trade in Animals and Related Products (Scotland) Regulations 2012 so that they continue to operate effectively after 31 December 2020.

Committee consideration on how the instrument has been categorised by the Scottish Government

30. The instrument has been categorised by the Scottish Government as of medium significance under the SSI Protocol.

31. The Committee is content that the instrument should be categorised as medium in terms of its significance under the SSI protocol. Although the instrument is primarily concerned with technical detail, it does include some more significant provisions that may warrant committee scrutiny, or more significant policy choice for Ministers but with limited implications. These aspects are:

- The provisions providing for a phased introduction of checks and pre-notification of EU (and EEA) goods at the end of the transition period. These will require, from 1 January 2021, pre-notification for imports of animal by-products and products which have been presented to certain member State border control posts (in addition to the pre-notification for live animals and germinal products already required under the EU Official Controls Regulation as amended by the draft Official Controls (Animals, Feed and Food, Plant Health etc) (Amendment) (EU Exit) Regulations 2020). From 1 April 2021, pre-notification of products of animal origin will also be required.
- A transitional provision pertaining to the re-importation of animals and products from Scotland which are rejected from entering the EU. These animals and products will not be required to re-enter via a border control post, provided that the Scottish Ministers or Food Standards Scotland are pre-notified and that they authorise the re-entry other than via a border control post.

Scrutiny of instruments under the Committee's remit: instrument drawn to the attention of the lead committee

Direct Payments to Farmers (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/draft)

Purpose

32. The instrument makes provision in the retained EU law governing the schemes for direct payments to farmers, to allow these schemes to continue beyond the 2020 claim year (which ends on 31 December 2020). It also amends three relevant SSIs.
33. The instrument establishes a mechanism for fixing the ceilings for the total amount of payments that can be made in Scotland in years beyond 2020, and makes the retained EU law operate effectively beyond 2020. It makes what the Scottish Government considers to be simplifications and improvements to this body of law.
34. The Committee wrote to the Scottish Government on 13 November asking a number of questions on the instrument (see Annex).
35. The Scottish Government responded to the points raised by the Committee on 17 November 2020 (see Annex).
36. The Committee agreed to draw this instrument to the attention of the Parliament under the general reporting ground, on the basis that the words "its share of" could have been omitted from Article 14 of the Direct Payments Regulation for consistency with the equivalent amendments made by the instrument to Articles 22(2), 23(2) and 25(1).
37. The Committee also agreed to call upon the Scottish Government to correct this at the next available legislative opportunity.

No points raised

COVID Committee

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/374)

Coronavirus Act 2020 (Suspension: Adult Social Care) (Scotland) Regulations 2020 (SSI 2020/377)

Economy, Energy and Fair Work Committee

Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Education and Skills Committee

Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 (Fees) (Coronavirus) (Amendment) Regulations 2020 (SSI 2020/376)

Environment, Climate Change and Land Reform Committee

Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 (Commencement No. 1 and Transitional Provision) Regulations 2020 (SSI 2020/379 (C. 32))

Equalities and Human Rights Committee

Age of Criminal Responsibility (Scotland) Act 2019 (Commencement No. 3) Regulations 2020 (SSI 2020/369 (C. 30))

Health and Sport Committee

Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 23) Regulations 2020 (SSI 2020/378)

Cross-border Health Care (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/draft)

Feed (Transfer of Functions) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/draft)

Justice Committee

Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2020 (SSI 2020/365)

Act of Sederunt (Registration Appeal Court) 2020 (SSI 2020/364)

Reciprocal Enforcement of Foreign Judgments (Norway) Amendment (Scotland) Order 2020 (SSI 2020/371)

Local Government and Communities Committee

Town and Country Planning (General Permitted Development) (Coronavirus) (Scotland) Amendment (No. 2) Order 2020 (SSI 2020/366)

Rural Economy and Connectivity Committee

Agriculture (EU Exit) (Scotland) (Amendment) Regulations 2020 (SSI 2020/368)

Common Agricultural Policy (Less Favoured Area Support) (EU Exit) (Scotland) Amendment Regulations 2020 (SSI 2020/draft)

Common Agricultural Policy (Simplifications and Improvements) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/349)

Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (Commencement No. 2) Regulations 2020 (SSI 2020/373 (C. 31))

Social Security Committee

First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Allocation of Functions, Procedure and Composition) (Miscellaneous Amendments) Regulations 2020 (SSI 2020/draft)

Annex

On 13 November 2020, the Committee wrote to the Scottish Government looking for a response on the following:

1. The instrument comes into force on 1 January 2021. Many of the amendments made by this instrument operate on text within EU Regulations that was inserted by SIs 2020/90 and 2020/91 (“the UK SIs”). The UK SIs appear to have effect only in relation to claim year 2020: at least the UK Government’s Explanatory Memorandum makes plain that the intention was to allow the direct payments regime to continue for claim year 2020 only, not beyond. The Explanatory Memorandum says, for example: “[t]he amendments will enable [the retained EU law governing the Direct Payment schemes in respect of claim year 2020] to operate effectively in the UK after EU Exit for claim year 2020” (s. 2.1) (emphasis added), and “[t]hese instruments relate only to the 2020 Direct Payments claim year” (s. 14.1). (In passing we note that Westlaw has marked the relevant amendments as, for example, “Substituted by [SI 2020/91].... Substitution has effect in respect of claim year 2020, which runs from January 1, 2020 to December 31, 2020”.)

Do the amendments that operate on text that was inserted by the UK SIs have anything to bite on, since that text appears only to have effect for the 2020 claim year? Is it considered that despite the intention set out in the UK Government’s Explanatory Memorandum, the UK SIs do in fact have the legal effect of amending not only the law that applies to claim year 2020 but also the law that applies to claim years 2021 and beyond? Given that the amendments in question only work if the text inserted by the UK SIs applies also to years 2021 and onwards, is provision required (or does it already exist elsewhere) to make this clear?

For information only, we asked the same question yesterday in relation to The Common Agricultural Policy (Simplifications and Improvements) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/349).

1. Regulation 2(8) amends Article 22 of the Direct Payments Regulation (“DPR”), which makes provision in relation to the basic payment scheme ceiling (“BPSC”). The key provision, new Article 22(2), is not amended to specify that it concerns the BPSC for Scotland (as opposed to for the whole UK). This contrasts with the approach taken in relation to some other provisions, which are amended to specify the BPSC “for Scotland” or “in Scotland”:
 - paragraph 4 of the same Article;
 - Article 23(2), which (as amended), refers to “the [BPSC] in Scotland referred to in Article 22(2)”;
 - Article 25(1) second subparagraph; and
 - Article 30.

For completeness, there is one other reference in the instrument to BPSC which does not specify “for Scotland”/“in Scotland”: new Article 5A(5) which refers to Article 22(2). Is it sufficiently clear, in the context of the approach taken to the amendment of the other provisions mentioned above, that new Article 22(2) refers to the BPSC

for Scotland?

1. Should Article 14 of the DPR have been amended to omit “its share of” the national ceiling, since “national ceiling” is being amended to refer to the (Scottish) “total ceiling”? “[Its] share of” is being omitted where equivalent amendments are being made, to Articles 22(2), 23(2) and 25(1).
1. Regulations 4(4) and 5(7) amend Article 112 of the Horizontal Regulation and Article 68(1) respectively, inserting reference to “agricultural support”. Is that term defined elsewhere, or is it otherwise sufficiently clear what that term means?
1. Regulation 5(4) amends Article 23(2) of Commission Implementing Regulation 809/2014 by omitting text in the second place it occurs. It appears that the text in question only occurs in one place. Is this an error?
1. Is any corrective action proposed, and if so, what action and when?

On 17 November 2020, the Scottish Government responded as follows:

1. We consider that the EU legislation governing direct payment schemes will continue to operate as retained EU law in 2021 and beyond.

The mechanism for rolling over EU direct payments legislation into domestic law is section 1(1) of the Direct Payments to Farmers (Legislative Continuity) Act 2020 (“the DPFLC Act”). We note that there is nothing in the DPFLC Act that sunsets the operation of the retained EU law governing CAP direct payments, and there has been no revocation of that legislation. It will remain on the statute book after 31 December 2020.

UK SIs 2020/90 and 91 (“the UK SIs”) were made using the power in section 3 of the DPFLC which empowers the Secretary of State (with consent) to make regulations to make that body of retained EU law operable. The UK SIs similarly do not sunset under the DPFLC and have not been revoked. Of particular importance is paragraph (8) which explains that no regulations may be made after 31 December 2020 “but this does not affect the continuation in force of regulations made before that date, including the exercise after that date of any power conferred by regulations made before that date”. We further note that there is nothing in the text of the UK SIs to suggest that the amendments made to the retained EU Regulations are limited in application to the claim year 2020.

It follows that the amendments made by the Direct Payments to Farmers (Miscellaneous Amendments) (Scotland) Regulations 2020 will bite on the text in the respective retained EU Regulations as amended by the UK SIs when they come into force on 1 January 2021.

We note your comments about the text of the explanatory memorandum lodged with the UK SIs. The Scottish Government was not involved in the drafting of the explanatory memorandum. However, it is not our view nor is it the view of the other UK administrations that the changes made in those instruments only have effect in claim year 2020 for the reasons set out above.

It is perhaps worth noting that the amendments made by the UK SIs are insufficient, in and of themselves, to make the direct payment schemes operable beyond claim year 2020. In order to do that it is necessary to make provision, as has been done in these Regulations using the powers in the Agriculture (Retained EU Law and Data) (Scotland) Act 2020, for the setting of the total ceiling for Scotland in 2021 and beyond. The other UK administrations will use similar powers in the UK Agriculture Act to pass further

subordinate legislation to provide for the future functioning of their direct payment schemes, in accordance with the policies of their respective administrations.

2. We consider that it is sufficiently clear that the new Article 22(2) refers to the BPSC for Scotland.

In accordance with new Article 22(2), the BPSC is calculated after making deductions from the total ceiling. The term total ceiling is defined with reference to Article 5A which is a new provision which clearly sets out a method for calculating the total ceiling for Scotland. Both mentions of the BPSC (within Articles 22(2) and 5A(5)) are inextricably linked to the process by which the Scottish Ministers determine the total ceiling for Scotland. The setting of the BPSC flows from that process. Accordingly those provisions could not reasonably be interpreted as referring to anything other than the BPSC for Scotland.

3. Thank you for drawing our attention to this point. We consider that it would be consistent to remove the words “its share of”. However, given that the relevant authority’s (the Scottish Ministers) share of the total ceiling is 100%, we consider that the provision is operable without the exclusion of those words.

4. “Agricultural support” is to be defined in the Horizontal Regulation (insofar as it relates to the common organisation of the markets and rural development measures), as “support for rural development and CMO support” when the changes contained in the Agriculture (Payments) (Amendment, etc) (EU Exit) Regulations 2020 take effect on IP completion day.

5. Thank you for drawing our attention to this point. This is an error. Provision to include that wording was intended to remove a provision which is now spent. In the event that this error results in that provision remaining on the statute book, we do not consider that to be problematic.

6. There is no corrective action proposed at this time. However in respect of the points raised in questions 3 and 5, we may include provision in a future SSI to omit the wording in order to tidy up the relevant provisions.

