NFU SCOTLAND BRIEFING – AGRICULTURE BILL – SECOND READING

Summary

1. A future agricultural policy that fits the needs and profile of Scottish agriculture, and all that it underpins, is the real prize that can be secured from the United Kingdom’s withdrawal from the European Union. However, such an outcome will only come about if the UK and Scottish governments resolve the impasse that has now come to a head under the Agriculture Bill over the creation of policy and financial frameworks, and repatriation of powers.

2. From the outset, NFU Scotland (NFUS) has been unequivocal in stating that the entire Brexit process must be pursued in the interests of agriculture and the food and drinks sectors. As an organisation, NFUS’ primary interest is to secure the best possible outcome for Scottish agriculture.

3. The Agriculture Bill published on 12 September will have an influence on every agricultural interest across the UK, including every farm and croft in Scotland.

4. However, as this briefing sets out, it is not only the outcomes of this legislative process that will shape agriculture in the future but also the decision-making processes that are established via the Agriculture Bill.
Introduction and Context

5. After Brexit (and any transition phase) UK agriculture will be operating outside of the EU’s Common Agricultural Policy (CAP). The CAP currently provides nearly £4 billion of support annually to farmers and crofters across the UK, of which approximately £500 million of which comes to Scotland and is delivered to farmers and crofters via Direct Payments (Pillar 1) and the Scottish Rural Development Programme (Pillar 2).

6. Leaving the CAP means that a new domestic agriculture policy is needed. NFUS strongly believes that change in how agriculture is supported has been needed for a very long time; Brexit will be the catalyst for that change, rather than the reason. The UK Government and devolved legislatures must take the opportunity to rethink agricultural support and the general operating environment for farm businesses. The proposals which NFUS continues to develop are set out below. NFUS will be engaging with Scottish Government as to how these proposals might be developed and implemented as the next phase of Scottish agricultural policy beyond the intentions set out in the Scottish Government’s document ‘Stability and Simplicity’ for the transitional period.

7. The Agriculture Bill is ‘enabling’ legislation, providing significantly broad powers to current and future governments to provide financial assistance and make other policy interventions around land use and agriculture in future. The Bill sets the framework upon which new policies and tools will be developed and built. The framework will be the bedrock of new agricultural policies across the UK that are designed specifically for the needs, and recognising the unique characteristics, of UK agriculture – including Scotland. The Bill is therefore crucially important for the farming sector across the UK and it is vital that NFUS engages with this process.

8. NFUS has two major issues with the Bill which pose complex questions – ultimately influencing the approach NFUS will take towards the Bill. Due to the politicised nature of these issues, NFUS has instructed an independent legal opinion of the issues. Without a clear view on the legal standing of one issue, it is impossible to take a view on the other. More detail is set out below. In addition, NFUS has also taken into account leading academic opinion regarding some of the constitutional aspects thrown up by the Bill.
**Key Issue 1: No Schedule for Scotland means no enabling powers are being granted to Scotland by the Bill.**

9. The Bill must adequately address the issues stemming from devolution, namely maintaining a level playing field (to protect the intra-UK market), respecting the devolution settlements and the UK’s international obligations. NFUS entirely supports that approach. However, it is of note that there is already some concern in England that there may be more scope for Ministers in Wales to provide assistance to farmers and rural businesses than Ministers in Defra will be able to.

10. The UK Government has explicitly stated that it has offered to extend powers in the Agriculture Bill to the devolved administrations which would enable each devolved administration to create their own farming support systems to replace the CAP.

11. Wales and Northern Ireland have accepted the offer – see Schedule 3 and Schedule 4 of the Agriculture Bill. The Bill will legislate for similar powers adapted for the Welsh Government and Department for Agriculture, Environment and Rural Affairs in Northern Ireland (DAERA) to be exercised by Ministers in those territories.

12. The Scottish Government has chosen not to take any powers in this Bill. This is due to the continued impasse between Ministers from the UK Government and the Scottish Government on the principle of agreeing common, UK-wide frameworks. Agriculture is devolved, but it is the view of NFUS that the Agriculture Bill has become very politicised. NFUS understands that Scottish Ministers could take up the option to include a Schedule very similar (if not identical) to that of Wales right up to the final stages of the Bill going through the Houses of Parliament.

13. NFUS is concerned without a Schedule in the Agriculture Bill (or any other appropriate method), it is possible that Scottish Government may not have any legal vehicle of delivering payments beyond 29 March 2019.
14. NFUS is of the view that if Scottish Government were to take up the offer of having a Schedule for Scotland inserted into the Bill, that would provide the necessary legal basis upon which Scottish Ministers could continue with agricultural policies with objectives and operations very similar to existing measures, such as Voluntary Coupled Support (suckler calf and ewe hogg schemes) and the Less Favoured Area Support Scheme (LFASS).

15. Moreover, it could also provide the vehicle to implement new agricultural policy measures in relation to financial stability, productivity improvements and environmental benefits – i.e. the elements proposed by NFUS in the ‘Steps to Change’ document (see below).

16. NFUS has therefore concluded that the right approach should be to work constructively and sensitively to ensure that Scotland can continue to deliver existing agricultural support and the development and implementation of future agricultural support after EU exit. Without clarity on any other possible means of doing this, it is the view of NFUS that a Schedule should be included in the Agriculture Bill.

17. However, NFUS is firmly of the view that the inclusion of a Schedule bespoke to Scotland’s agricultural policy needs, and which would enable Scottish Ministers to act in such regard, must be instigated and agreed by Scottish Government and UK Government rather than being imposed via the legislative process of the Bill through Westminster.

18. NFUS is also mindful that this approach can only be effectively taken forward with a resolution to Key Issue 2, outlined below, and the implementation of a formalised and constructive procedure towards the development of commonly agreed frameworks.

**Key Issue 2: Funding constraints on the devolved administrations.**

19. Equally as important is finding clarity on how the Bill will, or won’t, impose financial constraints on Scottish agricultural policy in areas of devolved competency.

20. The political debate hinges around Part 7 of the Bill which relates to the WTO Agreement on Agriculture.
21. Part 7 would provide powers for the Secretary of State to legislate for the UK to comply with the WTO Agreement on Agriculture. These powers could enable the setting of financial ceilings on the devolved administrations and England in relation to agricultural support that is considered trade distorting and classified as Amber Box by the WTO; and the establishment of a decision-making process to classify agricultural support in accordance with WTO criteria. Part 7 would also require devolved administrations to provide relevant information in relation to any of their proposed or existing farming support.

22. The UK Government contends it will be responsible for ensuring that all UK policies on domestic support in relation to agriculture are WTO compliant, as the UK will be the signatory to the WTO rather than any of the devolved nations.

23. However, the Scottish Government contends that Part 7 of the Bill would not respect the devolution settlement in that Part 7 could create unilateral powers for the Secretary of State that could constrain policy choices in Scotland because of limits on spending, in relation to WTO ‘Amber Box’ spend in particular. The Scottish Government has suggested that this could be used by a future Secretary of State to put a constraint on the Scottish Government making payments for schemes similar to LFASS or on coupled support schemes in the future.

24. NFUS considers that the wording is open to interpretation and this is why an independent legal opinion has been sought on the exact implications of the Bill’s wording on Part 7.

25. This legal opinion has suggested that “the Scottish Ministers will not have total freedom to apply domestic support as they see fit if the Secretary of State makes regulations setting limits in relation to the WTO classifications”. The opinion also then states: “It would not be a legitimate use of regulation-making power to prescribe within the limits how the Scottish Ministers would be able to exercise the powers to apply support”. NFUS is therefore concerned that, according to the wording of the Agriculture Bill, a future UK Secretary of State would have the ability to set limits on the amount of domestic support which could be targeted at specific measures that Scottish Ministers may seek to apply in Scotland to meet their objectives, and that these limits could be set at a lower ceiling than what is currently the case under existing arrangements.
26. Based on the outcome of this advice, NFUS suggests that an amendment should be inserted into Part 7 that would require the Scottish Ministers and the other devolved authorities to be consulted, and agreed on, the exercise of any regulation affecting Scotland which is made under Part 7. NFUS would also like an amendment to the Bill precluding the Secretary of State from making regulations which limit the ability of the Scottish Ministers to provide domestic support within any limit prescribed (i.e. the amber, green and blue limits), without first agreeing those limits with the devolved administrations as per the below section regarding commonly agreed frameworks.

27. NFUS also considers that funding of future agricultural policy across the UK should, as Part 7 of the Bill suggests, be held centrally and deliver at least the same quantum as at present but should be allocated to each devolved administration on a new objective and non-discriminatory basis (rather than historic) as a ring-fenced budget for each devolved administration to use specifically on agricultural and rural policy measures as befitting their territories.

Commonly Agreed Frameworks

28. The governance of common frameworks is an extremely complex constitutional issue which is also increasingly political. As an apolitical membership organisation, NFUS is not equipped to comment extensively on how such governance might or could operate; but it is a concern to NFUS that there is no formalised structure to ensure the current devolution settlement of policy and regulation to the constituent parts of the UK is maintained as frameworks are developed for the governance of EU competencies after Brexit.

29. NFUS has always maintained that commonly agreed frameworks are required in order to avoid regulatory divergence, preserve the integrity of UK internal market and to enable trade deals with the EU27 and third countries to be negotiated and secured. NFUS has also acknowledged the potential risks to intra-UK trade by unconstrained policy divergence. Measures cannot be so perpendicular across the UK as to cause internal market distortions. However, NFUS is equally clear that beyond these minimum common standards there must be clear flexibility to develop and implement appropriate agricultural and rural policy measures within each devolved administration.
30. NFUS therefore supports common frameworks, commonly agreed, in the policy areas necessary to enable internal UK markets to function effectively, via minimum common standards that also ensure that the UK is best placed to enter into and implement new trade deals that are to the benefit of the agricultural industry. The examples of policy areas which to NFUS would be sensibly governed by a commonly agreed framework would be pesticides, organic farming, fertilisers, animal health and traceability, food and feed safety, and food labelling. It is also vital that intra-UK spending allocations for future agricultural policies are commonly agreed.

31. Farming Ministers across the UK and agricultural departments must establish and maintain regular, formal and cooperative arrangements to manage policy, legislation and delivery of regulation across the UK economic area. A guiding principle should be that no single country determines or curtail UK policy in the rest of the UK. In terms of how this arrangement is managed, NFUS fully supports the recommendations outlined in the Royal Society of Edinburgh advice paper as supplied to the Scottish Parliament’s Finance and Constitution Committee in August 2018.

Other NFU Scotland Priorities for the Agriculture Bill

32. **Enshrining world-leading standards of production.** Scottish farmers and crofters are proud to produce to extremely high standards – these standards give us our provenance and Unique Selling Point in markets abroad. It is vital that in the negotiation of new Free Trade Arrangements, domestic producers can operate on a level playing field with producers elsewhere in the world and are not undermined by cheaper imported produce that has been produced to lower standards. The Bill should therefore contain provisions to require all food imported into the UK be produced to at least equivalent standards, as they relate to animal welfare, environmental protection and any other legitimate public policy concerns associated with food production, as those required of producers in the UK. NFUS notes that the other UK farming Unions are also supportive of amendments in this regard.
33. **Addressing the red meat levy.** The issue of red meat levy repatriation is a long-running sore for the industry – Quality Meat Scotland (QMS) estimates that over £1.5 million of levy on Scottish animals is lost each year. Following years of negotiation, it is now understood that the issue of Red Meat Levy Repatriation would only be resolved through primary legislation. For over two years, NFUS has been advised by Defra that the issue will be resolved when a legislative window presents itself. NFUS believes that the Agriculture Bill is the correct vehicle to address the issue of lost Red Meat levy and wants to see swift progress to address this now. NFUS will therefore advocate an amendment to the Bill in this regard.

34. **An “agricultural” Agriculture Bill.** It is a concern to NFUS and the other UK farming unions that, despite its title, the Bill makes scarce reference to supporting agricultural activity on the face of the Bill. For a Bill that focuses so strongly on the delivery of public goods through land management, NFUS strongly feels it is a missed opportunity not to include agricultural objectives on the face of the Bill as the clear vehicle to deliver on those public goods. This is a particular concern to NFUS in the context of considering budgetary expenditure.

35. NFUS fully supports the view that budgetary expenditure under the Agriculture Bill must be clearly connected to agricultural activity, or misunderstandings will arise as to the purpose of financial assistance which could lead to confusion in the debate about appropriate levels and justifications for support. NFUS therefore supports calls for an amendment to the first clause of the Bill to explicitly reference agricultural activity, farm business or farmland as objectives to which any financial assistance should contribute.

36. **Food security as a strategic priority for the nation.** Scottish farmers and crofters are proud to deliver on a range of public goods including water quality, biodiversity and climate change as they produce food. Food production in itself is not a public good; however, food security is surely a strategic priority for the nation. NFUS therefore considers it vital that the food security and stability of food supply are explicitly referenced on the face of the Bill as strategic outcomes from domestic support to agriculture. NFUS supports calls for an amendment to the first clause of the Bill to ensure food security and stability of food supply are objectives of the legislation.
Steps to Change: A New Agricultural Policy for Scotland Post-Brexit

37. NFUS firmly believes that any future agricultural policy must underpin the huge social and environmental contribution made by farmers and crofters to the Scottish economy. Through extensive and ongoing consultation with its members, NFUS has published detailed proposals in its document ‘Steps to Change – A New Agricultural Policy for Scotland Post-Brexit’, which can be viewed in full online here.

38. It is the view of NFUS that if the Steps to Change approach were to be adopted, much of what is required by way of future support for Scottish agriculture could be delivered with greater efficiency – in terms of funding, process and outcomes.

39. NFUS has identified that many of the objectives of future agricultural policy in Scotland now being established reflect similar goals of the other devolved administrations of the UK. However, there is also a clear recognition that Scotland has to meet those objectives on its own terms, and at its own pace, in order to ensure the successful delivery of the desired outcomes. That is why it is critical that, within a commonly agreed regulatory and standards framework across the UK, Scotland retains complete autonomy in the development and delivery of new agricultural and rural policy, through an effective transition period, that will enable managed change at business, sector and industry levels.

40. Central to the NFUS proposals is moving unequivocally away from area-based support, which NFUS considers has often incentivised inertia, thwarted innovation and stifled restructuring. The basis of any future support system must be led by agricultural activity which brings about real gains in productivity and the delivery of tangible environmental benefits. However, as the UK and Scotland moves towards a new, but as yet unknown, operating environment, financial stability will remain vital for the vast majority of Scotland’s agricultural businesses.

41. Rather than accessing payments through the simple occupation of land, it is the view of NFUS that a new approach to financial stability should be built on the concept of ‘actively farmed hectares’. NFUS is developing a model of ‘actively farmed hectares’ which it hopes to discuss with Scottish Government and MSPs in due course.
42. Under the NFUS proposals, the three components of financial stability, productivity and environment would work together to enable Scottish agriculture to be more competitive, resilient and profitable – forming the essential first link of a dynamic and fair supply chain while also providing essential public goods.

43. A suite of new and practical options would meet the needs of emerging and developing farm businesses, with an overarching objective running throughout the policy to make all farms and crofts across Scotland more resilient. These options would not be mutually exclusive, and they would be designed suit the full range of farming systems that make up Scottish agriculture – including management and capital options. All agricultural business must be able to draw down support from a range of measures across all three components. Many measures would be non-competitive, with levels of support linked to unit size.