December 2019

Dear Edward,

UK 2020 Direct Payments Bill

I am writing to update the Parliament on developments designed to ensure that Scottish Ministers will have a legal basis to make direct payments to Scottish farmers for the scheme year 2020 beyond the end of January 2020. It had been my intention to write to you regarding this matter some time ago but the uncertainty caused by the UK general election prevented this.

As you are aware, Regulation (EU) No. 1307/2013 ("the Direct Payment Regulation") is the basis for making direct payments to farmers under the CAP. The amended Withdrawal Agreement concluded between the UK Government and the EU in October provides that the Direct Payment Regulation will not apply to the UK for the 2020 scheme year (with the exception of Article 13 which is the state aid exemption). The Withdrawal Agreement Bill, which will give legal effect to that Withdrawal Agreement, is expected to be reintroduced to the Commons imminently.

Primary legislation will therefore be needed to roll over EU direct payments legislation into national law, so that payments can continue for the 2020 scheme year. Without any such primary legislation being made, no part of the UK will have the legal basis to make direct payments to farmers for that scheme year. The Scottish Government also anticipates new secondary legislation being required to fix the deficiencies in former EU law and in national law that would otherwise exist after the UK leaves the EU, some of which we expect to be required in advance of 31 January 2020.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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The possible lack of legal basis to make direct payments to Scottish farmers in 2020, brought about by the terms of the deal negotiated by the UK Government, has been a longstanding concern of mine. I wrote to Michael Gove, the then Secretary of State for Defra, about this increasingly urgent situation in July asking for assurances that the UK Government would take all necessary steps to ensure a legislative solution was in place across the United Kingdom, should the need for it materialise. I received the assurance in August that the necessary primary legislation would be put in place for the whole of the UK to reapply and amend the Direct Payment Regulation, including amendments to associated EU legislation as it would have effect in national law after exit.

The Scottish Government is now in discussions with the UK Government on the specific terms of this legislation, and our expectation is that the UK 2020 Direct Payments Bill (the “2020 Bill”) will be introduced to the UK Parliament once the anticipated Withdrawal Agreement Bill has made sufficient progress through the House of Commons. It is likely to be introduced in late December or early January, and I am assured that it will receive Royal Assent in advance of 31 January 2020. It is likely that this will require an expedited Bill process and while I will attempt to keep Parliament updated this may not always be possible.

The CAP is not a reserved matter, and so in line with Standing Orders, a legislative consent memorandum in relation to this Bill will be lodged by the Scottish Government following the Bill’s introduction to the UK Parliament. Due to how quickly the 2020 Bill might progress, the legislative consent process is also likely to be truncated to ensure that the Parliament’s views on the Bill can be made clear before the final amending stages of the Bill in the House of Lords.

As already noted, some of the secondary legislation that would need to be made under the 2020 Bill, once enacted, must be in force by 31 January. While the number of instruments is currently uncertain, it would be a mix of UK and Scottish legislation, as is the case for the deficiency fixes under the European Union (Withdrawal) Act 2018 (“EUWA”). The UK legislation would make changes to the former EU law that is rolled over into national law by the 2020 Bill, and the Scottish legislation would change our national implementing rules.

The Scottish Ministers and the Scottish Parliament have, as you know, agreed a protocol on the scrutiny of SIs made under EUWA that relate to devolved matters such as the CAP. That protocol does not cover the 2020 Bill, but we have committed to the principle that there should be proper scrutiny of ‘devolved’ UK instruments under all Brexit related bills, and I will therefore act as if it does apply here.

I therefore intend that any request for the Scottish Ministers to consent to a EU exit related UK instrument will be notified to the Parliament, and that the Parliament will have at least 28 days to agree (or not) to consent being given. A new protocol is being prepared that will formalise this new arrangement.

In this case however, it is essential that we have a legal basis for direct payments to be made to Scottish farmers beyond 31 January, which means that the secondary legislation must be in place by 31 January. I will of course ensure that the Parliament is given as much time as possible to consider each new instrument, but I regret that it is unlikely to be the full 28 days. This is however a direct result of the timing of the UK general election and the UK Government’s stated intention to leave the EU on the 31 January.

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I hope you and committee members will understand the necessity for this in the circumstances. Similarly the time constraints mean that any SSIs that are required and are subject to the negative procedure are unlikely to respect the 28 day rule as set out in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

I am copying this letter to the convener of the DPLR Committee.

Yours sincerely

FERGUS EWING