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Room T1.01
Scottish Parliament

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19 December 2019

Dear Andrew

AGRICULTURE (RETAINED EU LAW AND DATA) (SCOTLAND) BILL

Thank you for your letter on behalf of the Delegated Powers and Law Reform Committee to James Hynd, dated 10 December 2019, which sought further explanation regarding the delegated powers of the above Bill as introduced. An answer to each of the Committee's questions is set out below, with the Committee's questions in bold.

Section 2(1) – Power to simplify or improve CAP legislation

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Question 1: In light of all [the] factors, would the affirmative procedure be more appropriate?

It is the stated intention of the current Scottish Government that this power would be used to make changes during a transition period for the Scottish CAP in the immediate aftermath of the UK exit from the EU, and that such changes would be restricted to those that could be considered a simplification or improvement of the current CAP rules and regulations. The Stability and Simplification consultation sought to identify, for example, how to reduce the administrative burden through proposals to streamline and synergise some of the Pillar 2 schemes during a transition period. This transition period relates only to our policy on CAP, and is not the same as the transition period agreed by the EU and the UK under the Withdrawal Agreement (which currently ends on 31 December 2020).

The Committee noted this power will be available without limit of time to future governments, and said that it could be used to make changes to any aspect of the CAP, with potentially significant effects on individuals who receive CAP funding and on the policies delivered through the CAP.

It is true of course that a change may be significant to those directly affected, but the power is expressly limited to simplifying or improving the main CAP legislation (so not including common market organisation), and it is not intended that it would or could be used to make radical changes to the structure of the CAP or to individual CAP schemes.

Rather, it is expected that the power would be used to make moderate changes to the CAP during the transition period. This is reflected in the questions asked as part of the “Stability and Simplicity” consultation between 20 June 2018 and 15 August 2018, and in the responses. The simplifications and improvements that were identified in the responses, and which may be brought forward in secondary legislation made under this power, are predominantly minor in nature

Parliamentary time is of course valuable, and it remains our view that negative procedure is both appropriate and proportionate in respect of changes of that kind.

Even so, we thank the Committee for their comments, and will reflect further on them as we consider our approach for this section of the Bill as it progresses through the Scottish Parliament.

Question 2: Would a statutory consultation required be appropriate?

The Committee notes that it is the Scottish Government’s intention to fully engage stakeholders in the process of making simplifications and improvements, however it would be possible for a future Government to exercise this power to make changes without consultation.

The Scottish Government aims to make it as easy as possible for those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work. It will consult on proposals unless that is clearly impracticable because for example the matter is urgent, or unnecessary because for example the policy has already been subject to consultation.

The Scottish Government carried out a full “Stability and Simplicity” consultation between 20 June 2018 and 15 August 2018. This consultation included a wide range of questions on a number of areas that could be seen as a simplification or improvement of the CAP legislation. It may not therefore be necessary to consult again on some of those proposals, as affected stakeholders have had a recent opportunity to contribute to policy development.

The Scottish Government would expect to consult on further ‘simplification’ changes, and may depending on the circumstances consult again on changes covered by the previous consultation. It would aim to consult in a proportionate manner, having regard for example to the best use of our limited resources, and to the risks of consultation ‘fatigue’.

It may be appropriate for example to have only a short focused consultation with a small number of stakeholders on a particular technical change.

It may be appropriate to consider any new proposals through the regular stakeholder engagement through various groups, most notably the Agriculture and Rural

Development Stakeholder Group which includes over 30 stakeholder organisations from across the rural spectrum. A further public consultation might not then add anything to the policy development process.

A statutory requirement to consult may therefore be a 'one size fits all' solution to an issue that is best deal with in a flexible manner as set out above, that does not deliver any particular new benefit.

Taking account of all these factors, the Scottish Government does not consider at this time that a statutory consultation requirement is needed for this section of the Bill. However we will reflect further on this issue.

Question 3: Would a sunset provision be appropriate?

It is the Scottish Government's intention to have a new long term policy for agriculture in place from 2024. On the 10 January 2019 the Scottish Parliament agreed to establish a stakeholder group, the Farming and Food Production Future Policy Group, to explore and make recommendations on such long term policy.

The Committee notes that the policy intention is for this power to be exercised during a transition period of approximately 5 years, but that the power within the Bill is unlimited in time. It asks if a sunset provision is appropriate.

The Scottish Government considers that much remains uncertain, including the length of any transitional period for the purposes of the Withdrawal Agreement (during which EU law will continue to apply for some purposes), and the nature of any long-term UK/EU deal that will apply after that period.

Given there are still so many unknowns, an end date for these provisions has not been included in the Bill, as there needs to be some flexibility. The Scottish Government do not intend to rely on the powers in section 2 of the Bill any longer than is absolutely necessary.

In light of these factors, we do not feel that a sunset provision would be appropriate for this section.

Question 4: In light of the uncertainty over how the power will be used, and given that the power is not limited in time, would it be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used?

The Scottish Parliament can of course ask Ministers to account for their use of any power in this Bill at any time.

Even so, the Scottish Government recognises that considerable changes are now in motion, and that the powers in the Bill are to a degree (and necessarily) general in nature.

It does not follow that we consider there should be a legal duty to report periodically, but we will reflect on how we could keep the Parliament informed about developments.

Section 3(1) – Power to provide for the operation of CAP legislation beyond 2020

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Question 5: Would a statutory consultation requirement be appropriate?

This section of the Bill is about modifying the main CAP legislation to ensure it continues to operate in Scotland beyond 2020, including the ability to determine a national ceiling for each year.

The Committee notes the intention to consult on the use of this power, and asks if a statutory consultation requirement is appropriate.

The Scottish Government does not consider that it would be, for the reasons set out above in relation to the exercise of the powers in section 2 of the Bill. The continuing uncertainty in relation to process of leaving the EU is again relevant here, and in addition the views of the new UK administration on the arrangements that will (for example) replace the role of the EU Commission are not yet known.

Question 6: In light of the uncertainty over how the power will be used, and given that the power is not limited in time, would it be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used?

The Scottish Government will reflect on this, for the same reasons as set out in respect of the power in section 2 of the Bill.

Question 7: On whom might functions be conferred in connection with, or with the making of, a determination? What might those functions be?

The Scottish Government expects that significant powers, such as the power to determine a national ceiling, would best be conferred on the Scottish Ministers.

It may be that new bodies are created to carry out, at a national or UK level, some of the functions currently exercised by EU bodies. It may also be appropriate to confer some ancillary functions on such a body, such as a duty to provide advice to the Scottish Ministers in respect of a proposed determination.

The Scottish Government emphasises, however, that no new decisions have been made on any of those matters.

Section 4(1) – Power to modify financial provision in CAP legislation

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Question 8: Would a statutory consultation be more appropriate?

This section of the Bill relates to the power to modify the CAP legislation in relation to financial provisions, including the distribution of funds between pillars and schemes and the ability to cap individual payments.

The Committee notes this power may be required to respond to funding cuts at a UK level, and that any such cuts would be distributed across different aspects of CAP and could involve significant policy choices with significant impacts on individual farmers and crofters depending on circumstances and types of payments they receive. It asks if a statutory consultation requirement would be appropriate

The Scottish Government does not consider that it would be, for the reasons set out above in relation to the exercise of the powers in section 2 of the Bill.

The Scottish Government notes for example that it may be necessary to modify financial provision as part of our response to UK Government budget decisions, and consequent funding allocations. It might be that changes must be made in order for the CAP to continue to operate, so that there are no policy options to consult on. But we would even in that event seek to engage fully with stakeholders on the purpose and effect of the changes being made.

Section 6(1) – Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Question 9: Would statutory consultation requirement be more appropriate?

The Committee notes exercise of this power would principally affect an easily identifiable, limited group of stakeholders, and could have a significant impact on individual growers. The Scottish Government agrees that this power principally affects an easily identifiable group of growers; there are three existing Producer Organisations with headquarters in Scotland that receive funding through the Fruit and Vegetables Aid Scheme. The Scottish Government is in regular contact with them about their current operational programmes.

The Scottish Government's "Stability and Simplicity" consultation included a wide range of questions on a number of areas that could be seen as a simplification or improvement of the CAP legislation. Any simplifications and improvements to the CAP legislation on aid for fruit and vegetable producer organisations that may be brought forward are likely to be of a minor nature and would not therefore justify a further formal consultation.

As mentioned in question 2 three groups are taking forward a programme of work to effectively assess the proposals for change identified in the consultation. These groups include stakeholder membership and/or further stakeholder engagement and are in addition to other regular stakeholder engagement through various groups, such as the Agriculture and Rural Development Stakeholder Group which includes over 30 stakeholder organisations from across the rural spectrum.

Please also see our comments for question 2 on section 2 of the Bill.

Taking account of all these factors, the Scottish Government does not believe a further statutory consultation requirement is appropriate for this section of the Bill.

Question 10: Would a sunset clause be appropriate?

Similar to question 3 the Committee notes this power is not time limited, despite the Policy Memorandum stating that the aim is to enable simplifications and improvements to this aid scheme by making amendments to retained EU law during the period up to around 2024.

It is the Scottish Government's intention to have a new long term policy for agriculture in place from 2024. On 10 January 2019 the Parliament agreed to establish a stakeholder group, the Farming and Food Production Future Policy Group, to explore and make recommendations on such long term policy.

However, the ongoing uncertainty around the UK's exit from the EU, what any future relationship with the EU may look like, and what rules we may have to follow, has the potential to impact on that timetable.

Given there are still so many unknowns, an end date for these provisions has not been included in the Bill, as there needs to be some flexibility. The Scottish Government do not intend to rely on the powers in Section 6 of the Bill any longer than is absolutely necessary.

In light of these factors, we do not feel that a sunset provision would be appropriate for this section.

Section 8(1) – Marketing standards

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Question 11: In light of these factors, would the affirmative procedure be more appropriate?

The provisions related to marketing standards are in response to the provisions that were in the UK Agriculture Bill. As set out in the policy memorandum the risk is that Scotland would be adrift compared with England, Wales and Northern Ireland if the provisions in the UK Agriculture Bill, when reintroduced, proceeded. This power will simply enable Scotland to keep pace with other parts of the UK or with the EU.

The Committee notes that radical changes involving significant and sensitive policy considerations could be made under this power, and that the Parliament may therefore wish a higher level of scrutiny. We would note that, unlike the equivalent provisions in the former UK Agriculture Bill, section 8(5) specifically requires consultation with persons likely to be affected by the regulations before they are made. This will ensure that there is an opportunity for any significant issues to be aired and addressed.

The Committee notes that offences can be created with a maximum penalty of 5 years imprisonment on conviction on indictment. While that is true (and is a consequence of the provisions in section 20 applying generally to all offence-creating provisions in the Bill), in practice the maximum penalties for offences are likely to be at a considerably lower level. Under the existing marketing standards regulations, for example the Marketing of Horticultural Produce (Scotland) Regulations 2009, the Eggs and Chicks (Scotland) (No. 2) Regulations 2008, the Beef and Veal Labelling (Scotland) Regulations 2010, the Marketing of Bananas (Scotland) Regulations 2012, the maximum penalty is a level 5 fine on summary conviction. Each of those regulations has been made under negative procedure.

We thank the Committee for their comments on this issue and will reflect further on them as we consider our approach for this section of the Bill as it progresses through the Scottish Parliament.

Section 10(1) – Carcass classification

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Negative

Question 12: In light of these factors, would the affirmative procedure be more appropriate?

Similar to question 11 this will simply enable Scotland to keep pace with other parts of the UK or the EU. At this stage there is no proposal anywhere in the UK to changes to carcass classification legislation.

The Committee notes that offences can be created with a maximum penalty of 5 years imprisonment on conviction on indictment. While that is true (and is a consequence of the provisions in section 20 applying generally to all offence-creating provisions in the Bill), in practice the maximum penalties for offences are likely to be at a considerably lower level. Under the existing carcass classification regulations, the Beef and Pig Carcase Classification (Scotland) Regulations 2010, the maximum penalty for most offences is a level 5 fine on summary conviction – the only exceptions being offences related to misleading marks on beef and pig carcasses, for which an unlimited fine may be imposed on conviction on indictment. Those regulations were made under negative procedure.

We thank the Committee for their comments on this issue and will reflect further on them as we consider our approach for this section of the Bill as it progresses through the Scottish Parliament.

Yours sincerely



Vicky Dunlop
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