

# Agriculture (Retained EU Law and Data) (Scotland) Bill

[As Amended at Stage 2]

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## Supplementary Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with rule 9.7.10 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Agriculture (Retained EU Law and Data) (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2.

2. The contents of this memorandum do not form part of the Bill, are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. This supplementary memorandum should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

### Provisions conferring power to make subordinate legislation introduced or amended at stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

This document relates to the Agriculture (Retained EU Law and Data) (Scotland) Bill (SP Bill 59A) as amended at Stage 2

## Delegated powers

### **Section 2(1) Power to simplify or improve CAP legislation**

### **Section 3(1) Power to provide for the operation of CAP legislation beyond 2020**

### **Section 4(1) Power to modify financial provision in CAP legislation**

**Powers conferred on: The Scottish Ministers**

**Powers exercisable by: Regulations made by Scottish statutory instrument**

**Revised or new powers: Revised**

**Parliamentary procedure: Negative (section 2) and affirmative (sections 3 and 4)**

## **Provision**

4. Sections 2, 3 and 4 provide for the Scottish Ministers, by regulations, to modify the main Common Agricultural Policy (“CAP”) legislation (for which see section 1(2) of the Bill), to provide for:

- Simplification and improvement (section 2),
- Operation of that legislation beyond 2020 (section 3), and
- Modification of financial provisions (section 4).

5. The Bill was amended at Stage 2 to include a new Section 4A, which has the effect that the powers in sections 2(1), 3(1) and 4(1) cannot be exercised by the Scottish Ministers after 7 May 2026 (the expected date of the following Scottish Parliamentary elections). It also ensures that the expiry of powers in those sections does not affect the continuation in force of any regulations made under those sections before that date. The nature and form of the powers otherwise remain the same.

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## **Reason for taking power**

6. The reasons for taking the delegated powers in sections 2(1), 3(1) and 4(1) are unchanged and remain as described in the Delegated Powers Memorandum<sup>1</sup>.

7. During both Stage 1 and Stage 2, it became clear that there was a desire within Parliament and amongst stakeholders to ‘sunset’ the powers in certain sections of Part 1 of the Bill. This was also expressed in the Stage 1 reports of both the Rural Economy and Connectivity Committee<sup>2</sup> and the Delegated Powers and Law Reform Committee<sup>3</sup>.

8. The Scottish Government therefore supported the amendment lodged by Mike Rumbles MSP introducing the new section 4A at Stage 2, which places a time limit on the use of the regulation-making powers in sections 2(1), 3(1) and 4(1). New primary legislation will therefore be needed if powers similar to those in sections 2 to 4 are to be available after 2026.

9. A further amendment to section 23(1) brings the new section 4A into force on the day after Royal Assent.

## **Choice of procedure**

10. Section 4A simply limits the duration of the powers and, so, the parliamentary procedure for the regulation-making powers under sections 2(1), 3(1) and 4(1) remains unchanged.

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<sup>1</sup> <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/agriculture-retained-eu-law-and-data-scotland-bill/introduced/delegated-powers-memorandum-agriculture-retained-eu-law-and-data-scotland-bill.pdf>

<sup>2</sup>

<https://digitalpublications.parliament.scot/Committees/Report/REC/2020/3/3/Stage-1-Report-on-the-Agriculture--Retained-EU-Law-and-Data---Scotland--Bill>

<sup>3</sup>

<https://digitalpublications.parliament.scot/Committees/Report/DPLR/2020/2/6/Agriculture--Retained-EU-Law-and-Data---Scotland--Bill--Stage-1#Introduction>

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## **Section 8(1) – Marketing Standards**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Revised or new power: Revised**

**Parliamentary procedure: Affirmative**

### **Provision**

11. Section 8(1) of the Bill provides that the Scottish Ministers may make regulations in relation to certain products (as they are now listed in section 9A(1)) that are marketed in Scotland, concerning the standards with which those products must conform. These are known as “marketing standards”. They can cover the range of issues set out in section 8(2), such as production methods, grading by weight, size or age, presentation, labelling, packaging, and disposal or use of non-conforming products. Under section 8(3) of the Bill, regulations may also include provision about the enforcement of these standards.

12. Section 8(4) of the Bill concerns the applicable procedure for regulations made under section 8(1), and is discussed in paragraphs 16 and 17 below.

13. Under section 8(5) of the Bill, before laying a draft of a Scottish statutory instrument containing regulations under this section, the Scottish Ministers are required to consult such persons as they consider are representative of the interests of persons likely to be affected by the regulations as they consider appropriate.

### **Reason for taking power**

14. Under Regulation (EU) No 1308/2013 of the European Parliament and of the Council<sup>4</sup> (the “CMO Regulation”) provision is made for marketing

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<sup>4</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02013R1308-20190101>

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standards, supplemented where required by domestic legislation. However, the scope of any domestic changes is limited.

15. The section 8(1) power will enable the Scottish Ministers to establish marketing standards in Scotland in a way which is more flexible and responsive. It will for example enable the Scottish Ministers to replicate changes that might be made for England under the UK Agriculture Bill<sup>5</sup>, where doing so is desirable and/or necessary to maintain free trade flows within the UK.

### **Choice of procedure**

16. On the Bill's introduction, it was considered appropriate that regulations made using this power were subject to the negative procedure, as it is not the intention of the Scottish Ministers to make major changes to marketing standards in Scotland, but rather to ensure for example that, should the rest of the UK make changes to marketing standards, those applying in Scotland can be adjusted as considered desirable or needed. In addition, the Scottish Ministers are subject to the consultation requirement described in paragraph 13 above, which gives people the opportunity to give their views on any new or modified standards.

17. During Stage 1, concerns were raised about how this power will be used. The REC Committee in its Stage 1 report supported the recommendation of the DPLR Committee that, given the extent of powers it confers, both in terms of modifying marketing standards and in terms of creating associated offences for those who breach those standards, regulations made under section 8 of the Bill should be subject to the affirmative rather than negative procedure.

18. The Scottish Government agreed with this recommendation, and brought forward amendments at Stage 2 changing the procedure to affirmative that were agreed by the REC Committee.

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<sup>5</sup> <https://services.parliament.uk/Bills/2019-21/agriculture.html>

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## **Section 9A(3) – Marketing standards: agricultural products**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Revised or new power: New**

**Parliamentary procedure: Affirmative**

### **Provision**

19. A new version of section 9 of the Bill was substituted at Stage 2. New section 9A lists the specific agricultural products in respect of which marketing standards regulations may be made under section 8(1) of the Bill.

20. New section 9A(3) provides that the Scottish Ministers may make regulations to amend the list of agricultural products so as to add or remove an agricultural product, and/or alter the description of an agricultural product in that list.

21. This power replaces the similar power in section 9(2) of the Bill as introduced.

### **Reason for taking power**

22. New section 9A takes a different approach from section 9 as introduced. It replaces a list of “sectors” with a list of “products” as described in EU legislation, and adds additional specifications, with the effect that descriptions of products match those in the equivalent lists in schedules 4, 5 and 6 of the current UK Agriculture Bill<sup>6</sup>.

23. Under section 9(1) of the Bill as introduced, sectors were listed at a high level (e.g. “beef and veal” or “fruit and vegetables”). Section 9(2) enabled the Scottish Ministers, by regulations subject to the negative procedure, to add or remove a listed sector and/or set out in more detail precisely which products fall within those sectors. The new section 9A(3)

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<sup>6</sup> <https://services.parliament.uk/Bills/2019-21/agriculture.html>

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replaces that power with a power enabling the Scottish Ministers, by regulations subject to the affirmative procedure, to add or remove a listed product (or alter the description of a listed product).

24. New section 9A(1) provides more details of the products covered, generally by reference to the detailed Annexes of the CMO Regulation, which in turn refers to the Combined Nomenclature customs codes. New section 9A(1)(j) also refers to aromatised wine products as defined in the Aromatised Wine Regulation, which is further defined in new section 9A(2). The more detailed specification of products in new section 9A will therefore reduce the need for further secondary legislation under new section 9A(3). However, the Scottish Ministers consider that taking this as a delegated power is still necessary in order to enable them to respond quickly and flexibly to changes in market conditions, including by implementing future policy decisions about coverage or to adjust the details, which may be a particular issue after the end of the EU Exit implementation period (currently due to be 31 December 2020). Similar flexibility is available in England, Wales and Northern Ireland under the UK Agriculture Bill, and in the EU<sup>7</sup>.

### **Choice of procedure**

25. On the Bill's introduction, it was considered appropriate that regulations made using the section 9(2) power were subject to the negative procedure, as they would simply change the list of sectors in respect of which marketing standards may be established, or set out in more detail precisely which products are covered (e.g. by reference to customs codes).

26. However, in order to allow increased parliamentary scrutiny of such changes, and to match the procedure applicable to the equivalent power in section 35(5) of the current UK Agriculture Bill, it was considered appropriate that regulations made using this power should now be subject to the affirmative procedure. That change to affirmative procedure is reflected in the new section 9A(4).

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<sup>7</sup> See for instance the power in article 75(6) of Regulation 1308/2013 to modify the sectors in which marketing standards may be applied.

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## **Section 22(1)(c) – Interpretation and Effect**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Revised or new power: New**

**Parliamentary procedure: Negative**

### **Provision**

27. The powers in Part 1 of the Bill will enable the Scottish Ministers to modify CAP legislation, or provide for matters that were regulated by EU law. Those powers can only be exercised when EU law no longer applies; that is, when former EU CAP legislation has been rolled over into domestic law as retained EU law.

28. Section 22(1) contains express provision to that effect, namely that a reference to any EU regulation is a reference to the regulation as it forms part of domestic law by virtue of section 3 of the European Union (Withdrawal) Act 2018 (“EUWA”)<sup>8</sup>.

29. Section 22(1)(b) was added to the Bill at Stage 2, which has the effect that any reference in the Bill to any EU regulation will include a reference to any regulation rolled over into domestic law by virtue of section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020<sup>9</sup>.

30. Section 22(1)(c) was also added, and has the effect that the Scottish Ministers will be able, by regulations, to specify any other enactment that rolls over EU law into domestic law, should that be necessary in order to ensure that retained EU CAP law can be modified using the powers in Part 1 of the Bill.

31. New section 22(4) specifies the procedure required for this power, discussed at paragraph 35 below.

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<sup>8</sup> <http://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/2020/2/contents>



## **Reason for taking power**

32. At the time this Bill was introduced, the current Withdrawal Agreement<sup>10</sup> had yet to be agreed and implemented. At that point in time, it was thought that there would be a single rollover of EU rules into retained EU law at the end of the implementation period. However, Article 137(1) of the Withdrawal Agreement provided for the rollover of certain CAP rules (those relating to Direct Payments for the CAP 2020 claim year) on 31 January 2020, rather than at the end of the EU exit implementation period. That rollover of EU Direct Payments legislation was carried out by the Direct Payments to Farmers (Legislative Continuity) Act 2020.

33. Therefore, there will now be at least two types of retained EU legislation related to the CAP: EU legislation as retained under the Direct Payments to Farmers (Legislative Continuity) Act 2020, and EU legislation as will be retained under EUWA at the end of the implementation period.

34. The Withdrawal Agreement is complex, and the transition arrangements particularly so. Accordingly, if further legislation is needed to rollover any relevant EU law before the end of the EU exit implementation period, section 22(1)(c) will allow the Scottish Ministers to specify that legislation for the purposes of the interpretation provisions in section 22, thus ensuring those provisions continue to work as intended.

## **Choice of procedure**

35. Any regulations made under section 22(1)(c) will be technical, and by their nature consequential on substantive changes made in other legislation. They are also likely to be time sensitive. It was considered therefore that making such regulations subject to the negative procedure would be appropriate, and is reflected in the new section 22(4)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840655/Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf)

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