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

5 February 2024

Dear Finlay,

### **The Fair Dealing Obligations (Milk) Regulations 2024**

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 above Statutory Instrument ("SI") which the UK Government intend to lay before Parliament around the 21 February 2024 without seeking consent from the Scottish Ministers. The attached SI shadow notification and summary set out the details of the SI.

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 Fair Dealing Obligations (Milk) Regulations 2024. The UK Government take the view that the SI relates to the competition law reservation in Schedule 5, Part 2, section C3 of the Scotland Act 1998. This position is disputed by Scottish Ministers, who consider that the SI relates to devolved matters, namely the regulation of unfair contractual terms in commercial contracts by agricultural producers in Scotland, and so their consent should be sought to make the Regulations. Scottish Government officials have advised colleagues in the UK Government's Department for the Environment, Food and Rural Affairs (Defra) of 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](http://www.lobbying.scot)

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The SI introduces regulations to make mandatory written contracts between a milk producer and a milk business purchaser and setting out terms that must be included. This includes such things as the duration of the contract, the permitted pricing modelling, variable price contracts, and includes rules around any dispute resolutions.

The Committee may wish to note that the milk sector in Scotland is in favour of this legislation and have been involved in regular discussion with officials in Defra and the Scottish Government to agree on the detail of the Regulations, ensuring consistency across the UK.

The effect of the SI is consistent with the Scottish Government's policy, however, it is the Scottish Government's position that our consent should have been sought to these Regulations as they relate to devolved matters.

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.

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**

## **NOTIFICATION TO THE SCOTTISH PARLIAMENT**

### **Name of the instrument**

The Fair Dealing Obligations (Milk) Regulations 2024

### **Summary of the SI**

The UK Government intend laying the Fair Dealing Obligations (Milk) Regulations 2024 before Parliament approximately on the 21 February 2024. The SI has UK-wide extent. It makes provision in respect of commercial contracts for the purchase of milk between the producer and the business purchasing the milk.

The SI requires business purchasers to use written milk purchase contracts that comply with the Regulations when purchasing milk from a producer. The Regulations apply to all business purchasers and producers, including evergreen contracts which are contracts that have no end date. However, the Regulations do not apply to pre-existing contracts until 12 months after the commencement date, allowing a lead in time for contracts to be amended to comply with the legislation.

The Regulations make provision about the terms that must be included in a milk purchase contract, including the following:

- The format and duration of the milk purchase contract being either of a fixed duration or evergreen (as defined.)
- The permitted pricing modelling, this includes:
  - Fixed pricing contracts, which may include more than one fixed price within the duration of the contract.
  - Variable price contracts, where it imposes a requirement that the milk purchase contract must set out the factors to which the business purchaser must have due regard when determining the price and may relate to different periods within the duration of the contract. Variable price contracts must also include provision for referral to an independent third party.
  - Combination fixed and variable price contracts.
  - Exclusive milk purchase contracts may not use a pricing model where the price to be paid for milk under the contract changes if the amount of milk provided by the producer exceeds a certain volume.
- The method and frequency of payment.
- Conditions where the contract is for supply of a fixed volume of milk over a given period.
- The collection of milk by the business purchaser.
- Force majeure clauses, notice periods, cooling off period, termination process, variation terms and dispute resolution.

The Regulations make provision for enforcement by way of a complaint's procedure to the Secretary of State, with the power to impose civil penalties and compensation and an appeal route. The Regulations require to be reviewed by the Secretary of State from time to time.

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 legislation. The SI is consistent with Scottish Government policy and the Scottish Government agrees it should extend to Scotland. However, the Scottish Government's position is that the SI relates to devolved matters and so consent should be sought.

### **Explanation of law that the SI amends**

The SI makes standalone regulations. It also makes minor related amendments to assimilated Regulation (EU) No 1308/2013 of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products ("The Single CMO Regulation"). These remove a power conferred on the Secretary of State to make provision about mandatory written contracts in the dairy sector.

### **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.

The Fair Dealing Obligations (Milk) Regulations 2024 will be laid without the Secretary of State obtaining consent to it from Scottish Ministers. The SI is made under section 29 of the Agriculture Act 2020 (power of the Secretary of State to make regulations on fair dealing obligations of business purchasers of agricultural products). During the passage of the Agriculture Act, the UK Government took the view that this provision related to the competition law reservation in Schedule 5, Part 2, section C3 of the Scotland Act 1998. The Scottish Government disagreed and considered that section 29 was for devolved purposes, namely the regulation of unfair contractual terms in commercial contracts by agricultural producers in Scotland.

The Scottish Government therefore consider the provisions of this SI, made under section 29, to be devolved and that consent to it should be sought, however the UK Government consider it to be reserved. The effect of this SI is consistent with the Scottish Government policy, however the Scottish Government's position is that this SI relates to devolved matters.

The SI does not contain any transfers of functions.

### **EU alignment consideration**

The Scottish Ministers' consent has not been sought to the instrument, however the instrument does not diverge from EU law. The Single CMO Regulation permits member states to require the use of mandatory written contracts in the dairy sector.

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

No. The SI does not relate to a common framework. Currently there are no other schemes in relation to mandatory written contracts for agricultural produce. However, work is in progress looking at contractual arrangements in the Pig sector.

### **Stakeholder engagement/consultation**

There was a UK wide consultation carried out in 2020. The results of the consultation from a Scottish perspective were overwhelmingly in favour of mandatory written contracts in the sector, with 81% of respondents in Scotland agreeing or strongly agreeing that legislation is required. This compared with a UK wide figure of 72% of all respondents who either agreed or strongly agreed with the need for regulations.

Due to Covid this has not been progressed by the UK Government as quickly as original anticipated, however Defra have ensured that Scottish Government officials and importantly Scottish stakeholders have been fully involved throughout the process.

### **Any other impact assessments?**

A Full impact assessment has not been produced for this however a de-minimis assessment has been prepared as this instrument is likely to entail some costs for business. Engagement with stakeholders has also continued throughout the process.

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

Scottish Ministers' 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 provisions of the SI are devolved. Scottish Government officials have advised colleagues within Defra that it is the Scottish Government's position that the SI contains devolved provisions. The SI is however consistent with the Scottish Government's policy.

### **Intended laying date (if known) of instruments likely to arise**

The UK Government intend to lay the SI before Parliament on approximately the 21 February 2024.

### **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.

<p><b>Title of Instrument</b> The Fair Dealing Obligations (Milk) Regulations 2024</p>
<p><b>Laying date at Westminster</b> 21 February 2024(approx.)</p>
<p><b>Date by which Committee has been asked to respond.</b> N/A - the UK Government's position is that the SI relates to reserved matters and therefore they are not requesting Scottish Ministers' consent. The Committee is asked to note the background information in the notification.</p>
<p><b>Power(s) under which SI is to be made.</b> Sections 29 and 50(3) of the Agriculture Act 2020.</p>
<p><b>Categorisation under SI Protocol</b> N/A</p>
<p><b>Purpose</b> This new Statutory Instrument, which has UK-wide extent, requires a milk buying business to use a milk purchase contract that complies with these Regulations when buying milk from a producer. The Regulations for the purchase of milk cover several things that must be included in the contract with the producer, in particular:</p> <ul style="list-style-type: none"> <li>• The format and duration of the milk purchase contract.</li> <li>• The permitted pricing modelling.</li> <li>• The method and frequency of payment</li> <li>• Conditions where the contract is for supply of a fixed volume of milk over a given period.</li> <li>• The collection of milk by the business purchaser.</li> <li>• Force majeure clauses, notice periods and variation terms.</li> <li>• Cooling off period and termination process.</li> <li>• Dispute resolution procedure.</li> </ul> <p>The Regulations also make provision for enforcement, review of the Regulations, and consequential amendments.</p>
<p><b>Other information</b></p>
<p><b>SG Policy contact:</b> Heather Curran</p>