

This document relates to the Agriculture (Retained EU Law and Data) (Scotland) Bill (SP Bill 59) as introduced in the Scottish Parliament on 6 November 2019

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

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Agriculture (Retained EU Law and Data) (Scotland) Bill introduced in the Scottish Parliament on 6 November 2019.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 59–EN);
 - a Financial Memorandum (SP Bill 59–FM);
 - Statements on Legislative Competence by the Presiding Officer and the Scottish Government (SP 59–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Purpose of the bill

4. This Bill is intended to provide the Scottish Ministers with regulation-making powers to amend or replace the European Union (EU) Common Agricultural Policy (CAP) elements of retained EU law in Scotland, and to provide new powers for the collection of agricultural data.
5. Following a public consultation in 2018, the main policy objectives of this Bill are:

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- From 1 January 2021, to enable the continued operation of current CAP schemes and policies, but also to allow them to be progressively improved and simplified.
- From 1 January 2021, to enable pilot projects to be run in order to test out new policy approaches, so as to inform the development of longer term future rural policy.
- To update the legal mechanism by which agricultural data is collected, reinforcing the principles of the General Data Protection Regulation (GDPR).¹

Background

Current EU CAP policy

6. While this Bill will not make any significant changes to current CAP policy, a brief background to the CAP and the relevant impacts of leaving the EU is given here to set the context for the consultation and the policy objectives of the Bill.

7. The declared objectives of the CAP are as follows:²

- To support farmers and improve agricultural productivity, ensuring a stable supply of affordable food.
- To safeguard European Union farmers to make a reasonable living.
- To help tackle climate change and the sustainable management of natural resources.
- To maintain rural areas and landscapes across the EU.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)

² https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en

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- To keep the rural economy alive by promoting jobs in farming, agri-foods industries and associated sectors.

8. Agriculture is a devolved policy area in the UK, so decisions which under the CAP are at the discretion of the Member State, are taken for Scotland by the Scottish Ministers. The CAP consists of four principal EU regulations (with associated supporting and subordinate regulations):

- The Direct Payments Regulation.³
- The Common Organisation of the Markets Regulation (CMO).⁴
- The Rural Development Regulation.⁵
- Financing, Management and Monitoring (known as the Horizontal Regulation).⁶

9. CAP is generally said to be divided into two “Pillars”. Direct Payments and the CMO are Pillar 1 and Rural Development is Pillar 2, with the Horizontal Regulation providing cross cutting rules that apply to both.

³ Regulation (EU) 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009

⁴ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007

⁵ Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005

⁶ 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 and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008

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Direct Payments Regulation

10. Direct Payments are a form of income support and are aimed at helping to protect a farmer or crofter's income from market volatility. The payments are decoupled from production and are based on the area (number of hectares) farmed and accompanying payment "entitlements". Direct Payments are not means tested.

11. Direct Payments are a set of schemes run by the Member States' administrations which deliver annual payments to farmers in return for compliance with certain conditions. Some of these schemes are mandatory, while others are run at the discretion of the Member State. Within the EU framework of rules for Direct Payments, there is a degree of discretion for Member States, for example on eligibility conditions, calculation of payments, and scheme conditions. These decisions are taken by the Scottish Ministers as regards Scotland. The individual schemes adopted in Scotland are more fully explained in the Explanatory Notes.

12. Member States have the option to apply Direct Payment schemes on a regionalised basis, which has been done in the UK in order to reflect devolution. This means that Scotland has a set of Direct Payment schemes which are different from those in the rest of the UK, albeit naturally they share some common features because they are all based on the EU framework.

13. Most of the Direct Payment schemes involve a payment calculated according to the area of land claimed upon, known as the "Basic Payment Scheme" (BPS), and a payment for "Greening". The BPS supplements farmers' and crofters' main business income, while "Greening" is a form of support for agricultural practices beneficial for the climate and the environment. There is also a Direct Payment scheme for "coupled support". This is financial support linked to a specific form of farm production (as opposed to BPS and Greening which are not linked to a specific form of production and so are "decoupled"). Payments under this scheme can be based on land area (for the production of crops) or on the number of animals (for the production of livestock). Scotland has chosen to have coupled support schemes for beef cattle across the whole country, and for sheep in hill farming areas.

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Common Organisation of Markets Regulation

14. The CMO element of the CAP provides a set of policy tools through which the EU and the Member States are able to intervene to influence agricultural markets, either directly or indirectly.

15. Indirect policy tools include financial support to producers of particular products. These are typically discretionary for, and administered by, Member States. Examples of this type of indirect intervention in the market include: financial support schemes for specific farming sectors, protection for specific food names and descriptions, and schemes to encourage the consumption of specific products (e.g. 'school milk').

16. Policy tools that affect the market directly are, within the EU, typically administered by the European Commission (under delegated powers) in respect of the entire EU Single Market, and any associated expenditure is made by the Commission itself and not via Member State authorities. Examples of this type of direct intervention in the market include: manipulating supply, and therefore market price, and reactive policies in the event of exceptional market conditions (for instance, if a major trading partner of the EU stops accepting particular EU products, leading to oversupply on the EU market). It also provides rules on the condition and description of products within the EU and rules for competition between agricultural producers.

17. The CMO has an external element which provides rules for the import and exports of agricultural products in the internal EU market.

Rural Development Regulation

18. Pillar 2 of the CAP is the financial support provided through the European Agricultural Fund for Rural Development (EAFRD) to promote sustainable rural development throughout the EU.

19. The Rural Development Regulation provides Member States with a number of policy interventions in, or related to, rural businesses and communities. Member States are able to choose which ones to implement. Administrations in Member States must prepare and implement multi-annual programmes, which require approval by the European Commission both initially and in the event of any modification to the Programme.

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20. As with Direct Payments, Rural Development may be regionalised, and has been in the UK in line with devolution. Scotland, therefore, has its own Rural Development programme, the Scottish Rural Development Programme (SRDP) 2014 – 2020.⁷

21. The SRDP sets out the measures, in line with Articles in the Rural Development Regulation, under which financial support is provided. Funding is generally grouped together in “schemes” and is made available in the form of a non-refundable grant, although Member States have the option to use financial instruments such as loans, guarantees and equity.

22. Examples of schemes⁸ included in the SRDP include:

- The Less Favoured Area Support Scheme (LFASS), which provides support to farming businesses in remote and constrained rural areas.
- The Forestry Grant Scheme, which provides a range of grants for woodland creation, agro-forestry, tree health, woodland improvement, processing and marketing and sustainable management of forests.
- The Agri-Environment Climate Scheme (including support for organics and footpaths), which provides targeted support for land managers to undertake management and capital work for environmental purposes.
- LEADER,⁹ which provides opportunities for individuals, businesses and communities to come together and support rural development and provide long lasting benefits to the local area

⁷ More information can be found at <https://www.gov.scot/policies/agriculture-payments/scottish-rural-development-programme-srdp/>.

⁸ A fuller list of SRDP schemes is included at paragraph 63 of the Explanatory Notes for this Bill.

⁹ The acronym is French in origin i.e. liaison entre actions de développement rural. This translates as ‘links between actions of rural development’, as set out in this basic guide from the European Commission: https://ec.europa.eu/agriculture/sites/agriculture/files/publi/fact/leader/2006_en.pdf.

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(and includes support for non-agricultural small businesses, including farm diversification).

- Capital grants for certain categories of projects by farmers or food processors.

Horizontal Regulation

23. This Regulation provides for rules relating to the running of the CAP, as opposed to its policy content. For example, it sets out:

- Financing procedures.
- Requirements to be met by Member States' official CAP paying agencies.
- Checks and audits.
- A requirement for an integrated administration and control scheme.
- Penalties for non-compliance with scheme rules.

24. The Regulation also includes some matters of policy, broadly speaking those which are not specific to one of the other three CAP regulations. These include a requirement on Member States to have a farm advisory service, and “cross-compliance”, which is a system of requirements and standards that beneficiaries of CAP payments must adhere to, with administrative penalties in the event of non-compliance.

Implications of the UK leaving the EU

25. The UK's exit from the EU will mean that EU law will cease to apply in Scotland. This includes the main CAP Regulations, and the other Regulations which sit under them. To avoid a legal vacuum, the European Union (Withdrawal) Act 2018 (EUWA) as passed by the UK Parliament provides for the retention of most of EU law, as it stands on exit day, by converting it into a new body of domestic law. The effect is to adopt a rulebook and set of institutional arrangements that is – at least at first – close to that which currently exists under EU law.

26. This new body of domestic law will be known as ‘retained’ EU law, and is more fully explained in the Explanatory Notes. The EUWA also created powers for UK and devolved administrations to fix, via secondary

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legislation, any deficiencies that arise as a result of this conversion to domestic law, to ensure that there is a functioning statute book in the UK and in the devolved administrations.

27. In the event that a Withdrawal Agreement is agreed and implemented there will be a transition period until at least the end of 2020 during which most EU law, as it applies from time to time, would continue to have effect in the UK after it leaves the EU. Should this occur, the UK Government has said that it will bring forward legislation to give effect to the Agreement, including a Withdrawal Agreement Bill to postpone the rolling over of EU law into domestic retained EU law until the end of this implementation period.

28. Both of these routes will lead to current EU CAP legislation eventually becoming domestic 'retained' EU law.

29. The Scottish Government remains of the view that Scotland's interests are best served by remaining in the EU, and as such, it is not the intention of the Scottish Ministers to diverge wholly from the CAP approach.

30. The First Minister has announced a Continuity Bill in "Protecting Scotland's Future: the Government's Programme for Scotland 2019-2020"¹⁰ which will provide for the ability to maintain alignment with EU law in devolved areas after EU exit, in particular by providing a "keeping pace" power and will replace, where necessary, powers in connection with existing EU law lost in consequence of the repeal of the European Communities Act 1972.

Consultation

31. A full public consultation, "Stability and Simplicity",¹¹ was carried out between 20 June 2018 and 15 August 2018. It set out the Scottish Government's proposal to take a phased approach to future rural policy

¹⁰ <https://www.gov.scot/publications/protecting-scotlands-future-governments-programme-scotland-2019-20/pages/4/>

¹¹ <https://consult.gov.scot/agriculture-and-rural-communities/economy-post-brex-it-transition/>

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development, moving from the current EU CAP regime to a new rural policy for Scotland through:

- An initial period of “stability”, with little change to the current CAP schemes and policies, until the end of 2020, followed by;
- A period of “simplicity” from 1 January 2021 to approximately 2024, during which simplifications and improvements would be made to the current CAP schemes and policies, and during which potential new schemes for longer term rural policy could be piloted.

32. This phased approach is intended to give farmers, crofters and land managers as much certainty as possible during the immediate aftermath of the UK’s exit from the EU, as they often have to operate on long term, multi-year timescales.

33. The consultation comprised 46 questions which sought views across a range of issues, in addition to the phased approach outlined above, including:

- How to reduce the administrative burden on a range of steps in the payments system and process, including inspections, mapping and scheme rules.
- At what level to cap payments to release funds to test new policy priorities.
- How to protect and enhance long term future support for Less Favoured Areas (these are agriculturally disadvantaged regions, often characterised by low land quality and productivity).
- Shifting, where possible, from a strict compliance approach towards combining delivery of outcomes with support.
- Proposals to streamline and synergise some of the Pillar 2 schemes.
- Where the Scottish Government should be piloting new approaches, expanding on activity that is desirable to continue into the future and testing fresh ideas and innovation.

34. The consultation had a total of 135 responses. All responses, where consent was given to do so, have been published on the consultation

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website, and a report analysing them has also been published.¹² Overall, the respondents were content for current CAP support to continue as it is, with any improvements to process that are possible to be made. Broadly, all schemes received a reasonable level of support to continue in the short term, albeit all have some issues to address to improve delivery and outcomes. A Simplification Taskforce¹³ was appointed in December 2018 to explore ways of simplifying how the customer interacts with the Scottish Government's Rural Payments and Inspections Division.

Detailed policy objectives

Part 1 – retained EU law

35. The main policy objective for this Part of the Bill is to maintain the operation of current CAP schemes, while also enabling the Scottish Ministers to make simplifications and improvements. As noted in the consultation section above, farmers, crofters and land managers often operate on multi-year timescales, making current investments that they will frequently not see a return on for a number of years.

36. This, along with the ongoing uncertainty regarding the impacts of the UK leaving the EU, was a major consideration for consulting on the continued operation of CAP schemes, with simplifications and improvements where possible, for a transition period of approximately five years.

Power to simplify or improve CAP legislation

37. The Bill therefore includes the powers needed to deliver those simplifications and improvements.

38. Work is underway to consider the potential simplifications and improvements that will be delivered by this Bill, based on responses to the 2018 “Stability and Simplicity” consultation and input from the Simplification Taskforce. The intention is to engage with stakeholders in the autumn of 2019. This work is going on in parallel with the long-term future policy

¹² <https://consult.gov.scot/agriculture-and-rural-communities/economy-post-brexit-transition/>

¹³ <https://www.gov.scot/groups/rural-funding-simplification-taskforce/>

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discussion and, whilst it is a separate exercise, any ideas arising that could be delivered post-2024 are being passed to the post 2024 work stream.

39. An example of the type of simplification or improvement that could be made using this power involves the CAP Pillar 2 support for Less Favoured Areas (LFA). Under EU CAP legislation the options currently open to the Scottish Government are to continue with the “Less Favoured Area Support Scheme” (LFASS), but with a much reduced payment available to farmers in 2020, and then move to a replacement “Areas of Natural Constraint” (ANC) scheme from 2021. This power in the Bill would provide an additional option as it would enable the Scottish Ministers to modify the retained CAP legislation to ensure that support for farmers whose land is designated as being in an LFA under the current CAP, and who receive payments under LFASS, can continue. This will allow any changes to support for constrained areas to be considered as part of the future overall income support package for farmers and crofters.

Power to provide for the operation of CAP legislation beyond 2020

40. A power has been included in section 3 of this Part to enable the Scottish Ministers to ensure that the main CAP legislation continues to operate in Scotland beyond 2020, as appropriate. This is to explicitly ensure that CAP schemes remain fully operable for as long as required, as, for example, the retained EU law relating to the CAP would not allow the Scottish Ministers to make Direct Payments beyond 2020. This is because there is a limit (known as a “ceiling”) to the amount of money that is allowed to be spent by any individual Member State through Direct Payments, and while these limits are specified in retained EU law (in Annex II to the Direct Payments Regulation), they are only specified until 2020.¹⁴ To ensure that Direct Payments can be made after that, it is necessary to provide a means to determine those limits beyond 2020. A separate power is needed as it is considered that provision in that respect would go beyond simplifying or improving the current CAP after exit.

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R1307>

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Power to modify financial provision in CAP legislation

41. A power has been included in section 4 of this Part to enable the Scottish Ministers to make financial provision in relation to CAP legislation.

42. As set out in the consultation, the ability of the Scottish Ministers to carry out the “Stability and Simplicity” proposals is dependent on the necessary funding commitments being upheld by the UK Government (this is discussed further in the Financial Memorandum). The policy objective behind this power is both to enable the Scottish Ministers to alter the CAP financial provisions in the event that funding levels from the UK Government are changed, and also to enable the Scottish Ministers to amend the distribution of funds between Pillars and schemes, including placing a cap on individual payments in schemes.

Power to modify CAP legislation on public market intervention and private storage aid

43. The market intervention powers in the CMO Regulation enable the European Commission (and in some cases, the Member States) to manage prices in agricultural markets during periods of market volatility. This can be done by the purchase of product by public authorities and its removal from the market (“intervention purchasing”), or by paying private companies to store product rather than placing it immediately on the market (“private storage aid”). Routine intervention of this kind was the predominant feature of the CAP until the 1990s, but has declined hugely since then. Currently in the UK, it is only being used in relation to skimmed milk powder, although remaining intervention stocks are being sold off. Responsibility for management of the system will be transferred in domestic retained EU law to the Scottish Ministers.

44. These now little-used provisions were proposed for abolition in England, Wales and Northern Ireland by the UK Agriculture Bill, where they would be replaced with a new suite of powers which will be available during “exceptional market conditions”.

45. The power in section 5 of the Bill allows these measures to be disapplied temporarily or permanently, or to be otherwise simplified and improved. While the Scottish Ministers are unlikely to support the routine use of these tools after exit day, except possibly in exceptional

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circumstances, without the powers proposed in the Bill there is a risk that the Scottish Ministers could be obliged to intervene in a market in Scotland when the Secretary of State is not so obliged in England (or, likewise, the other devolved authorities in Wales and Northern Ireland). This could occur if, for instance, the other administrations dis-applied public intervention for a product such as skimmed milk (or made it optional rather than mandatory). In these circumstances, Scotland would be obliged to continue with mandatory market support and would effectively be acting alone in support of the entire UK market.

Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations

46. The existing EU Fruit and Vegetables Aid Scheme enables officially recognised producer organisations (POs), formed on the initiative of a group of growers, to receive financial assistance to help increase their competitiveness in the supply chain. To qualify for financial assistance, the PO must draw up a three to five year operational programme aimed at achieving pre-set objects, for example, improving the quality, marketing and end value of their produce, promoting the use of environmentally sound cultivation practices, or reducing production costs. The aim of section 6 of the Bill is to enable the Scottish Ministers to simplify and improve the operation of the Fruit and Vegetables Aid Scheme, if considered necessary, by making amendments to retained EU law during the period up to around 2024.

Power to revoke the EU Food Promotion Scheme

47. Section 7 of the Bill contains a power to abolish the EU Food Promotion Scheme in retained EU law. While this scheme falls outwith the CMO Regulation, it is included here as it is linked to the CMO in policy terms. The scheme,¹⁵ worth €200m in 2020 across Europe, aims to promote food from the EU, both within the EU and internationally. It combines programmes operating within single Member States and multi-national programmes. In 2015-17, Quality Meat Scotland (QMS) received €1.2m through this scheme for a campaign to enhance knowledge of Protected Geographical Indication symbols and stimulate demand for Scotch Beef and Scotch Lamb in northern Europe, but apart from

¹⁵ https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/market-measures/promotion-eu-farm-products_en

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involvement by the Agriculture and Horticulture Development Board (AHDB) in a multi-national lamb campaign (www.trylamb.co.uk) which may have some collateral impact, there is no current Scottish benefit. The deficiencies corrections under the European Union (Withdrawal) Act 2018 will make the EU scheme workable in the UK, with powers for the Scottish Ministers. However, these will be cumbersome to operate and so it is the intention of the Scottish Ministers instead to rely on more straightforward existing domestic powers, such as those in section 94 of the Natural Environment and Rural Communities Act 2006,¹⁶ to pay grants to bodies established under that Act, including Quality Meat Scotland and the Agriculture and Horticulture Development Board.

Marketing standards

48. The CMO Regulation provides for product descriptions designed to give businesses and customers certainty about the quality of products they are buying without having to inspect them physically. These are known as “marketing standards”, and apply across the UK (supplemented, where required, by domestic legislation).

49. The policy objective for sections 8 and 9 of the Bill is to enable the Scottish Ministers to make changes to these marketing standards in Scotland after EU exit. While it is not the intention of the Scottish Ministers to make any radical changes to marketing standards, the UK Government, Welsh Government and the Department of Agriculture, Environment and Rural Affairs (DAERA) (due to the current suspension of the Northern Ireland Assembly) planned to take similar powers through the UK Agriculture Bill. The power being taken here is to ensure that the Scottish Ministers have the ability to replicate changes made elsewhere in the UK, in order to avoid barriers to the movement and sale of goods within the UK after EU exit. Such decisions can be taken on a case-by-case basis regarding whether to follow any changes introduced in, or under, a UK Agriculture Bill, or whether to retain alignment with EU law. While the policy objective in relation to marketing standards and carcass classification (see below) could have been achieved through a power to amend retained EU law, akin to other provisions in the Bill, this would give rise to an even more complex mix of retained EU law, existing domestic provision and new amending provision under such a power. In the Scottish Government’s

¹⁶ <http://www.legislation.gov.uk/ukpga/2006/16/section/94>

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view, it is preferable to have a free-standing power that can be used to make comprehensive 'stand-alone' marketing regulations that will be clearer to the user, rather than the rules set out piecemeal in the current mix of EU and domestic legislation.

Carcass classification

50. Closely related to marketing standards, the current EU CMO Regulation contains scales for the classification of carcasses, which are used to calculate the payment due to the producer from the slaughterhouse. These scales are currently mandatory for beef, veal and pigmeat, and are at the discretion of Member States for goatmeat and sheepmeat (the UK has so far chosen not to apply these discretionary scales). Historically, the carcass classification provisions are also important for the market measures on public intervention and private storage aid.

51. Similar to the reasons outlined above for marketing standards, the power in section 10 of the Bill will enable the Scottish Ministers to make changes to these scales after EU exit, and to enable, where desired, these scales to be harmonised with those elsewhere in the UK. In addition, the Scottish Government consulted¹⁷ on the introduction of mandatory sheep carcass classification from 24 November 2017 to 26 January 2018, following the recommendations from the industry-led Scottish Sheep Sector review.¹⁸ While the analysis of the responses to that consultation concluded that it would not be appropriate for the Scottish Government to make a final decision regarding the introduction of mandatory sheep carcass classification without further industry engagement, the power taken in this Bill is required to allow the Scottish Ministers to make any changes that might result from that engagement, as the power to do that under the European Communities Act 1972 would no longer be available.

¹⁷ <https://consult.gov.scot/livestock-policy/mandatory-sheep-carcass-classification/>

¹⁸

<https://www2.gov.scot/Topics/farmingrural/Agriculture/Livestock/Meat/Sheep/Sheep>

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Alternative approaches

52. During this Bill's inception and development, various alternative approaches were considered. These are outlined below.

Rely on retained EU Law

53. Whatever scenario occurs in terms of the UK's exit from the EU, the end-point is that retained EU law, including the fixes for deficiencies, will apply in Scotland either from exit day or from the end of a transition period. At the outset, consideration was given to the extent to which the Scottish Ministers would be able to rely on this retained EU law relating to the CAP (which would include such regional flexibilities as are already part of the CAP) to carry out future rural policy. In this scenario, the Scottish Government would be obliged to implement retained EU law as it exists on exit day (or at the end of a transition period) until it is amended or superseded by future Scottish, or UK, primary legislation.

54. Suitable powers do not currently exist in domestic primary legislation that would enable Ministers (in any UK administration) to amend or supersede the CAP elements of retained EU law. Thus, in the absence of new primary legislation, all UK administrations would be unable to change policy or schemes except to the extent that change is allowed under powers that will be conferred on them by retained EU law. In particular, they would not be able to extend CAP schemes that are authorised only for a specified period such as the basic payment scheme under the Direct Payments Regulation.

55. This would mean that the Scottish Ministers would not be able to fully implement the proposals set out in the "Stability and Simplicity" consultation, or address the concerns of stakeholders expressed through their responses to that consultation. It would also mean that the Scottish Ministers would not have the power to make other changes that are desirable for Scotland, such as changing the requirement to move from the current LFA Support Scheme to a new scheme applying to "areas of natural constraint" (ANC). It would also have the potential to put Scottish farmers, crofters and land managers at a disadvantage should the rest of the UK choose to amend retained EU law in such a way as to benefit their farmers, crofters and land managers (through powers available in the UK Agriculture Bill, as detailed below).

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56. For these reasons, the Scottish Ministers decided that some form of domestic primary legislation would be required.

UK Agriculture Bill

57. Agriculture is a devolved area of policy. For England, an Agriculture Bill was brought forward in the UK Parliament to create powers in this area, so that CAP policies and schemes could be amended and ultimately replaced there. The Welsh Government and DAERA (due to the current suspension of the Northern Ireland Assembly) opted to take powers via schedules in that Bill. That Bill was intended to create in England the powers needed not only for an immediate post-Brexit transition, but also for a long term new policy completely different from the CAP. It completed the House of Commons Committee Stage in November 2018, but further progress was delayed due to developments around EU exit in the UK Parliament and it fell when the UK Parliament was prorogued on 8 October. Since then a General Election has been called, and it will now be for the incoming Government to decide whether to bring forward an Agriculture Bill in the next session of Parliament.

58. While it would have been possible for the Scottish Ministers to seek to use the UK Agriculture Bill to take the powers required to amend retained EU law related to the CAP, there were fundamental concerns regarding that Bill's impact on devolution. As set out in the Scottish Government's Legislative Consent Memorandum,¹⁹ the Scottish Government is in disagreement with the UK Government over whether three areas of that Bill relate to reserved or devolved matters. These three areas cover: the official recognition of Producer Organisations; fair dealing in agricultural supply chains; and compliance with the WTO Agreement on Agriculture. As the UK Government asserts that these areas are reserved, that Bill contains provisions in these three areas which apply across the whole UK, including Scotland, in which all powers rest with the UK Secretary of State, and for which the UK Government considers that legislative consent is not needed. The Scottish Government refutes this assertion and has therefore challenged these clauses in that Bill. The disputed clauses in the UK Bill do not affect this Bill, as it does not make provision in respect of any of those three areas.

¹⁹ <https://www.parliament.scot/S5ChamberOffice/SPLCM-S05-19.pdf>

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59. The Scottish Government has published²⁰ amendments to the UK Agriculture Bill which would, if adopted, bring these disputed provisions into line with the devolution settlement. These amendments have been tabled at the UK Parliament by MPs and debated during the House of Commons Committee Stage, but the UK Government has rejected them and none have been successfully adopted.

60. Given this fundamental disagreement, its wider reaching implications for devolution and the Sewel Convention, and the delays to the progress of the UK Agriculture Bill through the UK Parliament (which could put at risk the requisite powers being available to the Scottish Ministers to meet the timeline set out in the “Stability and Simplicity” consultation, i.e. from 1 January 2021), the Scottish Ministers decided that passing legislation through the Scottish Parliament would be the preferable option. This would also ensure that the Scottish Parliament is able to fully scrutinise the legislation that would apply in Scotland, rather than doing this at arm’s length through the UK Agriculture Bill.

Scottish Bill for longer term replacement of CAP policy

61. Consideration was also given to using this Bill to create powers relating to long term future rural policy, similar to the approach in the UK Agriculture Bill. While this would have certain advantages, namely setting a direction of travel for long term future policy and aiding farmers’, crofters’ and land managers’ ability to plan further into the future, there would also be significant disadvantages.

62. The ongoing uncertainty surrounding the UK’s exit from the EU means that the future environment in which long term rural policy will need to operate is still relatively unknown, even in broad terms. Until there is greater clarity around issues which could constrain or affect future Scottish rural policy, such as the UK Government plans for future funding, and the future trading relationship with the EU (and beyond), etc., any development of long term future policy would either need to be very general, or would need to be heavily caveated, either of which would negate the advantage of providing farmers, crofters and land managers with longer term certainty. As such, especially with regard to the current uncertainty around future

²⁰ <https://www.gov.scot/publications/proposed-amendments-to-the-uk-agriculture-bill/>

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funding from the UK Government, it was considered that setting out longer term rural policy in legislation at this stage would be inadvisable.

63. In addition, while there is general agreement between stakeholders, industry and government that change to the current system of support is inevitable as a result of leaving the EU, the pace of this change must be manageable for all involved. As well as the constraints of the current uncertainty mentioned above, the complexity, cost and risks involved, including the lead-in times required to develop or update IT systems, the time required to thoroughly consult on what would likely be wide-ranging changes to the current policy, and the time required by businesses to adapt to such changes, mean that having a full new domestic policy ready for introduction by 2021 would not be practical.

64. While there is a consensus that this change in the system of support is inevitable as a result of leaving the EU, there must also be sufficient consultation and engagement with stakeholders in order to establish a direction of travel for future rural policy that works for all. The Scottish Government has moved forward with plans in this area; during a debate on 10 January 2019, the Scottish Parliament agreed to the appointment of a group to make recommendations on future long term policy, and this “Farming and Food Production Future Policy Group”²¹ was announced at the Royal Highland Show in June 2019. However, legislating for a long term rural policy in this Bill may pre-empt the Scottish Ministers’ decisions in relation to the recommendations of that group, and so negatively impact on the best long term outcome for Scotland’s agricultural sector and wider rural economy.

Conclusion

65. Following these considerations, the Scottish Ministers decided to take powers to enable the simplification and improvement of the current CAP rules and regulations, as set out in the consultation section above. The intention is that the powers will be used during a transitional period following EU exit, but they are not time limited so that they will be available at any time if needed. These powers will only be required if the UK leaves the EU, and until that happens the EU CAP rules will continue to apply in their entirety. This will give farmers, crofters and land managers as much

²¹ <https://www.gov.scot/groups/farming-and-food-production-group/>

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certainty as possible should the UK leave the EU (either with or without a withdrawal agreement), and enable the Scottish Ministers to make any changes to simplify and improve the CAP while ensuring that the devolution settlement is respected. In the longer term, it will allow sufficient time (which will include adequate consultation and engagement with stakeholders) to develop future rural policy.

Part 2 – collection and processing of data

66. Accurate and up to date statistical information is an important tool in regulating and developing policy for the agricultural sector. For example, the Scottish Government conducts an annual census in June, and throughout the year collects data from other surveys and data sets. The primary purpose is to provide official statistics used for a range of measures, such as to estimate the economic activity of agriculture for National Accounts (such as calculations of Scottish Gross Domestic Product (GDP)). Other official statistics, for example information from the Farm Business Survey, are collected throughout the year from farm business accounts for the specific purpose of auditing and evaluating the effectiveness of the CAP. This function will be crucial for the Scottish Government in evaluating the effectiveness of any policies that the Scottish Government puts in place after leaving the EU. Information can also be collected to help inform how best to deal with certain emergency situations, such as a disease outbreak.

67. The current powers used to collect agricultural data in Scotland come from the Agriculture Act 1947. The CAP Regulations require the Scottish Government to provide certain agricultural data to the EU, but they do not make explicit provision for the collection of that data.

68. There is also some agricultural data that is collected at a UK level. The powers in this Part of the Bill have been designed in such a way that, where necessary, their use can be aligned with that of the powers the UK Government, Welsh Government and DAERA sought to take through the UK Agriculture Bill, to enable UK wide data to be collected.

Powers to require the provision of information

69. The policy objective behind the data collection powers in these sections, in addition to the reasons set out in paragraph 66, is to improve

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the Scottish Government's understanding of the agricultural sector, whilst modernising and improving the legal basis for collecting data and providing further expert advice. The data collected is used to analyse economic output of the sector, but is also used to analyse the economic performance of the sector, and the effectiveness of policies implemented to support businesses connected with the rural economy, which then helps to shape and improve policy delivery. The data is also ultimately provided to the UN, and helps Scotland provide information in the Sustainable Development Goals.²²

70. The key benefit of this data being provided is to direct government and alert it to emerging macro-level economic issues. This is already done through agricultural businesses supplying the Scottish Ministers with data through the June Census,²³ or a range of other sector specific surveys. The key risk of the Scottish Government not collecting this data, or not having enough data to make good estimates, is that emerging issues will be missed, and policy effectiveness cannot be monitored and evaluated. This is especially important as the audit functions of the European Commission will need to be replaced at the devolved level (potentially by Audit Scotland) shortly after the UK leaves the EU, and this data will be the basis of auditable data sets.

71. As data is already collected, there should be no additional burden placed on farmers, crofters and land managers. The Scottish Government is already looking at reducing the existing burden through the use of new technology such as earth observation data from satellites.

72. This policy objective was not explicitly consulted on through the "Stability and Simplicity" consultation. However, the Scottish Government has consulted with the Information Commissioner's Office (ICO) as required under the GDPR. When the ICO was consulted, she confirmed that she was content with the legislation at this stage, and so no changes

²² <https://www.un.org/sustainabledevelopment/>

²³ The June Agricultural Census is sent to agricultural businesses to collect information on areas of land owned or rented, crops, livestock, and labour. The 2019 June Agricultural Census can be found here: <https://www.gov.scot/publications/final-results-june-2019-agricultural-census/pages/1/>

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were made to the Bill as a result. Further information on these powers can be found in the Data Protection Impact Assessment.

Powers on the purposes for which information may be required and processed, and the limitations on the processing of that information

73. Under the General Data Protection Regulation (GDPR)²⁴ and the Data Protection Act 2018, the Scottish Government is required to provide transparency about the legal purpose for which it is collecting personal data. Currently this is achieved using the data collection powers in the Agricultural Act 1947. The provisions in this Part of the Bill are more explicit in both the extent and limitations of who can be required to provide data, what data can be requested, and what data can be processed and shared with individuals such as the agricultural research centres. By improving the transparency and openness of what data can and cannot be collected, the purposes for which it may be processed and how it may be processed, this ensures a clear, precise and foreseeable legal basis for collecting data in compliance with the principles of the GDPR and the Data Protection Act 2018. Providing more transparent powers will give those whose data is to be collected greater certainty about how their data will be used and protected.

Enforcement of information requirements

74. Where there is a lack of quality of data, especially in parts of the sector which are heavily consolidated in a few business operators, or where there is non-compliance, the requirement to provide information may be enforced through regulations. However, ahead of any such secondary legislation, the Scottish Government will work with businesses to reduce the burden where possible, and work with them to ensure their compliance in order to meet the needs of the Scottish Ministers and the needs of any future policy-making.

²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)

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75. It is the intention that the regulation-making powers on enforcement of information requirements be used to make future sanctions more proportionate and persuasive than current ones. It should be noted that these sanctions are completely different to sanctions and penalties under the CAP rules, i.e. cross-compliance.

Alternative approaches

76. Two alternative approaches to the powers relating to data collection were considered.

77. The first was to continue to rely on the Agriculture Act 1947. While this provides a viable mechanism by which the Scottish Ministers can collect agricultural data, the principles of GDPR and the Data Protection Act 2018 encourage the limits and reasoning behind the collection and processing of data to be made as clear and explicit as possible, and in this respect the nature of the powers in the 1947 Act is somewhat outdated and so new primary legislation would be preferable.

78. The second was to rely on the UK Agriculture Bill as a vehicle by which to take these powers. A brief overview to that Bill is given in the alternative approaches section for Part 1, including the current delays to that Bill's passage through the UK Parliament, and the fundamental disagreement between the Scottish and UK Governments regarding the reserved nature of three areas of that Bill and therefore its potential impact on devolution and the Sewell Convention. In addition, the powers in the UK Bill related to the collection of agricultural data are focussed on data related to animal and plant disease and public health (in part because the UK Government relies on the Trade Statistics Act 1947, which only applies to England and Wales, to collect other agricultural data). It is therefore considered that, should similar powers be taken for the Scottish Ministers through the UK Bill, they would not meet the needs of the Scottish agriculture sector.

79. Having considered these approaches, it was therefore concluded that this Bill would provide the most appropriate legislative vehicle for these powers.

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Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

80. The Scottish Government has assessed the potential impact of the Bill on equal opportunities. As the Bill itself does not represent any significant change in policy related to the CAP, it is the Scottish Government's view that it does not unlawfully discriminate in any way with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership), either directly or indirectly. The power to collect information may enable the Scottish Ministers to collect better information relevant to the diversity of those engaged in agricultural activities, which could then help inform the evidence base in order to better assess the policy outcomes, and so ensure that they are promoting diversity objectives.

81. It is expected that when secondary legislation is brought forward under this Bill, which may involve changes to the current policy, further consultation and EQIA will be carried out, where appropriate, to consider the impact the changes may have on equalities.

Human rights

82. The Scottish Government considers that the Bill does not give rise to any human rights concerns, and therefore complies with the European Convention on Human Rights (ECHR).

83. Current EU law will on exit day roll over into domestic legislation as retained EU law, which will then include the modifications necessary to ensure that it works as a body of purely national law. That will include, for example, transferring functions of the European Commission to the appropriate national authorities, including the Scottish Ministers as regards Scotland.

84. Retained EU law as modified will include the CAP regulations and rules which, as part of the current body of EU legislation, are considered to be compliant with the ECHR.

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85. Part 1 of the Bill itself does not make substantive changes to the CAP, but provides the Scottish Ministers with powers that will enable them to modify retained EU law in relation to the CAP after exit, provided of course that doing so is otherwise within devolved competence.

86. Part 2 of the Bill provides for the Scottish Ministers to be able to require persons who are in (or closely connected with) an agri-food supply chain, or who carry on an agricultural activity, to provide information about their activities in those respects.

Article 6 ECHR

87. Article 6 applies to the determination of “civil rights and obligations”. The European Court of Human Rights has interpreted it to go beyond traditional private law rights to include rights of a “civil character”.

88. Part 2 of the Bill provides for the Scottish Ministers to have a power to make provision in respect of the enforcement of information requirements under the Bill, including by way of monetary (that is, civil) penalties.

89. The Bill does not therefore include any provision that directly engages the Article 6 right. However, it does enable the making of provision that could do so, and it would be necessary to ensure that any such provision is compatible.

90. The power in section 18 therefore includes power to make provision about review of, or appeals against, things done (including decisions made) in connection with the enforcement of requirements. The Scottish Government considers, therefore, that the Bill will enable the Scottish Ministers to make such provision as is required in order to ensure that enforcement measures are compatible with Article 6 rights.

Article 8 ECHR

91. Article 8 ECHR provides that everyone has the right to respect for their private and family life, their home and their correspondence. There shall be no interference with that right except such as in accordance with the law, and necessary in a democratic society for (amongst other things) the economic well-being of the country.

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92. Individuals can be required to provide information about ‘agricultural’ activities. Many farm businesses are family businesses, and farms typically include one or more dwellinghouses. The powers might be used, for example, to collect information about the age or gender of persons engaged in agriculture. Information may therefore relate to some degree to the home life and personal identity of living persons. It is arguable therefore that the Bill engages Article 8 of the Convention to that extent.

93. The purpose behind the powers is primarily to further the economic well-being of Scotland. They will be used to carry out the annual Agricultural Census. The data generated from the information collected by the Census is used to inform policy-making in the agricultural sector, and to calculate key macro-economic indicators (including Scotland’s GDP).

94. These are legitimate aims for the purpose of Article 8. In the absence of these powers, including the power enabling the Scottish Ministers to provide for an enforcement regime, the quality and accuracy of agricultural data for Scotland would be severely reduced.

95. The powers are proportional to achieving those aims. They are in particular limited by the provisions of the Bill. A demand for information can only be made to a limited class of persons: those in or connected to an agri-food supply chain, and those who carry on agricultural activities. Further, those persons can only be asked to provide information which is connected to that supply chain or such activities. Any processing of personal information must also comply with the EU GDPR.

96. To the extent that Article 8 is engaged by the measures in Part 2 the interference is in accordance with the law, for a legitimate aim, and necessary. It is also proportionate to the aim.

Island communities

97. The Scottish Ministers are aware of the duty to consult island communities before making a material change to any policy, strategy or service which, in the Scottish Ministers’ opinion, is likely to have an effect on an island community which is significantly different from its effect on other communities.

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98. As this Bill provides the Scottish Ministers with the regulation-making powers by which they may make simplifications and improvements to the current CAP, rather than the power to make such changes directly, the Scottish Ministers have ensured that there will be no new unique impacts on island communities at this stage. During the development of subsequent secondary legislation under this Bill, which will set out the detail of any such simplifications and improvements, it is expected that further impact assessments and consultations will be undertaken as required to ensure the needs and views of the island communities are fully taken into account.

Local government

99. The Bill itself consists of regulation-making powers to amend or replace the EU CAP elements of retained EU law in Scotland, and to provide new powers for the collection of agricultural data. As such, it makes no direct reference to local government, and it is unlikely that any of its provisions will have a direct impact on local government.

100. Any policy changes, once decided upon, will be made through secondary legislation under this Bill, and will be subject to further impact assessments and consultation with stakeholders (including local authorities) where appropriate.

Sustainable development

101. The Bill itself does not change the current CAP regulations and schemes. These regulations and schemes, such as Greening and Cross Compliance, are intended to support sustainable development, but it could be argued it does so with varying degrees of success.

102. Greening provides a top-up payment in return for carrying out agricultural practices beneficial for the climate and the environment. There are three key elements to the greening payment, further detail of which can be found in the 2019 Greening Guidance:²⁵

²⁵ <https://www.ruralpayments.org/publicsite/futures/topics/all-schemes/basic-payment-scheme/basic-payment-scheme-full-guidance/greening-guidance-2019/>

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- Protection of permanent grassland – this element aims to protect the ratio of permanent grassland to the total area of agricultural land by stating that the annually declared ratio across Scotland must not decrease by more than 5%. As this is monitored at a national level there is no direct action required by farmers, crofters and land managers, however they are required to adhere to existing UK legislation²⁶ which protects all unimproved semi-natural areas (such as permanent grassland).
- Ecological Focus Areas (EFA) – this element requires farmers, crofters and land managers to maintain an area equal to 5% of their arable land as an EFA, unless they qualify for an exemption. There are various EFA options which the claimant can choose from, for example, leaving areas of land fallow or planting nitrogen fixing crops.
- Crop diversification – this element requires farmers, crofters and land managers to grow a number of different crops, with each different crop representing a defined proportion of the total.

103. Cross Compliance rules ensure that farmers, crofters and land managers comply with rules concerning food safety, animal health, plant health, the environment, the protection of water resources, animal welfare and the condition in which farmland is maintained. Failure to comply with these rules may result in a deduction of CAP support, and in the case of serious breaches may result in further legal proceedings. There are two specific elements of Cross Compliance, further detail of which can be found in the 2019 Cross Compliance Inspection Guidance:²⁷

- Statutory Management Requirements (SMRs) – these are 13 requirements which farmers, crofters and land managers are required to adhere to, and which cover a range of issues including the protection of wild birds, animal welfare, animal identification and traceability.
- Good Agricultural and Environmental Conditions (GAECs) – these are 7 measures that farmers, crofters and land managers are

²⁶ http://www.legislation.gov.uk/ssi/2006/582/pdfs/ssi_20060582_en.pdf

²⁷ <https://www.ruralpayments.org/publicsite/futures/topics/inspections/all-inspections/cross-compliance/what-is-cross-compliance/>

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required to comply with in order to protect water quality, soils and landscape features such as trees, hedges and dykes.

104. While these different rules do provide some level of protection in terms of ensuring future development is sustainable, the CAP regulations by which they are governed are extensive, complex and not always developed in a way that fits with Scotland's needs. As one example, the regulations relating to the protection of permanent grassland require a complex operational system on an individual farm basis, when there are already other domestic regulations which provide this protection and the area of permanent grassland in Scotland has not declined for many years. Another example would be the penalties associated with Cross Compliance, which could be seen in some cases to be disproportionate.

105. Although this Bill would have no impact on the continuation of these regulations and schemes, it does provide the Scottish Ministers with the necessary powers to amend these regulations and schemes to simplify and improve on them. This will provide the opportunity to review how policy objectives are delivered on the ground, for example by amending the penalty matrix to avoid disproportionate penalties and making the inspection regime more efficient and tailored to local circumstances (as proposed in the "Stability and Simplicity" consultation).²⁸

106. Any such changes to existing schemes will be made through subsequent secondary legislation under this Bill, and in preparing impact assessments for these changes, sustainable development for individual businesses, as well as the wider rural economy, will be a major consideration.

Strategic Environmental Assessment

107. The Scottish Government has reached the view that as the Bill is likely to have no or minimum effect in relation to the environment, as per section 7 of the Environmental Assessment (Scotland) Act 2005, and can therefore be considered exempt. A pre-screening report²⁹ outlining this view and the relevant information has been prepared and submitted to the

²⁸ <https://consult.gov.scot/agriculture-and-rural-communities/economy-post-brex-it-transition/>

²⁹ <https://www2.gov.scot/seag/publicsearch.aspx>

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consultation authorities via the SEA Gateway as per the requirements of the 2005 Act.

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