

# Net Zero, Energy and Transport Committee

## 10th Meeting, 2021 (session 6), Tuesday, 16 November 2021

### UK statutory instruments - consideration of consent notifications

#### Note by the Clerk

#### Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI) —

- [The Waste and Agriculture \(Legislative Functions\) Regs 2021](#)

2. As this SI notification cuts across a number of policy areas and addresses legislative deficiencies across three ministerial portfolios, this Committee will only focus on the environmental (waste) legislative functions. The other functions are:

- Agricultural legislative functions, Rural Affairs, Islands and Natural Environment Committee; and
- Planning (Extractive waste), Local Government and Communities Committee.

#### Process for parliamentary scrutiny of consent notifications for UK statutory instruments

3. The process for the Scottish Parliament's consideration of consent notifications is set out in a [Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit](#).
4. 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.
5. The protocol establishes a proportionate scrutiny approach and categorises SIs into type 1 and type 2.

6. 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.
7. For type 2 SI notifications, however, the Scottish Government will notify the Scottish Parliament within five days *after* giving consent.
8. 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.
9. **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.**
10. 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.
11. If the Committee is not content with the proposal, however, it may make one of the following three recommendations—
  - (1) 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;
  - (2) 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
  - (3) 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).

## The Waste and Agriculture (Legislative Functions) Regs 2021

12. A [notification was sent by the Minister for Green Skills, Circular Economy and Biodiversity on 4 October 2021](#) for this UK affirmative instrument. The UK Government intend to lay this SI before Parliament on 18 November 2021.
13. The Net Zero, Energy and Transport Committee discussed the SI at its [meeting on 26 October 2021](#), during consideration of its working programme. (This discussion took place in private.) Having examined the documentation supplied with the proposed SI, [the Committee agreed to write to the Cabinet Secretary for Net Zero, Energy and Transport](#) posing four questions, specifically on environmental waste regulations aspects, to help inform its consideration of the instrument.
14. [The Minister for Green Skills, Circular Economy and Biodiversity replied to the above letter on 8 November 2021.](#)

## For decision

15. The Committee is invited to note the Minister's 8 November response, and to consider whether it agrees with the Scottish Government that the environmental provisions set out in the notification should be included in the UK SI.