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

5 June 2023

Dear Finlay,

The Organic Production (Control of Imports) (Amendment) Regulations 2023 ('the AFC/029 Regulations').

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 and 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 attach a Type 1 notification which sets out the details of the SI which the UK Government propose to make. Please note, we are yet to have sight of the final SI, which 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 whether the final SI is in keeping with the terms of this notification.

The UK Government's position is that this SI relates to reserved matters and did not write to request the consent of Scottish Ministers to The Organic Production (Control of Imports) (Amendment) Regulations 2023 ('the AFC/029 Regulations'). This position is disputed by Scottish Ministers who consider that their consent is needed for UK Government Ministers to make the AFC/029 Regulations and will be writing to the UK Government to set out 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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This statutory instrument amends retained EU organic regulations in relation to the Certificate of Import required when importing organic food from outside the EU, EEA and Switzerland ('Third Countries') into Great Britain. These regulations make an administrative change to the Certificate of Import which is required to import organic food from outside the EU, EEA and Switzerland into Great Britain. The regulations will omit transitional provisions concerning certificates of inspection which expired on 31st December 2022 and make consequential amendments to Annexes arising from the expiry of the transitional provisions.

The Scottish Government's position is that these amendments relating to import/export of organic food are to provisions that relate to devolved matters, as set out below.

It is proposed that this statutory instrument 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 the importation of organics, an area of disputed competence between the Scottish Government and the UK Government.

The import and export control of organic products is reserved by the Scotland Act 1998 (Schedule 5, Part II, section C5). We consider that there are relevant exceptions to this reservation linked to the fact that the provisions in the organics legislation are observing and implementing obligations under the CAP. The legislative and non-legislative functions being transferred could be exercised for a devolved purpose and should not therefore be transferred solely to the Secretary of State.

The UK Government does not agree with our analysis and considers the matters to be reserved because, in their view, they relate to international relations, relations with territories outside the UK and they relate to the import and export controls. We disagree but are content that the amendments themselves to the proposed regulations are appropriate, as they properly reflect how the organics regime presently operates in practice as regards Scotland.

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 the Organic Production (Control of Imports) (Amendment) Regulations 2023. In the meantime, and in the spirit of being open and transparent with you, I attach details of the proposed The Organic Production (Control of Imports) (Amendment) Regulations 2023 for your consideration.

I am also 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

SI AFC/029 The Organic Production (Control of Imports) (Amendment) Regulations 2023.

1. Is the notification Type 1 or Type 2

Type 1

2. Name of the instrument

The advice covers The Organic Production (Control of Imports) (Amendment) Regulations 2023 (the 'AFC/029 Regulations').

This instrument will be laid on 6 July 2023 and will be subject to the negative resolution procedure.

3. Summary of the proposal

The AFC/029 Regulations amend Commission Regulation (EC) No 1235/2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries (EUR 2008/1235).

The AFC/029 Regulations amend retained EU organic regulations in relation to the Certificate of Import required when importing organic food from outside the EU, EEA and Switzerland into Great Britain. These amendments are administrative changes.

The UK Government's position is that the AFC/029 Regulations relate to reserved matters and they are not requesting Scottish Minister's consent to the making of these regulations. However the Scottish Government's position is that those amendments which relate to import/export of organic produce are provisions that relate to devolved matters, as set out below.

4. Explanation of law that the proposals amend

The retained direct EU legislation being amended by the AFC/029 Regulations is as follows:

- Commission Regulation (EC) No 1235/2008
- Commission Regulation (EC) No 834/2007

Previous advice has been provided on the following disputed secondary instruments (i.e. secondary instruments which the UK Government have laid, without seeking the consent of the Scottish Ministers, because the UK Government's position is that the secondary instruments 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):

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

In addition to those referenced above, this advice should be considered alongside the following previously notified secondary instruments 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 Production and Control (Amendment) (EU Exit) Regulations 2019 (AG/02)

5. Summary of the proposals

These regulations make an administrative change to the Certificate of Import which is required to import organic food from outside the EU, EEA and Switzerland into Great Britain. The regulations will omit transitional provisions concerning certificates of inspection which expired on 31st December 2022 and make consequential amendments to Annexes arising from the expiry of the transitional provisions.

6. Why are these changes necessary?

This SI makes a small administrative change e.g. removing references to Great Britain, to the Certificate of Inspection which is completed by those importing organic goods into Great Britain and reviewed by Port Health Authority/Border Control Post operatives. This change will simplify the process of completing the certificate.

7. 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 statutory instrument includes such provisions.

It is proposed that this statutory instrument 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 the importation of organics, an area of disputed competence between the Scottish Government and the UK Government.

The import and export control of organic products is reserved by the Scotland Act 1998 (Schedule 5, Part II, section C5). We consider that there are relevant exceptions to this reservation linked to the fact that the provisions in the organics legislation are observing and implementing obligations under the CAP. The legislative and non-legislative functions being transferred could be exercised for a devolved purpose and should not therefore be transferred solely to the Secretary of State.

The UK Government does not agree with our analysis and considers the matters to be reserved because, in their view, they relate to international relations and relations

with territories outside the UK and they relate to the import and export controls. We disagree but are content that the amendments themselves to the proposed regulations are appropriate, as they properly reflect how the organics regime presently operates in practice as regards Scotland

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

A provisional Organic Production Common Framework is currently undergoing scrutiny by the devolved administrations and 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.

9. Stakeholder engagement/consultation

Scottish Government are members of Defra's United Kingdom Organic Control Group. Industry representatives are members of this group and updates have been given in relation to the changes to this instrument.

10. 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 proposed regulations.

11. 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 AFC/029 Regulations as it is the position of the UK Government that these provisions are reserved, a position that is disputed by Scottish Ministers.

Scottish Ministers consider that their consent is needed for UK Government Ministers to make the AFC/029 Regulations and will be writing to the UK Government in due course to set out their view.

12. Intended UK laying date.

The AFC/029 Regulations will be laid before UK Parliament on 6 July 2023, subject to the negative resolution procedure.

13. Information about any time dependency associated with the proposal.

There is no time dependency associated with the proposals.

14. Any significant financial implications?

There are no financial implications associated with the proposals.