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NFU SCOTLAND BRIEFING – AGRICULTURE BILL – SECOND READING

Summary

1. A future agricultural policy that fits the needs and profile of Scottish agriculture, and all that it underpins, is the real prize that can be secured from the United Kingdom's withdrawal from the European Union. However, such an outcome will only come about if the UK and Scottish governments resolve the impasse that has now come to a head under the Agriculture Bill over the creation of policy and financial frameworks, and repatriation of powers.
2. From the outset, NFU Scotland (NFUS) has been unequivocal in stating that the entire Brexit process must be pursued in the interests of agriculture and the food and drinks sectors. The Agriculture Bill will have an influence on every agricultural interest across the UK, including every farm and croft in Scotland. As an organisation, NFUS' primary interest is to secure the best possible outcome for Scottish agriculture.
3. NFUS has two major issues with the Bill which pose complex questions, as outlined in the subsequent paragraphs within this paper. Due to the politicised nature of these issues, NFUS has instructed an independent legal opinion of the issues. Without a clear view on the legal standing of one issue, it is impossible to take a view on the other. More detail is set out below.
4. It is not only the outcomes of this legislative process that will shape agriculture in the future but also the decision-making processes that are established via the Agriculture Bill.

Schedules: Enabling powers for Scottish Ministers on agricultural policy

5. The Agriculture Bill is 'enabling' legislation, providing broad powers to current and future governments to provide financial assistance and make other policy interventions around land use and agriculture beyond the UK's departure from the Common Agricultural Policy (CAP).
6. The Bill will legislate for powers adapted for the Welsh Government and Department for Agriculture, Environment and Rural Affairs in Northern Ireland (DAERA) to be exercised by Ministers in those territories.
7. Whilst the Scottish Government's UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill awaits a decision within the Supreme Court, NFUS understands that if enacted, this legislation and/or the UK Government's European Union (Withdrawal) Act will ensure that there is a legal vehicle for Scottish Government to deliver payments to Scottish agricultural businesses on the same basis as it currently does following EU exit on 29 March 2019.
8. However, due to the continued impasse between Ministers from the UK Government and the Scottish Government on the principle of agreeing common, UK-wide frameworks the Scottish Government has chosen not to take any powers in this Bill. This means that it is not currently certain how the legal framework on which a new Scottish agricultural policy is developed will be enabled.
9. If the impasse is resolved to the satisfaction of both governments, then NFUS understands that Scottish Ministers could take up the option to include a Schedule very similar (if not identical) to that of Wales right up to the final stages of the Bill going through the Houses of Parliament. An alternative possibility is that Scottish Government introduces its own Bill on agricultural matters to the Scottish Parliament.
10. Agriculture is devolved, but it is the view of NFUS that the Agriculture Bill has become very politicised and this is damaging to the confidence of NFUS' farming and crofting members. NFUS remains of the view that the right approach is for both the UK and Scottish Governments to work constructively and sensitively to ensure that Scotland can develop and implement a new Scottish agricultural policy after EU exit. Without clarity on any other possible

means of doing this – i.e. whether a Scottish Government Agricultural Bill could deliver this – in the interests of expedience and certainty for the industry it is the view of NFUS that a Schedule should be included in the Agriculture Bill.

11. NFUS considers that if Scottish Government were to take up the offer of having a Schedule for Scotland inserted into the Agriculture Bill, that would provide the necessary legal basis upon which Scottish Ministers could continue with agricultural policies with objectives and operations very similar to existing measures, such as Voluntary Coupled Support (suckler calf and ewe hogg schemes) and the Less Favoured Area Support Scheme (LFASS) beyond departure of the CAP. Moreover, it could also provide the vehicle to design and implement new agricultural policy measures that deliver an improved Scottish agricultural policy to the benefit of Scottish agricultural businesses.
12. However, NFUS is firmly of the view that the inclusion of a Schedule bespoke to Scotland's agricultural policy needs, and which would enable Scottish Ministers to act in such regard, must be instigated and agreed by Scottish Government and UK Government rather than being imposed via the legislative process of the Bill through Westminster. **NFUS therefore does not support an amendment to the Bill in this regard unless it is tabled following joint resolution between the UK and Scottish governments on outstanding issues.**
13. NFUS is also mindful that this approach can only be effectively taken forward with a resolution to the issue outlined immediately below, and the implementation of a formalised and constructive procedure towards the development of commonly agreed frameworks.

Part 7, Clause 26: Funding constraints on the devolved administrations

14. Equally as important is finding clarity on how the Bill will, or won't, impose financial constraints on Scottish agricultural policy in areas of devolved competency. During Second Reading of the Agriculture Bill it became clear that the political debate hinges around Part 7 (Clause 26) of the Bill which relates to the WTO Agreement on Agriculture.

15. The UK Government contends that it will be responsible for ensuring that all UK policies on domestic support in relation to agriculture are WTO compliant, as the UK will be the signatory to the WTO rather than any of the devolved nations. NFUS, and indeed the Scottish Government, has no contest with this principle.
16. Article 6(3) of the WTO Agreement on Agriculture states that a member (i.e. the UK Government) “shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total Aggregate Measurement of Support does not exceed the corresponding annual or final bound commitment specified in Part IV of the Member’s Schedule”. Article 6 is therefore concerned with setting overall limits on Amber, and elements of Blue, Box support, as defined by the WTO. This subject matter is provided for within Clause 26(1) by providing powers for the Secretary of State to legislate for the UK to comply with the WTO Agreement on Agriculture.
17. Subsections (2) to (7) of Clause 26 enable the setting of financial ceilings on the devolved administrations and England in relation to agricultural support that is considered trade distorting and classified as Amber Box by the WTO; and the establishment of a decision-making process to classify agricultural support in accordance with WTO criteria. Clause 26 would also require devolved administrations to provide relevant information in relation to any of their proposed or existing farming support.
18. The Scottish Government contends that Clause 26 of the Bill would not respect the devolution settlement in that it could create unilateral powers for the Secretary of State that could constrain policy choices in Scotland because of limits on spending, in relation to WTO Amber Box spend in particular, over and above the requirements as set out within Article 6 of the Agreement on Agriculture. The Scottish Government has suggested that this could be used by a future Secretary of State to put a constraint on the Scottish Government making payments for schemes similar to LFASS or on coupled support schemes in the future.
19. NFUS considers that the wording is open to interpretation and this is why an independent legal opinion has been sought on the exact implications of Clause 26. This legal opinion has suggested that the wording of the Bill creates a

theoretical possibility that a UK Secretary of State could, in the future, put regulations in place over and above its obligations as per Article 6 of the Agreement on Agriculture (“the Scottish Ministers will not have total freedom to apply domestic support as they see fit if the Secretary of State makes regulations setting limits in relation to the WTO classifications”). The opinion also then states: “It would not be a legitimate use of regulation-making power to prescribe within the limits how the Scottish Ministers would be able to exercise the powers to apply support”.

20. NFUS is therefore concerned that, according to the wording of the Agriculture Bill, a future UK Secretary of State would have the ability to set limits on the amount of domestic support which could be targeted at specific measures that Scottish Ministers may seek to apply in Scotland to meet their objectives, and that these limits could be set at a lower ceiling than what is currently the case under existing arrangements. NFUS believes that it would compromise the devolution settlement for unilateral decisions on financial ceilings to be taken by the Secretary of State without prior consultation and, crucially, the agreement of the devolved administrations.
21. Based on the outcome of this advice, **NFUS suggests that an amendment should be inserted in to Clause 26 that would preclude the Secretary of State from making regulations setting limits for different classes of domestic support.** Otherwise, if this power were used in conjunction with the power to set different limits for different appropriate authorities, it would compromise the principle that decisions to implement certain agricultural policy tools (such as Voluntary Coupled Support and LFASS currently) in Scotland is a matter for Scottish Ministers.
22. NFUS would also like the amendment to preclude the Secretary of State from making regulations which limit the ability of the Scottish Ministers to provide domestic support within any limit prescribed (i.e. the amber, green and blue limits), without first agreeing those limits and the exercise of any regulation affecting the devolved administrations with the devolved administrations.
23. NFUS also considers that funding of future agricultural policy across the UK should, as Clause 26 of the Bill suggests, be held centrally and deliver at least the same quantum as at present but should be allocated to each devolved

administration on a new objective and non-discriminatory basis (rather than historic) as a ring-fenced budget for each devolved administration to use specifically on agricultural and rural policy measures as befitting their territories.

Part 2: Addressing the red meat levy

24. The issue of red meat levy repatriation is a long-running sore for the industry – Quality Meat Scotland (QMS) estimates that over £1.5 million of levy on Scottish animals is lost each year. Following years of negotiation, it is now understood that the issue of Red Meat Levy Repatriation would only be resolved through primary legislation.
25. For over two years, industry has been advised by Defra that the issue will be resolved when a legislative window presents itself. NFUS believes that the Agriculture Bill is the correct vehicle to address the issue of lost Red Meat levy and wants to see swift progress to address this now.
26. **NFUS advocates an amendment to the Bill within Part 2 via insertion of a new clause to set out a new power for appropriate authorities to act together to agree a scheme for the redistribution of levy among the levy boards.** It is the view of NFUS, shared by Scottish Government, that a new clause could amend the Natural Environment and Rural Communities (2006) Act to:
 - a. Allow appropriate authorities (Ministers) to act jointly to agree a scheme for redistribution of levy in two or more geographic areas
 - b. Allow the appropriate authority to require a board to comply with a redistribution scheme
 - c. Require a levy board to comply, if directed to by its appropriate authority (Ministers).
27. It is assumed that a redistribution scheme document would then be developed administratively, approved and put into operation by the appropriate authorities, and published for transparency to levy payers.

Part 1, Clause 1: Active agriculture and food security as strategic priorities

28. It is a concern to NFUS and the other UK farming unions that, despite its title, the Bill makes scarce reference to supporting agricultural activity on the face of the Bill. For a Bill that focuses so strongly on the delivery of public goods through land management, NFUS strongly feels it is a missed opportunity not to include agricultural objectives on the face of the Bill as the clear vehicle to deliver on those public goods. This is a particular concern to NFUS in the context of considering budgetary expenditure.
29. NFUS fully supports the view that budgetary expenditure under the Agriculture Bill must be clearly connected to agricultural activity, or misunderstandings will arise as to the purpose of financial assistance which could lead to confusion in the debate about appropriate levels and justifications for support. NFUS therefore supports calls for an amendment to the first clause of the Bill to explicitly reference agricultural activity, farm business or farmland as objectives to which any financial assistance should contribute.
30. Scottish farmers and crofters are proud to deliver on a range of public goods including water quality, biodiversity and climate change as they produce food. Food production in itself is not a public good; however, food security is surely a strategic priority for the nation. NFUS therefore considers it vital that the food security and stability of food supply are explicitly referenced on the face of the Bill as strategic outcomes from domestic support to agriculture. NFUS supports calls for an amendment to the first clause of the Bill to ensure food security and stability of food supply are objectives of the legislation.

Further concerns and deficiencies

31. Scottish farmers and crofters are proud to produce to extremely high standards – these standards give us our provenance and Unique Selling Point in markets abroad. It is vital that in the negotiation of new Free Trade Arrangements, domestic producers can operate on a level playing field with producers elsewhere in the world and are not undermined by cheaper imported produce that has been produced to lower standards.

32. It was highlighted during Second Reading that the Bill should contain provisions to require all food imported into the UK be produced to at least equivalent standards, as they relate to animal welfare, environmental protection and any other legitimate public policy concerns associated with food production, as those required of producers in the UK. NFUS notes that the other UK farming Unions are also supportive of amendments in this regard.