



# The Scottish Parliament

## ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

### AGENDA

**16<sup>th</sup> Meeting, 2003 (Session 2)**

**Wednesday 17 December 2003**

The Committee will meet at 11.30 am in Committee Room 3.

1. **Subordinate legislation:** The Committee will consider the following negative instrument—

the Pig Carcase (Grading) Amendment (Scotland) Regulations 2003, (SSI 2003/565)

2. **Subordinate legislation:** The Committee will consider the following negative instruments—

the Prohibition of Keeping or Release of Live Fish (Specified Species) (Scotland) Order 2003, (SSI 2003/560)

the Registration of Establishments Keeping Laying Hens (Scotland) Regulations 2003, (SSI 2003/576)

and may take evidence from—

Aileen Bearhop, Agriculture Policy Division, Scottish Executive

Malcolm McMillan, Legal and Parliamentary Services, Scottish Executive.

3. **Parliamentary debate:** The Committee will consider whether to seek a debate in the Parliament on the Report on its Inquiry into the National Waste Plan.

**Tracey Hawe**  
Clerk to the Committee  
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The following papers are attached:

<u>Agenda Item 1</u>	
<u>the Prohibition of Keeping or Release of Live Fish (Specified Species) (Scotland) Order 2003, (<a href="#">SSI 2003/560</a>)</u>	ERD/S2/03/16/1a
Extract from the Subordinate Legislation Committee's 14 <sup>th</sup> Report	<a href="#">ERD/S2/03/16/1b</a>
Memorandum from the Legal Adviser to the Subordinate Legislation Committee	<a href="#">ERD/S2/03/16/1c</a>
Memorandum from the Scottish Executive	<a href="#">ERD/S2/03/16/1d</a>
<u>the Pig Carcase (Grading) Amendment (Scotland) Regulations 2003, (<a href="#">SSI 2003/565</a>)</u>	ERD/S2/03/16/1e
Memorandum from the Scottish Executive	<a href="#">ERD/S2/03/16/1f</a>
<u>the Registration of Establishments Keeping Laying Hens (Scotland) Regulations 2003, (<a href="#">SSI 2003/576</a>)</u>	ERD/S2/03/16/1g
Extract from the Subordinate Legislation Committee's 15 <sup>th</sup> Report	<a href="#">ERD/S2/03/16/1h</a>
Memorandum from the Scottish Executive	<a href="#">ERD/S2/03/16/1i</a>

**Subordinate Legislation Committee  
Extract of 14<sup>th</sup> Report, 2003**

1. At its meeting on 2<sup>nd</sup> December the Committee determined that it did not need to draw the attention of the Parliament to the instruments listed in the Annexe to this report on any of the grounds in its remit.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Environment and Rural  
Development

SSI 2003/560

**Instruments subject to annulment**

The Prohibition of Keeping or Release of Live Fish (Specified Species)  
(Scotland) Order 2003 (**SSI 2003/560**)

*Background*

1. The Committee asked the Executive why this Order, which is made under a pre-devolution Act of the Westminster Parliament that extends only to Scotland, contains in article 2 a provision that defines “Scotland” for the purposes of the Order with reference to the Scottish Adjacent Waters Boundaries Order 1999 (SI 1999/1126).

*Response*

2. The Executive has explained that, because the definition provided by the Boundaries Order does not apply automatically to pre-commencement enactments, a definition was included to make it clear that the prohibitions imposed by the Order extend to the internal waters and territorial sea of the United Kingdom adjacent to Scotland (as determined by the Boundaries Order). The Executive’s response is reproduced at the Appendix to this report.

*Report*

3. While the intention may be clear, it seems to the Committee that the reply does not explain why the Executive considers that it has the necessary powers to define “Scotland” for the purposes of the Order. “Scotland” is not defined in the parent Act and therefore, according to the usual rules of statutory interpretation, would be construed “unless the context otherwise requires” as including the territorial waters off the coast of Scotland. The difficulty arises where the area of territorial sea attributable to Scotland may be uncertain. The concept of territorial sea is one that relates to a state not to parts of a state.

4. The Order attempts to deal with this problem by including a definition of Scotland in the Order that refers to the Boundaries Order. If the territorial extent of Scotland as defined by the Boundaries Order is coterminous with or

within the territorial extent of "Scotland" for the purposes of the parent Act then article 2 causes no difficulty.

5. If not, then there is a doubt as to how far article 2 is *intra vires* the enabling power. There is no information available to the Committee that would enable it to offer any further views on the point in relation to this Order. **The Committee therefore draws the attention of the lead committee and the Parliament to the instrument on the grounds that there are, to this extent, doubts as to whether it is *intra vires*.**

## **Appendix**

### **THE PROHIBITION OF KEEPING OR RELEASE OF LIVE FISH (SPECIFIED SPECIES) (SCOTLAND) ORDER 2003, (SSI 2003/560)**

On 25<sup>th</sup> November the Committee asked the Executive for an explanation of the following matter-

"The Committee notes that in article 2 of the Order there is a definition of "Scotland". The Executive is asked to explain the inclusion of this definition, given that the parent Act itself extends only to Scotland."

#### **The Scottish Executive responds as follows:**

As the Committee notes the parent Act extends to Scotland only. Scotland is not, however, defined in the parent Act nor in the Interpretation Act 1978. The Committee will note, however, that Scotland is defined in s126(1) of the Scotland Act 1998. The Interpretation Order (S.I. 1999/1379) provides that the definition in the Scotland Act is presumed to apply to any references to Scotland in a S.S.I. made under an Act of the Scottish Parliament.

The Interpretation Order does not apply as this instrument is made under a Westminster Act. The definition of Scotland was therefore included in the interpretation provision of this Instrument to make it clear that for the purposes of this Instrument Scotland has the same meaning as in s126 (1) of the Scotland Act 1998.

The inclusion of the definition of Scotland makes it absolutely clear that the prohibition of keeping or releasing live fish or eggs of the fish specified in the Schedules to the Order without a licence extends to the internal waters and territorial sea of the United Kingdom adjacent to Scotland (as determined by the Scottish Adjacent Waters Boundaries Order 1999 [S.I. 1999/1126] ).

**Scottish Executive Environment and Rural Affairs Department**

27 November 2003

**The Prohibition of Keeping or Release of Live Fish (Specified Species)  
(Scotland) Order 2003 (SSI 2003/560)**

**Memorandum from the Legal Adviser to the Subordinate Legislation  
Committee**

***Background***

The Environment and Rural Development Committee has noted the Report of the Subordinate Legislation Committee on the above Order and has asked for some further advice on issues raised by that Report.

Doubts have been raised by the SLC on the *vires* of article 2 of the Order which defines "Scotland" for the purposes of the Order with reference to section 126(1) of the Scotland Act 1998 and thereby to the Scottish Adjacent Waters Boundaries Order (SI 1999/1126). The difficulty is that the Import of Live Fish (Scotland) Act 1978 under which the Order was made is a pre-devolution Act that extends only to Scotland but which does not contain a definition of Scotland.

The Boundaries Order applies only for the purposes of the Scotland Act, that is, for defining the maximum limits of the extent of the devolved powers of the Parliament and the Scottish Ministers. While therefore a reference to the Order could be used to limit the boundaries of Scotland in the application of a pre-devolution statute, it cannot be used to extend those boundaries. If the effect of the reference in article 2 of the Live Fish Order to the Boundaries Order is to extend the boundaries of Scotland in the 1978 Act, then it may be to that extent *ultra vires*.

I have been asked 2 specific questions on the Order.

***If the Order is ultra vires, does this negate the whole Order?***

The short answer is no, it is very unlikely that a court would hold that the entire Order fell. Case law clearly indicates that courts are very reluctant to overturn subordinate legislation unless a defect goes to the heart of the instrument and will do their utmost to give effect to the instrument so far as possible. If for example an offending provision can be excised without otherwise doing damage to the instrument, then the courts will do so. Accordingly in my opinion, if the Order is partly *ultra vires* because the boundaries set out in the Boundaries Order exceed the boundaries of Scotland within the meaning of the 1978 Act a court would be likely to find that the Order was ineffective only in the area of sea which lies between the 2 boundaries.

***What was the plain language conclusion of the SLC on the instrument?***

The SLC was unable to reach any firm conclusion on the instrument. I have now seen the Executive's Memorandum to the E&RA Committee which illustrates the difficulties faced by the SLC in its consideration of the instrument. The SLC is not a court and as the Executive points out in paragraph 3 of the Memorandum the term "Scotland" was not defined in the 1978 Act nor in the Interpretation Act 1978 nor has it been judicially defined by the courts. Accordingly in order to determine what was intended by Parliament it would be necessary to have regard to matters of fact as well as to the legislation referred to in the Memorandum.

No evidence was produced to the SLC that would enable it to form any firm view, and it is observed that none is advanced by the Executive in its current Memorandum.

***Comments on the Executive's Memorandum***

I would not disagree with the summary of the law as set out in the Memorandum but do not think that it advances an understanding of the legal position very far. In paragraph 4 the Executive makes selective reference to Bennion on Statutory Interpretation. The Committee is referred to section 105 of that work in which it is stated in relation to the composition of an enactment's territory that difficulty can arise where a named territory is only part of a state "as is the case with Scotland". "While the land barriers may be clear, the area of the territorial waters attributable to the territory is likely to be uncertain." Bennion goes on to point out that this is because the concept of territorial waters belongs to a state not to parts of a state.

Section 125 of Bennion quoted by the Executive is concerned with the territorial waters of the United Kingdom. The principal difficulty in the case of the Live Fish Order lies with the delineation of the boundary between England and Scotland. While the Territorial Sea Act 1987 is relevant to the former, it has no application to the latter. Paragraph 8 of the Memorandum states what the Executive believes may have informed the drafting of the Boundaries Order but it does not mean that Scotland for the purposes of the 1978 Act is to be construed according to that Order.

It is perhaps significant that where it was thought that the delineation of the territorial sea adjacent to Scotland was likely to be relevant post-devolution for the interpretation of pre-devolution legislation, most such legislation was specifically amended by consequential modification order under the Scotland Act. The Committee is referred by way of example to the Inshore Fishing (Scotland) Act 1984 which was an Act that extended only to Scotland yet was specifically amended by SI 1999/1820 to define Scottish inshore waters with reference to waters within the 6 mile limit and within the Scottish zone (as defined by the Boundaries Order). Similar amendments were also made to other sea fisheries legislation. It is not known why no such amendments were made to the 1978 Act but it is always possible that this was an oversight. It is not self evident that there was any greater need for modification of the 1978 Act than for the 1984 Act.

### **Conclusion**

Despite what is said above, it should be emphasised that any doubts as to *vires* (and the doubts are only slight) are relatively minor and technical. The SLC took the view that the Executive may well be right in its assumption that the boundaries of the territorial sea adjacent to Scotland for the purposes of the 1978 Act are coterminous with or at least no less than those set out in the Boundaries Order. The Committee was concerned only that in the absence of judicial interpretation or clear statutory authority this could not in its opinion be guaranteed.

Even if a court were to determine that article 2 of the Order was partly *ultra vires* in that it extended the boundaries of Scotland for the purposes of the 1978 Act, it would be likely to give it effect so far as it was within the *vires* of that Act. On that basis the doubts of the SLC could be considered technical rather than substantial. It might have been better in all the circumstances had the Executive omitted article 2 from the Order as a substantive provision given that the territorial extent of the Order appears in this instance to be a matter of opinion rather than clear law.

Margaret Macdonald  
Directorate of Legal Services  
15 December 2003

**Memorandum from the Scottish Executive to the Environment and Rural  
Development Committee**

**THE PROHIBITION OF KEEPING OR RELEASE OF LIVE FISH (SPECIFIED  
SPECIES) (SCOTLAND) ORDER 2003**

1. On the specific questions asked by the Committee, it is the Executive's view that there is no difference between the boundaries at issue. It is the view of the Executive that the definition of Scotland used in the Prohibition of Keeping or Release of Live Fish (Specified Species) (Scotland) Order 2003 ("the Order") (that definition being by reference to section 126(1)) of the Scotland Act 1998) is coterminous with the meaning of Scotland in the 1978 Act. The Executive takes the view that the Order is therefore *intra vires*.

2. In relation to where the boundary falls in the Scottish Adjacent Boundaries Order 1999, that is set out in the Boundaries Order itself and shown on the illustrative map attached to the Order. An electronic copy of that map is attached.

3. In the response to the Subordinate Legislation Committee (SLC) dated 27 November 2003, the Executive pointed out that the term "Scotland" was not defined in the Import of Live Fish (Scotland) Act 1978 ("the 1978 Act") nor in the Interpretation Act 1978. The term has also not been judicially defined by the courts.

4. Bennion on Statutory Interpretation (4<sup>th</sup> edition) confirms at section 124 that Scotland is not the subject of a statutory definition. It is noted that Scotland's only land boundary, largely formed by the River Tweed, is coterminous with, and fixed by, the northern boundary of England. Scotland's seaward boundaries are those of the former Kingdom of Scotland and its Islands, including the Hebrides, the Orkneys and Shetlands, and Rockall. Bennion goes on to note that the name "Scotland" is a matter of repute. Scotland is "that part of Britain called Scotland". The SLC notes that Scotland would normally be taken to include the territorial waters off the coast of Scotland. The Executive agrees that Scotland would normally be taken to mean Scotland, including the internal waters and the territorial sea adjacent to Scotland.

*Meaning of Territorial Sea*

5. Bennion states at section 125 of the Code that subject to intervention by Parliament, the decision as to what constitutes territorial waters is now regarded as a matter within the Royal Prerogative. It is a matter of sovereignty; it is a matter of extension of sovereignty over the high seas, and, as such is particularly a matter for the Crown from time to time under the prerogative to determine. The Territorial Sea Act 1987 extended the United Kingdom territorial waters (which are referred to in that Act as the territorial sea) from 3 to 12 nautical miles (see section 1(1)(a) of that Act). That change reflected international practice. The 1987 Act recognises that in some instances, because of the narrowness of international straits, a true limit of 12 nautical miles is impracticable. Accordingly, the Act enables the limit to be altered in specified instances by order in council.

6. The definition of "Scotland" in the Scotland Act 1998 includes so much of the internal waters in the territorial sea of the United Kingdom as are adjacent to Scotland. Section 126(2) empowers Her Majesty by order in council to determine, or make provision for determining, for the purposes of the Scotland Act, any boundary between waters which are to be treated as internal waters or territorial sea of the United Kingdom, or sea within British fishery limits adjacent to Scotland, and those which are not.

7. The Scottish Adjacent Waters Boundaries Order 1999 sets the boundaries between waters which are to be treated as internal waters or territorial sea of the United Kingdom adjacent to Scotland and those which are not. The boundaries are set by reference to a number of specified co-ordinates.

8. The Executive understands that the boundaries in the Adjacent Waters Boundaries Order were drawn using the same method as would have been used where necessary to define Scotland pre-devolution. The boundaries in the Adjacent Waters Boundary Order were drawn in accordance with the normal rules of international law, by using the median line. This method of setting a boundary by drawing a median line followed accepted convention on the matter, so that every point on the boundary line is equidistant from Scotland and England. As a result, it is the Executive's view that the standard definition of Scotland in a pre-devolution Act, and the definition of Scotland in section 126(1) of the Scotland Act 1998 (as read with the Adjacent Waters Boundary Order), are not geographically different.

9. In conclusion, the Executive, for the reasons outlined above, is of the view that there is no difficulty with the *vires* of the Order. The Executive notes that while the SLC have raised the question of *vires*, the SLC gave no explanation of why they are concerned that the definition of Scotland used for the purposes of the 2003 Order may not be coterminous with the extent of Scotland for the purposes of the 1978 Act.

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ERAD:FFA2  
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Ext - 46227  
12 December 2003

Memorandum from the Scottish Executive to the Environment and Rural Development Committee

## **THE PIG CARCASE (GRADING) AMENDMENT (SCOTLAND) REGULATIONS 2003**

### **Confirmation that Ultra-FOM is no longer used by the Scottish Industry**

(i) I can confirm that Ultra-FOM is no longer used by the industry in Scotland. In fact Ultra-FOM has never been used in Scotland or the rest of GB.

### **Background to Pigmear Management Committee Decision on Methods of Classification**

(ii) In December 2002, the MLC submitted to the Department for Environment, Food and Rural Affairs (Defra) a protocol for a trial to be carried out on the use of AUTOFOM for carcase classification in GB. This was submitted to the EC last December when approval was given for the trial to start. Defra committed approximately £25k to the funding of the trials. The MLC submitted their report of the trials to Defra in July 2003 which was then forwarded onto the EC. At the Pigmear Mancom on 15 July, the EC tabled the MLC's report and invited Member States and their national experts to consider the results over the summer and to contact the MLC direct to discuss any issues of concern. On 17 September, the report was approved by the Pigmear Mancom. Authorisation was given for the use of AUTOFOM and authorisation for Ultra-FOM was withdrawn.

### **Technical and Industry Background to Classification Methods**

(iii) The AUTOFOM machine is a new classification method which is expected to improve feedback to producers on carcase quality and ultimately lead to improved competitiveness. The potential use of AUTOFOM is contained in the MLC British Pig Executive Committee (BPEX) strategy for the British pig industry "The Road to Recovery". The strategy was launched in May 2002. Since the launch of the strategy, BPEX charged the MLC to begin trials on the use of the new machinery which is already in operation in Denmark, Germany, Spain and Poland.

### **Consultation with the Industry**

(iv) We wrote on 12 August 2003 to the organisations below explaining the background to AUTOFOM and invited comments or concerns about its possible introduction. No responses were received.

Scotch Premier Meat Ltd  
Grampian Country Pork Buckie Ltd  
Grampian Country Pork Halls Ltd  
National Pig Association (Scottish Group)  
Robertsons Fine Foods

Ramsay of Carluke Ltd  
JM Munro Ltd  
DS Slaughterhouse Ltd, Dunblane  
Raymond Miller Ltd, Grantown on Spey  
St Andrews Slaughterhouse Co Ltd  
John Robertson, Ardrossan  
Scottish Borders Abattoir  
Wishaw Abattoir Ltd  
J Chapman Butchers Ltd, Shotts  
Sandyford Abattoir  
Rhinds of Elgin  
W Taylor (Lockerbie) Ltd

### **Costs to Scottish Industry**

(v) As explained in the Executive Note, installation costs of AUTOFOM will be met by the industry but the new equipment will have a beneficial impact on business. The new technology is not compulsory but will be an additional option.

I hope this is sufficient information for the Environment and Rural Development Committee to pass the regulations.

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12 December 2003

**Subordinate Legislation Committee  
Extract of 15<sup>th</sup> Report, 2003**

1. At its meeting on 9<sup>th</sup> December the Committee determined that it did not need to draw the attention of the Parliament to the instruments listed in the Annexe to this report on any of the grounds in its remit.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Environment and Rural Development    SSI 2003/576

**Instruments subject to annulment**

The Registration of Establishments Keeping Laying Hens (Scotland) Regulations 2003 (**SSI 2003/576**)

*Background*

1. The Regulations make provision for the registration of establishments keeping 350 or more laying hens and implement Commission Directive 2002/4/EC (OJ No.L30 31.1.2002 p.44).
2. The Committee referred a large number of serious concerns on the Regulations to the Executive for comment. Generally, these concerns have not been allayed by the Executive's responses. In the view of the Committee, the number and nature of the defects are such that consideration should be given to the making of a replacement instrument as soon as possible.
3. The Committee noted in passing that the Directive has been implemented very late and no explanation has been offered for the delay. In this instance, some explanation would have been particularly welcome.

*Question 1*

4. The Executive was asked what date was determined for the purposes of article 1.1(b) of the directive.

*Report 1*

5. The Executive has replied that the relevant date is 31<sup>st</sup> May 2003 and that producers were made aware of it by letter dated 15<sup>th</sup> March 2003. The Executive's response is reproduced at Appendix 3.

**6. The Executive has supplied the information requested which the Committee draws to the attention of the lead committee and the Parliament.**

*Question 2*

7. Article 1.1(c) of Directive 2002/4/EC states that the distinguishing number for establishments for which application was made by the date determined under Article 1.1(b) should have been allocated by 31 May 2003. The Committee therefore asked for confirmation that this obligation was fulfilled.

### *Report 2*

8. The Executive has confirmed that a distinguishing number was issued by 31<sup>st</sup> May 2003 to all establishments which made an application for registration. **The Committee draws this information to the attention of the lead committee and the Parliament as providing the information requested.**

9. The Committee nevertheless observes that nowhere in the Regulations is there any provision for treating either the register that it appears has apparently already been established administratively or registration under the administrative scheme as the register and registration respectively for the purposes of the Regulations. This has implications for the remainder of the Regulations not least regulation 8(1) on which the Committee comments below.

10. **This appears to the Committee to be an unusually limited use of the power which it reports to the lead committee and the Parliament.** In the absence of such a provision, in the Committee's view, the Regulations could be construed as requiring Ministers to set up a new register and as requiring establishments to register anew which does not appear to be the policy intention.

### *Question 3*

11. Regulation 8(1) provides that it is an offence for a person to continue to use an establishment for the keeping of laying hens after 31 December 2003 unless an application has been made by that date for registration in accordance with regulation 5 in respect of that establishment.

12. The Executive was asked to explain the *vires* of that provision standing Article 1.2 of the Directive which clearly states that Member States must provide that a person can only continue to use an establishment if an application for registration has been submitted by 1 June 2003 and that no establishment can be brought into use after that date until the registration requirements have been fulfilled.

### *Report 3*

13. The Executive claims that, as the Regulations do not come into force until 31<sup>st</sup> December 2003 and there is no power to make retrospective legislation under section 2(2) of the European Communities Act 1972 (with which statement the Committee agrees), 31<sup>st</sup> December 2003 is the earliest date that could be provided for in regulation 8. In relation to section 57(2) of the Scotland Act, the view of the Executive is that, simply by virtue of being late, the implementation measure (which in itself is within devolved competence) does not become ultra vires.

14. In the Committee's view, this is not a question of late implementation, though the Regulations certainly raise that issue, but one of providing for a transitional provision for existing establishments for which there appears to be no basis in the Directive. The Directive clearly states that no establishment for which the information required has not been supplied by 31<sup>st</sup> May 2003 (being the due date determined by the Executive) may continue to be used.

Leaving aside the point raised at Paragraph 17 above, by providing for existing unregistered establishments to continue in use after 31<sup>st</sup> December 2003 the Regulations appear in open violation of the express terms of the Directive.

**15. In the Committee's view, therefore, to that extent there is a doubt as to whether the Regulations are *intra vires*. In respect that regulation 8(1) breaches Community law, the Regulations also appear to raise a devolution issue. The Committee reports the Regulations to the lead committee and the Parliament on those grounds.**

16. Although possibly more a matter of policy for the lead committee and the Parliament, it is not clear in any event why it was thought that a transitional provision was appropriate in this instance as it appears that establishments have already had a period of more than 18 months in which to make application to register (though see comments above). It does seem to the Committee a very unexpected or unusual use of the power to include an additional period of grace in such circumstances. **The Committee draws this transitional provision to the attention of the lead committee and the Parliament to pursue as they see fit.**

#### *Question 4*

17. The Committee asked how a person could in any case take advantage of regulation 8(1) given that regulation 5 does not come into force until 31<sup>st</sup> December 2003.

#### *Report 4*

18. The Committee had some difficulty in following the Executive's reply. The Executive states that the intention is to treat all applications made before commencement of these Regulations as if they had been made under regulation 5. The Executive regrets the "narrowness" of the provision. **However, it seems to the Committee that irrespective of any questions as to its *vires*, the requirements of regulation 8(1) as drafted are impossible for an establishment to meet and as such the provision must be regarded as defectively drafted. The Committee therefore reports it to the lead committee and the Parliament on that ground.**

#### *Question 5*

19. The Executive was asked what sanction will apply where a registration is cancelled by Ministers given that regulation 8(2) only prohibits a person from *starting* to use premises until they have been registered and allocated a number.

#### *Report 5*

20. The Committee found the Executive's response very confusing. In particular, it does not seem to accord with the clear wording of the Regulations. On the Committee's reading of regulation 7 an establishment may be removed from the register not only, as the Executive states, if it ceases to be used for keeping laying hens but also if a person fails to supply notice of changes in the information submitted in the application for registration.

21. In the latter circumstances, it is true that a person does not seem to commit any offence by continuing to keep laying hens even although the establishment's registration has been cancelled. Under the Regulations as drafted, it seems that if an establishment has once been registered it can continue to be used even although the registration is withdrawn. The purpose of the power to withdraw registration in such circumstances is therefore obscure. **This appears to be a very unusual or unexpected use of the power and the Committee reports the Regulations on that ground.**

*Question 6*

22. Regulation 8(2) states that a person cannot begin to use an establishment until "that person has received a distinguishing number under regulation 4(2)". Regulation 4(2) states that Ministers are to intimate the distinguishing number to "the owner or keeper who made the application". As it seems possible that the person who will use the premises may not be the same person who made the application and to whom intimation is made, the Executive was asked to explain the discrepancy.

*Report 6*

23. Whilst the Executive has provided some indication as to the policy intention behind this provision, there remains a degree of confusion in the drafting of regulation 8(2) by reason of the reference to receiving a number under regulation 4(2). Only the person who makes the application receives the number under regulation 4(2) and, as the Executive confirms, this need not be the person using the establishment. The drafting of regulation 8(2) therefore appears to be defective in this respect as, contrary to the Executive's assertions, the Regulations do not take account of this possibility.

24. As a further point, the Committee notes that regulation 8(2) refers to the "person" having received a distinguishing number. However, it would seem that it is the premises which receive the number under regulation 4(2) which is then intimated to the person who made the application. Regulation 8(2) is therefore defectively drafted in this respect also.

**25. The Committee therefore reports regulation 8(2) as defectively drafted in the above respects.**

*Question 7*

26. Regulation 4(2) on page 2 requires the Scottish Ministers, within 21 days of receipt of an application under the Regulations, to allocate "to every establishment which is registered on the register" a distinguishing number. The Committee asked whether Ministers are obliged to register an establishment on an application being received and, if not, on what basis registration can be refused and what provision exists for notifying an applicant of the decision and of any right of appeal under regulation 9.

*Report 7*

27. The Executive states that, if an application is properly made, the establishment is registered and that, as whether or not an application is properly made is a matter of fact, no right of review under regulation 9 arises.

28. In the Committee's view, however, there is nothing to support this argument in the Regulations as drafted. The obligation on Ministers under regulation 4(2) is to allocate a distinguishing number to every establishment "which is registered on the register" within 21 days of receipt of the registration application. There is nothing in the Regulations that obliges the Ministers to register an establishment on the receipt of an application even if properly made. On the contrary, the existence of an unrestricted right of appeal suggests that it might be open to the Ministers to refuse to register an establishment in any circumstance.

29. It seems to the Committee that there may also be questions as to whether an application has been properly made, which appears to be a possibility that the Executive has not considered. **The Committee therefore reports the instrument to the lead committee and the Parliament on the two grounds of defective drafting of regulation 4 (2) as above.**

*Question 8*

30. Regulation 5(2) on page 2 requires any change in the information submitted in the application for registration to be notified to the Ministers "by the person who submitted the application for registration". The Committee asked whether this obligation will continue even if the person concerned has ceased to have any connection with the premises and what would happen, for example, in the event of death of the person.

*Report 8*

31. The Executive states that it will accept the change of information from persons representing the person who submitted the application.

32. In the Committee's view, that this cannot be considered wholly satisfactory. While it may deal with the problem of the apparent obligation on a deceased to notify the fact of his or her own death, it does not take account, for example, of a chain of different proprietors. It is not, it seems to the Committee, a question of a "possible narrow construction" of the provision. The provision is quite clear on whom the duty of notification is to lie.

33. Furthermore, it is changes in the particulars of the application that are to be notified rather than changes in the registered data (see Article 1.4 of the Directive). Again, it may be something of a burden on the notifier to have to refer to the original application rather than to the current data on the register. In most cases, the end result may be the same but, again, it does not take account of the fact that a change to the current registered data may in fact not be a change to the data included on the original application if, for example, a property has been sold and then bought back by the original owner.

34. **Therefore, in the Committee's view, regulation 5(2) as drafted represents a very unusual or unexpected use of the power and the Committee reports the instrument on that ground.** The Committee notes that the Executive recognises the problem and has undertaken to consider amending the provision.

35. As failure to notify changes to registered data could result in the removal of a registration, regulation 5(2) therefore does have some potentially

serious consequences (depending on what view is taken of such removal – see above). However, because of the doubts as to the effectiveness of the offence provisions these may be less than would otherwise be the case.

#### *Question 9*

36. The Executive was asked to explain, in relation to the words in parentheses in regulation 10(1), how authorised officers would know whether a dwelling house was being or not being used in connection with the Regulations unless they had first entered the house.

#### *Report 9*

37. Although the Executive considers that provisions such as that referred to by the Committee are commonplace, the Committee observes that it is extremely unusual for authorised officers to have powers of entry to a dwelling house as of right without first having obtained a court order. Even when such powers of entry are conferred by statute, they are invariably hedged with restrictions on their use to take account of the implications of Article 8.1 of the European Convention on Human Rights (ECHR).

38. The Executive claims that an officer would require to make appropriate enquiries as to the use of the dwelling house and only proceed to exercise the powers under the Regulations if satisfied that, in doing so, he would not be in breach of those powers. It seems evident to the Committee, however, that entry can only ever be on “reasonable suspicion” until the officer has actually entered the house and discovered at first hand whether or not it is being used for the stated purposes.

39. If it transpires that the house was not being so used then the power of entry will have been exercised unlawfully. This is not a happy position for either the officer or the householder. **It therefore seems to the Committee that regulation 10(1) as drafted is a very unusual or unexpected use of the powers and it reports the provision to the lead committee and the Parliament on that ground.**

#### *Question 10*

40. Regulation 12(1) provides that offences under the Regulations are to be triable either summarily or on indictment (“either way”) and that a person guilty of an offence is to be liable on summary conviction to a fine “not exceeding level 4 on the standard scale”. As the standard scale is relevant only to offences triable “only summarily” the Committee asked for an explanation of the drafting of this provision.

#### *Report 10*

41. The Executive’s response to the Committee’s question suggests that the Executive has misunderstood the purpose and effect of the provision. This Committee and the Joint Committee on Statutory Instruments (JCSI) at Westminster have often pointed out, as does the Executive’s own guidance, that the standard scale has no relevance to offences triable either way. The purpose of providing for a statutory offence to be triable either way is partly to emphasise the seriousness of the offence and, as the Committee has very recently pointed out, for various reasons to provide for a greater penalty to be

available than would be available on summary conviction for which the maximum fine (unless the legislation otherwise provides) is level 5 on the standard scale, currently £5000. On conviction on indictment there is no monetary limit on the fine that can be imposed.

42. It follows, therefore, that it is internally inconsistent and therefore wrong for an offence provision such as regulation 12 to provide in the case of an either way offence for the maximum penalty on summary conviction to be less than the maximum (the “statutory maximum”, currently £5000) that can be imposed on such conviction as specified by the Criminal Procedure (Scotland) Act 1995 as read with the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995.

43. If the Executive wishes certain offences to be subject to maximum penalties that do not exceed £5000 or whatever the current value of level 5 on the standard scale may be, then it seems to the Committee that the correct approach is to provide for them to be triable only summarily and subject to a penalty described with reference to a level on the standard scale. Creation of an “either way” offence is not appropriate.

44. There is a further difference between an offence triable only summarily and a summary trial of an “either way” offence in that, in the latter case, the statutory time limit in the Criminal Procedure (Scotland) Act 1995 for commencing proceedings does not apply. However, any perceived difficulties that this may cause can, in any case, easily be overcome by appropriate provision in the relevant offence-creating provision. The Executive has not indicated in any case that this was a factor in its considerations on the policy underlying this regulation.

**45. The Committee therefore reports regulation 12(1) to the lead committee and the Parliament on the ground of defective drafting as above.**

#### *Question 11*

46. The Executive was asked to explain why offences of obstruction under the Regulations are to be triable “either way” instead of, as is usual, triable summarily only and subject to a maximum penalty not exceeding level 3 on the standard scale.

#### *Report 11*

47. The Executive does not accept this point and refers to other SSIs including the TSE (Scotland) Regulations (SSI 2002/255) where obstruction is not triable only summarily and subject to the statutory maximum.

48. The Committee agrees that there has been a practice in some SSIs to provide for an offence of obstruction to be triable either way or, where the offence is triable only summarily, subject to a maximum fine exceeding level 3 on the standard scale. The Committee has already remarked adversely on this practice as, although it touches on policy, it is a departure from previously accepted guidelines in the field of criminal justice and thus represented an unusual or unexpected use of the power.

49. It may well be that in some circumstances obstruction of officers may demand a more serious sanction than normal. The TSE Regulations, which deal with controls related to BSE, may be one such example. This is not a matter on which this Committee can express a view. This is not to say, however, that because such a penalty is appropriate in one case it is equally appropriate in others. There is a question of proportionality in every case. It is by no means certain that obstruction in the context of the present Regulations is in the same category as obstruction in the context of the TSE Regulations. **While the matter is substantially one of policy for the lead committee, the Committee reports the provision on the ground that it appears to represent an unusual or unexpected use of the power.**

*Question 12*

50. Regulation 13(2) allows Ministers to direct a “local authority” to enforce the Regulations as an alternative to the Ministers themselves. The Committee asked why, contrary to usual practice, the Regulations do not contain a definition of “local authority”.

*Report 12*

51. The Executive has replied that it regrets the absence of the usual definition of “local authority” and will make an amendment at the next legislative opportunity.

52. It seems likely, in the Committee’s view, that “local authority” would be interpreted as meaning a council within the meaning of section 2 of the Local Government etc. (Scotland) Act 1994 (which it is assumed is the policy intention). However, as the term “local authority” can have different meanings for different purposes this is by no means certain. **The Committee therefore reports the instrument on the ground of defective drafting in this respect, acknowledged by the Executive and which it has undertaken to correct.**

## **Appendix**

### **THE REGISTRATION OF ESTABLISHMENTS KEEPING LAYING HENS (SCOTLAND) REGULATIONS 2003, (SSI 2003/576)**

On 2<sup>nd</sup> December the Subordinate Legislation Committee asked for an explanation of the following matters:

1. The Executive is asked to confirm what date was determined for the purposes of article 1.1(b).
2. The Committee notes that article 1.1(c) of Directive 2002/4/EC states that the distinguishing number for establishments for which application was made by the date determined under Article 1.1(b) should have been allocated by 31 May 2003. The Committee therefore seeks confirmation that this obligation was fulfilled.
3. The Executive is asked to explain the vires of regulation 8 standing Article 1.2 of the Directive which clearly states that Member States must provide that a person can only continue to use an establishment if an application for registration has been submitted by 1 June 2003 and that no establishment can be brought into use after that date until the registration requirements have been fulfilled.
4. The Committee seeks an explanation as to how a person can take advantage of regulation 8(1) given that regulation 5 does not come into force until 31 December 2003.
5. The Executive is asked to confirm what sanction will apply where a registration is cancelled by Ministers given that regulation 8(2) only prohibits a person from starting to use premises until they have been registered and allocated a number.
6. The Committee notes that regulation 8(2) states that a person cannot begin to use an establishment until “that person has received a distinguishing number under regulation 4(2)”. Regulation 4(2) states that Ministers are to intimate the distinguishing number to “the owner or keeper who made the application”. As it seems possible that the person who will use the premises may not be the same person who made the application and to whom intimation is made, the Executive is asked to explain the discrepancy.
7. The Committee observes that regulation 4(2) on page 2 requires the Scottish Ministers within 21 days of receipt of an application under the Regulations to allocate “to every establishment which is registered on the register” a distinguishing number. The Executive is therefore asked to confirm whether Ministers are obliged to register an establishment on an application being received and if not, on what basis registration can be refused and what provision exists for notifying an applicant of the decision and of any right of appeal under regulation 9.

8. Regulation 5(2) on page 2 requires any change in the information submitted in the application for registration to be notified to the Ministers “by the person who submitted the application for registration”. The Committee seeks clarification as to whether this obligation will continue even if the person concerned has ceased to have any connection with the premises and what would happen in the event of death of the person.

9. The Executive is asked to explain in relation to the words in parentheses in regulation 10(1) how authorised officers would know whether a dwelling house was being or not being used in connection with the Regulations unless they had first entered the house.

10. The Committee seeks clarification as to why regulation 12(1) on page 4 provides that a person guilty of an offence against the Regulations is to be liable on summary conviction to a fine “not exceeding level 4 on the standard scale” given that offences under the Regulations are triable “either way” and the standard scale is relevant only to offences triable “only summarily”.

11. The Executive is asked to explain why offences of obstruction under the Regulations are to be triable “either way” instead of as is usual triable summarily only and subject to a maximum penalty not exceeding level 3 on the standard scale.

12. The Committee seeks confirmation as to why in relation to regulation 13(2) contrary to usual practice the Regulations do not contain a definition of “local authority”.

**The Scottish Executive responds as follows:**

1. The date determined for the purposes of article 1.1(b) was 31 May 2003. Producers were made aware of this date by letter dated 15 March 2002.

2. A distinguishing number was issued by 31 May 2003 to all establishments which made an application for registration.

3. As the Regulations do not come into force until 31 December 2003 and there is no power to make retrospective legislation under section 2(2) of the European Communities Act 1972, it is considered that 31 December 2003 is the earliest date that could be provided for in regulation 8. In relation to section 57(2) of the Scotland Act, the view of the Executive is that, simply by virtue of being late, the implementation measure (which in itself is within devolved competence) does not become *ultra vires*. This matter has been the subject of correspondence between the Committee and the Executive on previous occasions.

4. It is the intention to treat all applications made prior to commencement of these Regulations as if they had been made under regulation 5. The drafting of this provision is unfortunately narrow but, as explained above, all applicants have received distinguishing numbers.

5. No sanction is required as removal from the register will only occur “if an establishment ceases to be used for the keeping of laying hens” (regulation 7).

6. The provision in regulation 4(2) requiring intimation of the number was added to provide clarity as to the person who would receive the number. The Executive considered whether there might be scope for a third person (in effect an “operator” of the establishment who was neither the keeper nor owner) to be included as recipient. It was decided that because the responsibility for application for registration rests with the owner or keeper, only the owner or keeper should receive the number. The owner or keeper should then make their own arrangements for confirming the position in relation to the outcome of application to any third person.

7. If an application is properly made the establishment is registered. If an application does not contain the information referred to in regulation 5(1) then that application has not been properly made and the Scottish Ministers cannot register the establishment and allocate a distinguishing number in terms of regulation 4(2). It follows accordingly that because no application has been properly made, no review right arises under regulation 9.

8. The point is noted. The Executive will accept the change of information from persons representing the person who submitted the application. Given the possible narrow construction of the provision, the Executive will consider amending this provision at a suitable legislative opportunity.

9. Provisions such as that referred to by the Committee are common place (although may be drafted in slightly different ways). An officer would require to make appropriate enquiries as to the use of the dwelling house and only proceed to exercise the powers under the Regulations if satisfied that in doing so he would not be in breach of those powers.

10. The intention of the provision is to reduce the maximum fine which may be imposed when tried summarily. The committee’s concern is noted and further consideration is being given to the point. If appropriate, an amendment will be made at the next suitable legislative opportunity.

11. The point is noted but not accepted. In relation to other Scottish Statutory Instruments there are examples where obstruction is not triable summarily only and subject to statutory maximum. For example, see the TSE (Scotland) Regulations 2002 (SSI 2002/255).

12. It is regrettable that the usual definition of “local authority” is not included in the Regulations. An amendment will be made at the next suitable legislative opportunity. However, it is considered that the matter will be clear when a direction is issued under regulation 13(2) as the Scottish Ministers will specify the local authority which is to be directed to discharge the duty under regulation 13(1).

**Scottish Executive Environment and Rural Affairs Department**

## **SSI 2003/576 – Registration of Establishments Keeping Laying Hens**

### **Memorandum from the Scottish Executive to the Environment and Rural Development Committee**

This note responds to the issues mentioned in the clerk's e-mail of 11 December. I should point out, however, that while we have tried to answer the points fully, this is difficult without sight of the legal brief available to the Subordinate Legislation Committee (SLC). We understand that this is where the concerns about the SSI arose. The concerns were discussed by the SLC only generally and are not elaborated upon in the Official Report. Similarly we do not, at the time of preparing this response, have sight of the Report of the SLC where the points would be set out in detail.

A full answer to specific SLC concerns about the SSI was provided to the Committee on 4<sup>th</sup> December. A copy of that response is attached below.

As I said when we spoke, the Executive does not intend to withdraw the SSI; that is not an option given that the instrument has been made. The Executive is also not convinced that immediate amendment is necessary. Whilst it appreciates that the SLC have concerns about the instrument, the Executive has considered and responded to those concerns and does not accept that the SSI is unworkable. This SSI contains some fairly standard (i.e. not unique) provisions on enforcement, penalties, applications and review of decisions. An English SI (SI 2003/3100) has been made in almost identical terms. As far as the Executive is aware, no steps are being taken to revoke that instrument.

The Executive is aware of its commitment to make the amendments offered, at the next suitable opportunity. This will be done when a suitable opportunity is identified.

The Official Report of the SLC meeting on 9 December raised three further issues of concern, namely *vires*, devolution and enforceability. We can respond as follows.

#### **Vires**

The Regulations are within *vires*. The SLC raised a specific question in relation to *vires* in their letter of 2<sup>nd</sup> December - see paragraph 3. The Executive answered this point fully in the formal response of 4<sup>th</sup> December - see paragraph 3.

It is not clear what further *vires* issues concern the SLC. If the point is in relation to "late implementation" then the position of the Executive on this has been set out several times - see for example the 21<sup>st</sup> Report (2003) of the SLC in relation to the Bluetongue (Scotland) Order 2003. The position of the SLC in relation to "late implementation" is fully set out in that report. The formal response by the Executive in relation to the Bluetongue Order is attached to that Report and Committee members will see the other instruments upon which the same point has been raised during various sessions of Parliament.

## **Devolution Issue**

A specific devolution issue was not referred to the Executive in the formal letter. Nor has it been explained, in either meeting of the SLC, what specific regulation they consider raises the devolution issue. However, the SLC are possibly concerned that a devolution issue is also raised as a result of late implementation (which is the position the SLC took in relation to the Bluetongue Order - see paragraphs 38-53 of the 21<sup>st</sup> Report referred to above). The Executive does not accept that a devolution issue arises in relation to this instrument.

## **Enforceability**

The Executive does not accept that the SSI is unenforceable. The SLC have not made it clear on what grounds they believe this to be the case. The Scottish Ministers are responsible for enforcement (see regulation 13). If it is the position of the SLC that the absence of a definition of "local authority" renders the regulations unenforceable then the Executive does not agree. Local authorities only have enforcement responsibilities if the Scottish Ministers so direct (regulation 13(2)). In the formal response to SLC, the Executive made it clear that the absence of a definition does not affect the power of the Scottish Ministers (see paragraph 12 of the formal response). The Executive offered an amendment in due course to satisfy the concerns of the SLC. It is not accepted that such an amendment is required in order to "fix" the enforcement provisions.

If the concern of the SLC in relation to enforceability is more general, for example in relation to the point raised by the Committee on how regulation 5 might be complied with following death of the original applicant, the Executive do not consider that to be an issue requiring an immediate amendment. The Executive answered this point (see paragraph 8 of the formal response) by offering an amendment to clarify the point in due course, while reassuring the committee that such an amendment would be unnecessary as representatives of an applicant (i.e. executors or agents) are able to act in the place of the original applicant. The SLC appear to accept this point (see Official Report, col 254).

I hope this clarifies the position for the Environment and Rural Development Committee.

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