**DIRECT PAYMENTS TO FARMERS (LEGISLATIVE CONTINUITY) BILL**

**Memorandum from the Department for Environment, Food and Rural Affairs to the Delegated Powers and Regulatory Reform Committee**

## A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Direct Payments to Farmers (Legislative Continuity) Bill ("the Bill"). The Bill was introduced in the House of Commons on Thursday 9 January 2020. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

2. The Bill contains 9 clauses, 2 of which together confer 7 delegated legislative powers, and two schedules. For completeness, we have also provided information on one of the clauses which expands an existing power.

3. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

## B. PURPOSE AND EFFECT OF THE BILL

4. As a member of the EU, the UK has implemented the Common Agricultural Policy (CAP). The CAP is governed primarily by directly applicable EU regulations. As a consequence of the passage of the Withdrawal Agreement into law, a legislative gap will emerge with respect to the CAP legislation relating to Direct Payments to farmers after 31 January 2020. This is because, at the point of the UK's exit from the EU, the Withdrawal Agreement will disapply this legislation in the UK for the 2020 Direct Payments claim year. This was intended as a means of avoiding the United Kingdom being included in the European Union's next multi-annual budget cycle beginning in 2021 (and which covers CAP Direct Payments for

the 2020 claim year).

5. The Bill will address this legislative gap and is narrow in scope. It applies only to the 2020 Direct Payments claim year. It is focused on ensuring we have legislation in place to continue operating the existing Direct Payment schemes in the UK, which are currently worth over £2.5 billion per annum to UK farmers. It will do so by incorporating the EU Direct Payments legislation for the 2020 Direct Payments claim year into domestic law at the point of the UK's exit from the EU.

6. The delegated powers in the Bill will ensure that the Secretary of State and the devolved authorities can make regulations to amend that retained EU law to ensure it operates effectively for the 2020 claim year.

7. The territorial extent of the Bill is UK-wide to enable the government and the devolved administrations to continue to pay farmers in their territories. Where the Bill gives the Secretary of State delegated powers to modify the retained EU law relating to Direct Payments as it applies in or as regards Scotland, Wales or Northern Ireland, it requires the consent of the devolved administrations. As agriculture is a devolved competence, powers are also provided for the devolved administrations to make regulations to modify the retained EU law as it applies in or as regards to their territory.

8. In September 2019 the Government accepted the recommendations of the Bew Review concerning the allocation of farm support funding in the UK. It agreed that a greater share of the so-called 'convergence funding', an uplift of the financial ceiling for Direct Payments which was given by the EU to the UK, should for the period 2020-22 be allocated to Scotland and Wales, while the corresponding allocations for England and Northern Ireland should be maintained. The Bill will enable the Government to implement this decision with respect to the 2020 claim year.

## C. DELEGATED POWERS

**Clause 3(1)(a): Regulations in connection with the retention of EU legislation under section 1**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Made affirmative procedure*

Context and Purpose

9. At the point of the UK's exit from the EU, clause 1 of the Bill will incorporate the EU law in relation to Direct Payments for the 2020 claim year into domestic law. The delegated power in clause 3(1)(a) will allow the Secretary of State to make provisions in regulations which he or she considers appropriate to prevent, remedy or mitigate any failure or deficiency in that retained EU law. It enables the Secretary of State to ensure that the legislation works in a domestic context. For example, it will allow references to EU institutions to be replaced with domestic bodies and provisions not relevant to the UK to be omitted.

Justification for taking the power

10. The amendments needed to ensure the retained EU law on Direct Payments works effectively in a domestic context are numerous, detailed and technical, as evidenced by the operability amendments made to these regulations under the European Union (Withdrawal) Act which the regulations made under this clause will largely replicate. These types of amendment are better suited to regulations and, given the scale of the task, taking a power to make these amendments by regulations also ensures that we will be able to make any necessary further amendments should that be required.

11. This power will sunset at the end of the 2020 Direct Payments claim year. It will not be possible to make regulations under clause 3(1)(a) after 31 December 2020.

12. Where the Secretary of State uses the powers to modify the retained EU law

as it applies in or as regards to Scotland, Wales or Northern Ireland, it requires the consent of the relevant devolved administration.

Justification for the procedure

13. The made affirmative resolution procedure is sought as it is critical that the regulations are in force directly the UK leaves the EU so that there is no gap while operational legislation is put in place. Many farmers currently rely on Direct Payments for their profitability and it is therefore important that there is no gap in the operation of the scheme. The made affirmative procedure enables us to avoid such a gap, while nonetheless ensuring that Parliament will debate and scrutinise the regulations, which is appropriate given the monetary value of Direct Payments.

**Clause 3(1)(b): Regulations in connection with the retention of EU legislation under section 1**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative procedure*

Context and Purpose

14. At the point of the UK's exit from the EU, clause 1 of the Bill will incorporate the EU law in relation to Direct Payments for the 2020 claim year into domestic law. The power in clause 3(1)(b) will allow the Secretary of State to modify that retained EU law if the EU later modifies the EU Direct Payments legislation for the 2020 claim year.

Justification for taking the power

15. The Withdrawal Agreement specifies that the UK's domestic Direct Payments for claim year 2020 will benefit from the existing state aid exemption where they are equivalent to the scheme in the EU's Direct Payments legislation. If that legislation were to change after 31 January 2020 we would need to consider whether we

would need to similarly change our legislation to continue to benefit from the state aid exemption for claim year 2020. The power in clause 3(1)(b) allows the Secretary of State to amend the retained EU law on Direct Payments in such circumstances.

16. This power will sunset at the end of the 2020 Direct Payments claim year. It will not be possible to make regulations under clause 3(1)(b) after 31 December 2020.

17. Where the Secretary of State uses the powers to modify the retained EU law as it applies in or as regards to Scotland, Wales or Northern Ireland, it requires the consent of the relevant devolved administration.

Justification for the procedure

18. The affirmative procedure is considered appropriate to ensure Parliament debates and scrutinises the regulations, given the monetary value of Direct Payments.

**Clause 3(3)(a): Regulations in connection with the retention of EU legislation under section 1**

*Power conferred on: A devolved authority*

*Power exercised by: Regulations*

*Parliamentary Procedure: Made affirmative procedure*

Context and Purpose

19. The delegated power in clause 3(3)(a) will allow devolved authorities to make provisions in regulations where they consider it appropriate to prevent, remedy or mitigate any failure or deficiency in the retained EU law relating to Direct Payments as it applies in or as regards to their territory. It enables the devolved authorities to ensure that the legislation works in a domestic context in the event that the regulations made by the Secretary of State under the power in clause 3(1) do not

apply in their territory.

Justification for taking the power

20. The amendments needed to ensure the retained EU law on Direct Payments works effectively in a domestic context are numerous, detailed and technical, as evidenced by the operability amendments made to these regulations under the European Union (Withdrawal) Act which the regulations made under this clause will largely replicate. These types of amendment are better suited to regulations and, given the scale of the task, taking a power to make these amendments by regulations also ensures that the devolved administrations will be able to make any necessary further amendments should that be required.

21. This power will sunset at the end of the 2020 Direct Payments claim year. It will not be possible to make regulations under clause 3(3)(a) after 31 January December 2020.

Justification for the procedure

22. The made affirmative resolution procedure is considered appropriate as it is critical that the regulations are in force directly the UK leaves the EU so that there is no gap while operational legislation is put in place. The made affirmative procedure enables the devolved administrations to avoid a gap in the operation of the schemes.

**Clause 3(3)(b): Regulations in connection with the retention of EU legislation under section 1**

*Power conferred on: A devolved authority*
*Power exercised by: Regulations*
*Parliamentary Procedure: Affirmative procedure*

Context and Purpose

23. The delegated power in clause 3(3)(b) will allow the devolved authorities to modify the retained EU law in relation to Direct Payments, as it applies in or as regards to their territory, if the EU later modifies the EU Direct Payments legislation for the 2020 claim year.

Justification for taking the power

24. The Withdrawal Agreement specifies that the UK's domestic Direct Payments for claim year 2020 will benefit from the existing state aid exemption where they are equivalent to the scheme in the EU's Direct Payments legislation. If that legislation were to change after 31 January 2020 the devolved administrations may need to similarly change their legislation to continue to benefit from the state aid exemption for claim year 2020. The power in clause 3(3)(b) allows the devolved administrations to amend the retained EU law on Direct Payments in such circumstances.

21. This power will sunset at the end of the 2020 Direct Payments claim year. It will not be possible to make regulations under clause 3(3)(b) after 31 December 2020.

Justification for the procedure

26. The affirmative procedure is considered appropriate to ensure the devolved legislatures debate and scrutinise the regulations, given the monetary value of Direct Payments.

**Clause 3(4): Regulations in connection with the retention of EU legislation under section 1**

*Power conferred on: The Department of Agriculture, Environment and Rural Affairs*

*Power exercised by: Regulations*

*Parliamentary Procedure: Affirmative procedure*

<u>Context and Purpose</u>

27. The delegated power in clause 3(4) will allow the Department of Agriculture, Environment and Rural Affairs in Northern Ireland (DAERA) to modify the retained EU law in relation to Direct Payments, as it applies in or as regards their territory, and only insofar as it concerns the value of payment entitlements, so that those entitlements may continue to move towards a uniform unit value. Since the start of the current scheme payment entitlements in Northern Ireland have been moving towards, but have not yet reached, a uniform unit value.

<u>Justification for taking the power</u>

28. By enabling DAERA to decide whether to make provision so that payment entitlements may continue to move towards a uniform unit value, this power provides the flexibility for them to implement the policy of future Northern Ireland Ministers.

<u>Justification for the procedure</u>

29. The affirmative procedure is considered appropriate to ensure the Northern Ireland Assembly debates and scrutinises the regulations, given the monetary value of Direct Payments.

**Clause 5: Power to increase direct payments ceilings for 2020**

*This clause does not contain a new delegated power but does extend the scope of existing powers in the Direct Payments legislation which will be brought into domestic law by this Bill and made operable by the regulations which will be laid under it.*

Context and Purpose

30. The CAP Direct Payments legislation, which this Bill will bring into domestic law, contains powers for the European Commission to amend Member States' annual financial ceilings (which determine the maximum total funding which can be granted to farmers each year) to take account of certain policy choices made by Member States. These existing powers (in Articles 6(3) and 7(3) of Regulation 1307/2013) will be made operable by the regulations which will be laid under this Bill so that the Secretary of State, with the consent of the devolved administrations, will be able to amend the UK financial ceilings for claim year 2020 to take account of the specified policy decisions.

31. In September 2019 the Government accepted the recommendations of the Bew Review concerning the allocation of farm support funding in the UK. It agreed that a greater share of the so-called 'convergence funding', an uplift of the financial ceiling for Direct Payments which was given by the EU to the UK, should for the period 2020-22 be allocated to Scotland and Wales, while the corresponding allocations for England and Northern Ireland should be maintained. Clause 5 allows the Secretary of State to make a decision to increase the total amounts for Direct Payments to take account of the findings of the Bew Review. It also amends the regulation-making powers in Articles 6(3) and 7(3) so that the ceilings can be increased as a result of this decision. This clause will enable the Government to increase the UK financial ceilings to accommodate this uplift as far as it relates to the 2020 claim year.

Justification for the clause

32. It is necessary to expand the scope of the existing power contained in the

Direct Payments legislation so that when the 2020 UK financial ceilings are adjusted to take account of other policy decisions (as provided for in the Direct Payments legislation), the Secretary of State can also take account of the Bew Review.

33. This clause will not enable the Secretary of State to decrease the 2020 financial ceilings, only to increase them to take account of the Bew Review.

Justification for the procedure

34. The procedure for regulations under Articles 6(3) and 7(3) in Regulation 1307/2013 will be the affirmative procedure. This is considered appropriate for regulations made in consequence of this clause to ensure that Parliament scrutinises the changes being made to the ceiling following the Bew Review.

**Clause 6(1): Consequential and transitional provision**

*Power conferred on: Secretary of State or devolved administration*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative procedure*

Context and Purpose

35. Subsection (1) provides the Secretary of State or devolved administration with a power to make consequential provisions in connection with any provision of this Bill. Regulations made using this power may modify primary legislation, retained direct EU legislation or subordinate legislation. Insofar as such regulations can modify primary legislation, this is a Henry VIII power.

Justification for taking the power

36. This power may only be exercised to make consequential provision in connection with a provision of the Bill. It cannot be used in isolation to make unwarranted provisions. It is not possible to establish in advance all consequential provisions that may be required; this may include a future requirement to make consequential amendments to some primary legislation, if required because of other

provisions in this Bill. A power is needed to avoid any legal uncertainty or legal lacunas after the Bill comes into force.

37. Where the Secretary of State uses the power to make regulations that apply in Scotland, Wales or Northern Ireland, he or she may only do so with the consent of the devolved administrations.

Justification for the procedure

38. This power can only be exercised in consequence of existing Bill provisions and its purpose is to bring certainty to the statute book where a provision of the Bill might otherwise give rise to legal uncertainties or gaps. As the scope of the Bill is narrow and as any consequential provisions made are likely to be highly technical matters, the negative resolution procedure is appropriate.

**Clause 6(4): Consequential and transitional provision**

*Power conferred on: Secretary of State or devolved administration*

*Power exercised by: Regulations*

*Parliamentary Procedure: No procedure*

Context and Purpose

39. Clause 6(4) provides the Secretary of State or devolved administration with a power to make transitional, transitory or saving provision in connection with the coming into force of any provision of this Bill.

Justification for taking the power

40. When a new provision comes into force, it is often necessary to make transitional, transitory or savings provision to ensure a smooth transition between the old and the new law. It is not possible to establish in advance all transitional, transitory or saving provisions that may be required. A power is needed to avoid any

legal uncertainty or legal lacunas after the Bill comes into force.

41. Where the Secretary of State uses the power to make regulations that apply in Scotland, Wales or Northern Ireland, he or she may only do so with the consent of the devolved administrations.

Justification for the procedure

42. This power applies to procedural matters which are concerned with how the new legislation will be brought into effect. Such powers are often included as part of a power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although the power in clause 6(4) is free-standing, the same principle applies and it is therefore appropriate that it is not subject to any parliamentary procedure.

**Department for Environment, Food and Rural Affairs**
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