

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

25 February 2019

Dear Edward,

Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019

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 made the above named Regulations to ensure the Common Market Organisation can continue to operate effectively after EU Exit. The UK Government has not written to request the consent of Scottish Ministers to the 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 disagreement with the UK Government as regards devolved competence in relation to the Regulations.

Consideration has been given as to whether the provisions being amended by this SI are reserved. 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

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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.

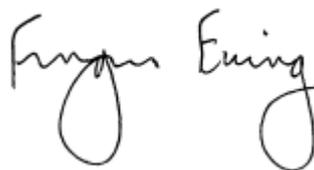
The remaining disputed areas concern provisions to ensure that imported food products comply with domestic marketing standards. The UK Government consider these are reserved under Schedule 5, Part II, section C5 – Import/Export Control). The Scottish Government's position is that the purpose and effect 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.

Since the legislative and non-legislative functions being transferred or created by amendments contained in CAP/07 as described above will be exercised for a devolved purpose, they should not be transferred solely to the Secretary of State.

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 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

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St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot



1. Name of the instrument and summary of proposal

The Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019 (“the proposed SI”) (CAP/07) make provision in relation to exercise of functions in the UK after EU exit. This SI contains mainly transfer 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. It also addresses 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 includes transitional provisions.

2. Explanation of law that the proposals amend

The SI amends retained European Union (“EU”) legislation relating to the Common Market Organisation (“CMO”). This instrument will address operability issues created by the United Kingdom (“UK”) leaving the EU. This is part of a package of CMO related instruments being progressed, to differing timetables, by DEFRA in Westminster to ensure that the CMO can continue to operate effectively after EU Exit.

This notification should be considered alongside the following previously notified SI’s;

- The Common Organisation of the Markets in Agricultural Products (Basic Acts) (Amendment etc.) (EU Exit) Regulations 2019;
- The Market Measures (Marketing Standards) (CAP) (Miscellaneous Amendments) (EU Exit) Regulations 2019;
- Market Measures Payment Schemes (Miscellaneous Amendments) (EU Exit) Regulations 2019;
- The Market Measures (Domestic Provisions) (CAP) (Miscellaneous Amendments) (EU Exit) Regulations 2019;
- The Agriculture (Transfer of Functions) (EU Exit) (No.2) Regulations 2019

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

3. Summary of the proposals

This SI contains amendments of the following;

- Regulation (EU) No. 1308/2013 of the European Parliament and of the Council establishing a 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,

- Regulation (EC) No 566/2008 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 as regards the marketing of the meat of bovine animals aged 12 months or less,
- Regulation (EU) No 543/2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors,
- Regulation (EC) No 1295/2008 on the importation of hops from third countries,
- Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy.
- The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

The provisions of these EU Regulations which are amended by the proposed SI relate to contractual relationships in agricultural sectors, producer organisations, interbranch organisations, export refunds, export certificates, third country imports of meat of bovine animals aged less than 12 months, marketing standards of fruit and veg, marketing standards of imported hops, wine imports, geographical indications and CAP financing, management and monitoring.

4. Why are these changes necessary?

On exit day, European Union Withdrawal Act 2018 will convert a range of EU legislation into domestic law (ie. retained EU law). This instrument is 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 this proposed SI 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 proposed SI 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 proposed SI contains some provisions which are not disputed. Amendments to Regulations 510/2014 and 1306/2013, and some articles of 1308/2013, (i.e. art 97 and 152(1) (a) and (c)) are agreed to be reserved.

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), interbranch organisations, wine imports, marketing standards and contractual relationships.

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. The UK Government consider these are reserved under Schedule 5, Part II, section C5 – Import/Export Control). 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 this SI 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 proposed SI as it does not consider that it contains provisions relating to devolved matters. Scottish Ministers consider that their consent is needed for UK Government Ministers to make the proposed SI and will be writing to the UK Government in due course to set out their view.

9. Intended UK laying date

This SI was laid at Westminster on 14 February.

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.