LEGISLATIVE CONSENT MEMORANDUM

DIRECT PAYMENTS TO FARMERS (LEGISLATIVE CONTINUITY) BILL

Introduction

1. The Direct Payments to Farmers (Legislative Continuity) Bill was introduced in the House of Commons on 9 January 2020. The Bill converts the EU legislation governing the 2020 Common Agricultural Policy (CAP) direct payment schemes into domestic law at 11 p.m. on 31 January 2020.

2. The Scottish Government considers that this is a relevant Bill under Rule 9B.1 of the Parliament's Standing Orders. This memorandum has been lodged by Fergus Ewing, Cabinet Secretary for the Rural Economy, in accordance with Rule 9B.3.1(a). The Bill and supporting documents can be accessed at: https://services.parliament.uk/Bills/2019-20/directpaymentstofarmerslegislativecontinuity.html

3. This memorandum relates to the Direct Payments to Farmers (Legislative Continuity Bill as introduced.

4. The Bill is necessary as a result of the UK's withdrawal from the EU under the terms of the European Union (Withdrawal) Act 2018 ("EUWA") and the introduction of the European Union (Withdrawal Agreement) Bill[1] ("the WAB") in the House of Commons which will implement and permit the subsequent ratification of the Withdrawal Agreement[2] concluded by the UK and EU on 17 October 2019.

5. The Scottish Government believes that the best option for the UK as a whole, and for Scotland, is to remain in the EU, as voted for by the people of Scotland3. That position was reinforced by the result of the December 2019 UK General Election where 88% of seats4 in Scotland were won by candidates who endorsed remaining in the EU. The Scottish Government considers that the UK's withdrawal from the EU will have widespread detrimental effects on Scotland and that the revised Withdrawal Agreement, if ratified, and Political Declaration on the Framework for the Future Relationship between the EU and UK, would be damaging to Scotland, politically, economically and socially, and represents a significantly worse position than the current one within the EU.

6. However, the Scottish Government accepts the need to make preparations for the exceptional circumstances which arise as a result of withdrawal from the EU under the terms of the Withdrawal Agreement, and to ensure that payments of subsidies to farmers in Scotland can continue to be legislated for and made.

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[1] The WAB and accompanying documents are available here: https://www.gov.uk/government/publications/eu-withdrawal-agreement-bill.

[2]A copy of the Withdrawal Agreement and the accompanying Political Declaration is available here: https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration.

[3] On 23 June 2016 62% of voters in Scotland supported remaining in the EU, with a majority for remain in every Scottish council area

[4] 52 of 59 Scottish seats (47 SNP; 4 Liberal Democrats; 1 Independent)

Background

7. The direct payment schemes[5] are a key part of the EU CAP. They are a set of schemes run by the Member State administrations which deliver annual payments to farmers in return for compliance with certain conditions. They are the largest source of farm subsidy in Scotland.

8. The direct payment schemes are established in law by Regulation (EU) No 1307/2013 (the “Direct Payments Regulation”) which is supplemented by a number of implementing and delegated EU Regulations (together, “the direct payments legislation”)6.

9. EUWA provides in domestic law for the consequences of the UK leaving the EU. It ensures that current EU law continues to have domestic effect following exit day, and provides Ministers with powers to ensure this retained EU law works effectively. Section 3 of EUWA ceases the direct effect of EU law in the UK (including the direct payments legislation) and converts most of it into domestic law as retained EU law. Had the UK and the EU failed to reach an agreement, or should the WAB not be enacted, this conversion would occur on exit day (11 p.m. on 31 January 2020).

10. The WAB makes significant changes to EUWA. It provides for a period (the “Implementation Period”) and inserts a provision into EUWA to maintain the effect of the European Communities Act 1972 (ECA) for the Implementation Period. This means that nearly every aspect of EU law will continue to apply in the UK during that period. Clause 25 of the WAB is intended to amend EUWA so the conversion of EU law into domestic law will not occur until the end of the Implementation Period (referred to as “IP completion day”). Unless an extension to the Implementation Period is agreed, IP completion day will be 11 p.m. on 31 December 2020. Until that date, EU law will continue to be applicable to and in the UK.

11. However, Article 137 of the Withdrawal Agreement provides that the Direct Payments Regulation will not apply in the UK for the 2020 claim year (save for Article 13 which is the state aid exemption). The amendments which Clause 1 of the WAB make to EUWA provide that, for the duration of the Implementation Period, the Withdrawal Agreement will be one of “the EU Treaties” for the purposes of the ECA and so Article 137 of the Withdrawal Agreement will prevent the Direct Payments Regulation (excluding Article 13) from forming part the body of EU law which has direct effect in the UK during the implementation period.

12. The cumulative effect of Clauses 1 and 25 of the WAB and Article 137 of the Withdrawal Agreement is that there will be no basis in law (whether EU or domestic) for the direct payments schemes to be continued in the UK between 31 January 2020 and the end of the implementation period.

13. On 9 July 2019, the Cabinet Secretary for the Rural Economy wrote to the then Secretary of State for Environment, Food and Rural Affairs requesting confirmation that the UK Government would take steps to ensure that, subject to the Scottish

[5] Please see Annex 1 for full descriptions of the schemes.
[6] Please see Annex 2 for full details.

Parliament's views on consent, there would be legislation in place for the direct payment schemes in the 2020 claim year. On 29 August 2019, the Secretary of State responded that she was confident that the legislation would be in place if required, and that the UK Government would seek the legislative consent of the Scottish Parliament. On 20 December 2019, the Defra Minister of State wrote to the Cabinet Secretary for the Rural Economy asking if he agreed that this Bill contained provisions within the competence of the Scottish Parliament and if he would consent in principle to begin the legislative consent process in the Scottish Parliament. The Cabinet Secretary for the Rural Economy responded to this letter on 10 January 2020 setting out the Scottish Government's consent in principle and highlighting that no precedents have been set when consenting to this Bill. It is envisaged that several statutory instruments will be made as soon as the legislation is enacted to ensure that direct payments legislation continues to operate for the UK after 31 January 2020. The Scottish Government is working with UK government officials and the other devolved administrations to resolve some final technical issues contained in the draft statutory instruments.

14. This Bill provides a UK-wide legal basis for the direct payment schemes in the 2020 claim year.

Content of the Bill

15. Clause 1(1) provides that the direct payments legislation for the 2020 claim year (defined as the 12 month period beginning on 1 January 2020) becomes part of domestic law at 11 p.m. on 31 January 2020. This is the moment that the legislation would otherwise cease to have effect in the UK by virtue of Article 137 of the Withdrawal Agreement. However, clause 1(6) provides that, in respect of the 2020 claim year, the direct payments legislation is to be treated as if it had formed part of domestic law from the beginning of 2020.

16. Clause 2 lays down rules for the interpretation of the direct payments legislation which are based on the treatment of retained EU law in EUWA. Clause 2(8) and (9) provide for the relationship between the direct payments legislation and the Human Rights Act 1998.

17. Clause 3(1) confers regulation making powers on the Secretary of State to modify the direct payments legislation where it would fail to operate effectively. Where regulations made under this clause relate to direct payments legislation as it applies to Scotland, the Secretary of State must obtain the consent of the Scottish Ministers in accordance with clause 3(2). Clause 3(3) confers a regulation making power on the Scottish Ministers for the same purpose.

18. Clause 4 provides for the publication of certain EU Regulations relating to the direct payments schemes.

19. Clause 5 will insert a new provision into the Direct Payments Regulation, enabling the Secretary of State to decide that the ceilings and the total maximum amount of direct payments can be raised to take account of recommendations made

by the Bew review[7]. The exercise of a power implementing the decision to increase ceilings in the Direct Payments Regulation will need the consent of the Scottish Ministers (by virtue of amendments to that Regulation which will be made under an UK SI to be made under clause 3).

20. Clause 6(1), (2) and (4) provides the Secretary of State and devolved authorities with the power to make consequential, transitional, transitory or saving regulations. Where the Secretary of State exercises this power as regards Scotland, it is subject to the consent of the Scottish Ministers. Clause 6(3) gives effect to schedule 1 which makes consequential provision.

21. Clause 7 gives effect to schedule 2 provisions regarding regulations. Clauses 8 and 9 provide interpretation, extent and final provisions.

Reasons for seeking legislative consent

22. The Explanatory Notes to the Bill set out the UK Government's view that each of the clauses in the Bill require the consent of the Scottish Parliament and the National Assembly for Wales.

23. The Scottish Government also believes that the Bill is a relevant Bill in terms of Rule 9.B.1.1 of Standing Orders as it makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament and alters the executive competence of the Scottish Ministers.

24. Agriculture is a devolved subject matter. The Scottish Ministers are the competent authority under the direct payments legislation for the administration of the Direct Payment schemes in Scotland. This includes responsibility for the payment of subsidies to farmers and crofters, and the making of regulations which are required to implement the Direct Payment schemes in Scotland[8].

25. As already noted, during the passage of the European Union (Withdrawal) Bill, the UK Government sought consent from the Scottish Parliament, in line with the Sewel Convention. The Scottish Parliament voted overwhelmingly (by 93 votes to 30) to refuse consent. The UK Government then decided, for the first time since devolution, to continue with the Bill and legislate for matters within or affecting the responsibilities of the Scottish Parliament without its agreement. In doing so, the UK Government demonstrated that it is prepared to proceed with legislation relating to the UK's withdrawal from the EU without the consent of the Scottish Parliament, even where that consent requires to be sought. As the UK Government has made clear that it will not accord the views of the Parliament on consent their proper status in relation to EU withdrawal related provision, the Scottish Government's position is that it does not plan to bring forward any legislative consent motions for Brexit-related provision without an undertaking that the Scottish Parliament's decisions will be respected, except in the most exceptional of circumstances.

[7] https://www.gov.uk/government/publications/domestic-farm-support-funding-bew-review-government-response
[8] For example, The Common Agricultural Policy (Direct Payments etc.) (Scotland) Regulations 2015 (S.S.I. 58)

26. This Bill is required to enable existing direct payment schemes to continue in the 2020 claim year. The disapplication of the direct payments legislation will be a direct result of implementing the Withdrawal Agreement negotiated by the UK Government. The legal vacuum created by the actions of the UK Government must be addressed given the importance of these schemes to Scottish farmers and crofters. Therefore, the Scottish Government believes the continued application of these schemes in Scotland must be legislated for in the limited time available. To ensure this, the Scottish Government intends to seek the Scottish Parliament's formal legislative consent to the Bill in these exceptional circumstances.

Consultation

27. The UK Government has not consulted on proposals for the Bill. The Bill will facilitate the continuation of the direct payments schemes during the 2020 claim year and, with the exception of clause 5, will not enable policy changes. Clause 5 will enable a policy change as it will allow the Secretary of State to increase the total amount of direct payments that may be granted in the claim year 2020. However, this power will implement the report of the Bew Review, a public review which ran a written and oral consultation before publishing its report.

Financial Implications

28. The Bill will be cost neutral for the Scottish Government. Direct Payments are currently funded as part of the EU CAP, and after exit from the EU, the UK Government has committed to replace this European funding for the 2020 claim year.

29. Direct payments make up the largest portion of CAP payments to Scotland's farmers and crofters, around £400 million per annum.

30. These payments are vital for the agriculture sector, providing a basic level of income support which acts as a safety net for farmers and crofters against market volatility. Scottish Government farm business income statistics show that, without the support from direct payments, around 60% of businesses would record a loss[9].

31. Without legislation to address the legal vacuum for making direct payments to farmers that the Withdrawal Agreement creates, many of Scotland's agricultural businesses would face severe financial implications. That in turn could result in many businesses folding, leading to land abandonment.

Conclusion

32. It remains a matter of regret to the Scottish Government that the UK Government plans to withdraw Scotland, as part of the UK, from the EU. The Scottish Government further regrets that it is the UK Government's intention to withdraw from the EU under the terms of the revised Withdrawal Agreement which is, in the Scottish Government's view, even more detrimental to Scotland's future than the previously

[9] https://www.gov.scot/publications/scottish-farm-business-income-estimates-2017-18/pages/1/

negotiated withdrawal agreement which was twice decisively rejected by the Scottish Parliament[10].

33. However, despite there being no democratic mandate for withdrawal from the EU in Scotland, the Scottish Government accepts that preparations need to be made for withdrawal, including the particular implications of Article 137 of the Withdrawal Agreement. Ensuring the continuity of the Direct Payment schemes in the 2020 claim year is a matter of the utmost importance to the Scottish Government.

34. The Scottish Government recognises that the Direct Payment schemes are critical to Scottish farmers. The Scottish Government acknowledges that, without primary legislation, those schemes would not apply in any part of the UK in the 2020 claim year as a result of the UK's withdrawal from the EU under the terms of the Withdrawal Agreement.

35. The Scottish Government considers that the Bill makes provision within the legislative competence of the Scottish Parliament and acknowledges that the UK Government has recognised it as such. The application of this Bill has been extended to Scotland at the request of the Cabinet Secretary (subject to the consent of the Scottish Parliament).

Draft Legislative Consent Motion

36. The UK Government has created a situation whereby Scottish farmers will be severely disadvantaged financially if the necessary legislation is not put in place and that situation needs to be addressed urgently. The most appropriate way to provide legal and financial certainty in Scotland is for the UK Government to put in place the necessary legislative cover across the UK for 2020. The Scottish Government recognises that the direct payment schemes are critical to Scottish farmers and crofters. Without this Bill, many of Scotland's agricultural businesses would face severe financial implications. That in turn could result in many businesses folding, leading to land abandonment.

37. The Scottish Government acknowledges that, without this Bill, those schemes would not apply in any part of the UK in the 2020 claim year as a result of the UK's withdrawal from the EU under the terms of the Withdrawal Agreement. The Scottish Government believes that the application of this Bill to Scotland should be put beyond doubt, and therefore intends, in these exceptional circumstances, to seek the Scottish Parliament's formal legislative consent to the UK Parliament legislating on devolved matters in the Bill.

38. The draft motion, which the Cabinet Secretary for the Rural Economy intends to lodge is:

> "That the Scottish Parliament agrees that the Direct Payments to Farmers (Legislative Continuity) Bill, introduced in the House of Commons on 9 January 2020, bringing the legislation governing the 2020 CAP direct payment schemes

[10] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11826&mode=pdf
http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11976&mode=pdf

into domestic law, granting powers to fix deficiencies in that legislation and to keep pace with changes in EU law during the Implementation Period, in so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament."

Scottish Government
January 2020

Annex 1

The Direct Payment Schemes in Scotland are—

1. The Basic Payment Scheme (BPS) - is the main direct payment scheme. It is an area-based scheme with payments calculated according to the area of land claimed upon, and acts as a safety net for farmers and crofters by providing a basic level of income support.

2. The Young Farmers' scheme - which provides a top-up payment to young farmers under 40 years of age, and is designed to encourage generational renewal and attract new entrants to the industry. Under the scheme, young farmers, who must also be newcomers to the industry or have set up their farms in the previous five years, can apply for an extra payment on top of their BPS payment for the first five years of their business

3. Greening - which provides a top-up payment in return for carrying out agricultural practices beneficial for the climate and the environment. It is mandatory for applicants to the BPS to comply with the Greening requirements, which covers permanent grassland, crop diversification and ecological focus areas (where relevant on their land) in order to receive the Greening payment.

4. Voluntary Coupled Support (VCS) – is aid targeted at a specific agricultural sector or sub-sector which may be undergoing economic difficulties and aims to prevent the escalation of these difficulties, which could cause abandonment of production with a knock-on effect on other parts of the supply chain or associated markets. In Scotland VCS includes the "Scottish Suckler Beef Support Scheme" and the "Scottish Upland Sheep Support Scheme". These schemes provide a payment linked to farm production to maintain livestock numbers.

Annex 2

The EU legislation which is the subject of this Bill is—

a) the Direct Payments Regulation, apart from article 13;

b) Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing the Direct Payments Regulation;

c) Commission Implementing Regulation (EU) No 641/2014 of 16 June 2014 laying down rules for the application of the Direct Payments Regulation;

d) in so far as relating to the CAP direct payment schemes—

   i. 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 ("the Horizontal Regulation");

   ii. Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing the Horizontal Regulation with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro;

   iii. Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of the Horizontal Regulation with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency;

   iv. Commission Implementing Regulation (EU) No 809/2014 of 17 July 2014 laying down rules for the application of the Horizontal Regulation with regard to the integrated administration and control system, rural development measures and cross compliance;

   v. Commission Delegated Regulation (EU) No 640/2014 of 11 March 2014 supplementing the Horizontal Regulation with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance.

Section 1 of the Bill defines "the EU legislation governing the 2020 CAP direct payment schemes" as the above legislation—

a) as it has effect in EU law immediately before 11 p.m. on 31 January 2020 for the claim year 2020, and

b) ignoring for this purpose the disapplication of any of its provisions in the United Kingdom in pursuance of arrangements under which the United Kingdom withdraws from the EU.

This Legislative Consent Memorandum relates to the Direct Payments to Farmers (Legislative Continuity) Bill (UK legislation) and was lodged with the Scottish Parliament on 13 January 2020

DIRECT PAYMENTS TO FARMERS (LEGISLATIVE CONTINUITY) BILL – LEGISLATIVE CONSENT MEMORANDUM

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