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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 October 2017



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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

1. At its meeting on 24 October 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—
 - Common Agricultural Policy (Direct Payments etc.) (Scotland) Amendment (No. 2) Regulations (SSI 2017/317)
 - Public and Private Water Supplies (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/321)
2. The Committee's recommendations and conclusions in relation to these instruments are set out in the following chapters of this report.
3. 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.

Points raised: Instruments subject to negative procedure

Common Agricultural Policy (Direct Payments etc.) (Scotland) Amendment (No. 2) Regulations 2017 (SSI 2017/317) (Rural Economy and Connectivity)

Purpose

4. The Regulations amend the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015 ("principal Regulations"). The amendments make provision to extend the deadline for relevant applications under the voluntary coupled support scheme for ovine animals.
5. The principal Regulations provide that the final date for submission of applications for support under voluntary coupled support for ovine animals is 16 October. Regulation 2 of these Regulations extends the deadline, as set out in Part 2 of Schedule 3, paragraph 6 of the principal Regulations, from 16 October to 30 November (for 2017 only). The eligibility conditions remain unchanged.
6. The Regulations are subject to the negative procedure and came into force on 9 October 2017.

Breach of the "28 day rule"

7. The Regulations fail to comply with the "28 day rule" contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA"). They were laid before the Parliament on 28 September and came into force on 9 October.
8. The "28 day rule" provides that where a Scottish statutory instrument is subject to the negative procedure, it must be laid at least 28 days before the instrument comes into force. A breach of the rule does not affect the validity of the Regulations.
9. In accordance with section 31(3) of ILRA, the Agriculture and Rural Economy Directorate of the Scottish Government wrote to the Presiding Officer on 28 September 2017 to explain why the requirements of section 28(2) have not been met in this case. The correspondence has been reproduced at Annex A.
10. The letter explains that the deadline is being extended in this instance as a direct result of requests from the farming industry. The Scottish Government sought to make, lay and bring the instrument into force as soon as possible, following the decision to agree to the request to extend the deadline. Given the fact that the original deadline was 16 October, the instrument has been brought into force a week earlier than the original deadline, in order to provide legal certainty and transparency. Consequently this has led to a short timeframe between laying the instrument and the date upon which it comes into force.

Recommendations

11. **The Committee draws the Regulations to the attention of the Parliament under reporting ground (j) as the instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
12. **The Regulations were laid before the Parliament on 28 September 2017, and came into force on 9 October 2017. They do 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.**
13. **The Committee finds the failure to comply with section 28(2) to be acceptable in the circumstances as outlined in correspondence received from the Scottish Government to the Presiding Officer on 28 September 2017.**

Public and Private Water Supplies (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/321) (Environment, Climate Change and Land Reform)

Purpose

14. The instrument corrects errors in two earlier instruments, the Public Water Supplies (Scotland) Amendment Regulations 2017 and the Water Intended for Human Consumption (Private Supplies) (Scotland) Regulations 2017. It fulfils an undertaking given by the Scottish Government to correct errors in these instruments at the earliest opportunity.
15. Those 2017 Regulations implement provisions of Commission Directive EU 2015/1787 ("the EU Directive") on monitoring requirements for drinking water, and of Council Directive 2013/51/Euratom on radioactive substances in drinking water. Those Regulations were laid before the Parliament on 7 September and will come into force on 27 October, which is also the date by which the provisions of the EU Directive must be implemented in domestic law.
16. The instrument is subject to the negative procedure and will come into force on 26 October 2017.

Breach of the "28 day rule"

17. Similar to SSI 2017/317 discussed above, the Regulations fail to comply with the "28 day rule" contained in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. They were laid before the Parliament on 3 October 2017, and come into force on 26 October 2017.
18. The Committee considered the reasons provided in the letter to the Presiding Officer of 3 October 2017 for the Scottish Government's reasons for breaching the "28 day rule". This correspondence is reproduced at Annex B.
19. The letter from the Energy and Climate Change Directorate explains that it is considered necessary to make this instrument, and to bring it into force early, in order to meet EU obligations and in particular in order to correctly transpose the EU Directive by the 27 October deadline.

Recommendations

20. The Committee draws the Regulations to the attention of the Parliament under reporting ground (j) as the instrument fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
21. The Regulations were made and laid before the Parliament on 3 October 2017, and come into force on 26 October 2017. They do 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.
22. The Committee finds the failure to comply with section 28(2) to be acceptable in the circumstances as outlined in correspondence received from the Scottish Government to the Presiding Officer on 3 October 2017.

No points raised

Environment, Climate Change and Land Reform

Pollution Prevention and Control (Scotland) Amendment Regulations 2017 [draft]

Pollution Prevention and Control (Designation of Medium Combustion Plant Directive) (Scotland) Order 2017 (SSI 2017/322)

Finance and Constitution

Budget (Scotland) Act 2017 Amendment Regulations 2017 [draft]

Justice

Telecommunications Restriction Orders (Custodial Institutions) (Scotland) Regulations 2017 [draft]

Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 (SSI 2017/329)

Housing (Scotland) Act 2014 (Commencement No. 7, Amendment and Saving Provision) Order 2017 (SSI 2017/330 (C.24))

Act of Sederunt (Civil Legal Aid Rules Amendment) 2017 (SSI 2017/332)

Rural Economy and Connectivity

Fishing Vessels and Fish Farming (Miscellaneous Revocations) (Scotland) Scheme 2017 [draft]

Sea Fishing (Miscellaneous Revocations) (Scotland) Regulations 2017 (SSI 2017/323)

Sea Fishing (Miscellaneous Revocations) (Scotland) Order 2017 (SSI 2017/324)

Prohibition of Fishing with Multiple Trawls (Scotland) Order 2017 (SSI 2017/325)

Annex A

Common Agricultural Policy (Direct Payments etc.) (Scotland) Amendment (No. 2) Regulations 2017 (SSI 2017/317)

Breach of laying requirements: letter to the Presiding Officer

Failure to comply with Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010

I am writing to inform you that the Scottish Government is unable to comply with the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA) of allowing 28 days between laying and bringing into force the provisions of the above instrument. Section 31(3) of ILRA sets out that in these circumstances, a letter explaining the reasons must be sent to the Presiding Officer at the time the SSI is laid.

I would emphasise that while failure to comply with the laying requirements does not affect the validity of the instrument or the ability of Parliament to scrutinise and report on it, I regret we have had to take this action. Having considered the available options I have, however, concluded that the most appropriate course of action is to lay this instrument and bring it into force on 9 October 2017.

Background to instrument

This Scottish Statutory Instrument (SSI) was made by the Scottish Ministers under section 2(2) of the European Communities Act 1972 on 28 September 2017. It is being laid before the Scottish Parliament on the same date and its provisions will come into force on 9 October 2017. It amends the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015 (SSI 2015/58).

The purpose of the amendment is to allow more time for farmers to submit their applications for subsidy under the Scottish Upland Sheep Support Scheme (SUSSS) 2017, which is the voluntary coupled support scheme for ovine animals operated in Scotland under Article 52 of Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013.

This amendment is being implemented as a direct result of a request from the farming industry to extend it due to farmers and crofters experiencing practical difficulties in submitting their applications by the current deadline of 16 October in respect of calendar year 2017. The difficulties are being caused by the extreme wet weather experienced across Scotland recently. Farmers and crofters are unable to get livestock off the hill land to draw and tag potentially eligible animals to claim. This amendment extends the deadline for submitting applications under the scheme until 30 November in respect of the current calendar year only. However, the eligibility conditions applicable to SUSSS remain unchanged.

The Scottish Government has sought to make, lay and bring into force this instrument as soon as possible following the decision to agree to the industry's request to extend the application deadline, given that the existing application deadline in SSI 2015/58 expires on 16 October 2017.

This provides legal certainty and transparency for farmers, land managers and agents. Land managers, farmers and agents have been made aware of the pending extensions to the deadlines through revised guidance and the change is prominent on the Scottish Government Common Agricultural Policy website. There has also been liaison with representative farming bodies.

The annex to this letter provides further technical explanation of how this amendment will be achieved in law.

In conclusion I would emphasise again that I regret that the Government has not been able to comply with section 28(2) of ILRA on this occasion and I hope you will agree that the action the Government has taken is justified in the circumstances. I would be happy to discuss the matter further with you.

Annex B

Public and Private Water Supplies (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/321)

Breach of laying requirements: letter to the Presiding Officer

The above amending instrument was made today by the Scottish Ministers under sections 76B, 76F(5) to (8), 101(1) and (1A) and 109(1) of the Water (Scotland) Act 1980 (c.45), section 47(2) to (4) of the Local Government in Scotland Act 2003 (asp 1) and section 2(2) of the European Communities Act 1972 (c.68). It is being laid before the Scottish Parliament today, and comes into force on 26 October 2017.

Section 28(2) (the 28 day rule) 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 the reasons for this.

This instrument is required to correct errors in the Public Water Supplies (Scotland) Amendment Regulations 2017 (SSI 2017/281) and the Water Intended for Human Consumption (Private Supplies) Regulations 2017 (SSI 2017/282). SSI 2017/281 and SSI 2017/282 were both laid before Parliament on 7 September 2017 and come into force on 27 October 2017.

Those instruments further implement Directive 98/83/EC (the “Drinking Water Directive”), including in particular amendments made by the Directive 2015/1787/EU (the “Drinking Water Amending Directive”), and Directive 2013/51/Euratom.

The Delegated Powers and Legal Reform Committee (DPLRC) have brought some errors in those instruments to our attention.

Among other provisions, the instruments set requirements relating to the methods of analysis of water samples, including minimum performance characteristics. Regrettably, owing to typing errors, the prescribed minimum “uncertainty of measurement” value for polycyclic aromatic hydrocarbons is specified to be 30, but should be 50, and the prescribed minimum “limit of detection” value for oxidisability is specified to be 25, but should be 10. These values are set by the Drinking Water Amending Directive, which requires to be implemented by 27 October 2017.

In addition, there is an incorrect cross-reference in the instruments relating to screening strategies for the frequency of monitoring of radionuclide levels, as provided for by the Euratom Directive.

We regret this breach of the 28 day rule, but we consider that it is necessary to make this amending instrument and bring it into force early, to meet our EU obligations, in particular to transpose the Drinking Water Amending Directive by 27 October 2017.

We have responded to the DPLRC’s questions to explain that we propose to take this action. In addition, this instrument makes some minor amendments to correct typing errors.

