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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Subordinate legislation considered by the Delegated Powers and Law Reform Committee on 5 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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# Committee Membership



**Convener**  
**Graham Simpson**  
Scottish Conservative  
and Unionist Party



**Deputy Convener**  
**Stuart McMillan**  
Scottish National Party



**Tom Arthur**  
Scottish National Party



**Mary Fee**  
Scottish Labour



**Alison Harris**  
Scottish Conservative  
and Unionist Party

# Introduction

## Instruments considered under the European Union (Withdrawal) Act 2018

1. At its meeting on 5 March 2019, the Committee considered the following instruments under the protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018-

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

Common Agricultural Policy (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/60);

Fisheries (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/69);

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

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

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-

Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2019 (SSI 2019/45)

Felling (Scotland) Regulations 2019 (SSI 2019/49)

Scotland Act 1998 (Specification of Functions and Transfer of Property etc.) Order 2019 (SI 2019/183)

Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1)).

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.

# Instruments considered under the SSI Protocol under the European Union (Withdrawal) Act 2018 (scrutiny procedure and categorisation)

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

### Purpose

6. This instrument amends a number of marketing regulations for seed and plant propagating materials. Those regulations transpose EU directives prescribing processes to ensure minimum quality standards and traceability for marketed seed and plant propagating material.
7. The instrument updates certain provisions in a number of the marketing regulations before they become retained EU law on exit day. It also makes changes to a number of the regulations to ensure that the law functions correctly after exit day in the event of the UK leaving the EU without a withdrawal agreement in place.

### Committee consideration

8. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
9. The Committee is content that the negative procedure is appropriate. This is on the basis that each instrument amended by this instrument is subject to the negative procedure and that the UK equivalent Statutory Instruments on this matter are also subject to the equivalent parliamentary procedure.
10. The Committee is also content with the categorisation given that the amendments are mainly technical in nature to ensure continuity of law and make what appear to be reasonable transitional provisions.

### Recommendations

11. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/59).**
12. **The Committee recommends to the Rural Economy and Connectivity Committee that the Seed and Propagating Material (EU Exit) (Scotland)**

**(Amendment) Regulations 2019 (SSI 2019/59) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

## **Common Agricultural Policy (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/60) (Rural Economy and Connectivity)**

### **Purpose**

13. This instrument makes very minor amendments to domestic legislation regulating the Common Agricultural Policy ("**CAP**") in Scotland. It corrects an out of date reference, deals with deficiencies in certain regulations arising as a result of the UK's withdrawal from the EU, and updates references to retained EU law.
14. The instrument also provides that a minor role in relation to confirmation of Bank of England interest rates currently exercised by the UK Co-ordinating Body in the recovery of undue payments will be exercisable by the Secretary of State, DEFRA, the Scottish Ministers and the Welsh Ministers acting jointly. The UK Co-ordinating Body is being removed on exit day by a UK statutory instrument.

### **Committee consideration**

15. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
16. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument is minor and technical in nature and is no more than necessary to ensure operability of the regulation of CAP in Scotland.

### **Recommendations**

17. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Common Agricultural Policy (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/60).**
18. **The Committee recommends to the Rural Economy and Connectivity Committee that the Common Agricultural Policy (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/60) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

## **Fisheries (EU Exit) (Scotland) (Amendment) (No.2) Regulations 2019 (SSI 2019/69) (Rural Economy and Connectivity)**

### **Purpose**

19. This instrument primarily updates and replaces out of date references to EU legislation in domestic legislation concerning sea fisheries prior to exit day using the powers in s.2(2) of the European Communities Act.
20. It also makes amendments to technical conservation measures relating to sea fisheries, remedying deficiencies arising as a result of the UK's exit from the EU.
21. In addition, a minor operability change is made to the Sea Fish (Specified Sea Areas) (Regulation of Nets and Other Fishing Gear) (Scotland) Order 2000 to replace an EU specific term with an equivalent term which will ensure continued effective operation of the relevant provision after exit day.

### **Committee consideration**

22. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
23. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the instrument makes changes that are minor and technical in nature, makes no policy change, and allows for the continuity of law.

### **Recommendations**

24. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Fisheries (EU Exit) (Scotland) (Amendment) (No.2) Regulations 2019 (SSI 2019/69).**
25. **The Committee recommends to the Rural Economy and Connectivity Committee that the Fisheries (EU Exit) (Scotland) (Amendment) (No.2) Regulations 2019 (SSI 2019/69) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

## **Animal Health (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/71) (Rural Economy and Connectivity)**

### **Purpose**

26. This instrument amends a number of animal health regulations. It updates out-of-date references to EU instruments in animal health legislation, rectifies errors or omissions, and makes minor and technical changes so as to ensure that in the event of the UK exiting from the EU without a withdrawal agreement, secondary legislation concerning animal health continues to function effectively.

### **Committee consideration**

27. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
28. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the amendments are relatively minor and technical and affect the policy no more than is necessary to ensure the continued functioning of the legislation.

### **Recommendations**

29. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Animal Health (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/71).**
30. **The Committee recommends to the Rural Economy and Connectivity Committee that the Animal Health (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/71) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

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

### **Purpose**

31. These Regulations correct technical deficiencies that will arise in some domestic secondary legislation related to agriculture, in the event of the UK exiting from the EU without a withdrawal agreement.

### **Committee consideration**

32. The Scottish Government has laid this instrument under the negative procedure and has categorised it as of low significance under the SSI Protocol.
33. The Committee is content that the negative procedure and the categorisation of the instrument as of low significance are appropriate given that the amendments made are relatively minor and technical and without a change in policy.

**Recommendations**

34. **The Committee recommends to the Rural Economy and Connectivity Committee that the negative procedure is the appropriate scrutiny procedure for the Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73).**
35. **The Committee recommends to the Rural Economy and Connectivity Committee that the Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73) are appropriately categorised as Low in terms of their significance under the SSI Protocol.**

# Points raised: Instruments subject to the negative procedure

## Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2019 (SSI 2019/45) (Local Government and Communities)

### Purpose

36. This Order updates the Non-Domestic Rating (Valuation of Utilities) (Scotland) Order 2005. The Order is subject to the negative procedure, and comes into force on 1 April 2019.
37. The Order is made under powers in the Valuation and Rating (Scotland) Act 1956. There is a statutory requirement to consult on the Order and the policy note confirms that the Scottish Assessors and COSLA were consulted during the drafting, and are content with the changes to the 2005 Order.

### Committee consideration

38. The Committee noted that the instrument contains a drafting error in article 6.
39. Article 6 adds a reference to “Sky Telecommunications Services Ltd” into the list of “fixed line operators” contained in article 7A(2) of the Non-Domestic Rating (Valuation of Utilities) (Scotland) Order 2005. The company name should be “Sky Telecommunications Services Limited”, which is the name registered at Companies House.
40. The issue was raised with the Scottish Government and the correspondence is reproduced at Annex A. The Government indicated that it would correct the error by amending instrument and the Committee noted that that instrument has now been laid.

### Recommendations

41. **The Committee draws the Order to the attention of the Parliament on the general reporting ground as it contains a drafting error in article 6 as detailed in paragraph 39 above.**
42. **The Committee welcomes the Scottish Government's prompt response to rectifying this drafting error by amending instrument.**

## **Felling (Scotland) Regulations 2019 (SSI 2019/49) (Rural Economy and Connectivity)**

### **Purpose**

43. This instrument sets out the detail relating to the future regulation of forestry in Scotland. It forms part of a package of instruments required to support the commencement on 1 April 2019 of the Forestry and Land Management (Scotland) Act 2018 (“the 2018 Act”). The 2018 Act repeals the Forestry Act 1967 Act, which currently regulates forestry management in Scotland, and establishes a new regime. The instrument sets out the detail behind various powers and duties of the Scottish Ministers under the 2018 Act.
44. The instrument is subject to the negative procedure and is due to come into force on 1 April 2019.

### **Committee consideration**

45. The Committee noted that the instrument contains drafting errors in regulation 4(1) and (2).
46. The final paragraphs of each provision are listed as paragraph (c) but ought to have been “full out” text. That is, they should not be part of the lettered list but should be a separate paragraph.
47. This issue was raised with the Scottish Government and the correspondence is reproduced at Annex B. The Scottish Government has acknowledged the errors and indicated that it will correct the errors by amending instrument at the earliest possible opportunity.

### **Recommendations**

48. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground as it contains drafting errors in regulation 4(1) and (2) as detailed in paragraph 46 above.**
49. **The Committee welcomes the Scottish Government's proposal to correct the errors by amending instrument at the earliest possible opportunity.**

## **Scotland Act 1998 (Specification of Functions and Transfer of Property etc.) Order 2019 (SI 2019/183) (Rural Economy and Connectivity)**

### **Purpose**

50. This Order is another instrument in the package of legislation intended to complete the devolution of forestry in Scotland. It follows the Forestry and Land Management

(Scotland) Act 2018, which provided that the Forestry Commissioners no longer exercise functions in Scotland, with effect from 1 April 2019.

51. Specifically, this Order:
1. transfers the property and liabilities of the Forestry Commissioners in Scotland to the Scottish Ministers (with certain exceptions);
  2. enables agency arrangements to be entered into under which the UK Government can exercise specified functions on the Scottish Ministers' behalf. These functions relate mainly to forestry and plant health; and
  3. makes transitional and saving provision.
52. It is a "Scotland Act Order" which requires to be laid before both the Scottish Parliament and UK Parliament. It is subject to the negative procedure.

### **Committee consideration**

53. The Committee noted that the instrument contains defective drafting in article 3(2)(c).
54. The error relates to the agency arrangements aspect. The Order specifies that among the functions which can be exercised by the UK Government on the Scottish Ministers' behalf are the functions in section 44 of the Climate Change (Scotland) Act 2009. Section 44 of that Act concerns the duties of public bodies in relation to climate change.
55. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex C. The Scottish Government has acknowledged this drafting error. Furthermore, the Government has confirmed that there is no intention for article 3(2)(c) to be given effect to or acted upon following the coming into force of the Order.

### **Recommendations**

56. **The Committee draws the instrument to the attention of the Parliament on reporting ground (i), as there appears to be defective drafting in article 3(2)(c) as detailed in paragraph 54 above.**
57. **The Committee accepts the Scottish Government's assurance that there is no intention for this provision to be acted upon, and also accepts the Government's proposal to correct the error at the earliest opportunity.**

# Points raised: Instruments not subject to any parliamentary procedure

## Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1)) (Rural Economy and Connectivity)

### Purpose

58. This instrument commences the sections of the Forestry and Land Management (Scotland) Act 2018 ("the 2018 Act") that have yet to be commenced. It also makes savings to Acts and statutory instruments on commencement and puts in place transitional arrangements to allow for the change from the previous management regime in the Forestry Act 1967 ("the 1967 Act") and the Forestry (Felling of trees) Regulations 1979.
59. The instrument is part of the package of instruments required to support the commencement of the 2018 Act. The 2018 Act repeals the 1967 Act as it applies to Scotland and in doing so abolished the Forestry Commission's role in managing Scotland's forests. The 2018 Act passes that role onto the Scottish Ministers and provides them with a number of duties.
60. The instrument is not subject to any procedure and comes into force on 1 April 2019.

### Committee consideration

61. The Committee noted that the instrument contains a drafting error as detailed below.
62. Regulation 19(2)(a) refers to section 39(a) of the 1967 Act, and sub-paragraph (b) refers to paragraph 2 of schedule 4(b) of the 1967 Act. Regulation 20(2)(a) refers to s.40(c) of the 1967 Act and sub-paragraph (3) refers to schedule 5(d) of the 1967 Act. There is no section 39(a), schedule 4(b), section 40(c) or schedule 5(d) in the 1967 Act.
63. These issues were raised with the Scottish Government and the correspondence is reproduced at Annex D. The Scottish Government has acknowledged the errors and has undertaken to correct them by amending instrument at the earliest possible opportunity.

### Recommendations

64. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground for a drafting error as detailed in paragraph 62 above.**

65. **The Committee welcomes the Scottish Government's undertaking to correct the errors by amending regulations at the earliest possible opportunity.**

# No points raised

## **Environment, Climate Change and Land Reform**

Conservation of Salmon (Scotland) Amendment Regulations 2019 Negative (SSI 2019/56)

Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2019 (SSI 2019/64)

## **Health and Sport**

Food and Feed Safety and Hygiene (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/52)

National Health Service Superannuation and Pension Schemes (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/46)

Nutrition (EU Exit) (Scotland) (Amendment) Regulations (SSI 2019/54)

## **Justice**

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/68)

## **Rural Economy and Connectivity**

Common Agricultural Policy (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/60)

Fisheries (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/69)

# Annex A

## **Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2019 (SSI 2019/45)**

**On 20 February 2019, the Scottish Government was asked:**

Article 6 adds a reference to “Sky Telecommunications Services Ltd”, registration number 02883980, into the list of “fixed line operators” contained in article 7A(2) of the Non-Domestic Rating (Valuation of Utilities) (Scotland) Order 2005. On the Companies House website ([www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)), the name of the company includes “Limited” rather than “Ltd”.

In respect that for the other companies in the list in article 7A(2), it is precisely stated whether a company includes “Limited” or “Ltd” in its name, is any corrective action proposed?

**The Scottish Government responded as follows:**

The Scottish Government realises the importance to the operation of the instrument in the names and registration numbers of the companies contained in the Order being fully consistent with their entries in Companies House. It will progress an amending SSI in early course.

# Annex B

## **Felling (Scotland) Regulations 2019 (SSI 2019/49)**

**On 21 February 2019, the Scottish Government was asked:**

The final paragraphs of regulation 4(1) and (2) are each listed as paragraph (c). What is the effect of this on the meaning of the provisions? Is corrective action proposed?

**The Scottish Government responded as follows:**

The Government thanks the Committee's advisers for drawing this issue to its attention. The final paragraphs of regulation 4(1) and (2) should not be listed as paragraph "(c)". The provisions ought to appear as full out text. It is proposed to correct this by way of an amending instrument at the earliest opportunity.

# Annex C

## **Scotland Act 1998 (Specification of Functions and Transfer of Property etc.) Order 2019 (SI 2019/183)**

**On 26 February 2019, the Scottish Government was asked:**

Article 3(2)(c) specifies the Scottish Ministers' functions under section 44 of the Climate Change (Scotland) Act 2009. Most of the nine subsections of section 44 do not contain functions which are capable of being exercised by agency arrangements under section 93 of the Scotland Act 1998, either because they are not functions or because they are functions of making subordinate legislation (so are excluded by section 93(3)). Could you explain which particular functions or subsections are intended to be covered?

**The Scottish Government responded as follows:**

The Government thanks the Committee's advisers for drawing this issue to its attention. The inclusion of Article 3(2)(c) is a drafting error. The Government confirms that there is no intention for Article 3(2)(c) to be given effect to or acted upon following the coming into force of the Order. For the avoidance of doubt, there is no intention for agency arrangements to be entered into in respect of the functions specified in Article 3(2)(c).

It is proposed to correct this drafting error at the earliest opportunity. The Scottish Government has discussed this issue with the Scotland Office who retain responsibility for the programme of Scotland Act Orders, and understands that, assuming the Order comes into force as planned on 1st April, there may be a suitable opportunity to remove the words that have been identified as superfluous later this year.

# Annex D

## **Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1))**

### **On 21 February 2019, the Scottish Government was asked:**

Regulation 19(2)(a) refers to section 39(a) of the 1967 Act, and sub-paragraph (b) refers to paragraph 2 of schedule 4(b) of the 1967 Act. Regulation 20(2)(a) refers to s.40(c) of the 1967 Act and sub-paragraph (3) refers to schedule 5(d) of the 1967 Act.

Should these have been footnotes rather than references to lettered sub-sections and schedules? Is corrective action proposed?

### **The Scottish Government responded as follows:**

Thank you for drawing this matter to our attention. In answer to your first question, we can confirm that the references you mention are indeed footnote flags not references to numbered/ lettered sub-subsections and schedules.

As regards your second question, we think that it is sufficiently clear that this is simply a formatting/footnoting error and that the references to the relevant provisions in the 1967 Act can be understood on the basis that—

- there is no section 39(a), schedule 4(b), section 40(c) or schedule 5(d) in the 1967 Act, and
- in each case, the surrounding words and title of each regulation, read together with the 1967 Act help clarify that the references should be read as references to section 39, schedule 4, section 40 and schedule 5 of that Act.

Nonetheless, we can see that it would be better to put the matter beyond doubt and undertake to make amending regulations at the earliest possible opportunity.

