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Finlay Carson MSP
Convener of the Rural Affairs and
Islands Committee
Scottish Parliament
Edinburgh
EH99 1SP

5 October 2023

Dear Finlay,

SI AFC/048 - The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2023

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers, to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and then Parliament, accompanied the letter from the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I now write to confirm the details of the Statutory Instrument (“SI”) which the UK Government intend to lay before Parliament on 23 November 2023, without seeking consent from the Scottish Ministers.

The UK Government’s position is that this SI relates to reserved matters and so they did not write to request the consent of Scottish Ministers to The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2023).

This position is disputed by Scottish Ministers, who consider that their consent is needed for UK Government Ministers to make the AFC/048 Regulations and we will write to the UK Government’s Department for the Environment, Food and Rural Affairs (Defra) to express this view.

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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The SI amends relevant REUL and domestic legislation to extend grace periods concerning import requirements for organics and marketing standards for hops and poultrymeat. The UK Government have further deferred import controls, which were due to be in place on 1 January 2024. This therefore extends the grace periods to end on 31 January 2025.

The Committee may wish to note that that the subject matter of the SI is very similar to the prior notifications in relation to the following statutory instruments:

- The Common Organisation of the Markets in Agricultural Products (Transitional Arrangements) (Amendment) Regulations 2021 (SI 2021/652). Also referred to as the **AG/042** Regulations.
- The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2021 (SI 2021/1396). Also referred to as the **CMO/002** Regulations.
- The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2022 (SI 2022/609). Also referred to as the **AFC/026** Regulations.

The Scottish Government's position is that our consent should have been sought to these amendments as they relate to devolved matters.

We note that Defra has previously acknowledged that poultrymeat and hops are devolved matters, having previously sought Scottish Parliament consent in relation to the UK SIs as set out below:

- The Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments etc.) (EU Exit) (No. 2) Regulations 2019 (**CAP/09** now I 2019/1422)
- The Market Measures (Miscellaneous Provisions) (Amendment) (EU Exit) Regulations 2019 (**CMO/06**, now I 2019/824)
- The Common Organisation of the Markets in Agricultural Products (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2020 (**CMO/18**, now I 2020/1453)

It is crucial that we ensure devolved interests are respected therefore I will also be writing to the UK Government Minister for Food, Farming and Fisheries, Mark Spencer, MP to highlight my concerns on this matter. In the meantime, and in the spirit of being open and transparent with you, I attach details of the proposed SI AFC/048 for your consideration.

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

I would be grateful if the Committee could note the notification accompanying this letter.

Yours sincerely,



MAIRI GOUGEON

ANNEX A

NOTIFICATION TO THE SCOTTISH PARLIAMENT

SI AFC/048 - The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2023

Name of the instrument

The Statutory Instrument (“SI”) is The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2023 (also known as AFC/048).

Summary of the SI

The UK Government are intending to lay AFC/048 before Parliament on 23 November 2023. The SI amends relevant REUL and domestic legislation to extend grace periods concerning import requirements for organics and marketing standards for hops and poultrymeat.

The Scottish Parliament has previously considered the underlying policy regarding previous extensions of grace periods, most recently as set out below:

- The Common Organisation of the Markets in Agricultural Products (Transitional Arrangements) (Amendment) Regulations 2021 (SI 2021/652) (also referred to as the “AG/042 Regulations”), which extended grace periods concerning import requirements for organics and marketing standards for hops, wine and fruit and vegetables.
- The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2021 (SI 2021/1396) (also referred to as the “CMO/002 Regulations”), which extended grace periods concerning import requirements for organics and marketing standards for hops, poultrymeat and fruit and vegetables.
- The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2022 (SI 2022/609) (also referred to as the “AFC/026 Regulations”) which extended grace periods concerning import requirements for organics and marketing standards for hops and poultrymeat.

The UK Government’s position is that the SI relates to reserved matters and they are therefore not requesting Scottish Ministers consent to the making of the AFC/048. The UK Government adopted the same position in relation to the AG/042 Regulations, the CMO/002 Regulations, the AFG/026 Regulations. The Scottish Government’s position is that those amendments relating to organics, hops and poultrymeat relate to devolved matters.

The SI itself does not give rise to issues of EU alignment as it extends the dates on which already existing grace periods will end, maintaining the current situation regarding import border controls. However, the amendments are made within the wider context of the UK Government's intention to review REUL in the future.

Explanation of law that the SI amends

The legislation amended by AFC/048 is:

- Retained Council Regulation (EC) No 834/2007 on organic production and labelling of organic products (EUR 2007/834);
- Retained 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 (EUR 2008/543);
- Retained Commission Regulation (EC) No 1235/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries (EUR 2008/1235);
- Retained Commission Regulation (EC) No 1295/2008 on the importation of hops from third countries (EUR 2008/1295);
- Retained Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products (EUR 2013/1308);
- The Hops Certification Regulations 1979, in respect of Great Britain (S.I. 1979/1095).

AFC/048 amends REUL and domestic legislation to extend grace periods concerning import requirements that apply to certain marketing standards. It will extend the grace periods applying to import requirements for (i) hops and hop products from the EU and certain third countries, (ii) poultrymeat with optional indications exported by the EU to Great Britain ("GB") and (iii) organic products exported by the EU, European Economic Area ("EEA") states and Switzerland to GB. AFC/048 extends the grace period to end on 31 January 2025 for all three groups of products.

In addition to the SI's noted above, previous advice has been provided on the following disputed SI's in relation to the following products (i.e. SI's which the UK Government have laid, without seeking the consent of the Scottish Ministers, because the UK Government's position is that the SI's relate to reserved matters, whereas the Scottish Government's position is that some or all of the amendments are to provisions that relate to devolved matters):

Organics

- AG/15 (SI 2019/692 – The Organic Production (Control of Imports) (Amendment) (EU Exit) Regulations 2019)
- FD/07 (SI 2020/1661 – The Agricultural Products, Food & Drink (Amendment) (EU Exit) Regulations 2020)

In addition to those referenced above, this advice should be considered alongside the following previously notified SIs containing organics provisions, which have been formally consented to by the Scottish Parliament:

- The Agriculture (Legislative Functions) (EU Exit) (No. 2) Regulations 2019 (AG-TF/02)
- The Organic Products (Amendment) (EU Exit) Regulations 2019 (AG/08)
- The Organic Production and Control (Amendment) (EU Exit) Regulations 2019 (AG/02)
- The Organic Products (Production and Control) (Amendment) (EU Exit) Regulations 2020 (AG/25)

Hops, wine and fruit and vegetables

- CAP/07 (SI 2019/828 – The Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019)
- CMO/17 (SI 2020/1452 – The Common Organisation of the Markets in Agricultural Products (Miscellaneous Amendments) (EU Exit) Regulations 2020)
- FD/07 (SI 2020/1661 – The Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2020)

Amendments to the Hops Certification Regulations 1979

The amendments to the Hops Certification Regulations 1979 are to provisions made in SIs to which the Scottish Ministers' consent was sought (CMO/06 and CMO/18 – now SIs 2019/824 and 2020/1453).

Why are these changes necessary?

The grace periods were originally set out by transitional provisions in legislation, which were inserted into the legislation by EU Exit SIs. This was done to allow businesses additional time to prepare for the introduction of the relevant certification and inspection requirements following the UK's withdrawal from the EU.

These grace periods were then extended further to align with revised timetables for the introduction of sanitary and phytosanitary (SPS) border controls. Since the laying of S.I. 2022/609 (the **AFC/026 Regulations**) which extended the grace periods to end on 31 December 2023, the UK Government has made further changes to the timeline for the introduction of the new border controls regime which was set out in the final version of the Border Target Operating Model (BTOM), published on 29 August 2023. The SI will extend the grace periods so that marketing standards and organic import requirements are not introduced until after wider import requirements set out in the BTOM are introduced. The UK Government is also making these amendments to allow time to review the relevant retained EU law (REUL) marketing standards regulations, including related import requirements, in light of the UK Government's policy to reform REUL. Further, the UK Government states that the amendments will allow time to consider whether an electronic solution to existing organic import processes can be found to ease the burden on businesses when organic import requirements are introduced. As a result, the marketing standards and import requirements will not be introduced from 1 January 2024 as previously planned.

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. The SI includes such provisions.

SI AFC/048 will be laid without the Secretary of State obtaining consent to it from Scottish Ministers and seeks to make changes to the law in relation to organics, hops and poultrymeat.

These areas of dispute have already been highlighted previously to the Scottish Parliament through the non-notifications listed above, in particular the CMO/002, AG/042 and AFC/026 Regulations.

The Scottish Government's position is that these amendments relate to devolved matters.

The SI does not contain any transfers of functions.

Does the SI relate to a common framework or other scheme?

A provisional Organics Framework Outline Agreement has been finalised and is awaiting Parliamentary approval. The framework is intended to cover the principles and overarching standards for organic production and certification; official controls, labelling and trade of organic produce; and organic aquaculture.

A provisional Agriculture Support Framework has also been finalised and is awaiting Parliamentary approval. The scope of the framework covers working arrangements between the four administrations on future agricultural support now that the UK has left the EU and the Common Agricultural Policy (CAP). Specific elements of agricultural support covered in this framework are:

- Agricultural spending
- Marketing standards
- Crisis measures, Public Intervention (PI) and Private Storage Aid (PSA)
- Cross border holdings (within the UK)
- Data collection and sharing

Stakeholder engagement/consultation

The UK Government did not undertake consultation for the amendments being made under this instrument but has communicated the changes to industry to familiarise them with the proposed changes to import requirements made under this instrument.

Any 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 SI.

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

Scottish Parliamentary consent has not been sought by the UK Government for the laying of the SI as it is the position of the UK Government that these provisions are reserved.

Scottish Ministers consider that the SI includes devolved provisions. Scottish Government officials have written to colleagues within Defra advising that it is the Scottish Government's position that the SI contains devolved provisions.

This notification has been drafted from information contained within a final version copy of the statutory instrument and explanatory memorandum shared by UK Government officials in Defra.

Intended UK laying date.

The UK Government intend to lay the SI before Parliament on 23 November.

Information about any time dependency associated with the proposal.

There is no time dependency associated with the SI.

Any significant financial implications?

There are no financial implications associated with the SI.

ANNEX B

SI NOTIFICATION: SUMMARY

Title of Instrument SI AFC/048 - The Common Organisation of the Markets in Agricultural Products (Marketing Standards and Organic Products) (Transitional Provisions) (Amendment) Regulations 2023.
Proposed laying date at Westminster 1. The UK Government intend to lay before Parliament on 23 November 2023.
Date by which Committee has been asked to respond N/A as the UK Government's position is that the SI relates to reserved matters and are therefore not requesting Scottish Ministers consent. The Committee are asked to note the background information in the notification.
Power(s) under which SI is to be made Articles 89(a) and 227(4) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products(a) and sections 38(5) and 50(3) of the Agriculture Act 2020
Categorisation under SI Protocol N/A
Purpose The SI amends relevant retained EU law and domestic legislation to extend grace periods concerning import requirements for organics and marketing standards for hops and poultrymeat. The UK Government is making these amendments in light of changes to the timeline for the introduction of the new border controls regime set out in the final version of the Border Target Operating Model (BTOM) published on 29 August 2023. The SI will extend the grace periods so that marketing standards and organic import requirements will not be introduced until after the requirements set out in the BTOM are introduced. The UK Government is also making these amendments to allow time to review the relevant REUL marketing standards regulations, including related import requirements, in light of the UK Government's policy to reform REUL. Further, the UK Government states that the amendments will allow time to consider whether an electronic solution to existing organic import processes can be found to ease the burden on businesses when organic import requirements are introduced. As a result, the marketing standards and import requirements will not be introduced from 1 January 2024 as previously planned. This SI extends the grace periods to end on 31 January 2025.
Other information N/A
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