

AGRICULTURE (RETAINED EU LAW AND DATA) (SCOTLAND) ACT 2020

EXPLANATORY NOTES

BACKGROUND

Pillar 2

Rural Development

56. Pillar 2 of the CAP is the financial support provided through the European Agricultural Fund for Rural Development (“the EAFRD”) to promote sustainable rural development throughout the EU.
57. The EAFRD operates through programmes prepared by Member States and approved by the Commission (which co-funds them). Member States submit either a single rural development programme, or a set of regional rural development programmes, for each seven-year programming period.
58. The majority of Pillar 2 expenditure is on environmental schemes which bring public benefit and that the market would not always consider, for example environmental land management through agri-environment and forestry schemes.
59. As with direct payments, the Rural Development Regulation may be regionalised, and has been in the UK in line with devolution. The UK therefore submits four rural development programmes under Article 11 of the Rural Development Regulation,¹ one for each country in the UK. The current Scottish programme is the “Scottish Rural Development Programme” (SRDP) 2014 – 2020.²
60. The SRDP sets out the measures, in line with Articles in the Rural Development Regulation, under which financial support is provided. The support is generally made available in the form of a non-refundable grant, although Member States have the option to use financial instruments and loans.
61. Funding is generally grouped together in “schemes”, and the current SRDP includes the following:
 - Less Favoured Area Support Scheme (LFASS), providing support to farming businesses in remote and constrained rural areas,
 - Forestry Grant Scheme, providing a range of grants for woodland creation, agro-forestry, tree health, woodland improvement, processing and marketing and sustainable management of forests,

¹ See <http://www.legislation.gov.uk/eur/2013/1305/article/11> for the EU law version.

² More information can be found at <https://www.gov.scot/policies/agriculture-payments/scottish-rural-development-programme-srdp/>.

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- Agri-Environment Climate Scheme (including support for organics and footpaths), which provides targeted support for land managers to undertake management and capital work for environmental purposes,
 - Beef Efficiency Scheme, to deliver economic and environmental improvements in the beef sector,
 - New Entrants, which provides start-up grants for new entrant young farmers of up to 40 years old, and capital funding for new entrants regardless of age to improve their business,
 - Crofting Agricultural Grant Scheme, which provides grants to improve crofts in order to help to sustain crofting business,
 - Small Farms Grant Scheme, which provides targeted support for small farms that face similar issues to crofters regarding sustainability,
 - Food Processing, Marketing and Co-operation, which supports small and medium sized enterprises in the food and drink sector with start-up grants for new enterprises, and business development grants,
 - LEADER,³ which provides opportunities for individuals, businesses and communities to come together and support rural development and provide long lasting benefits to the local area (and includes support for non-agricultural small businesses including farm diversification),
 - Knowledge Transfer and Innovation Fund (KTIF), which supports the sharing of innovative ways of improving working practices along with continuing support for Monitor Farms,
 - Farm Advisory Service, which provides advice and assistance to farmers, crofters and other land managers,
 - Broadband, which provides support for broadband provision in rural areas, and
 - Scottish Rural Network, which supports and promotes rural development through the sharing of ideas and best practice.
62. Financial support provided through each programme is intended to contribute to meeting the EU's priorities for Rural Development, which include objectives such as restoring, preserving and enhancing ecosystems related to agriculture and forestry.
63. The money for the support comes from both Europe through the EAFRD, and the Member States. Financial support must comply with the rules on state aid, except where a particular exemption operates for agricultural activities provided through the programme.

Financing of the CAP

64. For many years, the CAP was financed from a single fund, the European Agricultural Guidance and Guarantee Fund (EAGGF). On 1 January 2007, the EAGGF was replaced by two funds which form part of the EU's general budget: the European Agricultural Guarantee Fund ("the EAGF") which finances measures under Pillar 1, and the European Agricultural Fund for Rural Development (EAFRD) which finances measures under Pillar 2.
65. The legal basis for the setting up of the funds is Article 40(3) of the TFEU.

³ The acronym is French in origin i.e. *liaison entre actions de developement rural*. This translates as 'links between actions of rural development', as set out in this basic guide from the European Commission:

https://ec.europa.eu/agriculture/sites/agriculture/files/publi/fact/leader/2006_en.pdf.

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66. The Financial Memorandum⁴ that accompanied the Bill for this Act explains how the CAP has been funded in Scotland.

CAP reforms

67. The CAP has undergone five major reforms in recent decades, the most recent dating from 2013 when the legal framework was set for the current CAP in respect of the period 2014-2020.
68. On 1 June 2018, the European Commission presented legislative proposals for the CAP beyond 2020.⁵ These proposals aim to make the CAP more responsive to current and future challenges such as climate change or generational renewal, while continuing to support European farmers for a sustainable and competitive agricultural sector. As these proposals are still subject to agreement by the Member States, a two year transition period has been agreed, with the intention that the new legislative proposals (if agreed) would take effect in the EU from 2023.

Exiting the European Union

69. EU law was given effect in Scotland by the European Communities Act 1972 (the “1972 Act”).
70. The European Union (Withdrawal) Act 2018 (“EUWA”) repealed the 1972 Act with effect from exit day, whilst also preserving its continued effect in UK law during the transition period until IP completion day, which is currently due to be 31 December 2020 (see sections 1 and 1A of EUWA). The practical effect is that this will remove the constitutional basis for EU law having effect in the United Kingdom on IP completion day.
71. The basis in international law for EU law having effect in the UK was simultaneously extinguished by the operation of Article 50 of the Treaty on European Union, but the legal effect of EU law in the UK was also preserved during the transition period to IP completion day under Article 127 of the Withdrawal Agreement.
72. EUWA also provides for the retention of most of that law, as it stands on IP completion day, by converting it into a new body of domestic law. The effect is to adopt a rulebook and set of institutional arrangements that is – at least at first – close to that which currently exists under EU law.
73. This new body of domestic law is called “retained EU law”, and rolls the former EU law into national law under three distinct provisions:
- section 2 of the EUWA preserves EU-derived domestic legislation. This typically concerns the subordinate legislation made (usually, but not always, under the 1972 Act) or any primary legislation passed in order to implement one or more EU directives,
 - section 3 of the EUWA preserves direct EU legislation. This is defined as all EU regulations, decisions or tertiary legislation and certain parts of the EEA Agreement,⁶ and
 - section 4 of the EUWA preserves any directly effective residual rights, powers, liabilities, obligations, restrictions, remedies and procedures in EU law, subject to several specified exceptions.
74. Separately, Article 137 of the Withdrawal Agreement dis-applied EU direct payment rules for the 2020 claim year. Those rules were therefore converted into domestic

4 <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/agriculture-retained-eu-law-and-data-scotland-bill/introduced/financial-memorandum-agriculture-retained-eu-law-and-data-scotland-bill.pdf>

5 https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap_en

6 See <https://www.efta.int/eea/eea-agreement>.

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law on 31 January 2020 by section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020. Those rules are, as modified, now retained EU law.

75. This retained EU law will otherwise take effect at the end of the transition period.
76. The UK is also retaining:
 - most general principles of EU law as they existed on IP completion day,
 - most rights and obligations that currently exist in domestic law because of section 2(1) of the 1972 Act as they exist on IP completion day, and
 - relevant case law of the Court of Justice of the European Union issued before IP completion day (though the UK Supreme Court and High Court of Justiciary need no longer follow it).
77. The UK is not, however, retaining the Charter of Fundamental Rights of the European Union, EU directives themselves, the principle of the supremacy of EU law, or the Francovich principle of state liability (in relation to post-exit facts).
78. The EUWA also provides a scheme that determines the constitutional status of these elements of former EU law. Whereas previously the principle of supremacy of EU law would have given all EU law priority over any domestic law or legislation, the same is not true for retained EU law.
79. EU law retained under section 2 of the EUWA already has a domestic status, as it is either in an act of the UK or Scottish Parliament or in subordinate legislation (mainly but not exclusively made under the 1972 Act).
80. EU law retained under sections 3 and 4 of the EUWA, however, is neither primary nor secondary legislation. It is instead a new category of domestic law subject to bespoke rules determining how it may be modified. Section 7 and schedule 8 of the EUWA sets out those rules.
81. The status of retained EU law not falling into existing domestic categories is defined by section 7 of the EUWA. It subdivides retained direct EU legislation into two categories:
 - retained direct “principal” EU legislation, and
 - retained direct “minor” EU legislation.
82. These two categories do not directly correspond to “primary” and “secondary” legislation, which are the normal distinctions drawn in domestic law. Instead, the EUWA sets out the rules that govern how those two categories of law can be modified or repealed, and by what type of conventional domestic legal instrument.
83. The key difference between “minor” and “principal” retained direct EU legislation is that minor legislation can be modified by secondary legislation, but principal legislation must be modified by primary legislation unless and to the extent that the provisions under which any secondary legislation is made provide otherwise.
84. The CAP Regulations as defined in section 1 of the Act are for the most part principal EU legislation, and it follows that the express powers in Part 1 of the Act are required in order to enable the Scottish Ministers to modify those Regulations after exit.
85. EU law applies in all the Member States, and so confers duties and powers on the European Commission including, for example, the power to make EU implementing and delegated legislation. It follows that retained EU law needs to be modified to correct any provisions which would cease to operate, or not be appropriate, outside of the EU. These changes (known as ‘deficiency fixes’) have effect from IP completion day in measures made by and under the EUWA. Deficiency fixes in respect of retained Direct Payments legislation made by and under the Direct Payments to Farmers (Legislative Continuity) Act 2020 took effect on exit day.

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86. The CAP rules as they form part of retained EU law will therefore have effect subject to those deficiency fixes, which include for example powers for the Scottish Ministers to make subordinate legislation on matter formerly delegated to the Commission.