

DELEGATED POWERS AND LAW REFORM COMMITTEE

13th Meeting, 2022 (Session 6) Tuesday 26 April 2022

Instrument Responses

Rural Support (Controls) (Coronavirus) (Scotland) Regulations 2022 (SSI 2022/107)

On 5 April 2022, the Committee asked the Scottish Government:

The instrument amends the Horizontal Regulation (EUR 2013/1306) and Commission Implementing Regulation EUR 2014/809. These two Regulations, insofar as they relate to direct payment support (“DPS”), were incorporated into domestic law on exit day by the Direct Payments to Farmers (Legislative Continuity) Act 2020. Insofar as they relate to agricultural support (“AS”), they were incorporated into domestic law later, on IP completion day, under section 3 of the European Union (Withdrawal) Act 2018. However, the provisions of the Regulations are not identical for both DPS and AS purposes because they have been amended differently in relation to each type of support. This appears to result in there being parallel texts for DPS on the one hand and AS on the other for several of the provisions that this instrument amends (being the provisions amended by regulations 2(2), 3(2), 3(3) and 3(7) of the instrument). While the Agriculture (Payments) (Amendment, etc.) (EU Exit) Regulations 2020 (SI 2020/1445) makes provision in relation to how these two Regulations are to be treated on IP completion day, regulation 2(1)(a)(ii) of that SI appears to preserve, for DPS purposes, the amendments in relation to DPS that were made pre-IPCD, with the result appearing to be that there are still parallel texts for some provisions in relation to the two types of support.

It appears that two of the amendments made by the present instrument work on only one of the parallel texts. For example, regulation 3(2) of the instrument substitutes the second sub-paragraph of article 24(4) of EUR 2014/809, beginning “By way of derogation from...”. However, the sub-paragraph beginning with those words exists in article 24(4) only as it relates to DPS (having been inserted after exit day and before IPCD, when this article existed in domestic law only in relation to DPS, by SSI 2020/244). Regulation 2(1)(a) of SI 2020/1445 preserves the provision beginning “By way of derogation from...” but again only “insofar as it applies to the CAP direct payments schemes”. The substitution made by regulation 3(2) of the present instrument appears to be intended to apply both in relation to DPS and AS, given its content. However, since it would appear the substitution can operate only on the text as it applies to DPS, this could leave the position in relation to AS unamended, or in doubt.

It appears that the same issue arises in relation to the amendment made by regulation 3(7)(a)(i) to article 68 of EUR 2014/809. The issue does not arise in regulations 3(4), (5) and (6) of the instrument, because there are not parallel texts for the provisions they amend.

1. Please explain whether you consider that there are parallel texts in relation to DPS and in relation to AS for the provisions amended by regulations 2(2), 3(2), 3(3) and 3(7) of the instrument?
2. Please explain how the amendments made by regulations 3(2) and 3(7) work in relation to both DPS and AS?
3. Please explain whether and why it will be sufficiently clear to the reader which texts these amendments operate on? We note, for example, that Westlaw has interpreted the amendments made by regulations 2(2), 3(2), 3(3) and 3(7) of the instrument applying in each case to only one of the parallel texts.
4. Is the title of the Commission Implementing Regulation missing in reg 3(1)?
5. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 14 April 2022, the Scottish Government responded:

1. Regulations (EU) No. 2013/1306 and 2014/809 (“the Regulations”) were incorporated into retained EU law, insofar as they apply to DPS, on exit day by the Direct Payments to Farmers (Legislative Continuity) Act 2020 and then amended during the course of 2020. The Regulations, insofar as they apply to AS, were incorporated into retained EU law on IP completion day by section 3 of the European Union (Withdrawal) Act 2018. This would have created the situation where two separate versions of the Regulations existed in retained EU law. Section 2 of the Agriculture (Payments) (Amendment, etc.) (EU Exit) Regulations 2020 (SI 2020/1445) addresses this and ensures that there is just one version of the Regulations in retained EU law. Section 2 of SI 2020/1445 provides that the Regulations are to be treated as being incorporated into retained EU law on IP completion day in the form they took on exit day but including any amendments made domestically in relation to DPS, and at the EU level in relation to AS, between exit day and IP completion day. The Regulations, in the form they took on exit day, contained some provision that applied just to DPS, some provision that applied just to AS and some provision that applied to both. While the amendments made domestically in relation to DPS, and at the EU level in relation to AS, between exit day and IP completion day are saved by section 2 of SI 2020/1445 this does not necessarily lead to the creation of parallel texts in the Regulations.

It is acknowledged that this creates an extremely complex position for the user of the legislation. The Scottish Government’s approach in general terms is to ensure that in drafting amendments it makes clear whether any provision applies only to DPS, only to AS or to both. There are a variety of drafting techniques (with associated advantages and disadvantages) that can be used to achieve this. The appropriate way of achieving the effect will depend on the context in each case. Given that there is one version of the Regulations, in general, the Scottish Government would try to avoid having parallel texts unless this was unavoidable.

In relation to the provisions amended by regulations 2(2), 3(2), 3(3) and 3(7) our view on the existence of parallel texts is as follows:

Regulation 2(2) – amending Article 75(2) of EUR 2013/1306

We do not consider there to be parallel text as such in Article 75(2). Article 75(2) applied to both DPS and AS. It was then amended separately, but identically, for DPS and AS to make it operable in domestic law. These amendments were made at different times, so far as relating to each form of support, in line with the incorporation of the Regulations into domestic law at different times. The amendment made by the Rural Support (Controls) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/72) has, in our view, been incorrectly displayed by Westlaw as parallel text applied just to DPS. There is nothing in the drafting of SSI 2021/72 to suggest that this amendment only applies to DPS and given that there was no parallel text in Article 75(2) at the point SSI 2021/72 was made and the amendment is inserted “at the end of Article 75(2)” our view is that the drafting intention is clear and this was not inserted as parallel text.

Regulation 3(2) – amending Article 24(4) in EUR 2014/809

A second subparagraph was inserted into Article 24(4) by the Direct Payments to Farmers (Controls) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/244). This created a specific derogation from the first sub-paragraph of 24(4) that applied to DPS but not AS. We consider, therefore, that there was text in Article 24(4) that applied to DPS only.

Regulation 3(3) – amending Article 26(4) in EUR 2014/809

The second subparagraph in Article 26(4) applies only to DPS and as such was omitted from EUR 2014/809, insofar as it applies to AS, on IP completion day by the Common Agricultural Policy (Financing, Management and Monitoring Supplementary Provisions) Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/765). This subparagraph had already been retained by the Direct Payments to Farmers (Legislative Continuity) Act 2020. An additional subparagraph was inserted at the end, applied to DPS, by SSI 2020/244. We consider, therefore, that there is some text in Article 26(4) that applies just to DPS.

Regulation 3(7) – amending Article 68(1) and (4) in EUR 2014/809

Article 68(1) has been amended differently as it applies to DPS and AS, in particular there are parallel text versions of the first subparagraph, which is being amended by this SSI. The other subparagraph in Article 68(1) which is being amended is identical in its application to DPS and AS. A provision was inserted into Article 68(4) by SSI 2020/244 which applied just to DPS.

2. The amendment made by regulation 3(2) substitutes the derogation that was previously inserted into Article 24(4) and applied just to DPS for claim year 2020 with a consolidated paragraph covering claim years 2020 and 2021 applied to DPS and AS. This means that a derogation now applies for DPS in claim year 2020 and for DPS and AS in claim year 2021.

The amendments being made to Article 68 of EUR 2014/809 by regulation 3(7) apply to both DPS and AS. The first subparagraph of Article 68(1) sets the cross compliance inspection rate. Cross compliance inspections are conducted on samples comprising all beneficiaries across DPS and rural development (a component of AS). Due to how these regulations were rolled over into retained EU law, as discussed above, there are parallel versions of the first subparagraph of Article 68(1) that set the cross compliance control rate.

The DPS 'version' of the subparagraph reads:

The competent control authority shall, with regard to the requirements and standards for which it is responsible, carry out on-the-spot checks on at least 1% of the total number of the beneficiaries receiving direct payments and the other beneficiaries referred to in Article 92 of Regulation (EU) No 2013/1306, as amended for the purpose of agricultural support.

The AS 'version' of the subparagraph reads:

The competent control authority shall, with regard to the requirements and standards for which it is responsible, carry out on-the-spot checks on at least 1% of the total number of the beneficiaries receiving annual premia referred to in Article 92 of Regulation (EU) No 2013/1306 and the other beneficiaries receiving direct payment support.

As the cross compliance rate is selected across DPS and rural development beneficiaries you will note that the text of the parallel versions are mirror images of each other, i.e. both set the control rate as 1% of rural development beneficiaries (beneficiaries receiving annual premia referred to in Article 92 of Regulation (EU) No 2013/1306) and beneficiaries of DPS.

Our amendment in reg 3(7)(a)(i) reduces the control rate in the AS parallel text down to 0.5% for claim year 2021. Our amendment in reg 3(7)(a)(ii) extends the existing derogation that applies to DPS that brought the control rate down to 0.5% for claim year 2020 to claim year 2021. The effect of this is that in both parallel versions of Art 68(1) the cross compliance control rate is reduced to 0.5% for claim year 2021.

There is no parallel text in respect of the other provision in Article 68(1) being amended by regulation 3(7)(a)(iii) as it is identical in its application to DPS and AS. While there is provision in Article 68(4) that applies only to DPS our drafting intention in regulation 3(7)(b) is clear that the entirety of Article 68(4) should be omitted. We note that Westlaw has correctly applied the amendments made by regulation 3(7)(a)(iii) and 3(7)(b) in EUR 2014/809.

3. Whilst the text of the provision being inserted in the amendment being made by regulation 3(2) is a substitution of a subparagraph that previously applied only to DPS we consider that the legislative intent is clear given that the substituted provision specifically applies to both DPS and AS.

For the reasons explained above in response to question 2 we are of the view that the amendments made by regulation 3(7) are sufficiently clear as to the texts they operate on. We have amended both of the parallel texts in Article 68(1) to reduce the cross compliance control rate for claim year 2021 to 0.5%, there is no parallel text in respect of the other subparagraph in Article 68(1) being amended and we have omitted the entirety of Article 68(4).

We will be liaising with Westlaw in relation to the amendments that we consider are incorrectly displayed. We will also liaise with them to discuss how the position in relation to this complex post EU Exit legislation can be made clearer to the reader through appropriate signposting/footnoting.

4. Yes the full title of Commission Implementing Regulation 2014/809 is missing in reg 3(1).
5. There is no corrective action proposed at this time. However, in respect of the point raised in question 4, we propose to include provision in a future SSI to insert the missing part of the title of Commission Implementing Regulation 2014/809 into reg 3(1).

Traffic Signs Amendment (Scotland) Regulations and General Directions 2022 (SSI 2022/111)

On 30 March 2022, the Committee asked the Scottish Government:

The instrument amends the Traffic Signs Regulations and General Directions 2016 (SI 2016/362) (“TSRGD”) to make changes affecting road signs in Scotland. The instrument is made in two parts using different enabling powers.

Section 64 (1), (2) and (3) of the Road Traffic Regulation Act 1984 (“the 1984 Act”) provides for regulations about road signage to be made by the relevant authority. Section 64(6A) provides that the relevant authority in respect of functions exercisable within devolved competence in Scotland is the Scottish Ministers. Section 134(6) provides that such regulations made by Scottish Ministers are subject to the negative procedure.

Section 65(1) of the 1984 Act provides that the traffic authority may cause or permit signs to be placed on or near a road subject to and in conformity with such general directions or such other directions as may be given by the relevant authority. General directions made under section 65(1) are to be exercisable by Scottish statutory instrument in terms of section 65(3ZA). The 1984 Act does not appear to specify a procedure for general directions made under section 65(1).

The footnote (e) on page 1 of the instrument states that the powers to make these Regulations and give these General Directions are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) and that the instrument is subject to the negative procedure by virtue of section 33(4). The laying email states that the SSI is being laid under section 134(6) of the Road Traffic Regulation Act 1984.

Section A.17 on page 60 of SSIDM (May 2019) states that “It is not accepted practice to combine 2 or more forms (e.g. orders or regulations) in a single Scottish Statutory Instrument. This is regardless of whether in theory separate powers to make provision by way of an order or by way of regulations in a statutory instrument could be exercised together by Ministers in a single instrument.” It notes further that, although section 33 of ILRA might be read to allow the combination of forms that are subject to different procedures (as in this instrument which combines a regulation-making power and a power to issue general directions) “...it is not intended as a matter of practice to combine forms in a single instrument”. This is because it may give rise to difficulties in practice; in particular “...it would be unclear what the correct title would be or the effect of amending such an instrument”.

1. Is it your view that section 30(2) of ILRA applies to the Scottish Ministers’ power to issue general directions under section 65(1) of the 1984 Act?

2. Please explain why it is considered appropriate to combine two different forms (regulations and general directions) in the same instrument.
3. Please explain why it is considered appropriate to include two provisions with the same numbering both containing citation, commencement and extent provisions.
4. Please explain why the title of the instrument does not reflect the citation for the General Directions and make clear the General Directions apply to Scotland.
5. Please confirm whether any corrective action is proposed, and if so, what action and when?

On 12 April 2022, the Scottish Government responded:

1. General directions made under section 65(1) are exercisable by Scottish statutory instrument in terms of section 65(3ZA) of the 1984 Act. Such SSIs are not subject to the negative or the affirmative procedure. Section 30(2) of ILRA requires instruments not subject to the negative or the affirmative procedure to be laid before the Scottish Parliament as soon as practicable after they are made. However, section 30(3) of ILRA disapplies section 30(2) in relation to subordinate legislation made under the enactments mentioned in section 30(4). That subsection mentions the 1984 Act and accordingly section 30(2) does not apply to the Scottish Ministers' power to issue General Directions under section 65(1) of the 1984 Act. General Directions made under section 65(1) are therefore made and published, but are not laid before the Scottish Parliament. Section 33(2) of ILRA allows for the combination of different procedures, including a power to make SSIs to which the negative procedure, the affirmative procedure and section 30 do not apply (section 33(1)(d)). The instrument is therefore subject to the negative procedure by virtue of section 33(4).
2. The Scottish Government does not consider that there is anything legally to prevent different forms of powers from being exercised together. As noted in the 13th ed of *Craies*, the main theoretical constraint, and the main risk of combining forms, arises from the situation where different powers are subject to different forms of scrutiny. It is acknowledged that there might also be practical problems such as knowing what to call a combined instrument. It has however been the practice in the UK to combine forms of legislation in this particular context at least since the current 1984 Act powers were enacted. This approach has been replicated in the one SSI^[1] which has been made using these powers since they were devolved to Scottish Ministers in 2018.

Section 33 of ILRA obviates with the main identified risk in combining forms, namely the question of different levels of scrutiny. As described above, section 33 is relied on to combine procedures. Section 33 is not limited in its application to cases where powers subject to different procedures are exercisable in the same form.

While combining forms is not usual practice, there are good reasons for combining Regulations and General Directions in this context. The provisions in the Directions directly relate to and condition the use of the Regulations. That is the only purpose of the general Directions and in order to make sense of both the Regulations and General Directions they require to be read together as a single package of measures. It is therefore considered appropriate to follow the longstanding approach to the structure of instruments containing Regulations and General Directions under the 1984 Act in order to maintain its coherence and intelligibility for the end user.

3. For the reasons given above, and in particular to maintain consistency with the principal instrument being amended, the Scottish Government has chosen to structure this legislation as a single instrument divided into two parts. Again reflecting the principal instrument, both parts contain citation, commencement and extent provisions. This approach reflects the fact that different forms of legislation are not being combined in the sense of using a regulation-making power to make directions, or vice versa. Rather, two distinct forms of legislation have been combined into one instrument so that they can be read together in the manner in which they are intended to apply while maintaining their separate forms as required by the enabling powers. Given that the enabling powers require the separate forms to be maintained, it is considered appropriate to make separate provision as to citation. The principal instrument being amended takes the same approach, with the numbering and form of the General Directions being separate from the numbering of the Regulations and allowing for them to be cited separately if required.
4. This approach to the drafting of the title is intended to reflect the title of the principal instrument which is being amended. It is intended to be an amalgamation of the titles for the two parts of the instrument. The words 'Amendment' and (Scotland) apply equally to the Regulations and General Directions. It is considered to be clear both from the context and on a plain reading of the title (in particular the conjunctive 'and' between Regulations and Directions) that the Regulations as well as the General Directions apply only to Scotland.
5. In light of the above, no corrective action is proposed.

[\[1\]](#) The Traffic Signs Amendment (Scotland) Regulations and General Directions 2018 (No. 161).

National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/117)

On 6 April 2022, the Committee asked the Scottish Government:

Regulation 1(3) of this instrument provides that regulations 2 to 5 come into force immediately after the expiry of section 46 of the Coronavirus Act 2020. Section 89(1) of the 2020 Act provides that section 46 expires at the end of the period of 2 years beginning with the day on which it is passed. The expiry date of section 46 was not amended by the Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40).

1. Please explain whether you consider that section 46 of the 2020 Act expired at the end of 24 March 2022.
2. This instrument was made at 10:13AM on 25 March 2022. Both the Superannuation Act 1972 and the Public Service Pension Act 2013 contain provision enabling pension scheme regulations to have retrospective effect (see e.g. section 12(1) of the 1972 Act and section 3(3)(b) of the 2013 Act). If section 46 expired at the end of 24 March 2022, please explain whether, and if so why, the Scottish Government considers that regulation 1(2) and (3) of the instrument (under the heading "Citation and commencement") competently, and in line with proper drafting practice, have the effect of

bringing regulations 2 to 5 into force approximately 10 hours before the instrument was made, as opposed to commencing the instrument after it is made and providing separately that regulations 2 to 5 have retrospective effect prior to the instrument being made – see, for example, regulation 1(2) and (3) of the National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/30).

3. The preamble to this instrument narrates that it is made with the consent of the Treasury as required by section 10(1) of the 1972 Act and section 3(5) of the 2013 Act. The letter to the Presiding Officer dated 25 March 2022 explains that the Scottish Government had been consulting on amending regulations which sought to reform the member contribution structure from 1 April 2022 and that consultation closed on 27 February 2022. However, a letter from HM Treasury to the Chief Secretary to the Treasury of 18 February 2022 indicated that these reforms should be delayed until 1 October 2022. Please explain why consent from HM Treasury was not sought earlier to allow time for the Scottish Government to respond to any suggested changes and still afford Parliament the full 28 days to consider this instrument as provided for in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
4. Given the explanation in the accompanying letter to the Presiding Officer that HM Treasury directed that the reforms should be delayed until 1 October 2022, please confirm whether, and if so why, regulation 2 achieves the policy intention insofar as it provides that the modifications in Part 2 apply until the end of 31 October 2022, and whether HM Treasury consents to this.
5. In regulation 7(a) no reference is made to the paragraph in regulation 30 of the National Health Service Pension Scheme (Scotland) Regulations 2015 that the instrument amends. Please confirm whether there is an error, and whether reference should have been made to paragraph (3) in addition to sub-paragraph (g).
6. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 14 April 2022, the Scottish Government responded:

1. It is considered that section 46 of the 2020 Act expired at the end of 24 March 2022.
2. As noted, section 12(1) of the Superannuation Act 1972 provides that regulations making provision for the superannuation of persons engaged in health services may be framed so as to have effect as from a date earlier than the making of the regulations, and section 3(3)(b) of the Public Service Pensions Act 2013 provides that such regulations may make retrospective provision. The intention was for the provision in regulations 2 to 5 of this instrument, which temporarily modifies certain provisions in NHS pension scheme regulations to apply until 31 October 2022, to have retrospective effect in so far as the time of making of this instrument was after the expiry of section 46 of the Coronavirus Act 2020. It is regretted that the drafting of regulation 1(3) of this instrument may be read as providing that regulations 2 to 5 come into force, rather than take effect, at the relevant time.

3. As the letter to the Presiding Officer sets out, the consultation on the amending Regulations which closed on 27 February 2022 was carried out with the consent of HM Treasury. However, HMT then changed their position in a letter from the Chief Secretary to the Treasury of 18 February 2022 which expressed the view that the member contribution reforms which had been proposed should be delayed until 1 October 2022. Consent was then given to this instrument by HMT on 21 March 2022.
4. The view expressed by HMT that member contribution reforms should be delayed until 1 October 2022 relates to the provision made by regulations 6 to 8 of this instrument, which set out member contribution rates. The effect of regulations 7 and 8, as made, is to extend the current member contribution rates, and provide powers to continue to deduct member contributions, in lieu of the member contribution reform postponed by HMT. Regulations 7 and 8 extend those rates from 1 April 2022 and allows the inserted contribution table to apply until the reforms are agreed by HMT and stakeholders.
5. In regulation 7(a), reference should have been made to paragraph (3) of regulation 30, rather than to sub-paragraph (g) only. This omission is regretted but it is considered that the meaning of this provision is clear, on the basis that neither paragraph (1) or (2) of regulation 30 include a sub-paragraph (g). It is noted that in the current version of SSI 2015/94 on Westlaw, new sub-paragraph (h) has been inserted at the appropriate place, after sub-paragraph 30(3)(g).
6. No corrective action is proposed.