

LEGISLATIVE CONSENT MEMORANDUM

DIRECT PAYMENTS TO FARMERS (LEGISLATIVE CONTINUITY) BILL

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the National Assembly.
2. The Direct Payments to Farmers (Legislative Continuity) Bill (the “Bill”) was introduced by George Eustice MP in the House of Commons on 9th January 2020. The Bill can be found at:
<https://services.parliament.uk/Bills/2019-20/directpaymentstofarmerslegislativecontinuity.html>

Policy Objective(s)

3. Article 137 of the Withdrawal Agreement provides that Regulation (EU) No 1307/2013 (which governs Direct Payments to farmers) shall not apply in the UK for claim year 2020 save for Article 13 (the state aid exemption). Whilst Article 137 expressly refers to Regulation 1307/2013, it is also intended to capture legislation connected to the application of that Regulation such as EU Implementing and Delegated Acts.
4. Without new primary legislation, the Secretary of State, and the Devolved Administrations cannot make Direct Payments to farmers for the 2020 claim year.
5. The Direct Payments to Farmers (Legislative Continuity) Bill will provide the legal basis to continue paying Direct Payments to farmers by ensuring that the scheme continues in each part of the UK for claim year 2020. By incorporating EU legislation governing Direct Payments to farmers into domestic law, the Bill provides the legislative vehicle required to enable the Direct Payments scheme to continue for claim year 2020, and for payments under that scheme to be made to farmers.

Summary of the Bill

6. The Bill is sponsored by the Department for Environment, Food and Rural Affairs (DEFRA).
7. The Bill will domesticate the EU Direct Payments Regulation, as it stands on 31 January 2020, into UK law. It also includes time-limited regulation making powers to make secondary legislation to make corrections to that body of law to ensure it is operable once the UK has left the EU. The Bill also contains a discretionary power to enable amendments to be made, during 2020, to the law that this Bill domesticates if, for example, there are amendments to the equivalent European law that the Secretary of State or

the Devolved Administrations wish to replicate. In addition, the Bill amends the EU Direct Payments legislation to enable an increase to the Direct Payments financial ceilings for the 2020 scheme year to take account of the findings of the Bew Review concerning the allocation of farm support funding in the UK.

Provisions in the Bill for which consent is required

8. Consent is required for the following provisions of the Bill because they make provision with regards to devolved matters. The purpose of the Bill is to ensure the continuation of the direct payment scheme for farmers in claim year 2020. Agriculture, and the Common Agriculture Policy are devolved matters.

Clause 1: Incorporation of EU legislation governing the CAP direct payment schemes

9. The purpose of Clause 1 is to incorporate EU legislation governing the 2020 CAP direct payment schemes into domestic law.
10. Subsection (1) brings the EU legislation governing the CAP direct payment schemes for claim year 2020 into domestic law on exit day.
11. Subsection (2) clarifies that the body of law referred to in subsection (1) is the legislation as it has effect in EU law immediately before exit day in so far as it is concerned with claim year 2020, excepting any amendments made before this time concerned with giving effect to the EU Withdrawal Agreement.
12. Subsection (3) lists the legislation being incorporated into UK law under subsection (1). Subsection (3)(d) specifies that 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 CAP and the Implementing and Delegated Acts made under it will form part of the body of law domesticated under the Bill only in so far as they relate to the direct payment scheme for 2020.
13. Subsection (4) specifies that the EU legislation being incorporated is the English language version, but that other language versions may be used for the purposes of interpretation.
14. Subsection (5) excludes the provisions in this section from having any impact on matters relating to the previous claim year (year 2019) or earlier claim years.
15. Subsection (6) ensures continuity between January 2020 and the rest of the claim year in 2020 by treating the incorporated EU legislation as having formed part of domestic law from 1 January 2020. In relation to the 2020 claim year, farmers will be governed by EU law for January 2020 and by domestic law thereafter but this provision means that the timeframe for

compliance under the 2020 scheme will be treated as starting from the beginning of the claim year on 1 January 2020.

16. Subsection (7) defines terminology used under this clause.

Clause 2: Interpretation and status

17. Clause 2 sets out the rules for interpreting retained EU law governing CAP direct payment schemes in the domestic courts and makes provision about the status of that law. This clause applies the relevant provisions of the European Union (Withdrawal) Act 2018 (“2018 Act”) with modifications for the purposes of this Bill.

18. Subsection (1) applies the law within the 2018 Act governing the interpretation of retained EU law (set out in section 6 of the 2018 Act) for the purposes of this Bill in respect of the retained EU law incorporated into domestic law by Clause 1(1).

19. Subsection (2) applies section 6 of the 2018 Act but with modifications to certain expressions in that section. The modifications applied are those set out in subsections (5) and (6).

20. Subsection (3) sets out the status of retained EU law for the purposes of this Bill. It applies section 7(2) and (3) of, and specified paragraphs in Schedule 8 to, the 2018 Act but with modifications for the purposes of legislation incorporated under clause 1(1) of this Bill. Section 7(2) and (3) of the 2018 Act restrict the way in which retained EU law can be amended by primary and subordinate legislation. Paragraphs 3-8 of Schedule 8 to the 2018 Act set out how existing powers relating to subordinate legislation may operate on retained EU law and paragraphs 10-12 of Schedule 8 to that Act deals with how future power would operate on retained EU law.

21. Subsection (4) specifies that the modifications mentioned in subsection (3) are those listed in the table in subsection (5).

22. Subsection (5) lists a number of modifications to phrases used within the 2018 Act. Therefore those provisions are to be read as excluding the words in the left hand column of the table and instead replacing it with the words in the right hand column of the table.

23. Subsection (6) provides that, for the purposes of subsection (1) of this clause, the definitions applied in section 6(7) of the 2018 Act are modified to apply for the purposes of this Bill.

24. Subsection (7) provides that, when interpreting subordinate legislation which is both retained EU law incorporated by clause 1(1) of this Bill and retained EU law under section 6 of the 2018 Act, section 6 of the 2018 Act will apply with modifications made under this section but only insofar as it relates to the CAP direct payment schemes.

25. Subsection (8) defines the status of legislation listed in clause 1 of this Bill for the purposes of the Human Rights Act 1998.
26. Subsection (9) provides that certain terms within subsection (8) are to be interpreted as they are defined in the Human Rights Act 1998.
27. Subsection (10) defines terminology used under this clause.
28. Subsection (11) ensures that provisions that are not yet in force and any amendments made by the European Union (Withdrawal Agreement) Act 2020 will come into force at the same time as this section comes into force.

Clause 3: Regulations in connection with the retention of EU legislation under section 1

29. Clause 3 gives the Secretary of State the power to make necessary operability changes to make sure that the law works properly for claim year 2020. The Secretary of State may do so on a UK-wide basis but only with the consent of the Devolved Administrations (DAs). The regulation making power is mirrored for the DAs. There is also a power to make amendments during 2020 if the equivalent European law is amended and the UK or DAs similarly wish to make this amendment. These powers mirror the powers set out in sections 8 and 11 of the 2018 Act with modifications. There is also a power for DAERA to enable them to continue to move towards a uniform unit value of payment entitlements.
30. Subsection (1) provides the Secretary of State with the power to make secondary legislation to fix any deficiency or failure in retained EU law governing the CAP direct payment schemes that arises from EU exit, or to keep pace with any changes made to the CAP direct payments scheme for the claim year 2020 by the EU.
31. Subsection (2) places a duty on the Secretary of State to get consent from the DAs before making UK wide regulations.
32. Subsection (3) gives power to the devolved authorities in Scotland, Wales and Northern Ireland to make regulations to fix any deficiencies or failure in the retained EU law governing the CAP direct payment schemes that arises from EU exit, or to keep pace with any changes made to the CAP direct payments scheme for the claim year 2020 by the EU.
33. Subsection (4) makes specific provision in relation to Northern Ireland to allow DAERA to continue to move towards a uniform unit value.
34. Subsection (5) explains the sorts of deficiencies arising after exit day that may be corrected using the powers in subsections (1)(a)(ii) and 3(a)(ii). It mirrors some of the equivalent provisions in the 2018 Act.

35. Subsection (6) specifies that sections 8(5) to (7), apart from subsection (7)(e), of the 2018 Act apply in relation to regulations made under the powers in subsections (1) and (3) and explains how those sections of the 2018 Act are to be read.
- Section 8(5) of the 2018 Act provides that secondary legislation made under the power in this section can do anything an Act of Parliament might to deal with deficiencies. The power is subject to the restrictions set out in Section 8(7) of the 2018 Act.
 - Section 8(6) of the 2018 Act provides, non-exhaustively, for what the secondary legislation made under this power can do. For example, it can transfer the functions of EU authorities to UK public authorities. The power can be used to repeal, amend or replace parts of the retained law. There will be other uses of the power necessary to correct deficiencies.
 - Section 8(7) of the 2018 Act stipulates that regulations cannot be used to impose or increase taxation or fees, make retrospective provision, create a relevant criminal offence, establish a public authority, amend the Human Rights Act 1998 or any subordinate legislation made under it, or amend the devolution Acts (except in certain specific and limited ways)
36. Subsection (7) clarifies that the provisions made by regulations in this clause may apply in relation to matters arising in relation to the CAP direct payment schemes for the whole of the 2020 claim year. This ensures that provisions can cover matters arising in January 2020 whilst still under EU law.
37. Subsection (8) is an important safeguard and makes clear that the powers are temporary and will expire after 31 December 2020. This does not affect the continuation of regulations made before that date so, for example, any outstanding payments to farmers in relation to the 2020 scheme year can continue to be paid after 31 December 2020.
38. Subsection (9) specifies that the regulation making powers in subsections (1) or (3) include the ability to make different provision for different purposes. It also specifies that the regulation making powers in subsections (1) or (3) include powers to make consequential amendments to the regulations, including the power to re-state any retained EU law governing the CAP direct payment scheme to make it clearer.
39. Subsection (10) defines terminology used under this clause.

Clause 4: Publication and rules of evidence

40. Clause 4 makes provision for the domestic publication of certain EU regulations relating to Direct Payments, ahead of exit day. It also contains provision on rules of evidence.

41. Subsection (1) exempts the Direct Payments Regulation, and accompanying Delegated and Implementing Acts, from the publication requirement laid down in the 2018 Act.
42. Subsection (2) places a duty on the Queen's Printer to publish specified EU regulations listed in clause 1 as they appear in the Official Journal of the European Union before exit day.
43. Subsection (3) cross-refers to the regulations listed in subsection (1) and sub-paragraphs (i) to (v) of section 1(3)(d).
44. Subsection (4) exempts from publication anything that is repealed before exit day and any changes made after that time.
45. Subsection (5) specifies that retained EU legislation under clause 1(1) is a "relevant matter" for the purposes of paragraph 4 of Schedule 5 to the 2018 Act. Paragraph 4 of Schedule 5 is a power to make provision about judicial notice and admissibility. Matters which are 'judicially noticed' are deemed to already be within the knowledge of the Court, and so are not required to be 'proved' to the Court. For example, the EU Treaties are judicially noticed. Paragraph 4 provides that a Minister of the Crown can make regulations which provide for judicial notice to be taken of a relevant matter, and for the admissibility in legal proceedings of evidence of both a relevant matter and instruments and documents issued by or in the custody of an EU entity, to ensure that appropriate evidential rules can be put in place to reflect the new legal landscape after exit.

Clause 5: Power to increase direct payments ceilings for 2020

46. Clause 5 amends the retained Direct Payments Regulation to allow the Secretary of State, having regard to the Bew Review, to increase the UK national and net Direct Payments ceilings for 2020. It also amends regulation-making powers that already exist in the Direct Payments Regulation (in Articles 6(3) and 7(3)) so as to widen their scope to enable the 2020 national and net ceilings to be increased to take account of this decision. This will mean that where, as a consequence of the Government's decision following the Bew Review, the amount of direct payments would go above the limit set by the national and net ceilings for 2020, these powers can be used to increase those ceilings to ensure they are not breached and payments can be made within the legislative framework.
47. Subsection (1) introduces the amendments to the Direct Payments Regulation.
48. Subsection (2) amends Article 6(3) of the Direct Payments Regulation so that the regulations made under the powers provided to the Secretary of State in that paragraph to adapt the 2020 national ceiling can take into account the decision made in accordance with the new Article 7A, explained below. The national ceiling comprises, for the UK, the total value

of all allocated payment entitlements, of all national reserves and regional reserves and of all the financial ceilings calculated with respect to the individual direct payment schemes. Regulations made according to decisions relating to the 2020 national ceiling will require the consent of all DAs.

49. Subsection (3) amends Article 7(3) of the Direct Payments Regulation so that the regulations made under the powers provided to the Secretary of State in that paragraph to adapt the 2020 net ceiling can take into account the decision made in accordance with the new Article 7A, explained below. The net ceiling delimits the value of Direct Payments which can be made in the UK for the 2020 claim year. Regulations made according to decisions relating to the 2020 net ceiling will require the consent of all DAs.
50. Subsection (4) inserts Article 7A into the retained Direct Payments Regulation. This article provides the Secretary of State with the power, having regard to the Bew Review, to decide to increase the total maximum amount of direct payments that could otherwise be granted in relation for the claim year 2020. Subsection (1) of the new article provides the power. Subsection (2) specifies what the Bew Review is.
51. Subsection (5) of Clause 5 amends paragraph 5 of Article 22 of the Direct Payments Regulation, so that any increase in national or net ceilings as a result of the exercise of the powers in new Article 7A will result in a corresponding increase in the value of payment entitlements.

Clause 6: consequential and transitional provision

52. Subsection (1) provides the Secretary of State or relevant national authority with powers to make regulations which they consider appropriate as a consequence of this Bill.
53. Subsection (2) clarifies that consequential provision might include modifying both primary and secondary legislation.
54. Subsection (3) gives effect to the consequential provisions contained in Schedule 1 to this Bill.
55. Subsection (4) gives the Secretary of State or relevant national authority the power to make transitional, transitory or savings provision by regulations.
56. Subsection (5) provides that the Secretary of State may only make regulations under this Clause if the Secretary of State has received the 'required consent'. 'Required consent' is then defined in subsection (6).
57. Subsection (6) clarifies what is meant by "required consent", namely consent of Scottish Ministers, Welsh Ministers and DAERA.

58. Subsection (7) defines “relevant national authority”. Subsection (7)(b) provides that the “relevant national authority” for regulations that apply only in or in relation to Wales is the Welsh Ministers.

Clause 7: Regulations

59. Clause 7 gives legal effect to Schedule 2.

Clause 8: Interpretation

60. Clause 8 defines certain terms used throughout the Bill.

Clause 9: Extent, commencement and short title

61. Subsection (1) provides that the Bill extends to the legal jurisdiction of England and Wales, Scotland and Northern Ireland.

62. Subsection (2) sets out that clause 5 will come into force on exit day.

63. Subsection (3) sets out the provisions of the Bill that will commence on Royal Assent.

64. Subsection (4) establishes the short title of the Bill.

Schedule 1 – Consequential provision

65. Paragraph 1 specifies how references to EU legislation are to be interpreted on or after exit day.

66. Paragraph 2 disapplies paragraph 2 of Schedule 8 to the 2018 Act in relation to EU legislation listed in clause 1(3) incorporated into domestic law by clause 1(1).

67. Paragraphs 3 – 6 adds to definitions in the Interpretation Act 1978, the Legislation (Wales) Act 2019, the Interpretation and Legislative Reform (Scotland) Act 2010 and the Interpretation Act (Northern Ireland) 1954 for the purposes of this Bill.

68. Paragraph 7 confirms the status of EU law listed in the Bill for the purposes of the amendments in paragraphs 3 - 6

69. Paragraph 8 specifies that the effects of paragraphs 3 to 7 do not affect the terms mentioned in paragraph 3 of the 2018 Act.

Schedule 2 – Regulations under this Act

70. Schedule 2 details the procedures under which regulations can be made and scrutinised.

71. Paragraph 1 details the procedure by which the Secretary of State, the Welsh Ministers and DAERA may make regulations under this Bill.
72. Paragraph 2 provides for regulations to be made under the made affirmative procedure in respect of correcting deficiencies in clauses 3(1)(a) or 3(3)(a), and under the affirmative procedure in respect of making modifications in clauses 3(1)(b), 3(3)(b) or 3(4).
73. Paragraph 3 provides that regulations made under clause 6 are subject to the negative resolution procedure.
74. Paragraph 4 details the processes for (a) the Secretary of State, (b) the Scottish Ministers, (c) Welsh Ministers, and (4) DAERA whereby regulations under clause 3 are subject to made affirmative resolution procedure.
75. Paragraph 5 details the conditions of which the period of time in relation to paragraph 4(a) is subject to calculation.
76. Paragraph 6 details the conditions of which the period of time in relation to paragraph 4(b) or (c) is subject to calculation.
77. Paragraph 7 details the conditions of which the period of time in relation to paragraph 4(d) is subject to calculation.
78. Paragraph 8 specifies (a) that regulations that cease in line with the provisions of paragraph 4 will continue to be valid, and (b) that ceasing of regulations in line with the provisions of paragraph 4 will not prevent the making of new regulations.
79. Paragraph 9 sets out conditions on the making of regulations under this Act which are subject to the affirmative resolution procedure.
80. Paragraph 10 sets out conditions on the making of regulations under this Act which are subject to the negative resolution procedure.
81. Paragraph 11 allows for a combination of regulations to be made together, and lays down that regulations subject to negative resolution procedure may be made under affirmative or made affirmative resolution procedure.

Reasons for making these provisions for Wales in the Direct Payments to Farmers (Legislative Continuity) Bill

82. As set out above, Article 137 of the current Withdrawal Agreement provides that the Direct Payments Regulation as applicable in the year 2020 shall not apply in the United Kingdom for claim year 2020 (save for Article 13 (the state aid exemption)). Consequently, primary legislative provision is necessary to reapply the Direct Payments Regulation (and related EU legislation dealing with direct payments) to enable payments to

be made and the direct payments scheme to continue for scheme year 2020.

83. Taking powers under the UK Bill will provide a practical and pragmatic solution to the absence of legal powers needed to continue making direct payments to Welsh farmers in the 2020 scheme year.

84. By adopting a UK-wide approach we anticipate that we would be able to re-apply, and make operable, much of the drafting already in place for the Day 1 corrective legislation for the Direct Payments Regulation for the 2020 scheme year. Therefore rendering the process smoother, quicker and clearer for farmers and other stakeholders.

Financial implications

85. There are no new direct financial implications for the Welsh Government or the Assembly as a result of taking these powers in this bill. The Bill is necessary to reapply and make operable the Direct Payments Regulation for scheme year 2020.

Conclusion

86. It is the view of the Welsh Government that given the urgency of the issue resulting from the absence of legal powers needed to continue making Direct Payments to Welsh farmers in the 2020 scheme year, it would be appropriate to deal with these provisions in this UK Bill.

Lesley Griffiths AM
Minister for Energy, Environment and Rural Affairs
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