

Rural Affairs, Islands and Natural Environment Committee

28th Meeting, 2022 (Session 6), Wednesday, 2 November

UK subordinate legislation – consideration of consent notification

Introduction

1. This paper supports the Committee’s consideration of the following ‘type 1’ consent notification for UK subordinate legislation—
 - The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022
2. Background information relating to the process for parliamentary scrutiny of consent notifications for UK subordinate legislation is set out in **Annexe A**.

The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022

3. The Cabinet Secretary for Rural Affairs and Islands [wrote to the Committee in relation to the notification on 23 September 2022](#). This statutory instrument (SI) is made using powers under the European Union (Withdrawal) Act 2018 and is subject to the affirmative procedure. The SI was laid in the UK Parliament on 18 October 2022.
4. The Cabinet Secretary [wrote again to the Committee on 6 October 2022](#) to confirm the Scottish Government had “reached an agreement with UK Government officials that the instrument will not be debated in the UK Parliament until after a period of 28 days has elapsed from the date of the notification, or until such earlier date on which the Scottish Ministers have given their consent to the instrument”. The Committee has been asked to respond by 7 November 2022.
5. The SI notification summarises the purpose of the instrument is to make “necessary changes to retained EU law and domestic primary and secondary legislation to ensure they are fully operable following the UK’s exit from the EU”. According to the notification, certain provisions in retained EU legislation are not currently fully operational as they contain “uncorrected references to the EU or Member States” as well as “some powers and duties which have been deficiency-fixed require to be amended for operability”. The various amendments to which the Scottish Ministers are being asked to consent to are set out on pages 1 to 6 of the notification.

6. Several amendments relate to the Official Controls Regulation (notification pages 2 and 3). The SI amends Article 3(3) “to make clear” which authority is “the appropriate authority” and “the competent authority” under the Official Controls Regulation. The notification states that the appropriate authority in Scotland “is the Scottish Ministers except in the circumstances in which it is the Secretary of State” in circumstances where functions are exercised outside of devolved competence or has been consented to by Scottish Ministers. Amendments to Articles 128, 139 and 150 will provide the appropriate authority with power to make regulations to protect the biosecurity of Great Britain with respect to disease outbreaks in third countries, create and enforce offences, and extend transitional measures respectively. In addition, Annex 6 is amended to allow for temporary additional official controls on this category of goods from certain third countries while also replacing the requirement for full import checks with pre-notification for this category of goods arriving from EEA states into Great Britain.
7. A number of the proposed amendments to other regulations relate to the insertion of amendments to ensure the operability of legislation and regulations following the UK’s exit from the EU. Several of these amendments are made to reinstate provisions from retained EU law which had been removed or omitted in error from subsequent legislation, while others have been inserted to correct deficiencies not accounted for in earlier amending instruments.
8. The notification states the proposed changes will have “no, or no significant, impact on the public sector”. The Scottish Ministers have undertaken no public consultation on the instrument as they consider the amendments to be “technical in nature, and there has been no policy changes”.
9. The notification sets out that the Scottish Ministers consider it appropriate for the legislative changes to be made at the UK level in order to “ensure a functioning system of official controls and rules” relating to animal welfare during transport, the marketing of planting and plant propagating material, and legislation in relation to plants and planting material “is retained in UK law” following EU-exit. The Scottish Ministers conclude that the powers conferred or amended by the instrument “fully respect devolution”.

For decision

10. **Committee is invited to consider whether it agrees 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
November 2022

Process for parliamentary scrutiny of consent notifications for UK statutory instruments

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](#).

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.

The protocol establishes a proportionate scrutiny approach and categorises SIs into type 1 and type 2.

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.

For type 2 SI notifications, however, the Scottish Government will notify the Scottish Parliament within five days after giving consent.

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.

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.

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.

If the Committee is not content with the proposal, however, it may make one of the following three recommendations—

- 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;
- 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

- 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).