

Rural Affairs, Islands and Natural Environment Committee

2nd Meeting, 2022 (Session 6), Wednesday, 19 January

UK subordinate legislation

Introduction

1. This paper supports the Committee's consideration of a consent notification sent by the Scottish Government relating to **the Official Controls (Temporary Measures) (Coronavirus) (Amendment) (No. 3) Regulations 2021**.
2. Background relating to the process for parliamentary scrutiny of consent notifications for UK subordinate legislation is set out in **Annexe A**.

Consent notification

3. The Cabinet Secretary [wrote to the Committee in relation to the notification](#) on 23 December 2021.
4. The UK SI amends retained EU law to "extend the period of existing easements in the system of official controls in operation in Great Britain, beyond the existing expiry date of 31 December 2021 to 1 July 2022". This includes options to allow control authorities that carry out official controls and official activities to authorise, within strict parameters, natural persons to undertake official controls and official activities under their instruction by any available means of communication; to carry out checks on electronically submitted documents, also away from the border; and to conduct meetings with operators by using remote communication.
5. The notification states this extension is required "to prevent disruptions to trade during the coronavirus pandemic".
6. The notification confirms that "none of the amendments made by the instrument confer powers to make legislation on UK or Scottish Ministers".
7. The Cabinet Secretary's letter states that it "is the intention that this SI will be laid on 29 December 2021, with the legislation due to come into force on 30 December 2021". The Parliament has not, therefore, had the 28-day scrutiny period provided for in the SI protocol. The notification states the 28-day scrutiny period was not possible due to—

"The rapid emergence and transmission of the Omicron variant of coronavirus in the last few weeks and the associated ongoing uncertainty in relation to the immediate and longer-term impacts thereof has precipitated the decision that the period during which the current easements are to apply requires to be extended further beyond the current end date of 31 December 2021. Against this

background the Scottish Government was unable to comply with the requirement that members should have 28 days for scrutiny before the instrument was laid.”

For decision

- 8. Members are invited to consider whether they wish to agree with the Scottish Government’s decision to consent to the provisions set out in the notification being included in UK, rather than Scottish, subordinate legislation.**

**Rural Affairs, Islands and Natural Environment Committee clerks
January 2022**

Process for parliamentary scrutiny of consent notifications for UK statutory instruments

1. The process for the Scottish Parliament's consideration of consent notifications is set out in a [protocol](#) agreed between the Scottish Government and Scottish Parliament.
2. The protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain secondary legislation made by the UK Government. Specifically, this relates to UK Government secondary legislation on matters which are within devolved competence and are in areas formerly governed by EU law.
3. [The protocol](#) establishes a proportionate scrutiny approach and categorises SIs into type 1 and type 2.
4. For type 1 SI notifications, the Scottish Parliament's agreement is sought before the Scottish Government gives consent to the UK Government making secondary legislation in devolved competence. Except in respect of urgent notifications, the Scottish Parliament will have a minimum of 28 days to consider type 1 notifications.
5. For type 2 SI notifications, however, the Scottish Government will notify the Scottish Parliament within five days after giving consent.
6. Type 2 applies where all aspects of the proposed instrument are either clearly technical, do not involve a policy decision or update references in legislation that are no longer appropriate following EU exit. All other proposals fall into the type 1 category. In line with the proportionate scrutiny approach, each type 1 notification will be considered by the Committee. Committees will be notified of all type 2 notifications which fall within their remit; it is not, however, anticipated that these will normally be considered at a committee meeting. The protocol includes a number of review mechanisms and the categorisation of type 2 notifications will be monitored in this way.
7. **The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making regulations within devolved competence.**
8. If members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may wish to note any issues in its response or request that it be kept up to date on any relevant developments.
9. If the Committee is not content with the proposal, however, it may make one of the following three recommendations—

- (1) that the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution;
- (2) that the Scottish Government should not consent to the provision being made in a UK SI laid solely in the UK Parliament and should instead request that the provision be included in a UK SI laid in both Parliaments under the joint procedure (N.B. joint procedure is not available in every case so the option of making this recommendation will not always be available); or
- (3) that the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).