

Delegated Powers and Law Reform Committee
Tuesday, 23rd April 2024
13th Meeting, 2024 (Session 6)

Instrument Responses

Plant Health (Export Certification) (Scotland) Amendment Order 2024 (SSI 2024/86)

On Friday 12th April, the Committee asked the Scottish Government:

The instrument is made under the powers in sections 3(1) and 4A of the Plant Health Act 1967. This instrument amends an Order made in 2018, the Plant Health (Export Certification) (Scotland) Order 2018, which was made under the same powers in the 1967 Act.

The power in s3(1) states that “a competent authority may from time to time make such orders as the authority thinks expedient for preventing the spread of pests in Great Britain”. There is no express power to amend included in the power.

The power is contained in a UK Act, made before the enactment of the Interpretation Act 1978 which contains provision that a power to make rules, regulations, bye-laws, Orders in Council, orders or other subordinate legislation to be made by statutory instrument implies, unless the contrary intention appears, a power exercisable in the same manner and subject to the same conditions or limitations to revoke, amend or re-enact any instrument made under the power.

SSIDM states at paragraph 2(b) on page 22 that the implied power as described above applies to Acts of the UK Parliament which are passed after the year 1889 but only so far as it relates to rules, regulations or bye-laws and not to other forms of subordinate legislation, such as orders. Paragraph 3 states that “if it is intended to amend or revoke an order made under an Act of the UK Parliament passed before 1979, it is necessary to check to ensure that the Act confers an express power to amend or revoke it”.

1. Please explain why you consider that the enabling power in s3 of the 1967 Act confers a power to amend Orders made under it, in order that this instrument may be made.
2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On Tuesday 16th April, the Scottish Government responded:

1. In placing the position of implied powers to amend and revoke beyond doubt, section 14 of the Interpretation Act 1978 (‘the 1978 Act’) confirms the ability of primary legislation to imply a power to amend or revoke in the absence of an express provision. That Orders made prior to the commencement of the 1978 Act

were not included in the regime does not, however, exclude the possibility of implying a power to amend.

Craies at 14.4.22 discusses the interpretation regime and provides authority that for enactments not covered under s.14 of the 1978 Act, the existence of implied amending powers will be determined depending on the nature and context of the primary enabling power itself:

“it is probable that in appropriate cases the courts would infer the power to revoke and amend administrative and other directions where it was not seriously likely that Parliament had intended to enable a single and invariable exercise of the power”

In considering the contextual basis of the enabling power under section 4A of the 1967 Act, it seems highly unlikely that Parliament intended this power to be used to set a single, unchangeable set of fees. By their nature, such fees require periodic revision to reflect inflationary changes in the value of money. Failure to amend the fees on this basis would inevitably lead to inaccurate recovery of costs, resulting in unfairness to one or both parties involved. Parliament could not have intended such outcomes.

Should orders made under the Plant Health Act 1967 Act not be capable of amendment, variation, or revocation, then the Scottish Ministers would have only one opportunity to regulate each specific area of plant health activity. This would mean that any regulatory regime established by such an order, including the subordinate legislation itself, would be irrevocable and unchangeable. This interpretation seems unlikely to reflect Parliament's intention in enacting the 1967 Act.

The power conferred by section 3(1) to make orders "from time to time" suggests that the Scottish Ministers can modify regulatory regimes, such as the one set out in the Plant Health (Export Certification) (Scotland) Order 2018. The power to make orders "from time to time" would lack useful effect if amendments, variations, or revocations were not possible.

2. In light of the above comments, we do consider that the enabling powers in sections 3 and 4A of the Plant Health Act 1967 Act confer powers to amend Orders made under it. It is not therefore proposed that any corrective action be taken in relation to this instrument.