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The UK Agriculture Bill

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The UK Agriculture Bill had its first reading in the House of Commons on 12 September 2018. This briefing summarises the clauses in the Bill and shows where in the UK they apply. It also examines three areas in the Bill where there is debate on whether legislative consent is required from the Scottish Parliament.



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Executive Summary

NFU Scotland's briefing to MPs ahead of the second reading of the Bill in the UK Parliament House of Commons states "The Agriculture Bill published on 12 September will have an influence on every agricultural interest across the UK, including every farm and croft in Scotland."

SECTION 1 of this briefing summarises the clauses in the Bill.

Part 1 of the Bill gives the Secretary of State powers to give financial assistance to replace Common Agricultural Policy support, set conditions on the assistance, and allow checking, enforcing and monitoring of funds and conditions. This part applies in England. Similar but broader provisions apply in Wales. There are no provisions for Northern Ireland or Scotland.

Part 2 provides powers to make regulations for the agricultural transition period in England, to modify direct payments and to terminate direct payments. It applies in England. Similar provisions apply to Wales and Northern Ireland. There are no provisions for Scotland.

Part 3 allows the Secretary of State to require information to be provided and shared relating to the agri-food supply chain. It applies in England. Similar provisions apply to Wales and apply to Northern Ireland. There are no provisions for Scotland.

Part 4 enables the Secretary of State to intervene in markets in the event of exceptional market conditions. It applies in England. Similar provisions apply to Wales and Northern Ireland. There are no provisions for Scotland.

Part 5 allows the Secretary of State to make rules on the quality of agricultural goods marketed in England, and the product information that must be provided to consumers. It applies in England. Similar provisions apply to Wales and Northern Ireland. There are no provisions for Scotland.

Part 6 allows the creation of a domestic Producer Organisations regime throughout the UK. This allows farmers to work together and be exempt from some aspects of competition law. The UK Government argues that this is a reserved area and that this part extends to England, Wales, Northern Ireland and Scotland.

Part 7 provides the Secretary of State with powers to ensure the UK's compliance with its obligations under the World Trade Organisation (WTO) Agreement on Agriculture (AoA). The UK Government argues that this is a reserved area and that this part extends to England, Wales, Northern Ireland and Scotland.

The redistribution of Red Meat Levy is not on the face of the Bill at introduction. The Welsh Government expects a UK Government amendment on this.

SECTION 2 of this briefing examines the clauses on producer organisations, fair trading and the World Trade Organisation in more detail, focussing on the debate around legislative consent.

The Scottish Government has said that it will not bring forward legislative consent motions for primary Brexit legislation such as the Agriculture Bill until the Sewel Convention is

made operable again. The UK Government has stated that it is not seeking consent from the Scottish Parliament on this Bill because it is not legislating in areas of devolved competence in Scotland.

Due to the interaction between Producer Organisations and competition law, debate surrounds whether the purpose of this clause is the promotion of an effective agricultural market (which is devolved) or the regulation of anti-competitive practices (which is reserved).

Debate revolves around whether the fair dealing obligation clause is directed at unfair contractual terms, which is a devolved matter, or anti-competitive agreements and practices which is reserved.

Debate has arisen as to whether the purpose of the WTO clause is to regulate international trade (which is reserved) or to implement and observe international obligations (which is devolved).

Background information on Brexit and agriculture in Scotland can be found in SPICe SB17-12, [Agriculture and Brexit in Ten Charts](#).

The UK Agriculture Bill in the UK Parliament

The Agriculture Bill seeks to provide the legal framework required to transition out of the EU, replace the Common Agricultural Policy (CAP) and deliver a range of reforms. It lays the foundations for a future system based on public money for public goods, for the next generation of farmers and land managers ¹ .

The Bill was introduced to the House of Commons and given its [First Reading](#) on 12 September 2018. The [Second Reading](#) took place on 10 October 2018.

The bill, explanatory notes and delegated powers memoranda are available on the [Bill page](#).

The Public Bill Committee will scrutinise the Bill line by line. It met first on 23 October 2018 and is expected to report to the House by 20 November 2018.

The [Environment, Food and Rural Affairs Committee](#) in the House of Commons have launched an inquiry on the scope, provisions and powers proposed in the Agriculture Bill. The Committee's call for written submissions closed on 8 October 2018.

The House of Commons Library published a detailed [briefing](#) on the Bill on 8 October 2018 ² .

SECTION 1 - The UK Agriculture Bill

clauses

This section summarises the clauses in the Bill and sets out whether they, or similar provisions apply to devolved administrations.

New financial assistance powers - Part 1

This part of the bill gives the Secretary of State powers to -

1. give financial assistance (to replace common agricultural policy support)
2. set conditions on the assistance
3. allow checking, enforcing and monitoring of funds and conditions.

Extent: This part applies in England. Similar but broader provisions are set out in Schedule 3 and apply to Wales, with Welsh Ministers having the powers rather than the Secretary of State. There are no similar provisions for Northern Ireland or Scotland.

Clause 1 gives powers to the Secretary of State to provide financial assistance for -

- managing land or water in a way that protects or improves the environment
- supporting public access to and enjoyment of the countryside, farmland or woodland and better understanding of the environment
- managing land or water in a way that maintains, restores or enhances cultural heritage or natural heritage
- mitigating or adapting to climate change
- preventing, reducing or protecting from environmental hazards
- protecting or improving the health or welfare of livestock
- protecting or improving the health of plants.

The Secretary of State may also provide financial assistance for starting or improving the productivity of an agricultural, horticultural or forestry activity.

Clause 2 gives wide ranging powers relating to the form of financial assistance, the conditions attached to it, and the information that must be provided by recipients. Detail will be set out in regulation.

Clause 3 gives wide ranging powers relating to checking, enforcement and monitoring of financial support and the conditions attached to it. Detail will be set out in regulation.

Selected issues raised in the second reading of the Bill

- Much of the detail will be set out in regulation. Many speakers stated that the devil will be in the detail.
- There is no **duty** to provide financial assistance to support agriculture and rural development or to ensure the provision of public goods.
- It is not clear whether food production and food security are integral parts of the Bill.
- It is unclear how Ministers will put a value on public goods when they decide on payments to farmers.
- The Bill contains no legally enforceable environmental protection targets.

Support for agriculture after exiting the EU - Part 2

This part provides powers to make regulations for the agricultural transition period in England, to modify direct payments and to terminate direct payments.

Extent: It applies in England. However, similar provisions are set out in Schedule 3 and apply to Wales, with Welsh Ministers having the powers rather than the Secretary of State. Similar provisions are also set out in Schedule 4 and apply to Northern Ireland, with Department of Agriculture Environment and Rural Affairs having the powers rather than the Secretary of State.

The Bill states that the agricultural transition period away from the CAP and to a domestic agricultural policy in England will be for seven years starting with 2021. This part enables regulations to be made for -

- The basic payment scheme (BPS) to be modified, including by ending greening before the end of the transition period
- Phasing out direct payments for all or part of the transition period
- Making delinked payments (payment no longer linked to how much land is owned or managed)
- Defining what, how much, who receives a delinked payment
- The payment of a lump sum in lieu of direct payments to which a land manager may have been entitled.

Clause 8 terminates direct payments at the end of the agricultural transition period in England.

Clause 9 allows modification of retained direct EU "horizontal legislation", which according to the explanatory notes "has a fundamental role in making the CAP work." It is designed to ensure the proper management of CAP funds. The UK Co-ordinating body (which, amongst other things, provides full information on [CAP beneficiaries](#) in the UK) was set up under these regulations.

Clause 10 allows termination of aid for fruit and vegetable producer organisations in England.

Clause 11 allows regulations to be made to modify retained EU law on the rural development programme and subordinate legislation relating to it, in England. [Retained EU law](#) will consist of all of the converted EU law and preserved EU-related domestic law which was in force on the day before the UK left the EU.

Selected issues raised in the second reading of the Bill

- Much of the detail will be set out in regulation.
- There was discussion about the length of the transition period in England, with many speakers supporting the longer period.
- It is unclear how mechanisms in the Bill - such as the delinking payment - will work.
- There is information on what will be phased out - direct payments, but little on what will replace it.
- There is an absence of funding guarantees beyond 2022.

Collection of data in the agri-food supply chain - Part 3

This part of the bill allows the Secretary of State to require information to be provided and shared relating to the agri-food supply chain.

The Explanatory Notes that accompany the Bill state that "The agri-food supply chain may be colloquially known as "farm to fork" – from primary producers, through intermediary food processors to retailers such as supermarkets and ultimately individual consumers. The products in the agri-food supply chain include any plant products grown (cereals, fruit and vegetables) as well as animal products for consumption (meat, dairy, eggs) including plant and animal products taken from the wild (for example, truffles and venison).³"

Extent: It applies in England. Similar provisions are set out in Schedule 3 and apply to Wales, with Welsh Ministers having the powers rather than the Secretary of State. Similar provisions are set out in Schedule 4 and apply to Northern Ireland, with DAERA having the powers.

In England, this allows the Secretary of State to require a person in an agri-food supply chain to provide information about "matters connected with the supply chain". The purpose for which the information may be used must be set out, and be included in a list provided for in clause 14 (4). This includes -

- Helping persons in agri-food supply chains to increase productivity and manage risks promoting transparency or fairness in agri-food supply chains.
- Promoting the health or traceability of creatures of a kind kept for the production of food, drink, fibres or leathers.

- Promoting the health of plants.
- Minimising adverse environmental effects of activities connected with agri-food supply chains.

The Bill allows regulations to be made for monitoring and enforcement, and penalties for failing to comply.

What is the point of these clauses?

The [policy statement published by Defra](#) states that collecting and sharing of data will ⁴ -

- strengthen transparency in the supply chain ... With more transparent data, food producers will be able to respond more effectively to market signals, strengthen their negotiating position at the farm gate and seek a fairer return.
- enable farmers to benchmark their performance and to track and manage risks to their business. It will also improve disease control, and consequently productivity, through greater sharing of traceability and animal health data.
- support risk management while safeguarding sensitive information. Improved data collection and sharing will also support the private sector in developing risk management tools for farmers to help mitigate volatility.

Some issues raised in the second reading

- Many speakers welcomed the provisions seeking to ensure fairness in the supply chain
- It is unclear how increased transparency will improve fairness in the supply chain
- The provisions could be extended to apply to all sectors and to all stages of the supply chain.

Intervention in Agricultural Markets - Part 4

This part enables the Secretary of State to intervene in markets in the event of exceptional market conditions.

Extent: It applies in England. However, similar provisions are set out in Schedule 3 and apply to Wales. Similar provisions are set out in Schedule 4 and apply to Northern Ireland.

This part allows the Secretary of State to react to "exceptional market conditions" such as severe disruption in agricultural markets, which would have a significant effect on agricultural producers in England. In such circumstances -

- financial assistance may be given
- powers to modify retained direct EU law to allow public intervention and aid for private storage, may be used.

The [Explanatory Notes](#) state that these clauses do not extend to other exceptional events (e.g. animal disease, weather) unless they results in actual or threatened market disturbance.

Aid package for farmers from the European Commission for dairy crisis in 2015

As part of the CAP, in the past the EU has provided additional support to farmers in times of "exceptional market conditions". In 2015, a combination of the abolition of EU quotas, the Russian embargo on agricultural products, and falling demand for milk in China led to a [collapse in EU milk prices from 2014 to 2015](#).

The European Commission recognised the crisis in the dairy sector and provided £350 million to be shared across member states to deal with this event. [£2.4 million of this was allocated to Scottish farmers](#) . Other ways in which the EU provided assistance were through intervention buying and private storage aid, where the EU would buy commodities to take milk supplies from suppliers and smooth the market.

Source: Thomas, G. (2018) [Risk management in agriculture](#), SB18-46 ⁵ .

Some issues raised in the second reading

- That there should be an overarching policy across the UK to deal with crisis management
- These clauses could cover chronic disruption in the event of changes to trade regimes that damage domestic farm incomes.

Marketing standards and carcass classification - Part 5

This part allows the Secretary of State to make rules on the quality of agricultural goods marketed in England, and the product information that must be provided to consumers.

Extent: This part applies in England. Similar provisions are set out in Schedule 3 and apply to Wales. Similar provisions are set out in Schedule 4 and apply to Northern Ireland.

For agricultural products marketed in England, clause 20 allows the Secretary of State to make (affirmative) regulations "about the standards with which those products must conform ("marketing standards")."

Regulations may cover -

- technical definitions, designation and sales descriptions
- the presentation, labelling, packaging, rules to be applied in relation to packaging centres, marking, years of harvesting and use of specific terms

- specific substances used in production, or components or constituents, including their quantitative content, purity and identification
- the type of farming and production method
- the place of farming or origin, excluding poultry meat and spreadable fats
- restrictions as regards the use of certain substances and practices.

This clause also allows the Secretary of State to make regulations about the classification, identification and presentation of bovine, pig and sheep carcasses by slaughterhouses in England.

Regulations about enforcement may also be made.

[Defra's policy statement](#) says that common marketing standards "will make sure that marketing standards (for example, the grading of eggs) will protect farmers and consumers, are proportionate and will support the agriculture sector and take account of other objectives such as animal welfare."

This relates to how all products available on the English market are described.

Some issues raised in the second reading

- There should be an overarching policy across the UK to deal with marketing standards
- There was some discussion of a need for an overhaul of food labelling law, including country of origin labelling.

Producer organisations and fair dealing - Part 6

Under EU legislation, producer organisations (POs) can be recognised and exempt from some competition rules. This part of the Bill allows the creation of a domestic PO regime throughout the UK.

Producer Organisations are legally-constituted groups of farmers or growers which assist in the distribution and marketing of farm produce.

Extent: The UK Government argues that this is a reserved area and that this part extends to England, Wales, Northern Ireland and Scotland. However, this may be subject to debate (see below).

Clause 22 allows **producer organisations** and associations of producer organisations to be recognised under a given set of conditions. Organisations recognised in this way may be exempt from some provisions in the Competition Act 1998.

Clause 25 allows regulations to be made "for the purpose of promoting **fair contractual dealing** by the first purchasers of agricultural products." The Explanatory Notes state that -

“ Primary agricultural producers in the UK tend to be small, individual businesses operating without strong links between them. By contrast, operators further up the supply chain – processors, distributors and retailers – tend to be highly consolidated businesses that command substantial shares of the relevant market. This disparity makes primary producers vulnerable to unfair trading practices. It often forces them into contractual relationships which impose on them commercially harmful terms, but to which they have no commercial alternative and in respect of which there is no legal protection. ”

The kind of obligations that may be imposed include (clause 25(3)) -

- obligations to contract in writing
- obligations to include in the contract. E.g. quantity and quality of products to be purchased, timing of deliveries.

The Explanatory Notes state that clause 25 includes powers to introduce sector-specific codes... to improve principles of fair contractual practice.

Agricultural Producer Organisations in Scotland

In 2015 the first EU Dairy Producer Organisation (DPO) in Scotland was formed. This enabled the DPO to negotiate prices for members' milk without falling foul of competition legislation. It must attain Rural Payment Agency recognition by constituting and organising its role in accordance with criteria laid down in enabling EU regulations.

POs are long established in the fresh produce sector under the EU Fruit and Vegetable Regime, under which two members of Scotlands Agricultural Organisations Society (SAOS) East of Scotland Growers and Scottish Borders Produce, have been recognised POs for several years ([SOAS](#), accessed 17 September 2018).

A full list of POs in the UK can be found on the [DEFRA website](#).

The Scottish Agricultural Champions Report (2018) talks about unfair trading practices ⁶ . It states -

“ The supply chain must be regulated effectively to avoid unfair trading practices, building on the work of the Grocery Code Adjudicator and the Small Business Commissioner, and businesses must be made more aware of the options open to them under the regulatory systems in place.”

Some issues raised in the second reading

- There was a comment that more support is needed for producer organisations, including a wider exemption from competition law and further financial support to engender collaboration
- There was widespread support for fair dealing provisions
- Comment was made that fair dealing measures must apply to all sectors and to all stages of the supply chain
- There was discussion of how fair dealing provisions will be used and how they can be made as comprehensive and effective as possible, with real teeth.

Groceries Code Adjudicator

The Explanatory Notes state that "The [Groceries Code Adjudicator](#) (GCA) was appointed in 2013 to enforce the Groceries Supply Code of Practice (the Code). It is widely recognised that the GCA has improved the relationship between large grocery retailers and their direct suppliers, and the first statutory review of the GCA found that it is an exemplary modern regulator.

However, the majority of farmers do not supply supermarkets directly. They are therefore [not] covered by the GCA and can be exposed to unfair trading practices."

The GCA is funded by a levy on the regulated retailers (i.e. those with UK annual turnover of more than £1 billion).

The GCA encourages suppliers, trade associations and other representative bodies to provide her with information and evidence about how the large retailers are treating their direct suppliers. All information received is dealt with on a confidential basis and the GCA has a legal duty to preserve anonymity.

At a supplier's request the GCA must arbitrate in disputes and may also do so following a request from a regulated retailer. Arbitration awards are binding and may include compensation. The GCA can launch investigations. If a breach of the Code is found, the GCA can make recommendations, require regulated retailers to publish details of any breach and in the most serious cases impose a fine. The GCA power to fine a retailer up to 1% of its UK turnover came into force on 6 April 2015⁷.

WTO Agreement on Agriculture - Part 7

This part provides the Secretary of State with powers to ensure the UK's compliance with its obligations under the World Trade Organisation (WTO) Agreement on Agriculture (AoA). The UK is a WTO member in its own right.

Extent: The UK Government argues that this is a reserved area and that this part extends to England, Wales, Northern Ireland and Scotland. However, this may be subject to debate (see below).

The World Trade Organisation Agreement on Agriculture limits the amount of some forms of agricultural support that can be provided, because it is considered to distort trade. There are no limits on blue and green box forms of agricultural support. There are limits on amber box forms of support - price support and aid coupled to production. Scotland is currently the only country within the UK providing coupled support (where support is linked to, for example, the number of cattle a farmer has) via the Scottish Suckler Beef Support Scheme and the Scottish Upland Sheep Support Scheme⁸.

The WTO’s constraints on agricultural support

	Description	WTO constraint
Green box	Support with no, or minimal, trade distorting effects or effects on production, and that meets policy-specific criteria. (e.g. research programmes, pest and disease-control measures, agri-environment schemes. Also, the EU claims, decoupled income support including, the Basic Payment Scheme and its Greening component)	No expenditure limits apply
Blue Box	Direct payments under production limiting programmes (e.g. area payments or 'livestock payments ... made on a fixed number of head)	Currently no expenditure limits
Amber Box	Price support (e.g. milk will be sold at £X per litre) and aid coupled to production (e.g. a farmer will get £X for each beef cattle)	Support in this category must be within de minimis limits, unless the WTO member has negotiated additional entitlement, as the EU has.

Kenyon, W. (2016) Agriculture and Brexit in Ten ChartsKenyon, 2017⁹

However, some WTO members are allowed to exceed the “de minimis” limits in the Amber box because historically they have provided this type of support. The EU is allowed to and has Amber Box entitlements of €72.4 billion. As part of the EU and the CAP, the UK shares this entitlement. Indeed, total EU CAP payments are well within this limit (Swinbank, 2017).

Outwith the EU, new domestic agriculture policy will be constrained by the WTO Agreement on Agriculture rules.

Clause 26 allows the Secretary of State to make regulations for the purpose of securing compliance by the UK with the Agreement on Agriculture. Regulations may be made related to -

- how domestic support is classified, including the process of determining classification
- dispute resolution between Devolved Administrations. Although the Secretary of State is the final arbiter
- the total amount of support allowable in UK.

Clause 26(3c) states that regulations may set out "individual limits on the amount of domestic support that may be given by each appropriate authority in England, Wales, Scotland and Northern Ireland."

Clause 26(6) states that regulations may make provision requiring a devolved authority to provide information to the Secretary of State, mostly for the purpose of complying with WTO AoA requirements.

Some issues raised in the second reading

- Most comment related to whether the WTO clause is reserved (see below). There was much discussion of [NFU Scotland's briefing](#) and legal advice on this point ¹⁰ .

The concern is about the Secretary of State having powers to set the ceiling on the levels of domestic support classified as Amber box, without prior consultation and agreement with the Devolved Administrations.

Requested clauses

The Welsh Government and the DAERA for Northern Ireland accepted the UK Government's offer to extend powers in the Agriculture Bill to devolved administrations.

Clause 27 gives powers to the Welsh Government. The Explanatory Notes state -

“ Further provisions relating to Wales can be found in Schedule 3. This is at the request of the Welsh Government in order to continue making payments to farmers and land managers once the UK leaves the EU, to make changes to current schemes and to enable implementation of replacement land management schemes. These powers are intended to be time limited until a Welsh Agriculture Bill can be brought forward.”

Clause 28 gives powers for the DAERA for Northern Ireland. The explanatory notes state -

“ Further provisions relating to Northern Ireland can be found in Schedule 4. This is to enable DAERA to continue to make payments to farmers and land managers after the UK leaves the EU and to ensure that future Executive Ministers have the flexibility to develop policy once an Assembly is returned.”

The Scottish Government has not accepted the UK Government's offer to extend powers in the Bill to Scotland. The UK Government have [said](#) that the offer remains on the table.

There is no mention of an Agriculture Bill in the Scottish Government's Programme for Government 2018-19 ¹¹ .

Not currently in the bill - The Red Meat Levy

In the second reading Stephen Kerr (MP) explained the issue of the red meat levy. He [said](#)

"Members will be aware that quite often the levy is imposed at the point of slaughter of cattle, sheep and pigs. It is a devolved matter, with revenues collected by Scotland, England, Wales and Northern Ireland. To cut a long story short, a lot of the cattle, sheep and pigs that are raised in Scotland are shipped across the border to England where they are slaughtered, so there is a sum of money that should go back to Scottish industry for the promotion of Scotch beef and lamb. I urge the Secretary of State to make provision for that simple change in the Bill, as it would require primary legislation. It is worth about £1.5 million for the promotion of Scotch beef and lamb."

On this topic the [UK Government Scottish myth-buster document](#) states that "We remain in discussions with the Welsh and Scottish Governments regarding red meat levy funds and legislative options." ¹²

On 12 September 2018, Lesley Griffiths AM, Cabinet Secretary Energy, Planning and Rural Affairs published a [written statement on the Introduction of the UK Agriculture Bill](#) ¹³. It states that -

"On the Red Meat Levy, it is disappointing powers relating to the redistribution of Red Meat Levy will not be on the face of the Bill at introduction. The Welsh Government expects a UK Government amendment to correct this as soon as possible. It is critical the red meat industry is able to access funds to prepare it best for the opportunities of Brexit and react to inevitable change. Given a legislative change is required to underpin any future agreed mechanisms about finding a solution, the Agriculture Bill – the first to be introduced in Parliament for some decades – is clearly an opportunity to resolve this long standing issue."

Additional analysis and evidence on the Bill

Defra has published [additional information](#) related to the Bill -

- [Health and Harmony: the future for food, farming and the environment in a Green Brexit - policy statement](#)
 - this sets out the background to the Bill and specifies its policy aims. It also provides more detail about the agricultural transition period in England.
- [Policy statement - timeline](#) ¹⁴
 - this sets out what type of support will be available, in which years, in England. It does not say how much support will be available.
- [Agriculture Bill: Analysis and Economic Rationales for Government Intervention](#) ¹⁵
 - this sets out the evidence and analysis underpinning the Agriculture Bill and accompanies Health and Harmony: the future for food, farming and the environment in a Green Brexit - Policy Statement.
- [Moving away from Direct Payments Agriculture Bill: Analysis of the impacts of removing Direct Payments](#) ¹⁶
 - this sets out analysis and evidence for England on the following questions: What are Direct Payments and why do we want to remove them? How much do Direct Payments contribute to farm revenue and profit? What are the potential impacts of removing Direct Payments without a transition? How can farm businesses offset the removal of Direct Payments during the transition period? What are the options for moving away from Direct Payments?

SECTION 2 - Legislative Consent

The UK Government and the Scottish Government have different views as to how the Bill affects devolved administrations.

- The Scottish Government [responded](#) to the publication of the Agriculture Bill with a news release.
- The UK Government published a "[myth buster](#)".

The table below compares some of the statements in these two documents.

Comments on the Bill from the Scottish and the UK Government

Scottish Government	UK Government
The ... Agriculture Bill must meet the key test of respecting the devolved settlements	Agriculture is devolved to the Scottish Government and will remain devolved.
It would be wholly unacceptable if the Scottish Parliament were unable to continue to provide coupled support for active beef and sheep farmers and LFASS payments for our toughest farming areas for example, which are crucial elements of Scottish policy	No powers that could constrain devolved policy choices in Scotland are being introduced. For example, there is nothing in the Agriculture Bill which will stop existing Scottish Government policies – including the Voluntary Coupled Support and Less Favoured Area Support Scheme. They will still be possible under both retained EU law and the Agriculture Bill.
It represents a missed opportunity for the UK Government to deliver on promises made during the referendum and since – namely that Scottish farmers would continue to receive at least the same level of funding as they currently do in the event of Brexit	Scottish farmers will continue to receive the same level of funding as they currently do until the end of this Parliament in 2022
This bill rides roughshod over the devolved settlement. For example, on compliance with WTO rules, the bill could create sweeping unilateral powers that could constrain policy choices in Scotland.	The Agriculture Bill demonstrates a continued commitment by the UK Government to World Trade Organization (WTO) obligations on domestic support. ... the Scottish Parliament does not have the legal competence to act in this area... this is a reserved matter.
Unless and until the attempts to grab key powers that impact on farming and food production are addressed and revised, we are clear that we cannot and will not bring forward legislative consent motions for primary Brexit legislation, such as this, until the Sewel Convention is made operable again.	The UK Government is not seeking consent from the Scottish Parliament on this Bill as we are not legislating in areas of devolved competence in Scotland.
This government has always said that the best way to go about this task would be by cooperation and coordination between governments, in a way that respected the principles of devolution	We have offered to extend powers in the Agriculture Bill to the devolved administrations ... Wales and Northern Ireland have accepted the offer. The Scottish Government has chosen not to take any powers in this Bill. Agriculture is devolved and that is their choice. But our offer remains on the table.

What is Legislative Consent?

- The Scottish Government has said that it will not bring forward legislative consent motions for primary Brexit legislation such as the Agriculture Bill “until the Sewel Convention is made operable again”.
- The UK Government has said that it is not seeking consent from the Scottish Parliament on this Bill because it is not legislating in areas of devolved competence in Scotland.

The UK Parliament is sovereign

Devolution to Scotland, Wales, and Northern Ireland did not change the fact that the UK Parliament is sovereign and can change the law in devolved areas. However, since 1999, the UK Government has followed a convention that Westminster does not usually interfere in devolved areas without agreement from the devolved legislatures.

The legislative consent convention, also called the Sewel Convention, was enshrined in law by the Scotland Act 2016 and the Wales Act 2017. These Acts “recognise” the convention, but do not formally limit the power of the UK Parliament.

The Supreme Court ruled, in 2017, that Sewel is just a political convention. This means the devolved governments cannot turn to the courts to enforce it.

However, while the convention does not provide a legal veto power for the devolved bodies, it possesses significant political influence. The convention has been followed hundreds of times since 1999 and it has become a central part of how the UK and devolved legislatures interact.

How does the legislative consent convention work in practice?

The convention operates through a system of legislative consent motions and memorandums. The [Standing Orders of the devolved legislatures](#) in Edinburgh, Cardiff and Belfast state that a legislative consent memorandum should be prepared by the devolved Government if the UK Government publishes a bill with provisions falling within the scope of the Sewel Convention ¹⁷ .

The legislative consent memorandum sets out the bill’s objectives, the reasons why consent is required, and usually indicates whether and why the devolved government believes consent should be given.

Before a bill reaches its final amending stage in the UK Parliament the devolved legislatures vote on a legislative consent motion to either grant or refuse consent for the bill.

It is very rare for legislative consent to be withheld. Legally, the UK Parliament can seek Royal Assent for any Bill, even if a devolved legislature withholds consent for its provisions.

Does the convention apply ?

The convention states that the UK Parliament “ [will not normally legislate with regard to devolved matters without the consent](#) ” of the devolved parliaments. It applies in Scotland when UK legislation:

1. makes provision applying to Scotland for any purpose within the legislative competence of the Scottish Parliament
2. alters the legislative competence of the Scottish Parliament; or
3. alters the executive competence of the Scottish Ministers.

In the Scottish Parliament chamber on [26 September 2018](#) Fergus Ewing MSP, Cabinet Secretary for Rural Economy and Connectivity said - "unfortunately, the current UK Agriculture Bill impinges on devolved powers in three respects." These three areas are -

- clauses 22- 24 on producer organisations
- clause 25 on fair dealing obligations
- clause 26 on the WTO agreement on agriculture.

Scottish Government's Legislative Consent Memorandum

On 29 October 2018 the Scottish Government lodged a [legislative consent memorandum](#) in the Scottish Parliament ¹⁸ . The main points of this document are that -

- The Scottish Government considers that the UK Agriculture Bill is a relevant Bill under Rule 9B.1 of the Parliament's Standing Orders. This means the Scottish Government think the Bill "makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters the executive competence of the Scottish Ministers."
- The Scottish Government considers that Parts 6 and 7 of the Agriculture Bill deal with matters within the legislative competence of the Scottish Parliament in relation to the regulation of agricultural producers and agriculture support in Scotland.
- The Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill.
- The Scottish Government considers that the approach taken to this Bill is not consistent with devolved responsibilities and accordingly the Scottish Government cannot recommend that the Parliament gives its consent to the Bill at this time.

On 25 October 2018, Mr Ewing wrote to the Secretary of State for Environment, proposing amendments to the UK Agriculture Bill. The amendments were to the clauses where there is dispute over the devolved/reserved nature of the issue ¹⁹ .

These issues are considered below.

Producer Organisations

A Producer Organisation (“PO”) is an organisation formed by a group of farmers that carries a status under EU law. Through the PO, the farmers coordinate their activities to increase their competitiveness. POs benefit from a number of exemptions from competition law which enable their members to collaborate in ways which would otherwise breach competition law (such as, joint production planning and processing, collective negotiations). There is therefore a connection between the PO regime and competition law.

Clauses 22- 24 seek to do two key things -

1. they set out the conditions for groups of producers wishing to apply for recognition under the new domestic PO regime
2. they establish, through amendments to the Competition Act 1998, the exemptions from competition law that are available to recognised organisations.

Clauses 22-24 apply to Scotland. The Sewel Convention will apply if these serve a devolved purpose. Agricultural policy is a matter which falls within devolved competence. Producer organisations help to strengthen the position of producers in the food chain and contribute to a healthy and competitive agricultural market. It is therefore possible to argue that legislating in relation to POs serves a devolved purpose.

However, in order operate as intended, POs need to be exempt from certain competition law requirements. “Competition” is a reserved matter under [Schedule 5, Head C \(Trade and Industry\) of the Scotland Act 1998](#). The reservation covers “regulation of anti-competitive practices and agreements: abuse of dominant position; monopolies and merger.” The reservation was designed to ensure the continuation of a common United Kingdom system for the regulation of competition matters. Competition matters are currently regulated by the Competition Act 1998 which introduced a prohibition approach to anti-competitive agreements and abuse of a dominant position.

Due to the interaction between POs and competition law, the debate surrounds whether the purpose of this clause is the promotion of an effective agricultural market (which is devolved) or the regulation of anti-competitive practices (which is reserved).

What does the Welsh Government think?

On 12 September 2018, Lesley Griffiths AM, Cabinet Secretary Energy, Planning and Rural Affairs published a [written statement on the Introduction of the UK Agriculture Bill](#). It states that the Welsh Government is generally supportive of the Bill as drafted but that there are two outstanding issues. The issues cited are not related to these clauses (but the WTO and the red meat levy - see below).

Fair dealing obligations

The Explanatory Notes (Annex A) sets out that clause 25 on fair dealing obligations extend to Scotland, but that a legislative consent motion is not needed.

The Explanatory Notes to the Bill explain that there is a disparity in bargaining power between primary agricultural producers (farmers) and operators further up the chain, which leaves farmers vulnerable to unfair trading practices. This imbalance can force them into contractual relationships which impose on them commercially harmful terms but to which they have no commercial alternative.

Clause 25 provides the UK Government with the power to introduce obligations that promote fair contractual relationships between farmers and the first purchasers of their products. The intention is that clause 25 will aid transparency and promote fair dealing by making it a requirement, for example, that contracts between farmers and those who they supply are in writing and expressly deal with matters such as price and payment.

What is the issue?

Regulation of unfair contract terms is a matter of Scots private law, and is therefore devolved.

However, “the regulation of anti-competitive practices and agreements” is reserved. In the Explanatory Notes the UK Government suggest that this clause pursues a similar aim to that of the Groceries Supply Code of Practice, which promotes fair dealing between supermarkets and their suppliers. The Code applies on a UK basis, and is enforced by a UK adjudicator. The Code was concerned with anti-competitive practices in the UK groceries sector, and the market dominance of the 10 largest supermarkets.

A debate relates to whether clause 25 is directed at -

- unfair contractual terms, which is a devolved matter, or
- anti-competitive agreements and practices, which is reserved.

What does the Welsh Government think?

The Welsh Government has not publicly commented on the provisions on fair dealing.

World Trade Organisation Agreement on Agriculture

The WTO Agreement on Agriculture is an international treaty that sets out a number of rules and commitments on agricultural trade practices. The UK Government is responsible for ensuring that all UK policies on domestic support in relation to agriculture are WTO compliant.

The Agreement on Agriculture places limits on the amount of government financial support that can be given to domestic producers of agricultural products.

Clause 26 gives the UK Government the power to make regulations for the purpose of securing compliance with the Agreement on Agriculture. As part of this, the UK Government can set out how support is to be classified and set caps on the amount of support allowable to the UK as a whole and to the various devolved administrations.

The [UK Government myth buster](#) states -

"The Scottish Government has claimed powers enabling us to comply with our WTO obligations should be exercised jointly; however, the Scottish Parliament does not have the legal competence to act in this area. While this is a reserved matter, the UK Government will work closely with the devolved administrations on this given their interest. Just as we did ahead of the Agriculture Bill's introduction."

The [Scottish Government](#) has said -

"... on compliance with WTO rules, the bill could create sweeping unilateral powers that could constrain policy choices in Scotland. It is therefore of serious concern that the UK Government could impose unwanted policies and rules on Scottish farmers in areas of devolved competency."

Is this a reserved or devolved issue?

Schedule 5, Part 1, of the Scotland Act 1998 contains the following reservation -

7(1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

(2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

(b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.

The [Scottish Government](#) have stated that "In addition, there are already mechanisms in the in the Scotland Act 1998 to ensure compliance with international obligations."

A debate therefore relates to might arise as to whether the purpose of the provision is

- to regulate international trade (which is reserved) or
- to implement and observe international obligations (which is devolved).

Scottish powers in the absence of clauses in the UK Bill

Unlike the Welsh Government and the DAERA, the Scottish Government has not requested Scottish clauses to be included in the UK Agriculture Bill so far. So what powers will the Scottish Government have for agriculture, once the UK leaves the EU?

Scottish Ministers will have powers transferred to them under the European Union (Withdrawal) Act 2018. This will transfer CAP legislation, as it stands on exit day. Scottish Ministers also have powers that currently exist to allow discretion and regional variability in implementing the CAP.

Scottish Ministers have powers to **correct deficiencies** in this legislation to ensure that the law can operate. They will not have powers to **modify** this legislation - which England, Wales and Northern Ireland will have under the Agriculture Bill.

The Scottish Government's proposals for a rural transition period, set out in [Simplicity and Stability](#) indicate a two phased process²⁰.

1. until 2020 there will be little change. It maybe that no additional powers are needed. Existing discretion may be used to make small changes.
2. from 2021 onwards, current schemes will be simplified. If new powers are required, the Scottish Government could bring forward Scottish specific legislation for this phase of the transition.

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