

*These notes relate to the Agriculture (Retained EU Law and Data)
(Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

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

EXPLANATORY NOTES

BACKGROUND

Common Agricultural Policy (CAP)

3. The description of the Common Agricultural Policy (“CAP”) that follows is to aid the understanding of the effect of Part 1 of this Act, which makes provision in relation to the former EU CAP rules as they will have effect as retained EU law¹ under the European Union (Withdrawal) Act 2018 (the “2018 Act”),² following the UK withdrawal from the EU on 31 January 2020.
4. The CAP is the EU policy to provide financial support to farmers in Member States. It is said to have two “pillars”. Pillar 1 provides for direct payments to farmers, and also covers common market organisation (CMO). Pillar 2 provides for measures that support rural development, and in particular good environmental outcomes, farming productivity, socio-economic development and rural growth.
5. The CAP is managed and funded at European level from the resources of the EU budget. The majority of CAP funds are allocated to direct payments, which is based on the amount of land the recipient owns.
6. The declared objectives of the CAP are as follows:³
 - To support farmers and improve agricultural productivity, ensuring a stable supply of affordable food,
 - To safeguard European Union farmers to make a reasonable living,
 - To help tackle climate change and the sustainable management of natural resources,
 - To maintain rural areas and landscapes across the EU, and
 - To keep the rural economy alive by promoting jobs in farming, agri-foods industries and associated sectors.

¹ See paragraphs 69 to 86 below.

² The 2018 Act has been relevantly amended by the:

(1) (1) [European Union \(Withdrawal Agreement\) Act 2020 \(c.1\)](#), which implemented the Withdrawal Agreement between the UK and the EU as considered and agreed at European Council on 17 October 2019, and

(2) (2) [Direct Payments to Farmers \(Legislative Continuity\) Act 2020 \(c.2\)](#).

The Agreement provides for a transitional period ending on 31 December 2020. Under the terms of the Agreement, most EU law would continue to apply in the UK during the transition period; however, Article 137 of the Withdrawal Agreement stipulated EU Direct Payments regulations did not apply in the UK for the 2020 claim year.

Exit day for the purposes of the 2018 Act, now known as IP completion day, is at the end of the transitional period. EU legislation will generally become retained EU law on IP completion day.

³ https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en

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7. Within the UK, agriculture is devolved and therefore the Scottish Ministers are responsible for rural support, which includes implementing the CAP in Scotland.
8. The legal framework of the CAP is to be found in a series of directly applicable EU regulations that will, as modified for that purpose, become retained EU law after exit. The 5 basic acts (broadly equivalent to UK primary legislation) are:
 - Regulation [1305/2013](#)⁴ (“the Rural Development Regulation”): This Regulation establishes support for Rural Development by the European Agricultural Fund for Rural Development,
 - Regulation [1303/2013](#)⁵ (“the common provisions Regulation”): This Regulation lays down common provisions on EU funds, and in particular on the European Agricultural Fund for Rural Development,
 - Regulation [1306/2013](#)⁶ (“the Horizontal Regulation”): This Regulation covers the financing, management and monitoring of the Common Agricultural Policy, and in particular it provides for cross-cutting measures that apply to all areas of the CAP,
 - Regulation [1307/2013](#)⁷ (“the Direct Payments Regulation”): This Regulation establishes rules for Direct Payments to farmers under support schemes within the framework of the CAP, and
 - Regulation [1308/2013](#)⁸ (“The Single CMO Regulation”): This Regulation establishes a common organisation of the markets in agricultural products (“CMO”).
9. In addition, Regulation [1370/2013](#) provides for measures in respect of, and rules on, aid and refunds and similar matters as regards agricultural products and the CMO.
10. There is a body of EU subordinate legislation in the shape of delegated and implementing acts made under powers in the basic acts, which set out further detailed provisions in relation to the CAP.
11. There is also a body of national implementing legislation, including Scottish statutory instruments made by the Scottish Ministers as regards devolved matters in Scotland.

Pillar 1

Direct payments

12. Direct payments are a form of income support and are aimed at helping to protect a farmer’s or crofter’s income from market volatility. The payments are generally decoupled from production, and are not means tested. They are based on the area farmed and accompanying payment “entitlements”.
13. Direct payments rules for the 2020 claim year were rolled over into domestic law on 31 January 2020 by section 1 of the [Direct Payments to Farmers \(Legislative Continuity\) Act 2020 \(c.2\)](#).
14. Direct payments schemes deliver annual payments to farmers in return for compliance with certain conditions. Some of these schemes are mandatory, while others are run at

4 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1305>. The version that will become retained EU law on exit day will include ‘deficiency fixes’ made under the European Union (Withdrawal) Act 2018. The same is true for all the basic acts except so far as they relate to direct payments for claim year 2020, which became retained EU law on 31 January 2020 under the Direct Payments to Farmers (Legislative Continuity) Act 2020.

5 The EU law version can be found here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1303>.

6 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1306>.

7 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1307>. See also footnote 5 in that respect.

8 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1308>.

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the discretion of the Member States who have a degree of flexibility on, for example, eligibility conditions, calculation of payments, and scheme conditions.

15. Member States have the option to apply direct payment schemes on a regional basis, which the UK has done in order to reflect devolution. Thus, Scottish direct payment schemes are different from those in the rest of the UK, although they share common features as they are based on the EU framework.
16. The current Scottish direct payment schemes are:
 - The “Basic Payment Scheme” (BPS), which is the main direct payment scheme. It is an area-based scheme with payments calculated according to the area of land claimed upon, and acts as a safety net for farmers and crofters by providing a basic level of income support.
 - The “Greening” payment, which provides a top-up payment in return for carrying out agricultural practices beneficial for the climate and the environment.
 - The Young Farmer Scheme, which provides a top-up payment to young farmers under 40 years of age.
 - Voluntary Coupled Support (VCS), which includes the “Scottish Suckler Beef Support Scheme” (SSBSS) and the “Scottish Upland Sheep Support Scheme” (SUSSS). These schemes provide a payment linked to farm production to maintain livestock numbers.
17. In order to be eligible to receive a direct payment, farmers, crofters and land managers must submit an application form every year and meet the BPS eligibility criteria and, where relevant, the additional conditions for the greening payment, the Young Farmer Scheme and the VCS schemes.
18. Eligible farmers, crofters and land managers must comply with greening practices and rules concerning food safety, animal health, plant health, the environment, the protection of water resources, animal welfare and the condition in which farmland is maintained. This is referred to as “cross compliance”. Failure to meet cross compliance requirements could result in a reduction of payments or, in extreme cases, no payments.
19. Payments are calculated in accordance with a range of additional factors including the payment region, greening payment rates, young farmer payment and the VCS schemes. There are three payment regions in Scotland:
 - Payment Region 1, which includes better quality agricultural land that has been used for arable cropping, temporary grass and permanent grass,
 - Payment Region 2, which includes higher quality rough grazing in a Less Favoured Area (“LFA”), and
 - Payment Region 3, which includes lower quality rough grazing in an LFA.

Eligibility for BPS

20. Regulation [1307/2013](#) includes several conditions that farmers and crofters have to meet each year in order to be eligible to receive payments; these include being an “active farmer”, having eligible land, and valid payment entitlements. Farmers can apply every year.

The Young Farmers’ Scheme

21. The Young Farmer scheme is designed to encourage generational renewal and attract new entrants to the industry. Under the scheme, young farmers, who must also be newcomers to the industry or have set up their farms in the previous five years, can

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apply for an extra payment on top of their BPS payment for the first five years of their business.

22. It is mandatory for Member States to apply this scheme and to use up to 2% of their national budget allocation to fund the payments.
23. In Scotland, the young farmer payment is worth up to 25% of the average value of the payment entitlements held by the young farmers, multiplied by the number of entitlements they use to claim BPS (up to a maximum of 90). The exact percentage, however, will depend on how many farmers apply each year.

Greening

24. Greening was introduced from 2015 as part of the 2013 CAP reforms to improve the environmental performance of farming. A new Greening payment “for agricultural practices beneficial for the climate and environment” was introduced, and is paid on top of the BPS payment.
25. It is mandatory for applicants to the BPS to comply with the Greening requirements, which cover permanent grassland, crop diversification and ecological focus areas (where relevant on their land) in order to receive the Greening payment.
26. It is also a mandatory requirement for Member States to allocate 30% of their direct payment budget to the Greening payment.

Voluntary Coupled Support (VCS)

27. Under the CAP, the link between the receipt of income support payments and the production of specific products has been progressively removed (‘decoupled’). This is to avoid overproduction of certain products and to make sure that farmers are responding to genuine market demand.
28. In some situations, however, targeted aid to a specific agricultural sector or sub-sector may be needed as it is undergoing economic difficulties. The VCS scheme aims to prevent the escalation of these difficulties, which could cause abandonment of production with a knock-on effect on other parts of the supply chain or associated markets.
29. The Direct Payments Regulation allows Member States to continue to link (couple) a limited amount of income support payments to certain sectors or products, subject to various conditions and strict limits to mitigate the risk of market distortion. This support scheme is known as Voluntary Coupled Support.
30. The sectors that are potentially eligible for VCS are cereals, oilseeds, protein crops, grain legumes, flax, hemp, rice, nuts, starch potato, milk and milk products, seeds, sheepmeat and goatmeat, beef and veal, olive oil, silkworms, dried fodder, hops, sugar beet, cane and chicory, fruit and vegetables and short rotation coppice.
31. In Scotland, the two VCS schemes designed to try and address declining livestock numbers are the:
 - Scottish Suckler Beef Support Scheme (SSBSS), and
 - Scottish Upland Sheep Support Scheme (SUSSS).
32. The SSBSS provides additional support, on top of the BPS, to specialist beef producers. Payments are made based on the numbers of eligible animals declared. Eligible animals are male and female calves, with at least 75% beef genetics, born on a Scottish holding and kept there for at least 30 days.
33. The SUSSS provides additional support, on top of the BPS, to help sheep producers farming in Scotland’s rough grazing areas maintain their sheep flocks. Payments are

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made based on the numbers of eligible animals declared. Eligible animals are ewe hoggs (female sheep) born on Scottish holdings with poor quality rough grazing. The ewe hoggs must be less than 12 months old at the start of a retention period.⁹ Payments will be made up to a maximum of one ewe hogg per four hectares of land claimed.

34. For that purpose, a holding qualifies as being in a rough grazing area if:
- 80% or more of the agricultural land is in basic payment region three, and
 - no more than 200 hectares is good quality agricultural land in basic payment region one.

Payments and reductions

35. Direct payments are made annually, with the payment window opening in December. The amount to be paid to a farmer or crofter depends upon a number of factors including the number of payment entitlements and eligible hectares, the payment region, the greening payment rate, whether that farmer is a young farmer, and whether that farmer is eligible for a VCS payment.
36. There is a mandatory requirement in Article 11 of the Direct Payments Regulation, that where a BPS payment to be granted to a farmer for a given calendar year exceeds €150,000, the sum in excess of that amount must be reduced by 5%. In addition, Scotland has applied a cap, or upper limit, of €600,000 on all BPS payments.

Cross-compliance rules, inspections and penalties

37. Cross-compliance is described in paragraph 18 above.
38. Cross-compliance rules are as set out in Articles 91 to 95 of, and Annex II to, the Horizontal Regulation and comprise the:
- statutory management requirements, and
 - good agricultural and environment conditions.
39. There are also national implementing rules in the [Common Agricultural Policy \(Cross-Compliance\) \(Scotland\) Regulations 2014 \(S.S.I. 2014/325\)](#).
40. The Scottish Government's Rural Payments and Inspections Division (SGRPID) carries out inspections in Scotland to verify that all cross-compliance requirements are being met. Failure to meet these requirements will lead to financial penalties being applied to the payments.
41. Under existing CAP rules, there is no ability to waive penalties unless there is an event outside the farmer's control. This is known as force majeure or exceptional circumstances, and penalties can be waived if appropriate. For example, inspections were suspended during the 2007 Foot and Mouth Disease outbreak but penalties were still applied where breaches were discovered.
42. A false declaration, whether made deliberately or recklessly, may lead to criminal prosecution.

Common Organisation of Markets (CMO)

43. The common organisation of agricultural markets, known as the CMO, is an integral element of the CAP.¹⁰ It is part of Pillar 1, as more fully described in the Policy Memorandum¹¹ that accompanied the Bill for this Act.

⁹ A retention period is where claimed animals must be retained on the holding from 1 December in the year of the claim to 31 March the following year.

¹⁰ Prior to 2007, there were 21 separate common market organisations covering different markets and making different rules. These have now been brought together but the CMO acronym remains in use.

44. The basic act is the CMO Regulation.¹² It is intended to provide a safety net for agricultural markets through the use of market support tools, exceptional measures and aid schemes for certain sectors (in particular fruit and vegetables and wine). It is also intended to encourage producer cooperation through producer organisations and specific rules on competition, and to lay down marketing standards for certain products.¹³
45. The CMO has an internal aspect covering market intervention and rules on marketing standards and producer organisations, and an external one covering trade with third countries (for example import and export certificates, import duties, administration of tariff quotas, export refunds). The CMO deals with the competition rules applicable to businesses, rules on State Aid for agriculture, and the reserve fund for crises in the agricultural sector.
46. For the purposes of understanding the provisions of this Act, the key parts of the CMO Regulation (and relevant delegated and implementing regulations) are:

Market disturbance

47. Articles 219 to 222 of the CMO Regulation provide for market disturbance. Generally, market disturbance describes periods when prices are either fluctuating or rapidly increasing or decreasing. There can be various causes of market disturbance. For example, a fall in demand due to animal disease risks or a sudden increase in supply due to a major export market refusing to accept certain goods.

Market intervention

48. Articles 8 to 21 of the CMO Regulation provide for market intervention in the form of public intervention and private storage aid. There are also a number of delegated and implementing acts which sit beneath these Articles. These provisions aim to reduce supply when prices are low and increase supply when prices rise. They are, therefore, closely linked to the market disturbance provisions. These measures are used far less than in previous decades, but have been used to deal with market disturbance such as the closure of Russian markets to pigmeat in 2014 which led the European Union to provide private storage aid in 2015.¹⁴ The only current use of these interventions in the UK is in relation to skimmed milk powder.
49. As a general description, through public intervention the Member State (or States) will purchase and store the products directly until such time as they can be disposed of. The granting of aid for private storage is a form of financial assistance paid by the Commission to private operators so that they will store produce rather than sell it on the market until such time as the price rises.

Aid in the fruit and vegetable sector

50. Articles 32 to 38 of the CMO Regulation allow Member States to provide financial aid to the fruit and vegetable sector, known as the Fruit and Vegetable Scheme. Under this scheme, aid can be granted to producer organisations in these sectors.
51. The granting of the aid is subject to conditions contained in these Articles. In order to qualify, the producer organisation must implement a structured plan called an operational programme. The aim of an operational programme is to improve the producer organisation's performance and skills in marketing, product quality and environmental considerations.

11 <https://betaproxy2.parliament.scot/-/media/files/legislation/bills/current-bills/agriculture-retained-eu-law-and-data-scotland-bill/introduced/policy-memorandum-agriculture-retained-eu-law-and-data-scotland-bill.pdf>

12 See the footnotes to paragraph 8 for links to the EU law versions of the CAP basic acts, including the CMO Regulation.

13 https://eur-lex.europa.eu/summary/glossary/common_agricultural_markets.html

14 https://ec.europa.eu/agriculture/newsroom/193_en

Marketing standards and carcass classification

52. Marketing standards in the CMO are a body of detailed rules which govern the quality of agricultural products and ensure that certain information is provided to consumers. Carcass classification is a process which takes place in a slaughterhouse, and is used to calculate payments due to the producer from the slaughterhouse and also to support the market intervention powers.
53. In the CMO Regulation, the provisions on marketing standards are contained in Articles 73 to 91. These provisions are a mix of obligatory and discretionary rules. The rules do not apply to all products but only to the sectors and products listed in Article 75, which also lays down the standards which can be established for those products. Examples include technical designations and sales descriptions, criteria for appearance, and specific substances used in production. Where marketing standards apply to a product, Article 73 states that they “may only be marketed in the European Union if they conform to those standards”. Other provisions of the CMO Regulation provide detailed rules for the setting of marketing standards, including for specific products. The marketing standards themselves are set out in product specific implementing or delegated regulations, and there is a regime of domestic implementing legislation.
54. Provision on carcass classification is contained in Article 10¹⁵ which defines the Union scales for classification of carcasses. These scales are mandatory for beef, veal and pigmeat and at the discretion of the Member States for goatmeat and sheepmeat (and are not currently applied in the UK). The Union scales provide a classification for the meat derived from a carcass, and therefore is a gauge for the price that the farmer receives.

The EU Food Promotion Scheme

55. The EU Food Promotion Scheme is established by [EU Regulation 1144/2014](#), and provides funding for information provision and promotion measures to increase the competitiveness and consumption of EU products.

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,¹⁶ one for each country in the UK. The current Scottish programme is the “Scottish Rural Development Programme” (SRDP) 2014 – 2020.¹⁷

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R1308>

¹⁶ See <http://www.legislation.gov.uk/eur/2013/1305/article/11> for the EU law version.

¹⁷ More information can be found at <https://www.gov.scot/policies/agriculture-payments/scottish-rural-development-programme-srdp/>.

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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,
 - 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,¹⁸ 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

¹⁸ The acronym is French in origin i.e. *liaison entre actions de développement 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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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.
66. The Financial Memorandum¹⁹ 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 2020.²⁰ 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

¹⁹ <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>

²⁰ https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap_en

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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,²¹ 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 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

²¹ See <https://www.efta.int/eea/eea-agreement>.

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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.
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.