

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

EXPLANATORY NOTES

COMMENTARY ON PROVISIONS

Part 1 – Retained EU law

Section 1 – Defined terms

97. This section defines terms used in Part 1 for the purposes of that Part.
98. It defines the “main CAP legislation” as being:
- the Direct Payments Regulation, the Rural Development Regulation, the Horizontal Regulation, and – so far as relating to the Rural Development Regulation - the Common Provisions Regulation (each of which are further defined in the section),
 - delegated or implementing regulations made by the EU in respect of those Regulations, and
 - subordinate legislation made in the UK, implementing or otherwise relating to those Regulations.
99. It also defines the “CMO Regulation”, which forms part of the CAP, but is not included in the main CAP legislation for the purposes of the Act.
100. All references in the Act to EU regulations are to be read as references to the regulations as incorporated into domestic law (i.e. as part of “retained EU law”) by virtue of section 3 of the European Union (Withdrawal) Act 2018 or section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020 (see section 24(1) of the Act).
101. It provides for “modify” to include amend, revoke and repeal, and states that any related expressions are to be interpreted accordingly. This in particular covers revocation in relation to subordinate instruments.

Section 2 – Power to simplify or improve CAP legislation

102. This section provides for the Scottish Ministers to be able, by regulations, to modify the main CAP legislation, but only if they consider that the modification would simplify or improve the operation of the legislation.
103. An example of the type of simplification or improvement that could be made using this power involves the CAP Pillar 2 support for less favoured areas (LFA). Under EU CAP legislation the options currently open to the Scottish Government are to continue with the “Less Favoured Area Support Scheme” (LFASS) but with a much reduced payment available to farmers in 2020, and then move to a replacement “Areas of Natural Constraint” (ANC) scheme from 2021. This power in the Act would provide an additional option as it would enable the Scottish Ministers to modify the retained CAP legislation to ensure that support can continue for farmers whose land is designated as

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being in an LFA under the current CAP, and who receive payments under LFASS. This will allow any changes to support for constrained areas to be considered as part of the future overall income support package for farmers and crofters.

104. Regulations made under this section which have not been subject to the affirmative procedure, are subject to the negative procedure. This is sometimes known as an ‘either way’ power, and the effect is that the Scottish Ministers can choose which procedure is to apply to any particular use of the power.

Section 3 – Power to provide for the operation of CAP legislation beyond 2020

105. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to modify the main CAP legislation in order to ensure that the provisions of the CAP legislation can continue to operate in Scotland for one or more years beyond 2020.
106. Subsections (2) and (3) provide that the power extends to determining for any year a national ceiling as referred to in Article 6 of the Direct Payments Regulation.¹ This ceiling sets a limit on the amount that can be paid out as direct payments.
107. The national ceiling for each Member State is as specified in Annex II to that Regulation, and that ceiling became part of retained EU law after exit (but see paragraph 109 below). Article 6, as it has effect as retained EU law, has also been modified so that it can be adapted by regulations made by the Secretary of State with the consent of each of the relevant authorities for Wales, Scotland and Northern Ireland. The Scottish Ministers are the relevant authority for Scotland.
108. Subsection (3)(b) allows the Scottish Ministers to confer functions on any appropriate person in the making of such a determination for any year.
109. As set out above, the current CAP framework provides for the period 2014 to 2020. The power will therefore enable the Scottish Ministers to modify the main CAP legislation for the purpose of ensuring that it will operate after 2020. For example, there is currently no ceiling for direct payments in respect of any year after 2020. The power can be used to specify a new ceiling or ceilings for the purposes of Article 6 of the Direct Payments Regulation so ensuring that direct payments can be made from 2021 onwards.
110. A separate power is required as provision extending the operation of the main CAP legislation may require to do more than just simplify or improve the operation of that legislation (for which see section 2).

Section 4 – Power to modify financial provision in CAP legislation

111. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to modify any provision of the main CAP legislation relating to the setting or determining of ceilings on the amounts of any payments or expenditure for any purpose under the legislation, or to the reallocation or transfer of amounts or proportions of such ceilings between or among different purposes under the legislation. Subsection (2) lists some of the specific provisions that may be modified under this power.
112. Provision that might be made under this power will include reducing the sum available to be spent under a particular ceiling (also known as “capping”), or provision giving effect to flexibility between the CAP Pillars (also known as “Pillar to Pillar Transfer”). It might also include changing the ceiling on the total amount of a rural development programme that may be devoted to technical assistance, currently set at 4% by Article 51 of the Rural Development Regulation.

¹ See <http://www.legislation.gov.uk/eur/2013/1307/article/6> for the EU law version of that Article.

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113. A modification of a “financial” provision may also be a simplification or improvement of the main CAP legislation (for which see section 2), but this power will be available when that is not the case which might for example be a consideration when capping a ceiling.

Section 5 – Duration of the powers under sections 2, 3 and 4

114. Subsection (1) provides that the powers in sections 2, 3 and 4 cannot be exercised by the Scottish Ministers after 7 May 2026, which is the expected date of the elections to follow the 2021 to 2026 session of the Scottish Parliament.
115. Subsection (2) ensures that the expiry of those powers does not affect the continuation in force of any regulations made under those sections prior to 7 May 2026.

Section 6 – Power to modify CAP legislation on public intervention and private storage aid

116. This section provides for the Scottish Ministers to be able, by regulations, to modify the CAP legislation governing public intervention and private storage aid,² as specified in subsection (3).
117. The power in section 6 of the Act allows these measures to be dis-applied temporarily or permanently, or to be otherwise simplified and improved.
118. The Scottish Ministers are able to decide whether regulations made under this section are to be subject to the negative or affirmative procedure (see paragraph 104 in that respect).

Section 7 – Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations

119. This section provides for the Scottish Ministers to be able, by regulations, to modify the CAP legislation governing aid for fruit and vegetable producer organisations, as specified in subsection (3).
120. Subsection (2) provides that the power in subsection (1) may only be used to make such modifications which the Scottish Ministers consider would simplify or improve the operation of provisions of that legislation.
121. The Scottish Ministers are able to decide whether regulations made under this section are to be subject to the negative or affirmative procedure (see paragraph 104 in that respect).

Section 8 – Power to revoke the EU Food Promotion Scheme

122. This section provides for the Scottish Ministers to be able, by regulations subject to the negative procedure,³ to modify the CAP legislation establishing the EU Food Promotion Scheme³ as specified in subsection (2), for the purpose of ensuring that it ceases to have effect in Scotland.
123. The Scheme aims to promote food from the EU, both within the EU and internationally. It combines programmes operating within single Member States and multi-national programmes. Quality Meat Scotland (QMS) received €1.2 million in the period 2015 to 2017 for a campaign to enhance knowledge of protected geographical indication symbols, and to stimulate demand for Scotch beef and Scotch lamb in northern Europe. There is however no significant ongoing benefit for Scotland, such that Ministers may consider it appropriate to revoke the Scheme.

² See paragraph 45 of the Policy Memorandum that accompanied the Bill for this Act for information about market intervention under the CMO, “private storage aid” is the purchase of product by public authorities and its removal from the market (“intervention purchasing”), or by paying private companies to store product rather than placing it immediately on the market.

³ See paragraph 49 of the Policy Memorandum that accompanied the Bill for this Act.

Section 9 – Marketing standards

124. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to make provision about standards to which certain products listed in section 10(1) must conform when marketed in Scotland (see also section 12 below).
125. Subsection (2) provides that regulations made under this section may in particular include provision about the matters specified in this subsection. Those matters are a non-exclusive list of the types of standards to which the products may be subject. The list mirrors the types of marketing standards which may be established in EU law under the CMO Regulation. These matters may affect how products are marketed to consumers (for example, how they are described at the point of sale) or may impose requirements during production (for example, the type of production method used, or the use of specific substances in production).
126. Subsection (3) provides that regulations made under this section may provide for enforcement of the provisions of the regulations, including in particular in respect of the matters specified in this subsection which include the creation of offences and the imposition of monetary penalties. A monetary penalty is a civil penalty rather than a criminal fine.
127. Subsection (5) has the effect that the Scottish Ministers must consult such persons as they consider are representative of the interests of persons likely to be affected before laying a draft of a Scottish statutory instrument containing regulations under this section before the Scottish Parliament.

Section 10 – Marketing standards: agricultural products

128. This section lists the agricultural products in respect of which the Scottish Ministers are able to make regulations under section 9. The list provides further detail of the products covered by reference to the detailed Annexes of the CMO Regulation.
129. Subsections (3) and (4) provide for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to amend the list of products in subsection (1) by adding or removing products, or by altering the description of the products

Section 11 – Carcass classification

130. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to provide for the classification, identification and presentation of bovine, pig and sheep carcasses by slaughterhouses in Scotland.
131. Subsection (2) provides that regulations made under this section may provide for enforcement of the provisions of the regulations, including in particular in respect of the matters specified in this subsection which include the creation of offences and the imposition of monetary penalties. A monetary penalty is a civil penalty rather than a criminal fine.
132. Subsection (4) has the effect that the Scottish Ministers must consult such persons as they consider are representative of the interests of persons likely to be affected before laying a draft of a Scottish statutory instrument containing regulations under this section before the Scottish Parliament.

Section 12 – Marketing standards and carcass classification: consequential amendments and savings

133. This section gives effect to the schedule of the Act, which makes modifications to the CMO Regulation providing for the effect of any regulations made under sections 9 and 11, and includes a saving provision in connection with those modifications.

134. Marketing standards in Scotland will be set by regulations made under section 9 of this Act. This section has the effect of removing what would otherwise be concurrent powers to establish marketing standards in the CMO Regulation.

Part 2 – Collection and processing of data

Section 13 – Defined terms

135. Subsection (2) defines “agricultural activity” to have the same meaning as in Article 4(1)(c) of the Direct Payments Regulation.⁴ However, this is subject to subsection (10) which enables the Scottish Ministers to amend this definition by regulations subject to the affirmative procedure.
136. Subsection (3) defines “animal” as meaning a vertebrate (other than a human) or invertebrate but does not include fish.
137. Subsection (4) defines an “agri-food supply chain” as a supply chain for providing individuals with items of food or drink. It further provides that the products in such a supply chain must have been produced using anything grown, or any animal kept, for agriculture or any animal taken from the wild.
138. Subsection (5) defines the persons who are in an agri-food supply chain. These are the persons who originally farmed (or took from the wild) the raw agricultural products, the persons who finally consume the products, and every person in between.
139. Subsection (6) defines the persons who are “closely connected” with an agri-food supply chain. These are persons who provide goods as specified, persons who provide services relating to animal or plant health or the safety or quality of food and drink, persons carrying on activities capable of affecting such health, safety or quality, and representative bodies.
140. Subsection (7) provides that persons carrying out activities capable of affecting such health, safety or quality as is mentioned in subsection (6)(b), are to be treated as connected with the supply chain for the purposes of section 14(1) and (2), but does not limit the generality of what is meant by “connected” with the supply chain.
141. Subsection (8) defines “processing” by reference to an operation performed on information, and sets out a non-exhaustive list of the types of such operations.
142. Subsection (9) provides definitions for “agriculture”, “plants”, and “seeds” in relation to this section of the Act.
143. Subsection (10) provides that the Scottish Ministers may, by regulations subject to the affirmative procedure, amend the definition of “agricultural activity”.

Section 14 – Agri-food supply chains: requirement to provide information

144. This section provides the Scottish Ministers with a power to require, in writing, any person in or closely connected with an agri-food supply chain to provide information about their activities connected with the supply chain.
145. Subsection (2) provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to impose requirements on persons in, or closely connected with, an agri-food supply chain to provide information about their activities connected with the supply chain.
146. The direct power in subsection (1) and measures under the regulation-making power in subsection (2) will attach to the same categories of persons and the same types of data. However, the two powers are appropriate as in some circumstances the most effective way to collect data is to request it by notice. This would be the case, for example, where

⁴ Regulation (EU) No 1307/2013

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data is to be requested from a group of persons and the identity of each of those persons is known. However, there are other cases where data cannot be collected directly as the details of the persons to whom the request relates are unknown or subject to change. In that case, the data would be more effectively gathered using the regulation-making power.⁵

147. Subsection (3) provides that the requirements under subsection (1) or (2) may not be imposed on individuals in the supply chain if they are in the supply chain for the reason that they or a member of their household are the ultimate consumers.
148. Subsection (4) provides that requirements under subsection (1) or (2) may not be imposed on persons in relation to any of their activities connected with the supply chain if the activity is not carried on for profit or reward. This exempts persons who are in an agri-food supply chain but only as a hobbyist or in an amateur capacity. For example, an allotment keeper who gives vegetables to a neighbour is in an agri-food supply chain but is excluded from this provision. However, subsection (5) provides that the exemption in subsection (4) does not apply where the activity being carried on other than for profit or reward is capable of affecting a matter mentioned in section 13(6)(b)(i) or (ii), namely animal or plant health, or the quality or safety of food.

Section 15 – Agricultural activity: requirement to provide information

149. This section provides the Scottish Ministers with a power to require, in writing, any person who carries on an agricultural activity in Scotland (and who is not a person in, or closely connected with, an agri-food supply chain) to provide information about that activity.
150. Subsection (2) provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to impose requirements on persons who carry on agricultural activities to provide information about those activities.
151. The reasons for including a direct power and a regulation-making power in this section are the same as for section 14. As with section 14, the distinction between the two powers is not the data which can be collected but rather the most effective way to collect it.
152. Subsection (3) provides that requirements under subsection (1) or (2) may not be imposed on persons in relation to an agricultural activity if the activity is not carried on for profit or reward. Similar to section 14(4), this exempts persons who are carrying on agricultural activities as a hobby or pastime. For example, a person who keeps a few animals to produce a small amount of wool or hides.

Section 16 – Provision of information etc.

153. This section relates to a requirement to provide information imposed under section 14(1) or (2) or 15(1) or (2). It sets out what a requirement under those sections may specify, such as how and when the information is to be provided, the types of processing the information may be subjected to, and the form in which information may be disclosed.

Section 17 – Purposes for which information may be required and processed

154. This section relates to a requirement to provide information imposed under section 14(1) or (2) or 15(1) or (2).
155. Subsection (2) provides that any requirement must specify the purposes for which the information is required and may be processed, and subsection (3) provides that they must be purposes which are listed in subsection (4). The information cannot be used for purposes which fall outside those stated in the requirement to provide information.

⁵ Please see paragraph 94 for information regarding the distinction between these powers.

156. Subsection (5) defines the terms “plants” and “public authority” in relation to subsection (4).

Section 18 – Limitations on the processing of required information

157. This section provides for limitations on the use of information provided in response to a requirement imposed under section 14(1) or (2) or 15(1) or (2).
158. Subsection (2) provides that information given in response to a requirement can only be processed for the purpose that was set out in that requirement, and subsection (3) states that this applies both to the person to whom the information is initially provided (which may be the Scottish Ministers or any other person specified in the requirement in accordance with section 16(2)(a)(i)) and any person to whom it is subsequently disclosed.
159. Subsection (4) specifies that any person to whom the information is subsequently disclosed cannot process the information in a way that is contrary to the terms on which it was disclosed.
160. Subsection (5) sets out that, where a requirement specifies a certain type (or types) of processing that information may be used for, that information may not be used for any other types of processing except in circumstances specified in the requirement.
161. Subsection (6) provides that the additional safeguards in subsections (7) and (8) apply where a person proposes to disclose information collected under the powers of this Part. They place restrictions on its disclosure, as a specific type of data-processing. The restrictions apply to any person making such a disclosure. Similar to the purpose limitation in subsection (2), this includes both:
- the initial recipient of the information (for example, the Scottish Ministers), and
 - any subsequent recipient who proposes to further disclose the information (for example, a contracted data processor operating in accordance with a data-sharing agreement).
162. So, for instance, the restrictions in this section would apply to any company or expert consultant contracted by the Scottish Government to conduct analysis of agricultural data on its behalf (for the purposes, say, of developing analysis to provide evidence for a range of policy options or modelling scenarios for contingency planning such as disease outbreak).
163. Subsection (7) safeguards certain commercially sensitive information from being disclosed in a non-anonymised form. It requires that, where the person making the disclosure considers that doing so would or might prejudice the commercial interests of any person (which includes both the person who provided the information and any other person), the information must be disclosed in anonymised form. The only exception to this is if the Scottish Ministers consider that it is in the public interest for the disclosure to be in some other form.
164. Subsection (8) clarifies that where a disclosure is not considered commercially harmful, but the requirement specified the form in which information may be disclosed, disclosure must not be in any other form (except where circumstances specified in the requirement apply to the disclosure).

Section 19 – Enforcement of information requirements

165. Subsection (1) provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to make provision for the enforcement of information requirements imposed under section 14(1) or (2) or 15(1) or (2). This will enable sanctions to be applied where any person fails to provide information, or provides false information.

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166. Subsection (2) clarifies that the provisions for enforcement include how compliance will be monitored and how non-compliance will be investigated and addressed.
167. Subsection (3) has the effect that, amongst other matters, the regulations may provide for the imposition of monetary penalties for non-compliance, and for the recovery of those penalties. A monetary penalty is a civil penalty rather than a criminal fine.
168. Subsection (4) defines “specified” and “specified manner”, and has the effect in particular that regulations may provide that the amount of a monetary penalty is framed by reference to the income, turnover or profits of a person.

Section 20 – Consequential repeals

169. This section repeals sections 78 to 81 of the Agriculture Act 1947 (power to obtain agricultural statistics, etc.). The repealed provisions provide for data-gathering powers which are replaced by the powers in Part 2 of the Act.

Part 3 – General

Section 21 – Regulations: supplementary

170. This section provides in subsection (1) for the powers of the Scottish Ministers in this Act to make regulations to include the power to make different provision for different purposes.
171. Subsection (1) also provides for the powers of the Scottish Ministers in this Act to make regulations to include a power to make incidental, supplementary, consequential, transitional, transitory or saving provision. Subsection (2) has the effect that provision made by virtue of that power may amend enactments, and subsection (3) has the effect that any regulations that modify any part of the text of an Act will always be subject to affirmative procedure.
172. Subsection (4), provides that regulations under this Act that create an offence may not provide for the offence to be punishable with imprisonment for a period exceeding 5 years in the case of conviction on indictment, and 12 months in the case of summary conviction.
173. Subsection (5) provides that this section does not apply to commencement regulations under section 26.

Section 22 – Requirement for new Scottish agricultural policy

174. Subsection (1) of this section requires the Scottish Ministers to lay a report before the Scottish Parliament on progress towards establishing a new Scottish agricultural policy.
175. Subsection (2) specifies what must be included in that report. In particular, the report must include details of the Scottish Ministers’ policies and proposals in relation to the six matters that are listed in paragraph (a). It must also include an outline of any legislation required to implement those policies and proposals, a timeline for when any such legislation will be introduced (as defined by subsection (4)), details of any consultations undertaken on proposed policies and legislation, and any other matter related to Scottish agriculture that the Scottish Ministers consider appropriate.
176. Subsection (3) provides that a report under subsection (1) must be laid before the Scottish Parliament no later than 31 December 2024.

Section 23 – Ancillary provision

177. Subsection (1) of this section provides for the Scottish Ministers to be able to make by regulations such incidental, supplementary, consequential, transitional, transitory or

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saving provision that they consider appropriate for the purpose of, or in connection with, or for giving full effect to the Act or any provision made under it.

178. Subsection (2) has the effect that such regulations may modify enactments.
179. Subsection (3) has the effect that regulations made under this section will be subject to the negative procedure, unless they modify the text of an Act in which case they will be subject to the affirmative procedure.

Section 24 – Interpretation and effect

180. The powers in Part 1 of the Act provide for the Scottish Ministers to be able to make provision that modifies or relates to retained EU law.
181. This section makes certain interpretative provision and also makes it clear that no provision in this Act may have an effect that is incompatible with EU law, as defined by section 126(9) of the Scotland Act 1998.
182. Subsection (1) provides that a reference in this Act to any EU regulation will be a reference to that regulation as it forms part of domestic law (that is, retained EU law) by virtue of either section 3 of the European Union (Withdrawal) Act 2018 or section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020.
183. This section also provides for the Scottish Ministers to be able, by regulations subject to the negative procedure, to specify any other enactment that ‘rolls over’ EU law into domestic law.
184. Subsection (2) provides that any provision of this Act, or any provision made under it, that could be incompatible with EU law can only come into effect after the provision of EU law with which it would be incompatible has ceased to have effect in Scots law by virtue of the UK’s withdrawal from the EU.

Section 25 – Crown application

185. Subsection (1) of this section has the effect that nothing in or under this Act makes the Crown criminally liable.
186. By virtue of subsection (2), however, the Lord Advocate may apply to the Court of Session for a declarator of unlawfulness in respect of any act or omission for which the Crown would be criminally liable but for this section.
187. Subsection (3) provides that the Crown exemption from criminal liability in subsection (1) does not affect the criminal liability of persons in the service of the Crown.

Section 26 – Commencement

188. This section provides for sections 5 and 21 to 27 to come into force on the day after Royal Assent, and for the Scottish Ministers to be able to commence by regulations the other provisions of the Act. The power to make regulations under this section includes the power to make different provision for different purposes, and to make transitional, transitory or saving provision.

Section 27 – Short title

189. This section provides for the short title of the Act, Agriculture (Retained EU Law and Data) (Scotland) Act 2020, by which it may be cited.

Schedule – Modifications of the CMO Regulation

190. The schedule is introduced by section 12.

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191. It provides for amendments of the CMO Regulation consequential on sections 9 and 11 of the Act, and makes certain savings provision in relation to those amendments.
192. The amendments in paragraph 1 have the effect that certain powers in the CMO Regulation will no longer be available in Scotland.
193. Paragraph 2 provides a saving provision for measures made by the Commission under the powers being amended. The effect is that those measures will continue to apply as retained EU law, and that any new measures will be made by the Scottish Ministers under the powers in the Act.