

Edward Mountain MSP  
Convener  
Rural Economy and Connectivity Committee  
By email only

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24 March 2020

Dear Edward,

**POLICY AREAS: DIRECT PAYMENTS**

**The Direct Payments to Farmers (Legislative Continuity) Act 2020**

**The Direct Payments to Farmers (Legislative Continuity) Act (Consequential Amendments) Regulations 2020**

The UK Government has requested the Scottish Ministers give consent to the Direct Payments to Farmers (Legislative Continuity) Act (Consequential Amendments) Regulations 2020 (the “SI”).

You will recall that the protocol agreed between the Scottish Parliament and the Scottish Ministers for the scrutiny of legislation made under the European Union Withdrawal Act 2018 does not apply to legislation made under the 2020 Act. However, I would again like to reiterate my commitment to the principle that there should be proper scrutiny of UK instruments that contain devolved matters and I will therefore act as if this protocol applies here.

I therefore attach a Notification of Intention to Consent which sets out the details of the SI and the reasons why I am content for it to extend to Scotland. The SI is due to be made on or just before 28 April 2020. It will be laid on 28 April and come into force on or just before 30 April 2020. It will be subject to the negative procedure. Drafting of the SI is yet to be finalised and it is not available in the public domain at this stage. We will, in accordance with the protocol, confirm when the SI is made and laid, and we will advise you as to whether the final SI is in keeping with the terms of the attached notification.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

However, as explained in the Notification, we will regrettably be unable to give the Parliament 28 days to consider Scottish Ministers' proposal to consent to the SI. In particular, the UK Government could not agree to delay the laying of the above SI as it needs to be in force for the emergency laying of their own SI also on 30 April .

I would also stress that the content of the SI being notified in this case is only technical in nature and does not involve any policy change .

I would be grateful if the Committee could please consider and respond to the Notification of Intention to Consent before 28 April to allow me to respond to the UK Government's consent request.

I am copying this letter to the Convenors of the Environment, Climate Change & Land Reform Committee and of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you further.

Yours sincerely,

A handwritten signature in black ink that reads "Fergus Ewing". The signature is written in a cursive style with a large loop under the letter 'F' and another under the letter 'E'.

**FERGUS EWING**

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[www.gov.scot](http://www.gov.scot)



# **NOTIFICATION TO THE SCOTTISH PARLIAMENT**

## **DIRECT PAYMENTS**

### **1. Name of the SI**

The Direct Payments to Farmers (Legislative Continuity) Act (Consequential Amendments) Regulations 2020

### **2. A brief explanation of the law that the SI amends**

This proposed SI (“SI”) will be made under the Direct Payments to Farmers (Legislative Continuity) Act 2020 (the “2020 Act”). On 16 January 2020 the Scottish Parliament approved the Legislative Consent Motion lodged by the Cabinet Secretary for the Rural Economy in respect of the 2020 Act following the approval of the REC Committee the previous day.

The SI will be made by the Secretary of State under section 6(1) of the 2020 Act and will apply to Scotland. Section 6(5) of the 2020 Act provides that the Secretary of State may only make regulations under section 6(1) with the consent of Scottish Ministers.

The SI is required as a result of the enactment of the 2020 Act. The 2020 Act provides a legal basis in domestic law for the EU legislation governing the 2020 Direct Payment schemes (“the Direct Payments legislation”) which is part of the Common Agricultural Policy (“CAP”). The SI makes consequential amendments to ensure that the legislation is treated in the same way as other EU legislation which will become retained EU law under the European Union (Withdrawal) Act 2018 (the “2018 Act”).

### **3. Summary of the proposals**

The direct payment schemes are the largest source of farm subsidy in Scotland. Many farmers and land managers are reliant on this income to support their businesses. The amendments made by the SI will help ensure that the direct payments schemes continue to operate effectively

The Withdrawal Agreement negotiated between the EU and the UK (the “Withdrawal Agreement”) provides for an Implementation Period during which EU law will continue to apply in the UK unless otherwise provided. Article 137 of the Withdrawal Agreement does otherwise provide by dis-applying the Direct Payments legislation in the UK. Therefore, the 2020 Act was enacted to incorporate the Direct Payments legislation into domestic law on exit day. The 2020 Act therefore created a body of retained EU law which is distinct from the retained EU law that will be established by the 2018 Act at the end of the Implementation Period.

The SI makes amendments needed as a result of this. The amendments ensure the Direct Payments legislation will be treated in the same way as retained EU law established under the 2018 Act. The SI does not make policy changes. Instead, it maintains the status quo and will have no noticeable impacts on the ground for farmers.

The consequential amendments made by this SI under the 2020 Act are similar to the consequential amendments made by the European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2019<sup>1</sup> (the “2019 Regulations”) under the 2018 Act.

Regulation 2 provides a scheme for interpreting non-ambulatory references in retained EU law in other pieces of legislation. Equivalent provision is made in regulation 2 of the 2019 Regulations. Regulation 3 amends the Interpretation Act 1978 (the “1978 Act”). This regulation will have effect in Scotland to the extent that the 1978 Act applies to regulations which apply in Scotland. Regulation 5 amends the Interpretation and Legislative Reform (Scotland) Act 2010 (the “2010 Act”) so that references to “retained EU law” in Scottish legislation to which the 2010 applies will include the Direct Payments legislation as it forms part of domestic law under the 2020 Act.

#### **4. An explanation of why the change is considered necessary**

The proposed changes are considered to be necessary to ensure that the direct payments legislation remains functional and to provide consistency across the statute book.

#### **5. Scottish Government categorisation of significance of proposals**

The Scottish Government considers that the proposed SI falls within Category A, as the changes are minor and technical in nature and policy change is being avoided to preserve the current status quo.

#### **6. Impact on devolved areas**

The Scottish Government agree that the changes in the SI are a pragmatic way of making consequential amendments under the 2020 Act direct.

The proposed SI respects the current devolution settlement as it is subject to the consent of the Scottish Ministers.

No impact on business, charities or voluntary bodies or the public sector is anticipated. Beneficiaries will continue to receive direct payments similarly to before EU exit.

#### **7. Summary of stakeholder engagement/consultation**

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<sup>1</sup> S.I. 2019/628

The SI has not been subject to formal consultation because it aims to retain the status quo for the direct payments 2020 claim year, makes no substantive policy changes and is technical in nature.

#### **8. A note of other impact assessments, (if available)**

An impact assessment has not been carried out in relation to these regulations as they are aimed at preserving the effect of the current direct payments regulatory regimes.

#### **9. Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation**

If these consequential amendments are not made, the Scottish Ministers believe that this would risk undermining the cohesive regulatory framework for direct payments. This would cause problems for stakeholders as it would risk confusion and inconsistency in the interpretation of retained EU law.

The Scottish Ministers propose to consent to the SI to make consequential amendments under the 2020 Act. The approach set out in the SI is realistic, achievable and minimises the risk of immediate disruption. The Scottish Ministers believe that, in the circumstances, consenting to the SI would be the most effective way to help ensure a clear and consistent statute book.

The approach of the SI respects the devolution settlement and continues to provide for a transition from an EU to UK regulatory framework with devolved options for Scotland.

The Scottish Government has worked constructively with the UK Government and the other Devolved Administrations and, in light of that, is satisfied that the proposed amendments to the applicable legislation will ensure that it continues to operate effectively.

The Scottish Ministers consider that it is appropriate for the fixing legislation to be made on a UK-wide basis by the UK Government. This provides an effective achievable solution in current circumstances of limited resources and significant resource intensive legislative work needing to be completed under extremely tight time constraints. It also reduces the risk of conflicting provisions being produced by UK administrations that could result in confusion.

The Scottish Ministers believe stakeholders need clarity and continuity in the immediate future in so far as possible to continue to operate their businesses during this period of transition and consenting to the SI is the most likely way of achieving that aim at this time.

#### **10. Intended laying date (if known) of instruments likely to arise**

It is intended that the proposed SI will be laid at Westminster on the 28 April 2020. The negative procedure applies to the SI.

**11. Does the Scottish Parliament have 28 days to scrutinise?**

No we regret that it will not be possible in this case for scrutiny to take place for the full 28 day period. It is intended that the SI will be made on, or just before, 28 April 2020. It is due to be laid on 28 April 2020, and will come into force on, or just before, 30 April 2020. It will be subject to the negative procedure.

Timing is tight in this case as we only recently received the necessary information from the UK Government to enable us to make this notification. We asked the UK Government to delay the laying date to enable the full 28 day period. But they explained that this would not be possible in this case as they needed the SI to be made and laid as soon as possible so they can lay a further emergency instrument.

**12. Information about any time dependency associated with the proposal**

See above as explained in clause 11.

**13. Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?**

No

**14. Any significant financial implications?**

The Proposed SI is not expected to have any significant financial implications for stakeholders in Scotland.