Mr Edward Mountain MSP
Convener
Rural Economy and Connectivity Committee
Scottish Parliament
Edinburgh
EH99 1SP

21 February 2020

Dear Edward,

THE RULES FOR DIRECT PAYMENTS TO FARMERS (AMENDMENT) REGULATIONS 2020 (“DP 05”)
THE FINANCING, MANAGEMENT AND MONITORING OF DIRECT PAYMENTS TO FARMERS (AMENDMENT) REGULATIONS 2020 (“DP 06”)

I refer to your letter of 29 January regarding our notification for the above SIs.

First of all, I would like to express my sincere thanks to you and the Committee for responding so quickly and timeously to confirm the Committee’s approval for the Scottish Ministers to consent to the SIs. This enabled them to be made on 30 January and laid on 31 January by the UK Government using the made affirmative procedure. I am also pleased to confirm we are satisfied that the terms of the SIs are as notified to you.

I note that the Committee has asked for either a response to or to be kept up to date on the issues raised in your letter and on any future developments on some related policy issues.

I respond to these issues and provide some further explanation below.

Where it is not possible at present to provide the information requested, I confirm that I will keep you up to date on any further relevant developments on the issues.

1. Clarification of reasons for lack of time for Committee consideration

I too shared the concern of the Committee regarding the lack of time to consider the notification. This is why I wrote to you on 19 December (see Annex A attached) to explain why I anticipated the Committee would not have the usual period of time to consider the SIs.
It is regrettable that the Committee was not afforded 28 days to consider the notification. However, the responsibility for this rests with the UK Government. Indeed we made every effort to press the UK Government for progress with this work as can be seen from my letter of 9 July attached to Mr Gove (See Annex B attached).

Despite our efforts, the Direct Payments to Farmers (Legislative Continuity) Act 2020 (which was required to provide the legislation making power for the SIs) was not introduced by the UK Government until 9 January and did not receive Royal Assent until 30 January. We also did not receive the corresponding consent request letter from the UK Government until 20 January. As a consequence we were unable to send the notification to you until the 23 January. It is unfortunate that I was required to ask for a response from the Committee in such a short timescale. This was, however, necessary as the SIs needed to come into force for EU exit at 11.00 pm on 31 January to avoid any legislative gap in the direct payments schemes for the claim year 2020.

I reiterate my thanks to you and the Committee for assisting us with your quick response to the notification in these unusual circumstances.

2. Notification and reporting requirements

The notification requirements provided for in the relevant EU legislation were designed to allow the EU Commission to fulfil its reporting responsibilities in an international 28 member state context. Leaving the EU for a UK regime with well-established constitutional arrangements for just 4 constituent nations, means this part of the EU regulations is no longer necessary or appropriate.

The requirements to notify information to the Commission to feed into its oversight and reporting obligations to the other EU institutions were removed given the cessation of the EU’s involvement in the direct payments schemes for the 2020 claim year in the UK. They were also removed as the previous EU administrative processes and EU financing, auditing, accounting rules and budgeting mechanisms no longer apply.

Examples of requirements removed

- Article 9(6) of Regulation (EU) No. 1307/2013 is omitted by regulation 4(10)(f) of SI 2020/91. That provision required Member States to notify the Commission of relevant decisions relating to active farmers.

- Article 22(3) of Regulation (EU) No. 1307/2013 is amended by regulation 5(2)(a) of SI 2020/91. That provision required Member States to notify the Commission of annual review decisions relating to the Basic Payment Scheme ceiling.

- Article 52 of Regulation (EU) No. 1306/2013 is omitted by regulation 6(11) of SI 2020/90. That provision provided an appeals process for decisions by the Commission to reduce payments amount due to non-conformity. As part of a reconciliation process under that provision, a report must be submitted to the Commission outlining recommendations.

- Article 9 of Commission Implementing Regulation (EU) 809/2014 is omitted by regulation 14(9) of SI 2020/90. That provision required notification of control data and statistics, as well as some reports relating to direct payments, to the Commission.
Methodology, aims and contents of reporting

Despite the removal of some notification and reporting requirements, this does not have a substantive effect on overall implementation and monitoring of the direct payments schemes. Our inspection and scheme administrative systems will continue to be subject to strict auditing, scrutiny and controls.

Alteration of the methodology, aims and contents of reporting which go beyond the correction of deficiencies arising as a consequence of EU withdrawal is out with the scope of the powers under the Direct Payments (Legislative Continuity) Act 2020 which were relied upon to make these SIs. Accordingly, no such changes were made by the SIs.

Scrutiny of future working arrangements

Subject to it being passed by this Parliament, the Agriculture (Retained EU Law and Data) (Scotland) Bill will provide the Scottish Ministers with the powers to adapt the regulatory framework in Scotland. The Agriculture Bill, recently introduced at Westminster, will similarly empower administrations elsewhere in the UK.

I aim to ensure that any common UK arrangements (that may be needed as a result of leaving the EU) will respect the devolution settlement and will protect the interests of our rural communities. I am, of course, aware of the interests of the Committee in this respect.

3. The Basic Payment and Greening payment schemes

With regard to the Basic Payment Scheme, Cross Compliance is a mandatory set of requirements and standards that land managers have to meet in order to receive support scheme payments. There are two main elements to Cross Compliance, they are:

- Statutory Management Requirements (SMRs): requirements relating to public health, animal and plant health, environmental protection and animal welfare; and

- Good Agricultural and Environmental Conditions (GAECs): a range of standards developed to address soil erosion, soil organic matter, soil structure, ensuring a minimum level of maintenance, avoiding the deterioration of habitats and protection and management of water.

As above, this legislation is not the appropriate vehicle in which to introduce changes to matters like cross compliance measures and we have no current plans to change these measures through alternative mechanisms.

The same applies to Greening. The Greening requirements are indeed mandatory with farmers and crofters able to choose which measures they implement to meet their specific obligation. I apologise for the imprecise use of language which has led to this clarification being required.

4. References to Member States

Certain terms in the retained EU regulations need correction in order to refer to the appropriate post-exit UK equivalents.
All references to “Member State(s)” have been amended or omitted. Where a function is to be retained, it is transferred to either the Scottish Ministers or the Secretary of State but with the Secretary of State acting only with the consent of the Scottish Ministers and other devolved authorities.

The latter is for those few cases where it would be appropriate for a relevant function to be exercised on an agreed UK-wide basis, for example, adjustments of the financial ceilings for direct payments support following the Bew Review. Given that where joint decision making is necessary for a UK-wide decision, the Secretary of State will need the consent of Scottish Ministers and the other devolved administrations, we are satisfied that the devolution settlement has been properly respected, whilst ensuring the continuing legal operability of the functions.

5. Categorisation

I can clarify and confirm that the SIs were categorised A in general as they are technical transitional corrections of operational deficiencies restricted to only the 2020 claim year for direct payments that avoid policy change and seek to preserve the status quo in so far as possible. However, the SIs could be considered Category B to the extent that the transition from an EU to a UK framework would be considered a major and significant development.

I hope the above clarifications are helpful and confirm that I will keep the Committee informed of any relevant future developments regarding the points that you have raised.

Yours sincerely,

FERGUS EWING
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.
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.
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
The Rt Hon Michael Gove MP  
Secretary of State for Environment  
Food and Rural Affairs  
Defra  
Seacole Building  
2 Marsham Street  
London  
SW1P 4DF

9 July 2019

Dear Michael,

I am writing to you in relation to the increasingly urgent situation regarding Direct Payments to farmers, across the UK, for the 2020 scheme year. In your absence I raised this at the Interministerial Group (IMG) meeting on 24 June with your ministerial colleague Robert Goodwill, to whom I am copying this letter.

I am asking that you confirm immediately, in writing, that the UK Government will take steps now to ensure that there is a legislative solution in place, should this issue materialise, with the UK Government committing to respect the Scottish Parliament’s views on consent. I am also repeating the request I made at the IMG meeting, that your officials draft and circulate the appropriate legal text as soon as possible, and certainly before the next IMG meeting, so that devolved ministers and officials can give it the proper scrutiny.

You will of course be aware of the background. If the Withdrawal Agreement, as currently drafted, is approved and implemented, EU law will continue to apply in the UK until the end of 2020 with the exception of CAP regulation 1307/2013 on ‘Direct Payments’, which will cease to apply from the 2020 scheme year onwards.

The exception made in the Withdrawal Agreement creates the risk of a legal vacuum for farm payments for the 2020 scheme year, as EU law would have ceased to apply but ‘retained EU law’ would not automatically kick in to replace it. To guard against that risk, it is necessary for all parts of the UK to have legislation in place before the end of 2019 providing in domestic law for 2020 scheme year direct payments if the relevant scenario comes to pass. I note that this problem only arises if EU exit takes place and the Withdrawal Agreement is implemented.

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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www.gov.scot
A few weeks ago your officials were in contact with Scottish Government officials to discuss this issue. They said Defra had concluded that a solution necessitates not just primary legislation, but also consequential changes to the No Deal deficiency SIs which affect these payments, directly or indirectly.

At the IMG meeting Robert Goodwill and your officials were very keen that farmers should feel reassured in the face of this major risk. They set out two potential ways in which the primary legislation element of a solution could be delivered – through your Agriculture Bill or, as a fallback if the timetable for that Bill made that route infeasible, via a short separate Bill at Westminster. However, when I pressed them they confirmed that no drafting had yet been done. If this is the case then, given the lead time needed for legislation, I am unable to see how farmers could feel reassured.

As this problem is a direct result of the Withdrawal Agreement that the UK Government negotiated and agreed, it is only right that the UK Government should be responsible for rectifying the situation it has created.

I am copying this letter to Robert Goodwill, Minister of State, Defra, Lesley Griffiths AC/AM, Minister for Environment, Energy and Rural Affairs, Welsh Government and Dennis McMahon, Permanent Secretary DAERA, Northern Ireland, and David Mundell, Secretary of State for Scotland.

Yours sincerely,

FERGUS EWING