June 2019

Dear

The Agriculture (Miscellaneous Amendments) (EU Exit) Regulations 2019 (“CAP-08 Regulations”),
The Common Organisation of the Markets in Agricultural Products (Producer Organisations) (Amendment) (EU Exit) Regulations 2019 (“CAP-11 Regulations”), and,
The Common Organisation of the Markets in Agricultural Products (Transitional Arrangements) (Amendment) (EU Exit) Regulations 2019 (“CAP-14 Regulations”)

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

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 MSP, wrote to the Conveners of the Finance & Constitution and Delegated
Powers and Legislative Reform Committees on 11 September 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.

The UK Government has laid the above named Regulations (the “CAP Regulations”) to
ensure the Common Market Organisation and the Common Agricultural Policy can continue
to operate effectively after EU Exit. The UK Government has not written to request the
consent of Scottish Ministers to the CAP Regulations and we are therefore not in a position
to notify the Scottish Parliament under the agreed protocol. This is due to an on-going

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

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.gov.scot
disagreement with the UK Government as regards devolved competence in relation to the CAP Regulations.

Consideration has been given as to whether the provisions being amended by the CAP Regulations are reserved as noted below.

The provisions on producer organisations are considered by the UK Government to be reserved under the competition reservation (Schedule 5, Part II, section C3 – Competition - Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers). The Scottish Government’s position is that these provisions are devolved, as being for the purpose of promotion of an effective agricultural market.

The provisions on contractual relationships are considered by the UK Government also to be reserved under the competition reservation (Schedule 5, Part II, section C3 – Competition - Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers). The Scottish Government’s position is that these provisions are devolved and that the provisions do not fall within reservation C3. The provisions concern fair dealing with agricultural producers rather than the regulation of anti-competitive agreements – i.e. agreements which adversely affect the competitive structure of the market - and the abuse of a dominant position.

The remaining disputed areas concern provisions to ensure that imported food products comply with domestic marketing standards or permit changes to the list of products to which the CMO marketing standards apply. The UK Government consider these are reserved under (Schedule 5, Part II, section C5 – Import/Export Control or the foreign affairs reservation re international relations (Schedule 5, part 1, paragraph 7). The Scottish Government’s position is that the purpose and effect of these provisions is considered to be marketing standards. It is acknowledged that the import and export control reservation is engaged by such provisions, but the purpose of the provisions fall within the CAP exception to that reservation, and consequently the provisions are devolved. The CAP exception in reservation C5 is the prohibition and regulation of the import and export of food for the purposes of observing or implementing obligations under the Common Agricultural Policy (CAP). The EU Regulations covering Common Organisation of the Markets in Agricultural Products (Regulation 1308/2013 and the EU Regulations made under that Regulation – collectively the “CMO Regulations”) form part of the CAP, and the disputed provisions relate to marketing standards required by the CMO Regulations.

The Regulations cover legislative and non-legislative transfers of functions and, relatively straightforward, technical drafting amendments. It is the Scottish Government’s view that since the legislative and non-legislative functions being transferred or created by amendments contained in CAP Regulations as described above will be exercised for a devolved purpose, they should not be transferred solely to the Secretary of State. Additionally where there are technical changes, the Scottish Government’s view is that consent should have been sought, even if the effect created is consistent Scottish Government policy, where the technical change relates to devolved subject matter.

It should also be noted that the CAP-08 Regulations include the transfer of one function that has in fact already been notified to you. This is the Regulation 62(1) of the main horizontal EU regulation 1306/2013 for the financing management and monitoring of the Common Agriculture Policy that provides for the function requiring compliance with customs rules. This
was originally contained in the notification for the Agriculture (Transfer of Functions) (EU Exit) (No.2) Regulations 2019. Given this is an import/export function, we agree that this is reserved under Section C5, schedule 5 of The Scotland Act. Accordingly, this function is being transferred to the Secretary of State in accordance with the devolution settlement. We understand from Defra that they decided this provision’s natural home was these regulations along with the other reserved functions.

It is crucial that we ensure devolved interests are respected and we will continue to press our position with the UK Government in relation to these Regulations. In the meantime, and in the spirit of being open and transparent with you in relation to our preparations for EU Exit, I attach details of the proposed CAP Regulations for your consideration.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you in due course.

FERGUS EWING
1. Name of the instruments and summary of proposal

This advice covers the following UK Government SIs (the “CAP Regulations”):
- The Agriculture (Miscellaneous Amendments) (EU Exit) Regulations 2019 (“the CAP-08 Regulations”);
- The Common Organisation of the Markets in Agricultural Products (Transitional Arrangements) (Amendment) (EU Exit) Regulations 2019 (“the CAP-14 Regulations”);

The CAP Regulations make provision in relation to exercise of functions in the UK after EU exit. These instruments contain mainly transfers of non-legislative functions currently conferred on Member States and a small number of legislative functions that are currently conferred by EU legislation upon the European Commission, to various UK administrations. The CAP Regulations also address minor and technical deficiencies arising from the withdrawal of Scotland as part of the United Kingdom from the European Union, based on a presumed no deal scenario, and include transitional provisions.

2. Explanation of law that the proposals amend

The CAP Regulations amend retained European Union (“EU”) legislation relating to the Common Market Organisation (“CMO”) and the Common Agricultural Policy (“CAP”). These instruments will address operability issues created by the United Kingdom (“UK”) leaving the EU. The CAP Regulations are part of a package of CMO and CAP related instruments being progressed, to differing timetables, by DEFRA in Westminster to ensure that the CMO and CAP can continue to operate effectively after EU Exit.

This advice should be considered alongside the following previously notified SI’s, which have been formally consented to by the Scottish Parliament;

CMO
- The Common Organisation of the Markets in Agricultural Products Framework (Miscellaneous Amendments etc.) (EU Exit) Regulations 2019 (CMO-01)
- The Market Measures (Marketing Standards) (Amendment) (EU Exit) Regulations 2019 (CMO-04)
- Market Measures Payment Schemes (Amendment) (EU Exit) Regulations 2019 (CMO-05)
- The Market Measures (Miscellaneous Provisions) (Amendment) (EU Exit) Regulations 2019 (CMO-06)
- The Agriculture (Legislative Functions) (EU Exit) (No.2) Regulations 2019 (AG/TF/02);
- The Common Agricultural Policy (Direct Payments to Farmers) (Amendment) (EU Exit) (No. 2) Regulations 2019 (DP/03);
The Common Agricultural Policy (Financing, Management and Monitoring) (Miscellaneous Amendments) (EU Exit) Regulations 2019;
The Agriculture (Legislative Functions) (EU Exit) Regulations 2019;
The Common Agricultural Policy and Market Measures (Miscellaneous Amendments) (EU Exit) Regulations 2019;

As well as the following SIs which have been notified separately and are currently with the committee:

- The Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments, etc.) (EU Exit) (No.2) Regulations 2019 (CAP-09);
- The Common Organisation of the Markets in Agricultural Products (Market Measures and Notifications) (Amendment) (EU Exit) Regulations 2019 (CAP-12), and

Previous advice has also been provided on the disputed SI the Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019 (CAP/07).

### 3. Summary of the proposals

**CAP-08 Regulations**

The provisions of the EU Regulations which are amended by the CAP-08 Regulations relate to contractual relationships in agricultural sectors, producer organisations, export refunds, import and export licensing and duties, marketing standards of imported products, changes to descriptions of products covered by the CMO, wine imports, geographical indications (GI) and regulation of the import and export of food for the purposes of observing or implementing obligations under the Common Agricultural Policy (CAP).

The amendments to the Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019 revokes one transfer previously notified to the Scottish Parliament as part of the notification covering CMO-01. This correction is consistent with the consent granted by the Scottish Parliament for this SI.

The CAP-08 Regulations contain amendments of the following:

- Commission Regulation (EC) No 1299/2007 on the recognition of producer groups for hops,
- Commission Implementing Regulation (EU) No 511/2012 on notifications concerning producer and interbranch organisations and contractual
negotiations and relations provided for in Council Regulation (EC) No 1234/2007 in the milk and milk products sector,

- Regulation (EU) No. 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products,
- Council Regulation (EU) No. 1370/2013 determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products,
- Regulation (EU) No. 510/2014 of the European Parliament and of the Council laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products,
- Common Organisation of the Markets in Agricultural Products Framework (Miscellaneous Amendments, etc) (EU Exit) Regulations 2019,

**CAP-11 Regulations**

Amendments made by CAP-11 are largely in relation to the operational arrangements of the EU Fruit and Vegetables Aid Scheme. The EU Fruit and Vegetables Aid Scheme enables recognised Producer Organisations, formed on the initiative of a group of growers to receive grant funding from the EU to part finance multi-year operational programmes. CAP-11 makes changes to retained EU law so the Scheme continues to operate once the UK leaves the EU, however functions are being transferred solely to the Secretary of State, which the Scottish Government disputes. Previously notified CAP-12 contains amendments to the Fruit and vegetables Aid Scheme where there is agreement with the UK Government on competence.

CAP-11 also makes amendments to regulations related to producer organisations in the milk sector and certain aspects of producer cooperation.

The CAP-11 Regulations contain amendments of the following:

- Commission Delegated Regulation (EU) No 880/2012 supplementing Council Regulation (EC) No 1234/2007 as regards transnational cooperation and contractual negotiations of producer organisations in the milk and milk products sector,
sectors and amending Commission Implementing Regulation (EU) No 543/2011,

- Commission Implementing Regulation (EU) 2017/892 laying down rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to the fruit and vegetables and processed fruit and vegetables sectors,

**CAP-14 Regulations**

The CAP-14 Regulations are a UK statutory instrument that makes corrections to the disputed SI Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019 (CAP/07). The majority of these corrections are to amend transitional provisions made by that SI that refer specifically to dates calculated based on an EU exit date of 29 March 2019. These are amended to take account of subsequent amendments to the definition of “exit day” in the European Union (Withdrawal) Act 2018, providing for the same length of transitional periods, but without reference to specific calendar dates.

**4. Why are these changes necessary?**

On exit day, the European Union (Withdrawal) Act 2018 will convert a range of EU legislation into domestic law (ie. retained EU law). The CAP Regulations are part of a package of instruments intended to ensure that the legislation governing the CMO and CAP can operate effectively as domestic law after EU Exit. The purpose of the CAP Regulations is therefore to correct inoperability within the retained EU law to make it work as domestic law. The approach when amending retained EU law has been to keep that retained legislation as close to the current system as possible.

**5. Impact on devolved areas**

The Scottish Government has been able to reach agreement with the UK Government on legislative or administrative competence in many areas, however there are some areas of policy where this has not been possible. This proposed SI includes such provisions.

The UK Government’s position is that all provisions in the CAP Regulations are reserved. The Scottish Government has given consideration to whether the provisions engage the import and export control reservation (schedule 5, Part II, section C5 to the Scotland Act 1998), the competition reservation (Schedule 5, Part II, section C3 of the Scotland Act 1998) or the reservation of Foreign Affairs (schedule 5, Part I, paragraph 7 of the Scotland Act 1998).

This CAP Regulations contain some provisions which are not disputed. Amendments relating to GIs are agreed to be reserved. There are also some provisions which are clearly within the foreign affairs/international relations or import/export reservation and are not related to marketing standards. These provisions include the transfer of one function that has in fact already been notified to you. This is the Regulation 62(1) of the main horizontal EU regulation 1306/2013 for the financing management and monitoring of the Common Agriculture Policy that provides for the function requiring
compliance with customs rules, which has been amended in the CAP-08 Regulations. This amendment was originally contained in the notification for the Agriculture (Transfer of Functions) (EU Exit) (No.2) Regulations 2019. Given this is an import/export function, we agree that this is reserved under Section C5, schedule 5 of The Scotland Act. Accordingly, this function is being transferred to the Secretary of State in accordance with the devolution settlement. We understand from Defra that they decided this provision`s natural home was these regulations along with the other reserved functions.

However, there are a number of disputed areas. The areas of contention are functions, which are proposed to be exercisable by the Secretary of State alone, in areas which we consider to be devolved, namely producer organisations (POs), wine imports, marketing standards and contractual relationships. Additionally where there are technical changes, the Scottish Government’s view is that consent should have been sought, even if the effect created is consistent Scottish Government policy, where the technical change relates to devolved subject matter.

The provisions on producer organisations and inter branch organisations are considered by the UK Government to be reserved under the competition reservation (Schedule 5, Part II, section C3 – Competition - Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers). The Scottish Government’s position is that these provisions are devolved, as being for the purpose of promotion of an effective agricultural market.

The provisions on contractual relationships are considered by the UK Government also to be reserved under the competition reservation (Schedule 5, Part II, section C3 – Competition - Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers). The Scottish Government’s position is that these provisions are devolved and that the provisions do not fall within reservation C3. The provisions concern fair dealing with agricultural producers rather than the regulation of anti-competitive agreements – i.e. agreements which adversely affect the competitive structure of the market - and the abuse of a dominant position.

The remaining disputed areas concern provisions to ensure that imported food products comply with domestic marketing standards or permit changes to the list of products to which the CMO marketing standards apply. The UK Government consider these are reserved under Schedule 5, Part II, section C5 – Import/Export Control or the foreign affairs reservation re international relations (Schedule 5, part 1, paragraph 7). The Scottish Government’s position is that the purpose and effect of these provisions is considered to be marketing standards. It is acknowledged that the import and export control reservation is engaged by such provisions, but the purpose of the provisions fall within the CAP exception to that reservation, and consequently the provisions are devolved.

The CAP exception in reservation C5 is the prohibition and regulation of the import and export of food for the purposes of observing or implementing obligations under the Common Agricultural Policy (CAP). The EU Regulations covering Common Organisation of the Markets in Agricultural Products (Regulation 1308/2013 and the EU Regulations made under that Regulation – collectively the “CMO Regulations”)
form part of the CAP, and the disputed provisions relate to marketing standards required by the CMO Regulations.

6. Stakeholder engagement/consultation

The Scottish Government is in regular contact with all its stakeholders regarding the move towards leaving the EU. These proposals only amend these regulations to the extent necessary to allow them to operate after the UK’s withdrawal from the EU. The Scottish Government has not undertaken any specific engagement, or any formal consultation, on the subject matter of these amendments.

7. Any other impact assessments?

On the basis that these amendments do not result in any policy changes, no impact assessment has been prepared.

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

Scottish Parliamentary consent is not being sought by the UK Government for the laying of the CAP regulations as it is the position of the UK Government that these provisions are reserved, a position that is disputed by Scottish Ministers.

The UK Government has not requested the consent of the Scottish Ministers to the CAP Regulations as it does not consider that these instruments contain provisions relating to devolved matters. Scottish Ministers consider that their consent is needed for UK Government Ministers to make the CAP Regulations and will be writing to the UK Government in due course to set out their view.

9. Intended UK laying date

The CAP-08 Regulations were originally intended to laid on 20th June 2019, however we have been informed by Defra that this laying date has been delayed, with the new date to be confirmed. These instruments were laid in draft as the proposed regulations are subject to affirmative procedure.

The CAP-11 Regulations are to be laid on 15th July 2019. These instruments will be laid in draft as the proposed regulations are subject to affirmative procedure.

The CAP-14 Regulations are subject to the negative procedure and were laid for sifting at Westminster on 3rd July 2019.

10. Information about any time dependency associated with the proposal

There is no time dependency associated with the proposals.

13. Any significant financial implications?

There are no financial implications associated with the proposals.