

DELEGATED POWERS AND LAW REFORM COMMITTEE

32nd Meeting, 2022 (Session 6) Tuesday, 6 December 2022

Instrument Responses

Building (Scotland) Amendment (Amendment) (No. 2) Regulations 2022 (SSI 2022/340)

On 24 November 2022, the Committee asked the Scottish Government:

The Building (Scotland) Amendment Regulations 2022, SSI 2022/136 made various changes to building standards which came into force earlier this year. Part 3 of those regulations introduced changes to energy and environmental standards, which was initially intended to come into force on 1 October 2022. The in-force date for Part 3 was subsequently revised by the Building (Scotland) Amendment (Amendment) Regulations 2022, SSI 2022/209 with the negative instrument delaying the implementation of the changes to energy and environmental standards from 1 October 2022 to 1 December 2022. The reasons for this were to provide a longer period for the development of supporting third-party resources used to demonstrate compliance with the building standards introduced.

The present negative instrument seeks to further delay the implementation of the changes to energy and environmental standards for a further 2 months to 1 February 2023. It does not comply with laying requirements as it was laid on 17 November and will come into force on 30 November, in advance of the current implementation date of 1 December. The letter to the Presiding Officer states the reasons for failing to comply with the laying requirements is due to the “development and approval of such tools, which are commercial products produced by third parties, has taken longer than planned and this has significantly reduced the opportunity for developers to undertake and complete assessment of new buildings against the new standards.” It further states that this instrument was made, laid and brought into force as soon as possible following the latest assessment of delivery of approved software tools and supporting engagement with key stakeholders.

Please can you provide further explanation as to when the latest assessment of the planned implementation took place (referred to in the letter to the PO) and why this instrument was not able to be laid in accordance with the laying requirements on this particular occasion given that the laying requirements were complied with on the previous occasion.

On 29 November 2022, the Scottish Government responded:

To gauge the risk of potential negative impact on the capacity of developers to complete design assessments of new buildings, officials monitored both the likely time table for delivery of tools and the number of tools which would be available. The last round of email engagement with providers was sent out on 14 October. Whilst some responses were immediate, it took longer than expected to determine the full picture. We were aware of further changes, likely to disrupt the development process, being made over the period by the contractor managing the software approval process on our behalf. This indicated the likelihood of a further delay in availability of approved tools had increased and a formal submission to defer implementation was made on 4 November.

The position in May this year differed in that officials were able to confirm a level of delay in broader UK work to finalise the calculation methodology. They therefore proposed what, at that point, was considered to be a suitable adjustment to the in-force date for Part 3 of The Building (Scotland) Amendment Regulations 2022. There was no issue in breach of the 28-day rule at that time as the original in-force date was 1 October 2022. It was unfortunate that the information to inform that deferment was not available prior to laying of the original April regulations, resulting in the need for an amending SSI in June.

Official Controls (Import of High Risk Food and Feed of Non-Animal Origin) Amendment (Scotland) Regulations 2022 (SSI 2022/341)

On 25 November 2022, the Committee asked the Scottish Government:

The instrument is made in exercise of powers conferred by Article 53(1)(b) of Regulation (EC) No 178/2002 of the European Parliament and of the Council (Regulation 178/2002) and Articles 47(2)(b) and 54(4)(a) and (b) of Regulation (EU) No 2017/625 of the European Parliament and of the Council (Regulation 2017/625). As noted in the laying email the instrument is laid under Article 57a (5) of Regulation 178/2002.

Both Regulations 178/2002 and 2017/625 contain consultation requirement provisions. Article 9 of Regulation 178/2002, cited in the preamble of the instrument, requires open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where urgency doesn't permit this. Article 144(7) of Regulation 2017/625 requires that before making any regulations under this Regulation, the appropriate authority must consult (a) such bodies or persons as appear to the appropriate authority to be representative of the interests likely to be substantially affected by the regulations; (b) such other bodies or persons as the appropriate authority may consider appropriate. Article 144(7) of Regulation 2017/625 is not cited in the preamble of the instrument.

1. Should the instrument have been laid under both Article 57a(5) of Regulation 178/2002 and Article 144(5) of Regulation 2017/625?

2. Should the preamble of the instrument have cited both Article 9 of Regulation 178/2002 and Article 144(7) of Regulation 2017/625 with regards to consultation?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 29 November 2022, the Scottish Government responded:

The instrument is laid under both Article 57a(5) of Regulation 178/2002 and Article 144(5) of Regulation 2017/625 which should have been noted on the SSI form but was not in error and is the reason it was not stated in the email to the Parliament.

A twelve-week public consultation was launched on 6 April 2022 and closed on 29 June 2022. It was sent directly to interested parties likely to be affected, which met the precondition requirements of both:

- Article 9 of 178/2002 which states: *“There shall be open and transparent public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow”*; and
- Article 144(7) of 2017/625 which states: *“Before making any regulations under this Regulation, the appropriate authority must consult – (a) such bodies or persons as appear to the appropriate authority to be representative of the interests likely to be substantially affected by the regulations; (b) such other bodies or persons as the appropriate authority may consider appropriate”*.

Although the instrument does not cite Article 144(7) in the preamble there has been: (a) satisfaction of the precondition of consultation in that provision; and (b) fulfilment of the wider corresponding consultation requirement in Article 9 of 178/2002 cited in the instrument which applies in general to the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow.

On that basis the Scottish Government does not propose any corrective action.