EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT
The Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) (No. 2) 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 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 of Intention to Consent which sets out the details of the above named 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 this. Please note, we are yet to have sight of the final SI and it is 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 these final SIs are in keeping with the terms of this notification.


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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www.gov.scot
Those relevant UK SIs have already been notified to the Scottish Parliament in accordance with the Parliamentary Notification Protocol in the notifications that covered the Rural Development (Amendment) (EU Exit) Regulations 2019, the European Structural and Investment Funds Common Provisions (Amendment) (EU Exit) Regulations 2019 and the Agriculture (Legislative Functions) (EU Exit) Regulations 2019. The further amendments to be covered by this SI concern the correction of deficient EU terminology, for example “Member State”, and the removal of Commission powers to adopt subordinate legislation which will not be appropriate post-exit. As such, the proposed changes to be made to the CAP instruments by this SI are purely technical and are consistent with the original notifications for the CAP instruments.

I am copying this letter to 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.

FERGUS EWING
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SIs

The SI covered by this notification is:

- The Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments, etc.) (EU Exit) (No.2) Regulations 2019 (The “2019 Regulations”)

The 2019 Regulations are a UK statutory instrument which addresses technical deficiencies to EU and UK Regulations regarding the common organisation of the markets in agricultural products (“CMO”) arising from withdrawal from the EU, based on a presumed “no deal” scenario.

Most of these amendments are minor and technical in nature, for example correcting references to the “Member State” or “Union” that will not be relevant when the UK leaves the EU, and removing provisions that will become redundant. In some cases these amendments involve transferring legislative and non-legislative functions that are currently conferred by EU legislation upon the European Commission or Member States to the devolved administrations and/or the Secretary of State. This will ensure those functions, which ensure the operability of the legislation, can be exercised after the UK leaves the EU.

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

CMO

- The Common Organisation of the Markets in Agricultural Products (Basic Acts) (Amendment etc.) (EU Exit) Regulations 2019 (CMO-01)
- The Market Measures (Marketing Standards) (CAP) (Miscellaneous Amendments) (EU Exit) Regulations 2019 (CMO-04)
- Market Measures Payment Schemes (Miscellaneous Amendments) (EU Exit) Regulations 2019 (CMO-05)
- The Market Measures (Domestic Provisions) (CAP) (Miscellaneous Amendments) (EU Exit) Regulations 2019 (CMO-06)
- The Agriculture (Transfer of 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);

CAP

- 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 previous advice 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).
Brief explanation of laws that the proposals amend

The Legislation Being Amended

The 2019 Regulations cover amendments to the following EU regulations:

Common Market Organisation Framework Amendments:
- Council Regulation (EU) No 1370/2013 of 16 December 2013 determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products,

Marketing Standards Amendments:
- Commission Regulation (EC) 617/2008 laying down detailed rules for implementing Regulation (EC) No 1234/2007 as regards marketing standards for eggs for hatching and farmyard poultry chicks,
- Commission Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis,
- Commission Implementing Regulation (EC) No 543/2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for olive oil,
- Commission Regulation (EC) No 543/2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing standards for poultrymeat,

Payment Schemes Amendments:
- Commission Implementing Regulation (EU) 2017/39 on rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to Union aid for the supply of fruit and vegetables, bananas and milk in educational establishments,

Public Intervention Amendments:
• Commission Implementing Regulation (EU) 2019/98 opening a tendering procedure for buying-in skimmed milk powder during the public intervention period from 1 March to 30 September 2019,
• Commission Implementing Regulation (EU) 2019/465 on the minimum selling price for skimmed milk powder for the 34th partial invitation to tender within the tendering procedure opened by Implementing Regulation (EU) 2016/2080,

Rural Development Amendments:
• Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD);

Amendments to domestic/subordinate legislation:
• The Eggs and Chicks (England) Regulations 2009,
• The Poultrymeat (England) Regulations 2011,
• The Olive Oil (Marketing Standards) Regulations 2014,

Of these domestic regulations being amended, only the Olive Oil (Marketing Standards) Regulations 2014 applies to Scotland. Some amendments made to these 2014 Regulations were previously covered in the notification on CMO-06. The amendments to these 2014 Regulations made in the 2019 Regulations are those consequential on amendments made to Commission Implementing Regulation (EU) No. 29/2012 on marketing standards for olive oil. Like those made by CMO/06, these amendments are minor and technical in nature, include removal of redundant references, and do not involve transfers of functions.

The following regulations are revoked by the 2019 Regulations:
• Commission Delegated Regulation (EU) No 611/2014 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards the support programmes for the olive-oil and table-olives sector,
Summary of the proposals and how these correct deficiencies

At the point of EU-Exit, European legislation relating to the CMO will be converted into UK law and 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 exit from the EU.

The 2019 Regulations use powers in the European Union (Withdrawal) Act 2018 to transfer legislative and non-legislative functions and correct other deficiencies to achieve the continued operation of CMO law.

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 direct EU legislation listed above. The majority of the amendments being made to these regulations are minor corrective amendments such as correcting references to “EU” to instead read “United Kingdom” or removing provisions or regulations which are redundant. In some cases these amendments involve transferring legislative or non-legislative functions that are currently conferred by EU legislation upon the European Commission or Member States to the devolved administrations and/or the Secretary of State. These proposals only amend these EU Regulations to the extent necessary to allow them to operate after the UK’s withdrawal from the EU. Where the amendments in the 2019 Regulations transfer functions to various UK administrations, more detail on the approach for this is set out below.

Devolved Areas

In general, agriculture, including setting the marketing standards for agricultural produce and providing aid related to agricultural produce, is devolved. Hence much of the CMO subject matter is devolved. Where the Scottish Government and the UK Government are in agreement that a function is within devolved competence then these functions are being 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. This means, in Scotland, Scottish Ministers can exercise the function, but if they chose 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 has been used for transferring the majority of functions relating to olive oil and apiculture, as well as legislative functions relating to school milk and fruit and veg aid schemes.

Option 0 – Functions will be exercisable only by devolved administrations. This means that for devolved matters in or as regards Scotland, it is only the Scottish
Ministers who can carry out the function. This has been used for the majority of the transfer of non-legislative functions in the 2019 Regulations, consistent with the approach taken in related SIs. A variation of this approach is taken in a small number of functions relating to olive oil, where the function is exercisable by the devolved administrations acting between them to ensure that a requirement is carried out. This approach has been taken in instances where a single UK-wide exercise of the function is desirable (eg. maintaining a list of panels).

Reserved/devolved provision - The exercise of these functions and assessment of whether they are devolved or reserved would depend on the provision in question. For example, the function would be given to the Secretary of State alone only where it is outside devolved competence. When the function falls within devolved competence it would be given to the Scottish Ministers in relation to Scotland or to the Secretary of State in relation to a constituent nation, if the Devolved Administration of that constituent nation agree and consent. This drafting solution has only been used where there are provisions that could have both devolved and reserved application. This applies in relation to amendments to articles 122, 123, 166(b), 174(1), and 223 of Regulation 1308/2013 (of the common market organisation framework amendments).

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 certain functions relating to olive oil and some common market organisation framework amendments. These olive oil articles relate to tasting and organoleptic assessment panels for olive oil. While functions relating to olive oil are devolved, they are currently carried out on a UK-wide basis and therefore it is an appropriate use of resources to have a single UK-wide panel for these functions and for Westminster to exercise functions in relation to this panel with SM consent. In relation to common market organisation framework amendments in articles 177 to 179 of Regulation 1308/2013, on import and export licences, in cases where the subject matter is devolved (such as animal welfare) the function can only be exercised by the Secretary of State with consent of Scottish Ministers.

An overview of the approach taken to the transfer of functions within the 2019 Regulations is provided below. Where an EU regulation listed above is not covered below this means that there are no transfers of functions in the amendments to that regulation.

1308/2013

Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products, covers a variety of different areas and as such contains a mixture of devolved and reserved functions.

Devolved areas
The amendments to Article 23 relate to the transfer of legislative functions relating to school milk and fruit and veg schemes. These functions are being transferred under Option 1 outlined above.

**Reserved/ devolved areas**

The majority of amendments being made to this regulation in the 2019 Regulations relate to provisions that could have both reserved and devolved application. The amendments to Article 122 and 123 which allow for the making of regulations relating to both wine with protected geographical indications (GI) which is reserved, and non-GI wine which is devolved. Amendments to Articles 125(4), 166(b), 174 and 223 relate to functions to make regulations in relation to a wide range of CMO-related purposes, some of which relate to reserved matters (ie. import/export) and some of which relate to devolved matters such as marketing standards.

The approach that has been taken in these amendments is to draft the amendment so that the exercise of this function and assessment of whether it is devolved or reserved would depend on the provision made in question. For example, the function would be given to the Secretary of State alone only where it is outside devolved competence. When the function falls within devolved competence it would be given to the Scottish Ministers in relation to Scotland, or to the Secretary of State in relation to a constituent nation if the Devolved Administration of that constituent nation agrees and consents. An exception to this approach is set out below.

**Amendments to Articles 177-179:** The function transferred in the amendments to these provisions relate to import/export licencing which is generally reserved. However this article is written in such broad terms that the purpose of the regulations being made under these provisions may fall within devolved areas, such regulation of import and export to take account animal welfare standards. These amendments are being transferred similarly to those outlined above, with the exception being that in this case, when the function falls within devolved competence it can be exercised by the Secretary of State but only with the consent of the devolved administrations.

**1370/2013**

These amendments relate to the transfer of legislative functions relating to school milk and fruit and veg schemes. These functions are being transferred under Option 1 outlined above.


**Devolved functions**

These amendments relate to the transfer of non-legislative functions relating to marketing standards for eggs and poultrymeat. These functions are being transferred under Option 0 outlined above. This means that as regards Scotland, it is only the Scottish Ministers who can carry out these functions.

**2568/91, 29/2012**

**Devolved functions**

These amendments relate to the transfer of non-legislative functions relating to olive oil characteristics, analysis and marketing standards. As these functions are
currently being exercised on a UK-wide basis, these have been transferred under Option 1 outlined above, with the exceptions outlined below.

2568/91, Amendments to Articles 2(2) and Article 4(1) and (2): These non-legislative functions relate to tasting and organoleptic assessment panels for olive oil. These specific functions are being transferred under Option 3 as outlined above. While functions relating to olive oil are devolved, they are currently carried out on a UK-wide basis (as there is no significant olive oil industry in Scotland). Therefore it is an appropriate use of resources to have a single UK-wide panel for these functions and for Westminster to exercise functions in relation to this panel with SM consent.

2568/91, Amendments to Article 2a(4) para 2, Article 4(1) para 2, and Article 4(3): These functions are transferred to the relevant authorities (Scottish Ministers in relation to Scotland) acting between them to ensure that the function is carried out. The functions are:- Article 2a(4) para 2 - requirement that at least one conformity check per thousand tonnes oil marketed in the United Kingdom is carried out per year; article 4(1), para 2 - arrangement of annual checks on assessment panels; article 4(3) - ensuring there is an up-to-date list of tasting panels in the United Kingdom and that those panels comply with the applicable conditions. In each of these cases, the approach here was considered appropriate given the nature of these functions, which are UK-wide obligations relating to devolved matters which should be exercised by the devolved administrations, but where it is practical to have a single UK-wide exercise of the function.

2015/1366, 2015/1368
Devolved functions

The amendments being made to these regulations by the 2019 Regulations relate to aid in the apiculture sector. They are mostly technical in nature, amending or removing redundant provisions allowing the regulations to continue to work effectively post exit. The 2019 Regulation also transfers functions under the Option 1 approach as outlined above. This is consistent with the approach taken to the transfer of related functions relating to apiculture that were transferred as part of amendments to 1308/2013 that were previously notified to the Scottish Parliament as part of the notification covering CMO-01, 04, 05 and 06.

2017/39, 2017/40
Devolved functions

These amendments relate to the transfer of non-legislative functions relating to school milk and fruit and veg schemes. These functions are being transferred under Option 0 outlined above. This means that as regards Scotland, it is only the Scottish Ministers who can carry out these functions.

Explanation of why the change is considered necessary

After EU Exit, without amendment, the legislative and non-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 administrative changes to each policy regime. The instrument uses
powers in the European Union (Withdrawal) Act 2018 to correct deficiencies 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 CMO area, the current regimes for common organisation of the market (such as marketing standards or aid) would not operate effectively. The amendments will ensure that the regimes outlined above will continue to function smoothly after EU Exit.

**Scottish Government categorisation of significance of proposals**

Category B. The 2019 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 2019 Regulations also update references which are no longer appropriate once the UK has left the EU and aim 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.

**Impact on devolved areas**

Our primary objective in working with UKG 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. SG 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 one of the options 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**

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.

Scottish Government policy officials have engaged with Defra as part of UK-wide consultations to stakeholders on the approach being taken to correct deficiencies in food and drink legislation. The consultation informed stakeholders that the laws and rules that currently exist while we are part of the EU will, as far as possible, continue to apply after exit. They set out that in some cases changes are required in order to correct deficiencies arising as a result of exit and outlined the relevant changes.
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

The provisions were made at the UK level to reflect the mix of reserved and devolved responsibilities and the UK wide approach taken in the subject matter dealt with in the Regulations. Scottish Ministers consider that consenting to the Regulations is the most effective and transparent way to make changes to address deficiencies at the same level. Officials have worked with UKG to ensure the drafting delivers for our interests and respects devolved competence in Scotland.

Intended laying date of instrument

We understand that the 2019 Regulations will be laid on 20th June. The instrument will be laid in draft as the proposed regulations are subject to affirmative procedure.

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

Not applicable. Scottish Government are working with Defra on the basis that no EU Exit SIs will proceed to be made (for negative procedure SIs), or laid in draft (for affirmative SIs) until after they have been through the consent process agreed with the Scottish Parliament.

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 October 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

There are not expected to be any significant financial implications associated with the proposed instrument.
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Further to my letter of 7 March 2019, this SI also proposes to correct outstanding deficiencies in Commission Regulation (EC) No 1974/2006, Regulation (EU) No 1303/2013 and Regulation (EU) No 1305/2013 (“the CAP instruments”). The proposed amendments relate to deficiencies that were not fully captured in the relevant UK SIs amending the CAP instruments. Those relevant UK SIs have already been notified to the Scottish Parliament in...
accordance with the Parliamentary Notification Protocol in the notifications that covered the Rural Development (Amendment) (EU Exit) Regulations 2019, the European Structural and Investment Funds Common Provisions (Amendment) (EU Exit) Regulations 2019 and the Agriculture (Legislative Functions) (EU Exit) Regulations 2019. The further amendments to be covered by this SI concern the correction of deficient EU terminology, for example “Member State”, and the removal of Commission powers to adopt subordinate legislation which will not be appropriate post-exit. As such, the proposed changes to be made to the CAP instruments by this SI are purely technical and are consistent with the original notifications for the CAP instruments.

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