EXPLANATORY MEMORANDUM TO

THE SCOTLAND ACT 1998 (AGENCY ARRANGEMENTS) (SPECIFICATION) (NO. 2) ORDER 2018

2018 No. 1344

1. Introduction

1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland ("the Scotland Office") and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to allow for functions of the Scottish Ministers relating to the Welfare Food Regulations 1996 ("the 1996 Regulations")[1], and the Healthy Start Scheme and Welfare Food (Amendment) Regulations 2005 ("the 2005 Regulations")[2] to be specified so that these functions can be exercised by arrangement on behalf of the Scottish Ministers by a Minister of the Crown. This is known as an "agency arrangement". Any such arrangement could not be made without agreement between the UK Government and the Scottish Government; this instrument enables such arrangements to be agreed.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Order is made by Her Majesty in Council in exercise of the power conferred by section 93(3) of the Scotland Act 1998 ("the 1998 Act").

3.2 This Order specifies functions that are to become exercisable by the Scottish Ministers from the date that section 27 (welfare foods) of the Scotland Act 2016 ("the 2016 Act") comes into force, on 8th February 2019. This Order comes into force immediately after the commencement of section 27 of the 2016 Act, when the functions contained in the 1996 Regulations and the 2005 Regulations become exercisable by Scottish Ministers instead of by a Minister of the Crown, so far as these functions are exercisable within devolved competence, as a consequence of section 32 of the 2016 Act.

3.3 The Scottish Government and the UK Government intend to enter into an agency arrangement from that same day, which will enable a Minister of the Crown to continue to carry out functions specified in this Order on behalf of the Scottish Ministers for a transitional period. This arrangement will ensure that there is no break in welfare foods service delivery in Scotland during the agreed transition period.

[1] S.I. 1996/1434.
[2] S.I. 2005/3262.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.4 As the instrument is not subject to parliamentary procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business.

4. Extent and Territorial Application

4.1 This instrument applies to all of the United Kingdom.

4.2 The territorial application of this instrument is all of the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Section 93(1) of the 1998 Act enables Scottish Ministers to make arrangements for any of their specified functions to be exercised on their behalf by a Minister of the Crown. Under section 93(3), functions which are to be subject to such arrangements must be specified in an Order in Council.

6.2 This Order specifies, for the purposes of section 93(1) of the 1998 Act, functions that will become exercisable by the Scottish Ministers by virtue of section 27 of the 2016 Act. These functions relate to welfare foods schemes established in the 1996 Regulations and the 2005 Regulations under section 13 of the Social Security Act 1988 ("the 1988 Act"), and they will be transferred to the Scottish Ministers on 8th February 2019, immediately before this Order comes into force.

6.3 Section 27 of the 2016 Act devolves welfare foods powers by including the subject matter of section 13 of the 1988 Act (benefits under schemes for improving nutrition: pregnant women, mothers and children) as an exception to the social security reservation in Schedule 5 to the 1998 Act, and also omitting the paragraph J5 (welfare foods) reservation from that Schedule.

6.4 As soon as section 27 comes into force, the welfare foods functions contained in the 2005 Regulations and the 1996 Regulations will become exercisable by Scottish Ministers as a consequence of section 32 of the 2016 Act. Section 32 gives the 1998 Act effect, so that any functions which are exercisable within devolved competence by virtue of section 27 of the 2016 Act and which are conferred on a Minister of the Crown by any enactment made before 8th February 2019 will become exercisable instead by Scottish Ministers, so far as the functions are exercisable within devolved competence. When this occurs, triggering this Order's commencement, the Scottish Government will be able to make arrangements with the UK Government for the functions specified in this Order to be delivered on their behalf by the Department of Health and Social Care ("DHSC"). Both Governments wish to enter into an agency arrangement that would allow DHSC to continue to deliver the functions specified in this Order to people in Scotland for a transitional period, with flexibility for either Government to determine when it considers it appropriate for that period to end. The agency arrangement will set out the terms and conditions on termination. This will ensure there is no break in service from the day that the subject matter of section 13 of the 1988 Act becomes devolved.

7. Policy background

What is being done and why?

7.1 Section 27 of the 2016 Act devolves powers over functions in relation to welfare foods schemes. The commencement regulations for section 27 were signed by the Secretary of State for Scotland on 12th December 2018, bringing section 27 into force on 8th February 2019, formally devolving power over welfare foods to the Scottish Parliament and Scottish Ministers.

7.2 When section 27 comes into force, the functions conferred on a Minister of the Crown in the 1996 Regulations and the 2005 Regulations will transfer as a consequence of section 32 of the 2016 Act, and become exercisable by the Scottish Ministers so far as these functions are exercisable within devolved competence. These functions concern delivery of two welfare foods schemes operating in Scotland by virtue of the 1996 and 2005 Regulations, specified in this Order:

(i) Healthy Start foods (via vouchers) and Healthy Start vitamins, (contained in the 2005 Regulations); and

(ii) the Nursery Milk Scheme, (contained in the 1996 Regulations).

7.3 The Scottish Government intends to introduce a new welfare foods scheme under section 13 of the 1988 Act on 1st April 2019. However, it also wishes for the UK Government to continue to deliver certain welfare foods functions on its behalf under the 1996 Regulations and the 2005 Regulations that will remain deliverable in Scotland after the new Scottish welfare foods regulations are introduced. This agency arrangement will be in place for a transitional period, as agreed between the UK Government and the Scottish Government.

7.4 The agency arrangement between the UK Government and the Scottish Government may concern any of the functions exercisable in terms of the 1996 and 2005 Regulations as agreed between the UK Government and the Scottish Government.

7.5 For the Nursery Milk scheme, a Scottish replacement scheme is intended to come into force in August 2020. This Order is thus needed to enable UK Ministers to continue to carry out nursery milk functions in Scotland on behalf of Scottish Ministers until this date.

7.6 Without this Order and related agency arrangements, Scottish Ministers would be unable, at least initially, to deliver functions under the 1996 and 2005 Regulations in Scotland following commencement of section 27 of the 2016 Act. Scottish Ministers require a period of time to put in place the necessary systems for delivering the benefits relating to their new powers exercisable once the subject matter of section 13 of the 1988 Act devolves.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The purpose of this instrument is not related to consolidation.

10. Consultation outcome

10.1 There has been no general public consultation specific to this Order as it simply allows administrative arrangements to be entered into.

10.2 The UK Government departments with responsibility for the legislation which this Order affects, as well as the Scottish Government, have been consulted during the drafting of this Order. The content of this Order has been approved by the Department of Health and Social Care, the Scotland Office and the Scottish Government.

11. Guidance

11.1 No formal guidance will be available on the use of these powers as the Order makes provision for Ministers of the Crown to enter into agency arrangements with the Scottish Government and has no wider impact.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because there is no impact on business, charities, voluntary bodies or the public sector. This instrument simply allows administrative arrangements to be entered into.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 There is no need for review or monitoring as any arrangement made as a consequence of the Order will be subject to individual agreement.

15. Contact

15.1 Henry Green at the Office of the Secretary of State for Scotland (Telephone: 02072706795 or email: henry.green@scotlandoffice.gsi.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Alison Evans and Rachel Irvine (job-share), Deputy Director for Constitutional Policy at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

15.3 David Mundell, Secretary of State for Scotland, can confirm that this Explanatory Memorandum meets the required standard.