

Date : 9 November 2018  
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## AGRICULTURE BILL – NFU SCOTLAND POSITION PAPER

- NFU Scotland (NFUS) is aware of the recent correspondence exchange<sup>1</sup> between Scottish Government and Defra on areas of contention within the Agriculture Bill ('the Bill').
- NFUS has given evidence to the Agriculture Bill Public Bill Committee, as well as the Scottish Affairs Committee, in their consideration of the Bill following the Second Reading.
- NFUS is aware that both written and oral evidence provided by NFUS on certain aspects of the Bill and its wider context has been subject to political discussion within these committees.
- This Position Statement clarifies the position of NFUS was set out to MPs in its briefing ahead of Second Reading of the Bill on 10 October; and in subsequent written evidence to the Public Bill Committee on 25 October.
- NFUS is an apolitical membership organisation comprised of over 8,500 farming and crofting members across Scotland. The role of NFUS is to represent and communicate the interests of its membership to a political audience. The position taken by NFUS on the Bill reflects the views of its members on these complex legal and constitutional issues, informed by independent legal and constitutional academic advice. NFUS wishes to reiterate that its position has been taken after receipt of this advice and consultation with membership.

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<sup>1</sup> Scottish Government, October/November 2018: <https://www.gov.scot/publications/proposed-amendments-to-the-uk-agriculture-bill/>

Defra response, November 2018: <https://www.gov.uk/government/publications/agriculture-bill-letter-to-scottish-government>

- It is the view of NFUS that the Bill has become very politicised and, as a result, it and its interaction with subsequent agricultural policy development in Scotland puts at risk the required policy measures to secure the best possible outcome for Scottish agriculture from this process.
- NFUS is of the view that the right approach is for both the UK and Scottish governments to work constructively and sensitively to ensure that Scotland has the ability to develop and implement a new Scottish agricultural policy after EU exit.

## **Identification of key issues**

Through this Position Statement, NFUS sets out its unequivocal position on three issues which have been subject to debate in the context of the Bill.

For the avoidance of doubt, when referring to payments relating to ‘scheme years’, NFUS is extensively referring to direct (Pillar 1) payments which are applied for under existing Common Agricultural Policy (CAP) schemes in the May of that year, and which are normally paid from 1 December of that same year and into the following calendar year within the prescribed direct payments window.

### **1) The ability of the Scottish Government to make payments to farmers in scheme year 2019**

NFUS is clear that the Scottish Government will have the legal basis upon which to make direct payments through the Basic Payment Scheme (BPS), Greening and Voluntary Coupled Support (VCS) schemes that operate under Pillar 1 of the CAP for the 2019 scheme year if the Supreme Court rules in favour of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the ‘Continuity Bill’). Likewise, for payments made under the Scottish Rural Development Programme (Pillar 2), such as the Less Favoured areas Support Scheme.

If the Supreme Court rules against the legal standing of the Continuity Bill, then the UK Government’s European Union (Withdrawal) Act 2018 (the ‘Withdrawal Act’) will provide the necessary legal cover for these payments to be made in payment year 2019. The Withdrawal Act provides a safety net if the Continuity Bill falls.

NFUS understands that the Supreme Court ruling on the Continuity Bill is anticipated in before the end of November 2018. It is a concern to NFUS that there remains to be some dubiety on the processes that would enable to the Withdrawal Act to 'kick in' as a safety net if the Continuity Bill is ruled against. NFUS believes this is an issue which should be clarified by Scottish Government and has therefore requested that Scottish Government corroborates this understanding in writing.

## **2) The ability of the Scottish Government to make payments to farmers in scheme year 2020**

The EU text of the Direct Payments Regulations relating to BPS, Greening and VCS applies to the years up to 2020.

However, Article 130 of the Draft Agreement on the withdrawal of the UK from the EU<sup>2</sup> clearly states: "Regulation (EU) No 1307/2013 [covering rules for direct payments to farmers under support schemes within the framework of the common agricultural policy] of the European Parliament and of the Council shall not apply in the United Kingdom for claim year 2020" in accordance with the terms committed to under the Multi-annual Financial Framework (MFF) 2014-20.

As such, and as things stand, there would be no legal basis for direct support (BPS, etc.) payments to be made in the UK for claims made in the 2020 scheme year.

It is clear to NFUS that a clause to allow for continuation of BPS and other direct payments in 2020 was left out of the Agriculture Bill due to drafting error. NFUS recognises that George Eustice MP, Minister for Agriculture, Fisheries and Food, has sought to redress this by tabling NC3 to the Bill, which will allow for BPS and Greening to be continued in England for the 2020 scheme year and through the agricultural transition period for England.

NFUS appreciates that in its consultation document 'Stability and Simplicity', Scottish Government has clearly stated its preference to continue with current schemes and payments (i.e. BPS, etc.), with some minimal changes, through an agricultural transition from 2019 to 2024. NFUS largely supports this approach.

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<sup>2</sup> European Commission and UK Government, March 2018:  
[https://ec.europa.eu/commission/sites/beta-political/files/draft\\_agreement\\_coloured.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf)

NFUS also appreciates that it is within the competence of the Scottish Parliament to introduce like-for-like primary legislation to allow for this continuation of BPS, etc. in and beyond 2020.

However, at present, Scottish Government has not confirmed that it intends to pursue primary legislation that would allow for the continuation of BPS and all other direct (Pillar 1) support in and beyond 2020. NFUS is therefore concerned that there is currently no clarity on the legal vehicle for the Scottish Government's 'Stability and Simplicity' transitional model to be delivered.

In light of this, it would be the preference of NFUS for the Scottish Government to include a like-for-like NC3 within the Agriculture Bill for Scotland, in order to provide this legal certainty for and beyond the 2020 payment year. If the Scottish Government does not take up this option, NFUS would wish to see like-for-like legislation to be introduced to the Scottish Parliament as a matter of urgency, so that stakeholders and the businesses they represent can plan ahead with an element of certainty on the transitional arrangements.

### **3) The ability for Scottish Government to develop, implement and make payments for a new (i.e. 'non-CAP') agricultural policy in 2021 and beyond**

The two issues outlined above mean that agricultural support will still be entirely tied to the current CAP rules. Whilst this is important for continuity and stability through transition, NFUS has always been clear that the real prize from exiting the EU is to move away from the CAP, and the ability to develop and implement new agricultural policies that are bespoke to the unique and differing needs of the UK.

NFUS continues to develop its proposals as set out in the policy document 'Steps to Change – A New Agricultural Policy for Scotland Post-Brexit'<sup>3</sup> through consultation with members and engagement with the Scottish Government and other stakeholders.

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<sup>3</sup> NFU Scotland, March 2018:  
<https://www.nfus.org.uk/userfiles/images/Policy/Brexit/STEPS%20FOR%20CHANGE%20March%202018%20-%20for%20email.pdf>

In order to develop and implement a new, 'non-CAP' policy from 2021, primary legislation is required.

The Scottish Government has identified various issues with the Agriculture Bill and has declared that it will not take a Schedule in the Agriculture Bill unless these issues are resolved. NFUS shares some of these concerns, which are set out in further detail below.

NFUS also understands that the Scottish Government is keeping open the option of introducing its own Agriculture Bill to the Scottish Parliament. The Scottish Government has indicated that, if it were to pursue this, a Scottish Agriculture Bill could be introduced to the Scottish Parliament in Autumn 2019, in order to go through the parliamentary processes and receive Royal Assent in time for the 2020 payment year.

If this option is taken forward, it would provide the same legislative vehicle that is on offer via the UK Government's Agriculture Bill for Scottish Government to make payments in the 2020 payment year and for Scotland to subsequently develop and implement a new, 'non-CAP' agricultural policy beyond the transition period.

Through extensive consultation with members, it is clear to NFUS that there is a significant lack of confidence within the industry, compounded by political uncertainty around Brexit.

The NFUS position on this issue has been made clear in written and verbal evidence to parliamentary committees; in the interests of expediency, pragmatism and certainty for the industry it would be better for Scotland to have a Schedule included within the Agriculture Bill – however, only if elements of the Bill are amended to reflect devolved concerns. Please see the section below.

### **NFU Scotland proposals for amendment**

- **Part 7, Clause 26**

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.

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.

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.

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.

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”.

It is important to highlight the current process adhered to by the European Commission in relation to WTO matters<sup>4</sup>. Each Member State of the European Union is a signatory to the WTO. Therefore, responsibility to comply sits with each Member State. When it comes to the European Union reporting to the WTO, as a trading bloc, it is the Member States that allow the European Commission (as the EU’s executive body) to act as the ‘spokesperson’.

This is done via the European Commission consulting with the trade policy committee of the Council of Ministers that agree the mandate for the European Commission that then provides the reporting back to the WTO – effectively acting as a secretariat.

On spending limitations, the European Commission can make proposals on CAP budgets in periods of reform, etc, but it is the Council of Ministers (and the European parliament) that carry the responsibility for approval (i.e. meeting the WTO obligations) – again via negotiation at the trade policy committee of the Council.

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.

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<sup>4</sup> European Commission: [http://ec.europa.eu/trade/policy/eu-and-wto/index\\_en.htm](http://ec.europa.eu/trade/policy/eu-and-wto/index_en.htm)

NFUS believes that it this sets a precedent that is quite different to the process currently adhered to at EU level; and 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.

As outlined above, when an agreement is negotiated at the WTO, the Commission needs the formal authorisation of the Council and European Parliament to then sign the agreement on behalf of the EU. For NFUS, it is vital that similar protocols are established in the UK when the European Commission is no longer the secretariat for these matters in the UK.

Indeed, NFUS welcomes that, in correspondence to the Cabinet Secretary for Rural Economy, the Secretary of State for Environment, Food and Rural Affairs states: “I believe we can reach a position that properly recognises the devolved interest whilst ensuring that the UK can meet its obligations in the unlikely event consensus cannot be reached on ‘Amber Box’ allocations or scheme classifications”.

Based on its legal advice, NFUS suggests that amendments 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.

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.

NFUS supports the principles behind amendments 67 and 68 to the Agriculture Bill. Alternatively-worded amendments proposed by NFUS are included in an Annex to this paper.

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. NFUS therefore sees merit in the principles around NC13 being explored.

- **NC4: Red Meat Levy**

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.

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 Red Meat Levy and wants to see swift progress to address this now.

**NFUS believes that the wording of NC4 will deliver the right framework to address this issue, and calls on UK Government to lend support for this amendment.**

- **Amendment 109: Multiannual Financial Framework**

It is the view of NFUS, shared by the other UK Farming Unions, that the Agriculture Bill should establish a budgetary framework that provides certainty for farmers and crofters and allows them to plan and invest for the future. Budgetary cycles should be independent of the Parliamentary cycle to reflect the need for long term planning and investment and to avoid the agricultural budget becoming politicised and subject to annual discretionary spending decisions.

**NFUS is therefore supportive of amendment 109, which would establish a multi-annual budgetary framework.**

- **NC11: UK-Wide Framework for Agriculture**

NFUS has commented extensively on the issue of UK-wide frameworks since 2016.

NFUS has always been of the view that after the UK departs the CAP, commonly agreed frameworks will be required across the UK so that the internal UK market can function via minimum common standards that also ensure the UK is best placed to enter into and implement new trade deals.

The examples of policy areas which NFUS believes would be sensibly governed by a commonly agreed framework – supported by the UK Government’s Frameworks Analysis – are pesticides, organic farming, fertilisers, food and feed safety, food labelling, and animal health and traceability.

Thereafter, beyond these common standards, there must be flexibility for each nation to develop and implement the appropriate agricultural and rural policies within each administration.

Frameworks, therefore, must be agreed, and not imposed by any one part of the UK on another. Nor should it be possible for any part of the UK to be able to exercise a ‘veto’.

The governance of common frameworks is an extremely complex constitutional issue which is also increasingly political. As an apolitical membership organisation, NFUS is not equipped to comment extensively on how such governance might or could operate; but it is a concern to NFUS that there is no formalised structure to ensure the current devolution settlement of policy and regulation to the constituent parts of the UK is maintained as frameworks are developed for the governance of EU competencies after Brexit. It is important to NFUS that Farming Ministers across the UK and agricultural departments establish and maintain regular, formal and cooperative arrangements to manage policy, legislation and delivery of regulation across the UK economic area.

**NFUS, and the other UK farming unions, are of the view that NC11 is an important addition to the Agriculture Bill to establish this decision-making structure and calls on the UK and Scottish governments to lend their support to this amendment.**

- **NC12: Standards and international trade**

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.

Representations from MPs throughout the passage of the Agriculture Bill so far echo the concerns of NFUS that the Bill should contain provisions to require all food imported into the UK to 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.

**NC12 would deliver this reassurance to domestic producers and NFUS calls on UK Government to support this principle in legislation.**

## Annex – Alternative wording for Clause 26 Amendments

- Clause 26, page 21, line 15, leave out paragraph (b).

Member's explanatory statement:

*This amendment 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 agriculture is a devolved matter.*

- Clause 26, page 21, line 25, after subsection (5) insert –  
"( ) In setting limits for domestic support, the Secretary of State must not set limits for different classes of domestic support in relation to the devolved authorities."

Member's explanatory statement:

*This amendment secures that the Secretary of State may not make regulations setting limits for different classes of domestic support. It preserves the principle that agriculture is a devolved matter.*

- Clause 26, page 22, line 2, after subsection (7) insert -  
"( ) Before making regulations under this section which are to apply to Scotland, the Secretary of State must obtain unanimous agreement between each of the devolved authorities ".

Member's explanatory statement:

*This amendment would require the Secretary of State to consult the devolved Ministers on any regulations which are to apply to them, before they are made.*