Edward Mountain MSP
Convenor
Rural Economy and Connectivity Committee
Scottish Parliament
Edinburgh
EH99 1SP

6th February 2019

Dear Edward,

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT
The Environment, Food and Rural Affairs (Miscellaneous Amendments) (EU Exit) Regulations 2019

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell wrote to the Convenors of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September 2018 setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach one notification (as detailed in the heading above) which sets out the details of the UK SI which the UK Government proposes to make and the reasons why I am content that Scottish devolved matters are to be included in these. Please note, we are yet to have sight of the final SIs and they are not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification. The instrument is due to be laid in the UK Parliament on 11 February 2019.

The Chancellor of the Duchy of Lancaster Minister for the Cabinet Office has given an undertaking that the UK Government will not schedule debates for affirmative SIs until the Scottish Parliament has given a view on the SI notification under the protocol. We would

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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welcome a view from the committee as soon as possible, however the Scottish Parliament will have 28 days for consideration if needed under the agreed protocol to consider the proposal to consent to the SI or SIs.

I am copying this letter to the Cabinet Secretary for Rural Economy, the Convenor of the Environment, Climate Change & Land reform Committee and the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

MAIRI GOUGEON
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI

The Environment, Food and Rural Affairs (EU Exit) Regulations 2019 (the “2019 Regulations”) amends domestic regulations, retained and directly applicable European regulations and directly applicable European Decisions, which implement different European regulations and directives related to i) spirits, ii) food labelling, iii) wines, iv) genetically modified organisms (release to the environment) (“GMOs”), and v) animal health to ensure that the existing policy regimes can continue to operate effectively after the UK leaves the EU on 29 March 2019.

Wine and Spirits

In this area of activity on legislative deficiency, the UK Government is seeking to correct deficiencies by using a number of separate statutory instruments. The first of these was The Quality Agricultural Products and Food Stuffs, Spirit Drinks, Wine and Aromatised Wine (Amendments etc) (EU Exit) Regulations 2019 which has been formally consented to by the Scottish Parliament. Legislative functions are being transferred in the 2019 Regulations covered in this notification and non-legislative functions are being transferred in The Food and Farming (Miscellaneous Amendments) (EU Exit) Regulations 2019 which is being notified separately. Additionally, deficiency fixing wine amendments to 1308/2013 are being made under The Common Organisation of the Markets in Agricultural Products (Basic Acts) (Amendment etc.) (EU Exit) Regulations 2019 which was notified to the Scottish Parliament on 24th January 2019.

Food labelling and Information

In this area of activity on legislative deficiency, the UK Government is seeking to correct deficiencies through a number of statutory instruments. Legislative functions are being transferred in the 2019 Regulations covered in this notification and fixes to correct general deficiencies are covered in the Food (Amendment) (EU Exit) Regulations 2019, which will be notified shortly. The UK Government also proposes a further statutory instrument to address technical standards points, intended to apply soon after Exit day.

Animal Health

In this area of activity on legislative deficiency, the UK Government is seeking to correct deficiencies by creating a number of statutory instruments and these are listed as follows:

- The Exotic Disease (Amendment etc.) (EU exit) Regulations;
- The Animal Welfare (Amendment) (EU Exit) Regulations 2018;
- The Livestock (Records, Identification and Movement (EU Exit) (Miscellaneous Amendments) Regulations 2018;
- Animal By-Products and Control and Eradication of Transmissible Spongiform Encephalopathies (UK) (EU Exit) (Miscellaneous Amendments) 2018;
• The Equine (Records, Identification and Movement) (Amendment) (EU Exit) Regulations 2018;
• Veterinary Medicines and Animals and Animal Products (Examination of Residues and Maximum Residue Limits) (Amendment etc.) (EU Exit) Regulations 2018;
• Agriculture (Zootechnics) (UK) (EU Exit) (Miscellaneous Amendments);
• The Farriers (Registration) and Animal Health (Amendment) (EU Exit) Regulations 2019;
• The Trade in Animals and Related Products (Amendment) (EU Exit) Regulations 2018;
• The Import and Trade of Animals and Animal Products (Amendment etc.) (EU Exit) Regulations 2018 and
• The Animals and Food (Transfer of Functions) (EU Exit) Regulations 2018.

All of the above instruments have been formally consented to by the Scottish Parliament.

Genetically Modified Organisms – traceability and labelling

In this area of activity, the UK Government is seeking to, on exit day, address deficiencies in various pieces of retained EU law which extend to Scotland. In particular, the Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019 (which were consented to by the Scottish Parliament and were laid on 23 January 2019) make provision to address various deficiencies in Regulation (EC) No 1830/2003 of the European Parliament and of the Council concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms. Supplementing this, the 2019 Regulations will insert two regulation-making powers into the retained EU law version of Regulation (EC) No 1830/2003.

Brief explanation of laws that the proposals amend

The Legislation being Amended

Spirits:
• Regulation No 110/2008 of the European Parliament and of the Council on spirit drinks

Food Labelling:

Wines:
• EU Regulation No 251/2014 on aromatised wine products
• EU Delegated Regulation 2019/33 supplementing Directive 1308/2013 and Directive 13/06/2013 on designations and geographical indications in the wine sector, and labelling and presentation

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Genetically Modified Organisms:
- Regulation (EC) No 1830/2003 of the European Parliament and of the Council concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms

Animal Health:
- Commission Decision 2009/821/EC of 27 November 2009 on border inspection posts
- Commission Implementing Decision 2011/630/EU of 20 September 2011 on imports of bovine semen
- Commission Implementing Decision 2012/137/EU of 1 March 2012 on imports of porcine semen
- Commission Implementing Regulation (EU) 2018/659 on conditions for importing equidae and the semen, ova and embryo thereof
- Commission Regulation (EC) No 2004/599 on certification and inspection reporting for trade in animals and animal products

Summary of the proposals and how these correct deficiencies

At the point of EU-Exit, European legislation relating to i) spirits, ii) food labelling, iii) wines and aromatised wines, iv) genetically modified organisms (release to the environment) (“GMOs”), and v) animal health will be converted into UK law. The legislation thus requires to be corrected so that it can continue to operate throughout the UK purely as a piece of domestic law in the event of a no-deal situation on UK’s exit from the EU.

The 2019 Regulations use powers in the European Union (Withdrawal) Act 2018 to transfer legislative functions and correct deficiencies to achieve the continued operation of law relating to the areas referenced above.

These changes are necessary to create a coherent UK-wide, rather than an EU regulatory, regime. However, subject to this proviso, the drafting approach for the 2019 Regulations is to avoid policy changes and to maintain the status quo in so far as possible.

We have extensive experience of working collaboratively with the UK Government and other devolved administrations in these areas.

This notification covers proposals to fix deficiencies in the EU legislation listed above. The majority of the amendments being made to the legislation are minor corrective amendments such as correcting references to “EU” to instead read “United Kingdom” or removing provisions which are redundant. In some cases these amendments involve transferring legislative functions that are currently conferred by EU legislation upon the European Commission to the devolved administrations and/or the Secretary of State where applicable.

This notification covers the legislation set out above. These proposals only amend these EU legislation to the extent necessary to allow them to operate effectively after the UK’s withdrawal from the EU. Where the amendments in the 2019 Regulations
transfer functions from European Commission to various UK administrations, more
detail on the approach used for this is set out below.

**Devolved Areas**

Where functions in this proposed SI relate to animal health, non-GI wine and
aromatised wine, non-GI spirits, and GMOs these are devolved areas. Where the
Scottish Government and the UK Government are in agreement that a function is
within devolved competence, then those functions are transferred according to one of
the approaches below:

Option 1 – Functions will be exercisable by the devolved administrations of each
constituent nation but, if such a devolved administration agrees and gives consent,
then the Secretary of State can exercise the function in relation to that relevant
constituent nation when consent is provided. This means, in Scotland, Scottish
Ministers can exercise the function, but if they choose they can allow the Secretary
of State to exercise the function for Scotland. It has the effect that if a UK-wide
approach is preferable, the Secretary of State can exercise a function on behalf of
all four administrations. In order for the Secretary of State to do so, consent from the
Scottish Ministers (and the other devolved administrations) will be required. This
approach has been used in the majority of cases where the 2019 Regulations
transfer legislative functions in devolved areas.

Option 2 - Functions will be exercisable only by devolved administrations. This
means that for devolved matters in or as regards Scotland, only the Scottish
Ministers can carry out the function(s). This approach has been used for the transfer
of non-legislative administrative functions relating to spirits. This is consistent with
the approach that was taken in amendments under The Quality Agricultural Products
and Food Stuffs, Spirit Drinks, Wine and Aromatised Wine (Amendments etc) (EU
Exit) Regulations 2019.

Option 3 - Functions can only be exercised by the Secretary of State, with the
consent of the devolved administrations. This decision making option has only been
used in a limited number of areas where the amendments to articles amend
legislative functions relating to wine and aromatised wine. Where there are no
functioning commercial wineries in Scotland (and a climate which makes any future
commercial wineries unlikely) it is an appropriate use of resources to have Westminster exercise functions with Scottish Ministers consent.

An overview of the approach taken to the transfer of functions for each subject
matter covered by the 2019 Regulations is provided below.

**Spirits**

**Devolved Areas**

All legislative functions relating to non-GI spirits are being transferred according to
Option 1 outlined above.
The amendments to Articles 1(5) to 1(6) of 110/2008 transfer an administrative function directly to the Scottish Ministers (i.e. Option 2 outlined above) to grant derogation from provisions under Annex 1 and 2. This is the only transfer of a non-GI spirits related administrative function contained in the 2019 Regulations. The approach taken here respects the devolution settlement and follows the approach that has been taken for non-GI spirits transfer of functions across EU Exit SIs, which is to transfer legislative functions under Option 1 and administrative functions under Option 2.

Reserved Areas

Where spirits related functions being transferred as part of the amendments to the regulations specified above relate to geographical indications (reservation C4 of the Scotland Act – intellectual property) we are in agreement that these are reserved. In such cases, functions are being transferred directly to the Secretary of State to exercise in accordance with the devolution settlement.

Wines and aromatised wines

Devolved Areas

All functions relating to non-GI wines are being transferred according to Option 3 outlined above. Where there are no functioning commercial wineries in Scotland (and a climate which makes any future commercial wineries unlikely) it is an appropriate use of resources to have Westminster exercise functions with SM consent. This is consistent with the approach that was taken in amendments under The Quality Agricultural Products and Food Stuffs, Spirit Drinks, Wine and Aromatised Wine (Amendments etc) (EU Exit) Regulations 2019 and in wine amendments to 1308/2013 made under The Common Organisation of the Markets in Agricultural Products (Basic Acts) (Amendment etc.) (EU Exit) Regulations 2019.

Reserved Areas

Where wine and aromatised wines related functions being transferred as part of the amendments to the regulations specified above relate to geographical indications (reservation C4 of the Scotland Act – intellectual property) we are in agreement that these are reserved. In such cases, functions are being transferred directly to the Secretary of State to exercise in accordance with the devolution settlement.

Genetically Modified Organisms – traceability and labelling

Option 1 is favoured and that is the case for this instrument.

Animal Health

Option 1 favoured for the vast majority of animal health UK SIs and that is the case for this instrument.

Food Labelling and Information
The proposed changes relate to 11 areas where the Commission has reserved the right to review areas and introduce specific legislation in future, for example updating the list of substances and products known to cause food allergies and intolerances. These areas are devolved and in transferring functions from the Commission they would be for Scottish Ministers to exercise in relation to Scotland, with the option to use concurrent powers if agreed in line with option 1.

**Explanation of why the change is considered necessary**

After EU Exit, without amendment, the legislative functions within the above retained EU legislation would contain inoperable provisions which would prevent administrations throughout the UK from being able to make any necessary legislative changes to each policy regime. The instrument uses powers in the European Union (Withdrawal) Act 2018 to correct this deficiency to enable these functions to continue to be exercised by relevant UK public authorities. Additionally after EU exit, without technical, drafting amendments to the retained EU legislation and the domestic legislation in the areas covered by the 2019 regulations, current regimes would not operate effectively. The amendments will ensure that the regimes outlined above will continue to function smoothly after UK’s exit from the EU.

**Scottish Government categorisation of significance of proposals**

Category B. The proposed regulations address deficiencies that arise as a result of withdrawal from the EU, ensuring the appropriate transfer of functions to maintain the effective operation of the regimes outlined above. The aim of the proposed regulations is to ensure continuity of law on exit day. There are no significant policy decisions for Ministers to make. The deficiencies do require to be corrected but there is an obvious policy answer in all cases, particularly given the “no deal” scenario. The SI updates references which are no longer appropriate once the UK has left the EU.

**Impact on devolved areas**

Our primary objective in working with UK Government on these amendments has been to ensure that Scottish Ministers can continue to effectively manage these policy areas and that the devolution settlement is respected. Scottish Government considers that the amendments to regulations contained in this SI constitute a pragmatic approach to addressing deficiencies in rolling the EU legislation into UK Law, arising as a result of EU Exit.

The 2019 Regulations respect the current devolution settlement by ensuring that Scottish Ministers have an appropriate role in relation to Scotland. Where a function is being transferred from an EU entity that is capable of being exercised within devolved competence it has been transferred under the option outlined above. For that reason, functions will transfer solely to the Secretary of State (i.e., capable of being exercised without the consent of the Scottish Ministers) only where the exercise of those functions is outside devolved competence.

**Summary of stakeholder engagement/consultation**
Spirits and Wine

The Scottish Government is in regular contact with all its stakeholders regarding the move towards leaving the EU. The Scottish Government has not undertaken any specific engagement, or any formal consultation on the subject matter of the 2019 Regulations. There is limited Scottish industry interest in wines and aromatised wine. Defra have conducted a UK wide consultation on the substantive changes arising out of the 2019 Regulations.

Animal Health

Animal Health & Welfare Division are in regular contact and communication with DEFRA and other devolved administrations. There has been no formal stakeholder engagement or consultation in relation to the 2019 Regulations as it is envisaged that there will be no measureable change to policy and no operational or financial impact is anticipated. The Division continues to consult stakeholders regularly.

Genetically Modified Organisms – traceability and labelling

The GMO team in Agriculture and Rural Development Division are in regular contact and communication with Defra and the other devolved administrations. There has been no formal stakeholder engagement or consultation in relation to the 2019 Regulations as it is envisaged that there will be no change to policy as a result of the transfer of functions and no operational or financial impact is anticipated. The Division has regular contact with its stakeholders via a variety of stakeholder groups.

Food Labelling and Information

Defra carried out a consultation on its food amendment proposals from 6 November to 4 December 2018 and FSS highlighted the consultation to stakeholders in Scotland. Consultation analysis shows that the majority of respondents have concerns over the potential additional burdens associated with the need to modify existing labels and have stressed that should such a requirement be introduced, a transitional period would be essential. Of the 69 responses received, 10 came from Scottish based stakeholders. All of these respondents supported the need for a transition period. Reasons given include allowing businesses time to update labelling and use up stocks of pre-printed labels and packaging. In addition, some stakeholders feel that it is important to allow businesses time to understand what the post EU exit situation will actually mean for their production processes. Defra does not propose to make substantive changes to labelling requirements through this SI. Other points made include concerns about trading with the EU in future such as the need for an address established in the EU, whereas at present a UK address is acceptable for trade with all EU Member States. However, this aspect is not the subject of this SI but is a consequence of the EU requirements on products marketed in EU Member States.
Other impact assessments

No other impact assessments have been carried out and the UK Government do not intend to produce an impact assessment for the proposed regulations.

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

Spirits and Wine

Within the 2019 Regulations and specific to those areas identified where there is devolved competence, the Scottish Government believes that Scotland’s best interests are served by a UK wide instrument which respects the devolved competence of the Scottish Ministers. The Scottish Government is comfortable that the devolution settlement is being respected in the 2019 Regulations.

Animal Health

It is the view of the Scottish Government that the amendment in the 2019 Regulations are necessary and appropriate to secure continuation of effective trade. The 2019 Regulations will make amendments to existing EU legislation which are minor and technical in nature and aim to ensure the continued operability of what will become retained EU law. Where the 2019 Regulations will make provision for exercise of functions in the legislation being amended provision is made for those functions to be exercised by the “appropriate authority”, in relation to Scotland, by the Scottish Ministers. In these circumstances the Scottish Ministers consider it is appropriate that the 2019 Regulations be brought forward by the UK Government. This is particularly the case in circumstances where the 2019 Regulations will protect Scottish Ministers’ interests under the devolution settlement.

Genetically Modified Organisms (GMOs) – traceability and labelling

The 2019 Regulations will make necessary amendments to GMO legislation to ensure operability after EU exit by conferring two regulation-making powers on the appropriate authorities in each part of the UK (to make provision on or after exit day, that could, prior to that day, have been made by the EU institutions). The first concerns the power to amend or set thresholds for traces of authorised GMOs in products (which are adventitious or technically unavoidable and cannot be excluded), below which product labelling does not to state that a GMO is present. The second concerns a power to adapt the system for assigning unique identifiers to GMOs. The SI provides that the Scottish Ministers may exercise these powers to make provision in relation to Scotland, but they may also give consent to the Secretary of State to exercise these powers to make such provision on their behalf. The SI therefore protects Scottish Ministers’ interests under the devolution settlement.

Food Labelling and Information

The Scottish Ministers believe that the changes proposed in this SI are necessary so far as falling within devolved competence to secure continuation of an effective food labelling regulatory regime, and to provide continuity for business from exit
day. In the current circumstances where there is existing harmonised EU law in this area and the need to prepare for a No-Deal exit from the EU, the Scottish Ministers consider that it is appropriate therefore for the fixing legislation be made on a UK-wide basis by the UK Government.

**Intended laying date of instrument**

The 2019 Regulations is subject to affirmative procedure and will be laid at Westminster on 11 February 2019 in draft.

**If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?**

The Chancellor of the Duchy of Lancaster Minister for the Cabinet Office has given an undertaking that the UK Government will not schedule debates for affirmative SIs until the Scottish Parliament has given a view on the SI notification under the protocol. We would welcome a view from the committee as soon as possible, however the Scottish Parliament will have 28 days for consideration if needed under the agreed protocol to consider the proposal to consent to the SI or SIs.

**Information about any time dependency associated with the proposal**

It is essential that the legislation being amended is operable in the event that the UK leaves the EU with no deal or no transition period in March 2019. Consequently, the Regulations must be introduced in the UK Parliament in good time in order to ensure the UK parliamentary procedure is adhered to.

**Significant financial implications**

The 2019 Regulations are not expected to have any financial implications, including for the Scottish Government and for stakeholders in Scotland.