DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

14th Meeting, 2018 (Session 5)

Tuesday 1 May 2018

The Committee will meet at 10.00 am in the Sir Alexander Fleming Room (CR3).

1. Decision on taking business in private: The Committee will decide whether to take item 5 in private.

2. Prescription (Scotland) Bill: The Committee will take evidence on the Bill at Stage 1 from—

   Annabelle Ewing, Minister for Community Safety and Legal Affairs; Jill Clark, Head of Civil Law Reform Unit, Justice Directorate; Michael Paparakis, Civil Law Policy Manager, Civil Law Reform Unit; Neel Mojee, Solicitor, Constitution and Civil Law, Scottish Government.

3. European Union (Withdrawal) Bill (UK Parliament legislation): The Committee will take evidence on supplementary legislative consent memorandum LCM-S5-10a from—

   Michael Russell, Minister for UK Negotiations on Scotland’s Place in Europe; Gerald Byrne, Head of Constitutional Policy; Graham Fisher, Solicitor and Team Leader, Constitutional and Civil Law Division; Luke McBratney, Policy Officer, Legislative Consequences of EU Withdrawal Project, Scottish Government.

4. Instruments subject to negative procedure: The Committee will consider the following—

   Common Agricultural Policy (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/122);
   National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No. 2) Regulations 2017 Amendment Regulations 2018 (SSI 2018/123);
   Act of Sederunt (Fees of Messengers-at-Arms, Sheriff Officers and Shorthand Writers) (Amendment) 2018 (SSI 2018/126);
   Bankruptcy Fees (Scotland) Regulations 2018 (SSI 2018/127).
5. **European Union (Withdrawal) Bill (UK Parliament legislation):** The Committee will consider the evidence it heard earlier in the meeting.

6. **Prescription (Scotland) Bill (in private):** The Committee will consider the evidence it heard earlier in the meeting.

Andrew Proudfoot  
Clerk to the Delegated Powers and Law Reform Committee  
Room T1.01  
The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5212  
Email: andrew.proudfoot@parliament.scot

The papers for this meeting are as follows—

**Agenda Items 2 and 6**

Prescription (Scotland) Bill - As Introduced

Prescription (Scotland) Bill - Explanatory Notes

Briefing Paper (private)  
DPLR/S5/18/14/1(P)

**Agenda Items 3 and 5**

European Union (Withdrawal) Bill - supplementary legislative consent memorandum (LCM-S5-10a)

European Union (Withdrawal) Bill - letter from the Minister for UK Negotiations on Scotland’s Place in Europe regarding draft protocols

European Union (Withdrawal) Bill - as introduced in the House of Lords

European Union (Withdrawal) Bill - Supplementary Delegated Powers Memorandum

Briefing Paper (private)  
DPLR/S5/18/14/2(P)

**Agenda Item 4**

Briefing on Instruments (private)  
DPLR/S5/18/14/3(P)

Instrument Responses  
DPLR/S5/18/14/4
DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting, 2018 (Session 5)

Tuesday 1 May 2018

Instrument Responses

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Common Agricultural Policy (Miscellaneous Amendments) (Scotland) Regulations 2018 (SSI 2018/122)

On 20 April 2018, the Scottish Government was asked:

1. The new regulation 5(2)(c) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, as inserted by regulation 4 of this instrument, transposes provision in the second sentence of the second sub-paragraph of Article 4(1) of the "Direct Payments Regulation" (EU) No. 1307/2013. It appears that that second sentence provides that "from 1 January 2018 parcels of land lying fallow which have been accepted as arable land under this subparagraph in 2018 shall become permanent grassland in 2023, or thereafter, if the conditions set out in point (h) are met".

Please explain how the new regulation 5(2)(c) is considered to properly implement that second sentence, given that the subparagraph does not mention the requirement for acceptance as arable land in 2018 (as a condition of the land to become permanent grassland), or whether it is considered that the provision could more clearly implement that second sentence?

2. Is it agreed that there is an error in the new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, in respect that the provision defines "established local practices" for the purposes of paragraph (2)(b), but the definition is contained in paragraph (2)(a)?

3. Is corrective action proposed?

The Scottish Government responded as follows:

1. Regulation (EU) 1307/2013 prior to amendment contained provision, so far as relevant, as follows:

“arable land” was defined at Article 4(1)(f) as land cultivated for crop production or available for crop production but lying fallow. This reflects farming practice of leaving parcels of land uncultivated for a period of time, depending on crop rotation, but eventually re-establishing crops there. This definition prevents such land from being reclassified as permanent grassland whilst lying fallow.

“permanent grassland” was defined at article 4(1)(h) as land used to grow grasses or other herbaceous forage naturally (self-seeded) or through cultivation (sown) and that has not been included in the crop rotation of the holding for 5 years or more.
The effect of these two definitions was that where land reached the point that it had been lying fallow for 5 years or more, it would be re-classified as permanent grassland. 2018 is particularly pertinent given that the current CAP started in 2014; 2018 being the fifth calendar year after 2014.

Regulation (EU) 1307/2013 amends the definitions for arable land and permanent grassland and, in particular, inserts a new second sub-paragraph to Article 4(1) stating that MS may continue to accept fallow land as arable land and, in its second sentence, that “From 1 January 2018, parcels of fallow land which have been accepted as arable under this sub-paragraph in 2018 shall become permanent grassland in 2023, or thereafter, if the conditions set out in point (h) are met.”.

Whilst the Scottish Government agrees that the effect of this provision must be to bite on land lying fallow which is accepted by the Scottish Ministers only in 2018 as arable land, it must also be intended to bite on land on the land described in regulation 5(2)(c) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015.

Recital 25 to Regulation (EU) 2017/2393 (which amends Regulation (EU) 1307/2013 of European Parliament and of the Council) says “In order to clarify the classification prior to 2018 of land lying fallow as arable land, where it had been in place for 5 years or more, and provide certainty to farmers concerned, MS should be able to maintain its classification as arable land in 2018.” This recital is clear that the purpose of the amendment is to allow fallow land which has been accepted, prior to 2018 as arable land, to maintain its status as arable land. Therefore, it is the Scottish Government’s position that where the second sentence of new Article 4(1), second sub-paragraph, states “parcels of fallow land which have been accepted as arable under this sub-paragraph in 2018” it must also be intended to include parcels of fallow land which prior to 1 January 2018 have been accepted as arable and, in 2018, are still able to be considered as arable, notwithstanding the definition of permanent grassland. Indeed the Scottish Government understands the EU’s rationale to be that any land put into fallow should continue to be part of the managed agricultural rotation of the holding for a longer period.

If this was not the intended effect of these words, there would have been no need for the second sentence of new Article 4(1), second sub-paragraph: the “standard” definitions of arable land and permanent grassland (still found at Articles 4(1)(f) and (h), respectively) would bite so that fallow land accepted as arable in 2018 would, after 5 years of lying fallow and not having been ploughed up, be considered permanent grassland. Indeed, the words “Notwithstanding points (f) and (h) of the first sub-paragraph” also strengthen this view.

Accordingly, new regulation 5(2)(c) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015 makes provision for the definition of permanent grassland to include fallow land which prior to 1 January 2018 has been accepted as (or “constitutes”) arable land but which on or after 1st January 2023 meets the conditions for permanent grassland as set out in Article 4(1)(h). Where fallow land is accepted only in 2018 as arable land the directly applicable “standard” definition of permanent grassland at article 4(1)(h) bites to re-classify the land as permanent grassland in 2023 – this does not need to be implemented in the domestic regulations.
2. It is agreed that there is an error in new regulation 5(3) of the Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015, in respect that the provision defines “established local practices” for the purposes of paragraph (2)(b), but that the definition is contained in paragraph (2)(a). The Scottish Government is grateful for this being drawn to its attention.

3. In respect of question 2, the Scottish Government will take corrective action by way of a correction slip.
On 20 April 2018, the Scottish Government was asked:

Regulation 3 of the Regulations makes provision replacing regulation 1(2) of the National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) (No.2) (Scotland) Regulations 2017 ("SSI 2017/434").

1. New regulation 1(2)(a) of SSI 2017/434 provides that regulation 15 of that SSI has effect from 1st July 2013. Regulation 15 of SSI 2017/434 has had effect from 31st January 2018 and will have effect until 31 May 2018 prospectively. As of 1 June 2018, it will have effect retrospectively from 1st July 2013.

In the absence of further explanation, please explain whether the provision in new regulation 1(2)(a) should have been made at the time SSI 2017/434 was made or otherwise why such provision has been made in the Regulations.

2. New regulation 1(2)(b) of SSI 2017/434 provides that regulation 7 (among others) of that SSI has effect from 1st April 2015, “but only in respect of the other regulations referred to in this sub-paragraph”. One of the other regulations referred to in new regulation 1(2)(b) is regulation 5. However, regulation 7 of SSI 2017/434 provides that the National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 are amended in accordance with regulations 8 to 18 (i.e. not in accordance with regulation 5 of that SSI). (a) Is it intended that the other regulations in respect of which regulation 7 of SSI 2017/434 has effect from 1st April 2015 are the regulations referred to in this sub-paragraph? If so, should this be made clearer?

(b) New regulation 1(2)(b) of SSI 2017/434 gives retrospective effect to regulations 5, 8 and 14 of that SSI from 1st April 2015. Those regulations had effect from 31st January 2018 and will have effect until 31 May 2018 prospectively. As of 1 June 2018, they will have effect retrospectively from 1st April 2015.

In the absence of further explanation, please explain whether the provision in new regulation 1(2)(b) in respect of regulations 5, 8 and 14 should have been made at the time SSI 2017/434 was made or otherwise why such provision has been made in the Regulations.

3. Is corrective action proposed?

The Scottish Government responded as follows:

In reply to question 1, the desirability of corrective action drawn to SG’s attention which necessitated the current S.S.I. 2018/123, allowed a further refinement of policy which is reflected in the changes to the 2017 instrument referred to in the question. The fact that this was being done in addition to the corrective action is referred to in
the explanatory note to S.S.I. 2018/123. It is thought that there is therefore sufficient clarity.

In reply to question 2(a) it was intended that the other regulations in respect of which regulation 7 of SSI 2017/434 had effect from 1st April 2015 were to be the regulations referred to following the reference to regulation 7 in new regulation 1(2)(b) (i.e. regulations 8, 9, 13, 14, 16 and 18 of SSI 2017/434, but not regulation 5 of that SSI). This in the opinion of SG is the only construction possible given the terms of regulation 7. In any event regulation 5 is to have effect from the same date in terms of the regulation and therefore there can be no confusion about the effective date of regulation 5.

In reply to question 2(b), the desirability of corrective action drawn to SG’s attention which necessitated the current S.S.I. 2018/123, allowed a further refinement of policy which is reflected in the changes to the 2017 instrument referred to in the question. The fact that this was being done in addition to the corrective action is referred to in the explanatory note to S.S.I. 2018/123. It is thought that there is therefore sufficient clarity.

In reply to question 3, no corrective action is proposed.