Legislative consent motion for the Direct Payments for Farmers (Legislative Continuity) Bill

Clarification offered by Mr Ewing during his evidence to the committee on 15 January 2020

On 13 January I lodged a memorandum setting out why the Scottish Government was recommending that the Scottish Parliament should provide its consent to the Direct Payments for Farmers (Legislative Continuity) Bill (“the DPLC Bill”).

I was grateful that the Committee found time on 15 January to allow me to provide oral evidence on the Scottish Government’s position, and was grateful that the Committee recommended that the Scottish Parliament should indeed provide consent.

I was also encouraged that we could all agree that the length of time the UK Government’s actions have left for the Scottish Parliament to consider this important and complex matter is unacceptable. I have sought to maximise the time available.

These are challenging legal issues to consider in this short period, and I was therefore happy for the Scottish Government to give three undertakings to provide further information for the Committee. In particular, we undertook to:

(i) to provide copies of the correspondence which I have had with the DEFRA Secretary of State (except only where that is necessarily confidential).

(ii) put in writing our position on the legal basis for direct payments relating to claim year 2019, and

(iii) study the Official Report, and provide any further clarification that might help you in your future deliberations.
Correspondence with UK Ministers relating to this Bill

I enclose copies of my letter

My letter to Mr Gove dated 9 July 2019
Ms Villiers reply on behalf of Mr Gove dated 29 August 2019
Mr Eustice’s letter dated 21 October 2019 and 20 December 2019
My letter to Mr Eustice dated 10 January 2020
Mr Eustice’s letter dated 20 January 2020
My letter to Mr Eustice dated 23 January 2020

I am content that nothing in this correspondence is confidential.

2019 claim year

The legal basis for all direct payments for all years in the period up to exit day is the Direct Payments Regulation (Regulation (EU) No. 1307/2013), as that Regulation currently applies in the UK as a matter of EU law.

Indeed, this Bill itself states that the rolling over into domestic law of EU law governing the 2020 CAP direct payment schemes does not affect any rights or other matters arising in relation to the CAP direct payment schemes for the claim year 2019 or earlier claim years.

The Committee will also wish to note that the Direct Payments Regulation will remain on the statute book after the end of the transitional period, when all other EU law will be rolled into domestic law as retained EU law. It will be the legal basis for direct payments for the 2021 claim year onward.

The domestic version of the Direct Payments Regulation will of course be different from the EU version, either as a result of modifications to be made under this Bill, or any modifications we may make using the powers we are seeking in the Agriculture (Retained EU Law and Data) (Scotland) Bill.

Other comments

I have reflected on the questions from committee members and would like to offer the following information.

Evidence to RECC on 31 October 2018

You reminded me about the evidence I gave to your Committee on 31 October 2018, following a question from Maureen Watt MSP relaying a concern on the part of NFU Scotland that there may not be a legal vehicle for delivering payments beyond 29 March 2019.

You will recall that I wrote to the Committee on this question on 7 November 2018, and 6 and 22 February 2019.
The Scottish Government has remained focussed on the need to ensure that there is a secure basis for delivering payments in relation to the different Brexit scenarios. The UK Government negotiated measures with the EU to be included in its draft Withdrawal Agreement which was published in November 2018. Scottish Government officials assessed that agreement for its impact on Scottish interests and at that point, we became aware of the gap in legislative competence for CAP payments for the 2020 claim year. Scottish officials liaised closely with UK counterparts to seek resolution of this issue.

As soon as I was advised by officials of this situation, I wrote to UK Ministers on 9 July 2019 to urge them to urgently remedy the situation and determined that the best approach was UK legislation given the incredibly tight deadline that the UK government’s actions had left us with.

_Agriculture (Retained EU Law and Data) (Scotland) Bill_

The purpose of the Scottish Agricultural bill is to allow the Scottish Ministers to, among other things, simplify or improve the operation of all the CAP legislation once it becomes domestic law.

The Scottish bill does not therefore provide the legal basis for direct payments for claim years 2021 onward. That will be found in the Direct Payments Regulation as set out above.

The measures in the Direct Payments Bill are devolved, and they could therefore have been included in the Scottish Bill, but that would have been very challenging given the timings (and the months of uncertainty about the timings). Our Bill would have needed to have cleared all stages of Parliament and received Royal Assent before the UK left the EU (now confirmed as January 2020 but previously scheduled for 31 October 2019).

I also consider that the UK government created this problem, and it was for them to fix it, which they now have done, although unnecessarily late in the day.

I hope that this letter provides useful clarity on these outstanding matters.

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.
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
Fergus Ewing MSP
Cabinet Secretary for the Rural Economy
Scottish Government
St. Andrew's House
Edinburgh
EH1 3DG

Dear Fergus,

Thank you very much for your letter to the Rt Hon. Michael Gove of 9 July about Direct Payments to farmers for the 2020 scheme year. I understand the concerns you have raised and I would like to reassure you that we are taking action in good time on this issue.

As you set out in your letter, Article 137 of the current Withdrawal Agreement disappplies Regulation (EU) No. 1307/2013 for the 2020 scheme year. This regulation is the basis for making Direct Payments to farmers. If an agreement which includes a transition period is agreed and ratified by Parliament, we would need primary legislation in force and regulations made by the end of 2019 to reapply and amend that Regulation, and that connected to its implementation. Such a fix will only be needed in the event of a deal with the EU this year and you can be satisfied that we will make sure new legislation is in place in good time. Should this issue materialise, the UK Government will of course be seeking legislative consent. If you are content with the solution and the accompanying devolution analysis, we will then follow the usual process for legislative consent in due course.

If the UK leaves the EU without a deal that Regulation, as amended by the EU Exit SIs, will become domestic law on 31 October 2019 pursuant to the European Union (Withdrawal) Act 2018. This will allow each part of the UK to make payments to farmers until the end of the 2020 scheme year. I understand that our officials are in frequent contact and working closely on these issues.

Please be assured that my Department is preparing for all eventualities. If it proves to be needed, I am confident that the legislation can be in place for the 2020 scheme year.

I greatly appreciate the cooperation from you and your officials on this matter, and look forward to working together in the future.

I am copying this letter to George Eustice MP, Minister of State for Agriculture, Lesley Griffiths AM, Minister for Environment, Energy and Rural Affairs, Dennis McMahon, Permanent Secretary at DAERA, and the Secretaries of State for Scotland, Wales and Northern Ireland.

Thank you again for your letter.

With every good wish,

Theresa Villiers
DIRECT PAYMENTS TO FARMERS (LEGISLATIVE CONTINUITY) BILL

I am writing regarding the Direct Payments to Farmers (Legislative Continuity) Bill ahead of its introduction to Parliament. I understand our officials have had discussions on our proposals, and I am grateful for the constructive manner of those discussions and the contribution of your officials. I have attached a copy of the draft Bill. I would be grateful if this is held in confidence until the Bill is introduced.

The Withdrawal Agreement disapplies Regulation (EU) No. 1307/2013 for the 2020 scheme year. This is the basis for making direct payments to farmers in each part of the UK. If the Withdrawal Agreement is ratified by Parliament, the UK Government will introduce the Bill which will reapply and amend that Regulation, and that connected to its implementation. This will allow for direct payments to be made to farmers in each part of the UK in 2020.

Defra officials have been working closely with their counterparts in the Scottish Government over the last few months, with draft clauses first being shared in July. The provisions of the Bill extend to the whole of the United Kingdom. It is the view of the UK Government that all clauses contain provision within the legislative competence of the Scottish Parliament, in relation to agriculture, in order to make direct payments to farmers in Scotland for the 2020 scheme year.

My officials are preparing a final version of the Bill ready for introduction, and as such the final structure of the Bill may change. I will ensure your office is updated with the final version of the Bill once available.

I would be grateful if you could write, by 23 October, to confirm whether you agree with this devolution analysis and indicate if you would be content, in principle, to begin the legislative consent process in the Scottish Parliament. Due to the importance of passing this legislation in a short timeframe, I would also welcome your support in expediting the legislative consent process.

Due to wider Parliamentary circumstances, I cannot provide definitive timings on when the Bill will be introduced. I would like to thank Scottish Government officials for their continued cooperation on this matter and I hope we continue our close ways of working together in the future.
I am copying this letter to the Secretary of State for Environment Food and Rural Affairs and the Secretary of State for Scotland.

GEORGE EUSTICE MP
DIRECT PAYMENTS TO FARMERS (LEGISLATIVE CONTINUITY) BILL

I wrote to you in October regarding the Direct Payments to Farmers (Legislative Continuity) Bill ahead of its planned introduction to the UK Parliament. Following the general election, I can confirm that it remains the government’s intention to introduce the Direct Payments Bill in early January.

The provisions of the Bill extend to the whole of the United Kingdom. It therefore remains the view of the UK Government that all clauses contain provision within the legislative competence of the Scottish Parliament, in relation to agriculture, in order to make direct payments to farmers in Scotland for the 2020 scheme year.

The drafting of the Bill is largely unchanged since the version shared with you in October. My officials will be in discussion with yours about a potential amendment which will give certainty on financial ceilings in light of the Bew Review. The Bill is still being finalised. I will ensure your office is updated with the final version of the Bill before introduction.

I would be grateful if you could write, by 6 January, to confirm whether you agree with the devolution analysis that all clauses within this Bill contain provision within the legislative competence of the Scottish Parliament. I would be grateful if you could also indicate if you would be content, in principle, to begin the legislative consent process in the Scottish Parliament. Our officials have discussed the importance of passing this legislation in a short timeframe, and I would also welcome your support in expediting the legislative consent process in this case.

I am also writing to notify you that it is also my intention to lay two Direct Payment Statutory Instruments under this Bill. Drafts have been shared with your officials and we will keep them updated as we discuss and finalise these SIs. As the proposed SIs contain devolved policy whose application extends to Scotland, I will write at a later date to seek your agreement prior to laying these SIs.

Due to wider parliamentary circumstances, I cannot provide definitive timings on when the Bill will be introduced. I would like to thank Scottish Government officials for their continued cooperation on this matter and I hope we continue our close ways of working together in the future.
I am copying this letter to the Secretary of State for Environment Food and Rural Affairs and the Secretary of State for Scotland.

GEORGE EUSTICE MP
10 January 2020

Dear George,

Thank you for your letter of 20 December 2019, in relation to the Direct Payments to Farmers (Legislative Continuity) Bill, which follows on from your letter of 21 October, which preceded a delay in the introduction of the Bill.

As you will be aware, I wrote to the then Secretary of State on 9 July requesting that the UK Government take steps immediately to ensure that a legislative solution is in place to prevent the catastrophic situation, that in the event of an EU exit deal being agreed, there is no legal basis to make support payments to farmers in Scotland and indeed across the UK.

I am therefore pleased that our officials have been in discussion and that a Bill was introduced into the UK parliament on 9 January 2020.

I agree that the Bill’s provisions are generally within the legislative competence of the Scottish Parliament, in relation to agriculture. Clause 5 of the bill confers a power on the Secretary of State to be able to increase the total amount of direct payments that could otherwise be granted in relation to claim year 2020. I am content to agree to Clause 5, however this is only on the basis that it relates to scheme year 2020 alone as the block grant should be utilised to transfer over funding in future so that the Scottish Government is empowered to make the decisions on utilisation of funding. We would also expect Bew monies to be received via the Block grant but note that as Clause 5 is not a regulation making power, the Secretary of State will need Scottish Ministerial consent before increasing the ceiling.

I am still content to agree in principle to your request to begin the legislative consent process in the Scottish Parliament and a legislative consent motion for this bill has been introduced into the Scottish parliament today. there are still a few technical issues that our legal officials are discussing around the supporting secondary legislation.
You will be aware of the Scottish Government’s position that we do not intend to bring forward any legislative consent motions for Brexit-related provisions without an undertaking the Scottish Parliament’s decisions will be respected, except in the most exceptional of circumstances.

Therefore, my decision to begin the legislative consent process in relation to this Bill has been taken after considering the exceptional circumstances which exist in this instance, and is made exceptionally and without prejudice to future decisions on legislative consent for EU withdrawal related provision.

I am somewhat dismayed however, that it has taken so long to get to this point when this issue has been known for some time. I would therefore ask for an assurance from the UK Government that this Bill and the 2 SIs you mention will be expedited to ensure they are in force, in good time prior to exit day, and that there is a legal basis to make the vital support payments to Scotland’s farmers and crofters, and avoid a financial disaster for our rural businesses and economy.

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

Yours sincerely,

FERGUS EWING
Dear Fergus,

I am writing to you following my previous letter which sought agreement to the Direct Payments to Farmers (Legislative Continuity) Bill. As per clause 3(2) of the Bill, I am now writing to seek your consent to lay two SIs under this Bill. I should be grateful of this in advance of the intended laying dates.

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<td>Made affirmative</td>
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I would like to express my continued appreciation for the positive cooperation that exists between our officials that has enabled this work to progress so effectively to date.

I am copying this letter to the Secretary of State for Scotland.

George Eustice MP

GEORGE EUSTICE MP
George Eustice MP
Minister of State
Defra
Seacole Building
2 Marsham Street
London
SW1P 4DF

23 January 2020

Dear George,

The Direct Payments to Farmers (Legislative Continuity) Bill
The Rules for Direct Payments to Farmers (Amendment) Regulations 2020
The Financing, Management and Monitoring of Direct Payments to Farmers (Amendment) Regulations 2020

Thank you for your letter of 20 January seeking the consent of the Scottish Government to lay two SIs under the Direct Payments to Farmers (Legislative Continuity) Bill.

I can confirm that the Scottish Parliament approved on 16 January the Legislative Consent Motion that I had lodged for the Bill.

I share your appreciation that our respective officials have been able to progress the work on the SIs for this Bill. The timescales that the UK government have proposed mean that the Scottish Government cannot give the Scottish Parliament the expected time to consider these matters that is set out in the established notification protocol that I mention below.

I am concerned that there is now limited time remaining to have all the secondary legislation drafted and laid in our respective parliaments for 31 January.

You will be aware the Scottish Government has a protocol in place with the Scottish Parliament that requires us to obtain approval by the Scottish Parliament of the Scottish Government’s intention to consent to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to legislation falling within the legislative competence of the Scottish Parliament. In order to seek the views of the Scottish Parliament I have undertaken to treat these SIs as if the existing protocol applies to them. I will therefore be writing to the Scottish Parliament about the proposed SIs in terms of the protocol and when I receive their response I will write again to you to confirm the position.

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

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.gov.scot
I am copying this letter to the Secretary of State for Environment Food and Rural Affairs, The Secretary of State for Scotland, Lesley Griffiths AC/AM, Minister for Environment, Energy and Rural Affairs, Welsh Government and Dennis McMahon, Permanent Secretary, DAERA, Northern Ireland.

FERGUS EWING