Subordinate Legislation Committee

20th Report, 2011 (Session 4)

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Subordinate Legislation

The Committee reports to the Parliament as follows—

1. At its meeting on 13 December 2011, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Control of Volatile Organic Compounds (Petrol Vapour Recovery) (Scotland) Regulations 2011 (SSI 2011/418); and

   Police (Retention and Disposal of Motor Vehicles (Scotland) Amendment Revocation Regulations 2011 (SSI 2011/429)

2. The Committee’s recommendations in relation to these instruments are set out below. The instrument that the Committee determined it did not need to draw the Parliament’s attention to is set out at the end of this report.
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(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; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Kezia Dugdale
Mike MacKenzie
John Scott
Drew Smith

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

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Support Manager
Lori Gray
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2. The Committee’s recommendations in relation to these instruments are set out below. The instrument that the Committee determined it did not need to draw the Parliament’s attention to is set out at the end of this report.
NEGATIVE PROCEDURE

Control of Volatile Organic Compounds (Petrol Vapour Recovery) (Scotland) Regulations 2011 (SSI 2011/418) (Rural Affairs, Climate Change and Environment Committee)

3. These Regulations are subject to the negative procedure and will come into force on 31 December 2011.

4. These Regulations introduce new permit requirements for certain specified service stations, in order to give effect to Directive 2009/126/EC (on Stage II petrol vapour recovery during refuelling of motor vehicles at service stations (“the 2009 Directive”)) on time. This is being achieved by extending the controls which are already required under the Pollution Prevention and Control (Scotland) Regulations 2000 (“the 2000 Regulations”).

5. The new requirements under the 2000 Regulations, as amended by these Regulations, are as follows.

6. From 1 January 2012, a permit will be required for:
   - new or significantly refurbished service stations situated below permanent living quarters or working areas, where the petrol refuelling throughput in any 12 month period (“throughput”) is or is intended to be above 100m³;
   - significantly refurbished service stations where the throughput is or is intended to be above 500m³.

7. Furthermore, by 31 December 2018, a permit will be required for:
   - existing service stations with a throughput above 3000m³.

8. These Regulations also make consequential amendments to various other specified regulations, where necessary in order to avoid duplication with the amended 2000 Regulations.

9. The Scottish Government was asked to explain why regulation 9G of the 2000 Regulations, as inserted by regulation 4(2) of these Regulations, is not included in the definition of “hybrid permit” under regulation 2 of the 2000 Regulations.

10. Furthermore, the Scottish Government was asked why the conditions required under regulation 9G are not expressly included under regulations 7(2)(a), 10(2), 10A, 13(1) and (4) and 22(11) of the 2000 Regulations. This correspondence is reproduced at Appendix A.

11. In its response, the Scottish Government conceded that all of the specified omissions are errors. It has undertaken to correct these at the first available opportunity.
12. The Committee considered that the omission of certain references to regulation 9G has a bearing upon the effective operation of the instrument. Particularly significant is the failure to refer to regulation 9G in regulation 7 (which confers power on the Scottish Environment Protection Agency to grant or refuse permits) and regulation 13 (which confers power on SEPA to vary the conditions of permits) of the 2000 Regulations.

13. The Scottish Government was asked to explain the effect of the omission of reference to regulation 9G in the instances set out above.

14. The Scottish Government considers that the courts will read in the missing references where necessary, particularly in light of the duty on the courts to interpret national measures so as to comply with EU law. However, the Committee takes the view that the courts could equally consider that the references to regulation 9G had been purposely omitted, on the basis that these Regulations explicitly insert the new regulation 9G but make no provision about cross-referencing it. The Committee considers that without express authority it may be questionable whether SEPA has power to impose regulation 9G conditions when granting or varying permits.

15. Accordingly, the Committee concludes that it appears that the intention of these Regulations, namely that permits should in appropriate cases be subject to the conditions set out in regulation 9G, is frustrated.

16. The Regulations are intended to ensure compliance with an EU Directive, and do so by inserting a new regulation 9G into the Pollution Prevention and Control (Scotland) Regulations 2000. However, the Scottish Government accepts that cross-references to the new regulation 9G have been omitted in error, in particular in the provisions which confer power on the Scottish Environment Protection Agency to grant and vary permits for certain purposes. It accordingly appears to be doubtful whether the Scottish Environment Protection Agency has power to grant permits subject to the conditions in regulation 9G, or to vary permits to make them subject to those conditions. Accordingly, the Regulations appear to be defectively drafted. As such, the Committee draws the instrument to the attention of the Parliament on reporting ground (i).

17. In so doing, the Committee calls on the Scottish Government to correct these errors at the earliest possible date, instead of waiting for the next available opportunity.
NEGATIVE PROCEDURE

Police (Retention and Disposal of Motor Vehicles) (Scotland) Amendment Revocation Regulations 2011 (SSI 2011/429) (Rural Affairs, Climate Change and Environment Committee)

18. These Regulations revoke the Police (Retention and Disposal of Motor Vehicles) (Scotland) Amendment Regulations 2011 ("the principal Regulations"), which would otherwise have come into force on 22 December 2011.

19. The Committee considered the principal Regulations at its 13th meeting on 29 November 2011 and did not draw the instrument to the attention of the Parliament. The principal Regulations introduced a new charging system for the removal and retention of vehicles by the police under the Antisocial Behaviour etc. (Scotland) Act 2004. They replaced the current system of flat rates with charges based on the type or size of the vehicle and the circumstances under which it is uplifted ("matrix charging").

20. A UK-wide consultation exercise was conducted by the Home Office in 2007 to establish the most appropriate charges for the removal, storage and disposal of vehicles. This revealed widespread support for matrix charging and as a result such charging arrangements were implemented in England and Wales. As detailed in the executive note to the principal Regulations, the Scottish Government was of the view that, since the UK consultation had not attracted any significant opposition, an additional consultation exercise was not required.

21. However key stakeholders subsequently raised concerns about the decision not to conduct a separate Scottish consultation. Consequently, these Regulations have been made in order to revoke the principal Regulations before they come into force. The Scottish Government indicates that this will allow time for discussions to be held with key stakeholders prior to the introduction of any further measures.

22. These Regulations are subject to the negative procedure, and they come into force on 21 December 2011.

23. Section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010 relates to instruments which are subject to negative procedure. Section 28(2) sets out the rule that a Scottish statutory instrument which is subject to negative procedure must be laid before Parliament as soon as practicable after it is made, and in any event at least 28 days before the instrument comes into force. A failure to comply with section 28(2) does not render the instrument invalid, but the Scottish Government must explain to the Presiding Officer why the laying requirements have not been complied with.

24. This instrument comes into force 15 days after it was laid. Consequently it does not comply with section 28(2). A failure to comply with section 28(2) automatically engages reporting ground (j).

25. A formal letter was provided on 6 December to the Presiding Officer by the Scottish Government.
26. The letter explains that the laying requirements have not been complied with in order to ensure that the principal Regulations are revoked before the date they are due to come into force (22 December 2011). The letter states that the revocation of the principal Regulations is necessary in order to provide an opportunity for discussion with key stakeholders.

27. Since the decision to consult has been taken at this late stage, it appears to the Committee that there was little option but to breach the 28 day rule in order to prevent the principal Regulations from coming into force.

28. This instrument has not been laid at least 28 days before coming into force, as required by section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Committee therefore draws the instrument to the attention of the Parliament on ground (j).

29. In so doing, the Committee accepts the explanation given by the Scottish Government for failing to comply with section 28(2).
30. At its meeting on 13 December 2011, the Committee also considered the following instrument and determined that it did not need to draw the attention of the Parliament to it on any grounds within its remit:

*Rural Affairs, Climate Change and Environment Committee*

Marine Licensing (Exempted Activities) (Scottish Inshore and Offshore Regions) Amendment Order 2012 [draft]
INSTRUMENTS SUBJECT TO THE NEGATIVE PROCEDURE

APPENDIX 1

Control of Volatile Organic Compounds (Petrol Vapour Recovery) (Scotland) Regulations 2011 (SSI 2011/418)

On 1 December 2011 the Scottish Government was asked:

1. To explain why regulation 9G of the Pollution Prevention and Control (Scotland) Regulations 2000 (“the 2000 Regulations”) as inserted by regulation 4(2) of the Control of Volatile Organic Compounds (Petrol Vapour Recovery) (Scotland) Regulations 2011 (“regulation 9G”) is not included in the definition of “hybrid permit” under regulation 2 of the 2000 Regulations. Is it intended that a hybrid permit may not be granted which contains one or more standard rules conditions together with the conditions required under regulation 9G?

2. To explain why the conditions required under regulation 9G are not expressly included under:
   - regulation 7(2)(a) of the 2000 Regulations, which relates to the conditions subject to which a permit may be granted;
   - regulation 10(2) of the 2000 Regulations, which relates to the conditions to which standard rules should comply;
   - regulation 10A, which relates to the conditions to which a standard rules permit may be subject;
   - regulations 13(1) and (4) of the 2000 Regulations, which relate to the basis for which SEPA might vary the conditions of a permit; and
   - regulation 22(11) of the 2000 Regulations, which relates to appeals determined by the Scottish Ministers in exercise of the powers specified in regulations 22(4)(b) and (c) of the 2000 Regulations;

given that in order to adequately transpose the provisions of Council Directive 2009/126/EC, the conditions set out in regulation 9G must be implemented.

3. What effect does the omission of reference to regulation 9G have in each case?

The Scottish Government responded as follows:

1. The failure to insert a reference to new regulation 9G into the definition of “hybrid permit” in regulation 2 of the 2000 Regulations is an error which the Scottish Government regrets. It will be corrected at the first available opportunity.

2. The failure to insert references to new regulation 9G in the specified provisions of the 2002 Regulations is a further error, which again will be corrected at the first available opportunity.

3. New regulation 9G partly transposes obligations in the two Volatile Organic Compound Directives as referred to in that regulation.
The Scottish Government considers that the intended effect of new regulation 9G is clear in the context of the scheme provided for under the 2000 Regulations. It is therefore reasonable to expect that the courts will read in the missing references to the operative parts of the 2000 Regulations in proceedings in which they require to interpret those Regulations. This is made even more likely given the duty on the courts to interpret national measures so as to give effect to EU law.

In any event, SEPA is considered to be an emanation of the Member State for this purpose. It is therefore already required to implement EU law so far as doing so is within the scope of a relevant function. So, for example, SEPA already impose such conditions as are needed to give effect to the first VOC Directive in any relevant PPC permit, and will do so from 31 December 2011 in respect of the second VOC Directive when it comes into force.

The main effect is therefore that the 2000 Regulations as amended are not as clear as they should be because of the missing reference in the specified provisions. It is for that reason that the Scottish Government intends to correct the errors.
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