

# **AGRICULTURE (RETAINED EU LAW AND DATA) (SCOTLAND) ACT 2020**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Agriculture (Retained EU Law and Data) (Scotland) Act 2020. They do not form part of the Act and have not been endorsed by the Parliament.
2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **BACKGROUND**

#### ***Common Agricultural Policy (CAP)***

3. The description of the Common Agricultural Policy (“CAP”) that follows is to aid the understanding of the effect of Part 1 of this Act, which makes provision in relation to the former EU CAP rules as they will have effect as retained EU law<sup>1</sup> under the European Union (Withdrawal) Act 2018 (the “2018 Act”),<sup>2</sup> following the UK withdrawal from the EU on 31 January 2020.
4. The CAP is the EU policy to provide financial support to farmers in Member States. It is said to have two “pillars”. Pillar 1 provides for direct payments to farmers, and also covers common market organisation (CMO). Pillar 2 provides for measures that support rural development, and in particular good environmental outcomes, farming productivity, socio-economic development and rural growth.
5. The CAP is managed and funded at European level from the resources of the EU budget. The majority of CAP funds are allocated to direct payments, which is based on the amount of land the recipient owns.
6. The declared objectives of the CAP are as follows:<sup>3</sup>

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<sup>1</sup> See paragraphs 69 to 86 below.

<sup>2</sup> The 2018 Act has been relevantly amended by the:

(1) (1) [European Union \(Withdrawal Agreement\) Act 2020 \(c.1\)](#), which implemented the Withdrawal Agreement between the UK and the EU as considered and agreed at European Council on 17 October 2019, and

(2) (2) [Direct Payments to Farmers \(Legislative Continuity\) Act 2020 \(c.2\)](#).

The Agreement provides for a transitional period ending on 31 December 2020. Under the terms of the Agreement, most EU law would continue to apply in the UK during the transition period; however, Article 137 of the Withdrawal Agreement stipulated EU Direct Payments regulations did not apply in the UK for the 2020 claim year.

Exit day for the purposes of the 2018 Act, now known as IP completion day, is at the end of the transitional period. EU legislation will generally become retained EU law on IP completion day.

<sup>3</sup> [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en)

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- To support farmers and improve agricultural productivity, ensuring a stable supply of affordable food,
  - To safeguard European Union farmers to make a reasonable living,
  - To help tackle climate change and the sustainable management of natural resources,
  - To maintain rural areas and landscapes across the EU, and
  - To keep the rural economy alive by promoting jobs in farming, agri-foods industries and associated sectors.
7. Within the UK, agriculture is devolved and therefore the Scottish Ministers are responsible for rural support, which includes implementing the CAP in Scotland.
8. The legal framework of the CAP is to be found in a series of directly applicable EU regulations that will, as modified for that purpose, become retained EU law after exit. The 5 basic acts (broadly equivalent to UK primary legislation) are:
- Regulation [1305/2013](#)<sup>4</sup> (“the Rural Development Regulation”): This Regulation establishes support for Rural Development by the European Agricultural Fund for Rural Development,
  - Regulation [1303/2013](#)<sup>5</sup> (“the common provisions Regulation”): This Regulation lays down common provisions on EU funds, and in particular on the European Agricultural Fund for Rural Development,
  - Regulation [1306/2013](#)<sup>6</sup> (“the Horizontal Regulation”): This Regulation covers the financing, management and monitoring of the Common Agricultural Policy, and in particular it provides for cross-cutting measures that apply to all areas of the CAP,
  - Regulation [1307/2013](#)<sup>7</sup> (“the Direct Payments Regulation”): This Regulation establishes rules for Direct Payments to farmers under support schemes within the framework of the CAP, and
  - Regulation [1308/2013](#)<sup>8</sup> (“The Single CMO Regulation”): This Regulation establishes a common organisation of the markets in agricultural products (“CMO”).
9. In addition, Regulation [1370/2013](#) provides for measures in respect of, and rules on, aid and refunds and similar matters as regards agricultural products and the CMO.
10. There is a body of EU subordinate legislation in the shape of delegated and implementing acts made under powers in the basic acts, which set out further detailed provisions in relation to the CAP.
11. There is also a body of national implementing legislation, including Scottish statutory instruments made by the Scottish Ministers as regards devolved matters in Scotland.

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4 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1305>. The version that will become retained EU law on exit day will include ‘deficiency fixes’ made under the European Union (Withdrawal) Act 2018. The same is true for all the basic acts except so far as they relate to direct payments for claim year 2020, which became retained EU law on 31 January 2020 under the Direct Payments to Farmers (Legislative Continuity) Act 2020.

5 The EU law version can be found here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1303>.

6 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1306>.

7 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1307>. See also footnote 5 in that respect.

8 The EU law version can be found here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1308>.

## **Pillar 1**

### **Direct payments**

12. Direct payments are a form of income support and are aimed at helping to protect a farmer's or crofter's income from market volatility. The payments are generally decoupled from production, and are not means tested. They are based on the area farmed and accompanying payment "entitlements".
13. Direct payments rules for the 2020 claim year were rolled over into domestic law on 31 January 2020 by section 1 of the [Direct Payments to Farmers \(Legislative Continuity\) Act 2020 \(c.2\)](#).
14. Direct payments schemes deliver annual payments to farmers in return for compliance with certain conditions. Some of these schemes are mandatory, while others are run at the discretion of the Member States who have a degree of flexibility on, for example, eligibility conditions, calculation of payments, and scheme conditions.
15. Member States have the option to apply direct payment schemes on a regional basis, which the UK has done in order to reflect devolution. Thus, Scottish direct payment schemes are different from those in the rest of the UK, although they share common features as they are based on the EU framework.
16. The current Scottish direct payment schemes are:
  - The "Basic Payment Scheme" (BPS), which is the main direct payment scheme. It is an area-based scheme with payments calculated according to the area of land claimed upon, and acts as a safety net for farmers and crofters by providing a basic level of income support.
  - The "Greening" payment, which provides a top-up payment in return for carrying out agricultural practices beneficial for the climate and the environment.
  - The Young Farmer Scheme, which provides a top-up payment to young farmers under 40 years of age.
  - Voluntary Coupled Support (VCS), which includes the "Scottish Suckler Beef Support Scheme" (SSBSS) and the "Scottish Upland Sheep Support Scheme" (SUSSS). These schemes provide a payment linked to farm production to maintain livestock numbers.
17. In order to be eligible to receive a direct payment, farmers, crofters and land managers must submit an application form every year and meet the BPS eligibility criteria and, where relevant, the additional conditions for the greening payment, the Young Farmer Scheme and the VCS schemes.
18. Eligible farmers, crofters and land managers must comply with greening practices and rules concerning food safety, animal health, plant health, the environment, the protection of water resources, animal welfare and the condition in which farmland is maintained. This is referred to as "cross compliance". Failure to meet cross compliance requirements could result in a reduction of payments or, in extreme cases, no payments.
19. Payments are calculated in accordance with a range of additional factors including the payment region, greening payment rates, young farmer payment and the VCS schemes. There are three payment regions in Scotland:
  - Payment Region 1, which includes better quality agricultural land that has been used for arable cropping, temporary grass and permanent grass,
  - Payment Region 2, which includes higher quality rough grazing in a Less Favoured Area ("LFA"), and
  - Payment Region 3, which includes lower quality rough grazing in an LFA.

### ***Eligibility for BPS***

20. Regulation 1307/2013 includes several conditions that farmers and crofters have to meet each year in order to be eligible to receive payments; these include being an “active farmer”, having eligible land, and valid payment entitlements. Farmers can apply every year.

### ***The Young Farmers’ Scheme***

21. The Young Farmer scheme is designed to encourage generational renewal and attract new entrants to the industry. Under the scheme, young farmers, who must also be newcomers to the industry or have set up their farms in the previous five years, can apply for an extra payment on top of their BPS payment for the first five years of their business.
22. It is mandatory for Member States to apply this scheme and to use up to 2% of their national budget allocation to fund the payments.
23. In Scotland, the young farmer payment is worth up to 25% of the average value of the payment entitlements held by the young farmers, multiplied by the number of entitlements they use to claim BPS (up to a maximum of 90). The exact percentage, however, will depend on how many farmers apply each year.

### ***Greening***

24. Greening was introduced from 2015 as part of the 2013 CAP reforms to improve the environmental performance of farming. A new Greening payment “for agricultural practices beneficial for the climate and environment” was introduced, and is paid on top of the BPS payment.
25. It is mandatory for applicants to the BPS to comply with the Greening requirements, which cover permanent grassland, crop diversification and ecological focus areas (where relevant on their land) in order to receive the Greening payment.
26. It is also a mandatory requirement for Member States to allocate 30% of their direct payment budget to the Greening payment.

### ***Voluntary Coupled Support (VCS)***

27. Under the CAP, the link between the receipt of income support payments and the production of specific products has been progressively removed (‘decoupled’). This is to avoid overproduction of certain products and to make sure that farmers are responding to genuine market demand.
28. In some situations, however, targeted aid to a specific agricultural sector or sub-sector may be needed as it is undergoing economic difficulties. The VCS scheme aims to prevent the escalation of these difficulties, which could cause abandonment of production with a knock-on effect on other parts of the supply chain or associated markets.
29. The Direct Payments Regulation allows Member States to continue to link (couple) a limited amount of income support payments to certain sectors or products, subject to various conditions and strict limits to mitigate the risk of market distortion. This support scheme is known as Voluntary Coupled Support.
30. The sectors that are potentially eligible for VCS are cereals, oilseeds, protein crops, grain legumes, flax, hemp, rice, nuts, starch potato, milk and milk products, seeds, sheepmeat and goatmeat, beef and veal, olive oil, silkworms, dried fodder, hops, sugar beet, cane and chicory, fruit and vegetables and short rotation coppice.
31. In Scotland, the two VCS schemes designed to try and address declining livestock numbers are the:

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- Scottish Suckler Beef Support Scheme (SSBSS), and
  - Scottish Upland Sheep Support Scheme (SUSSS).
32. The SSBSS provides additional support, on top of the BPS, to specialist beef producers. Payments are made based on the numbers of eligible animals declared. Eligible animals are male and female calves, with at least 75% beef genetics, born on a Scottish holding and kept there for at least 30 days.
33. The SUSSS provides additional support, on top of the BPS, to help sheep producers farming in Scotland's rough grazing areas maintain their sheep flocks. Payments are made based on the numbers of eligible animals declared. Eligible animals are ewe hoggs (female sheep) born on Scottish holdings with poor quality rough grazing. The ewe hoggs must be less than 12 months old at the start of a retention period.<sup>9</sup> Payments will be made up to a maximum of one ewe hogg per four hectares of land claimed.
34. For that purpose, a holding qualifies as being in a rough grazing area if:
- 80% or more of the agricultural land is in basic payment region three, and
  - no more than 200 hectares is good quality agricultural land in basic payment region one.

### ***Payments and reductions***

35. Direct payments are made annually, with the payment window opening in December. The amount to be paid to a farmer or crofter depends upon a number of factors including the number of payment entitlements and eligible hectares, the payment region, the greening payment rate, whether that farmer is a young farmer, and whether that farmer is eligible for a VCS payment.
36. There is a mandatory requirement in Article 11 of the Direct Payments Regulation, that where a BPS payment to be granted to a farmer for a given calendar year exceeds €150,000, the sum in excess of that amount must be reduced by 5%. In addition, Scotland has applied a cap, or upper limit, of €600,000 on all BPS payments.

### ***Cross-compliance rules, inspections and penalties***

37. Cross-compliance is described in paragraph 18 above.
38. Cross-compliance rules are as set out in Articles 91 to 95 of, and Annex II to, the Horizontal Regulation and comprise the:
- statutory management requirements, and
  - good agricultural and environment conditions.
39. There are also national implementing rules in the [Common Agricultural Policy \(Cross-Compliance\) \(Scotland\) Regulations 2014 \(S.S.I. 2014/325\)](#).
40. The Scottish Government's Rural Payments and Inspections Division (SGRPID) carries out inspections in Scotland to verify that all cross-compliance requirements are being met. Failure to meet these requirements will lead to financial penalties being applied to the payments.
41. Under existing CAP rules, there is no ability to waive penalties unless there is an event outside the farmer's control. This is known as force majeure or exceptional circumstances, and penalties can be waived if appropriate. For example, inspections

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<sup>9</sup> A retention period is where claimed animals must be retained on the holding from 1 December in the year of the claim to 31 March the following year.

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were suspended during the 2007 Foot and Mouth Disease outbreak but penalties were still applied where breaches were discovered.

42. A false declaration, whether made deliberately or recklessly, may lead to criminal prosecution.

### ***Common Organisation of Markets (CMO)***

43. The common organisation of agricultural markets, known as the CMO, is an integral element of the CAP.<sup>10</sup> It is part of Pillar 1, as more fully described in the Policy Memorandum<sup>11</sup> that accompanied the Bill for this Act.
44. The basic act is the CMO Regulation.<sup>12</sup> It is intended to provide a safety net for agricultural markets through the use of market support tools, exceptional measures and aid schemes for certain sectors (in particular fruit and vegetables and wine). It is also intended to encourage producer cooperation through producer organisations and specific rules on competition, and to lay down marketing standards for certain products.<sup>13</sup>
45. The CMO has an internal aspect covering market intervention and rules on marketing standards and producer organisations, and an external one covering trade with third countries (for example import and export certificates, import duties, administration of tariff quotas, export refunds). The CMO deals with the competition rules applicable to businesses, rules on State Aid for agriculture, and the reserve fund for crises in the agricultural sector.
46. For the purposes of understanding the provisions of this Act, the key parts of the CMO Regulation (and relevant delegated and implementing regulations) are:

### ***Market disturbance***

47. Articles 219 to 222 of the CMO Regulation provide for market disturbance. Generally, market disturbance describes periods when prices are either fluctuating or rapidly increasing or decreasing. There can be various causes of market disturbance. For example, a fall in demand due to animal disease risks or a sudden increase in supply due to a major export market refusing to accept certain goods.

### ***Market intervention***

48. Articles 8 to 21 of the CMO Regulation provide for market intervention in the form of public intervention and private storage aid. There are also a number of delegated and implementing acts which sit beneath these Articles. These provisions aim to reduce supply when prices are low and increase supply when prices rise. They are, therefore, closely linked to the market disturbance provisions. These measures are used far less than in previous decades, but have been used to deal with market disturbance such as the closure of Russian markets to pigmeat in 2014 which led the European Union to provide private storage aid in 2015.<sup>14</sup> The only current use of these interventions in the UK is in relation to skimmed milk powder.
49. As a general description, through public intervention the Member State (or States) will purchase and store the products directly until such time as they can be disposed of. The granting of aid for private storage is a form of financial assistance paid by the Commission to private operators so that they will store produce rather than sell it on the market until such time as the price rises.

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<sup>10</sup> Prior to 2007, there were 21 separate common market organisations covering different markets and making different rules. These have now been brought together but the CMO acronym remains in use.

<sup>11</sup> <https://betaproxy2.parliament.scot/-/media/files/legislation/bills/current-bills/agriculture-retained-eu-law-and-data-scotland-bill/introduced/policy-memorandum-agriculture-retained-eu-law-and-data-scotland-bill.pdf>

<sup>12</sup> See the footnotes to paragraph 8 for links to the EU law versions of the CAP basic acts, including the CMO Regulation.

<sup>13</sup> [https://eur-lex.europa.eu/summary/glossary/common\\_agricultural\\_markets.html](https://eur-lex.europa.eu/summary/glossary/common_agricultural_markets.html)

<sup>14</sup> [https://ec.europa.eu/agriculture/newsroom/193\\_en](https://ec.europa.eu/agriculture/newsroom/193_en)

### ***Aid in the fruit and vegetable sector***

50. Articles 32 to 38 of the CMO Regulation allow Member States to provide financial aid to the fruit and vegetable sector, known as the Fruit and Vegetable Scheme. Under this scheme, aid can be granted to producer organisations in these sectors.
51. The granting of the aid is subject to conditions contained in these Articles. In order to qualify, the producer organisation must implement a structured plan called an operational programme. The aim of an operational programme is to improve the producer organisation's performance and skills in marketing, product quality and environmental considerations.

### ***Marketing standards and carcass classification***

52. Marketing standards in the CMO are a body of detailed rules which govern the quality of agricultural products and ensure that certain information is provided to consumers. Carcass classification is a process which takes place in a slaughterhouse, and is used to calculate payments due to the producer from the slaughterhouse and also to support the market intervention powers.
53. In the CMO Regulation, the provisions on marketing standards are contained in Articles 73 to 91. These provisions are a mix of obligatory and discretionary rules. The rules do not apply to all products but only to the sectors and products listed in Article 75, which also lays down the standards which can be established for those products. Examples include technical designations and sales descriptions, criteria for appearance, and specific substances used in production. Where marketing standards apply to a product, Article 73 states that they "may only be marketed in the European Union if they conform to those standards". Other provisions of the CMO Regulation provide detailed rules for the setting of marketing standards, including for specific products. The marketing standards themselves are set out in product specific implementing or delegated regulations, and there is a regime of domestic implementing legislation.
54. Provision on carcass classification is contained in Article 10<sup>15</sup> which defines the Union scales for classification of carcasses. These scales are mandatory for beef, veal and pigmeat and at the discretion of the Member States for goatmeat and sheepmeat (and are not currently applied in the UK). The Union scales provide a classification for the meat derived from a carcass, and therefore is a gauge for the price that the farmer receives.

### ***The EU Food Promotion Scheme***

55. The EU Food Promotion Scheme is established by [EU Regulation 1144/2014](#), and provides funding for information provision and promotion measures to increase the competitiveness and consumption of EU products.

## ***Pillar 2***

### ***Rural Development***

56. Pillar 2 of the CAP is the financial support provided through the European Agricultural Fund for Rural Development ("the EAFRD") to promote sustainable rural development throughout the EU.
57. The EAFRD operates through programmes prepared by Member States and approved by the Commission (which co-funds them). Member States submit either a single rural development programme, or a set of regional rural development programmes, for each seven-year programming period.

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15 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32013R1308>

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58. The majority of Pillar 2 expenditure is on environmental schemes which bring public benefit and that the market would not always consider, for example environmental land management through agri-environment and forestry schemes.
59. As with direct payments, the Rural Development Regulation may be regionalised, and has been in the UK in line with devolution. The UK therefore submits four rural development programmes under Article 11 of the Rural Development Regulation,<sup>16</sup> one for each country in the UK. The current Scottish programme is the “Scottish Rural Development Programme” (SRDP) 2014 – 2020.<sup>17</sup>
60. The SRDP sets out the measures, in line with Articles in the Rural Development Regulation, under which financial support is provided. The support is generally made available in the form of a non-refundable grant, although Member States have the option to use financial instruments and loans.
61. Funding is generally grouped together in “schemes”, and the current SRDP includes the following:
- Less Favoured Area Support Scheme (LFASS), providing support to farming businesses in remote and constrained rural areas,
  - Forestry Grant Scheme, providing a range of grants for woodland creation, agro-forestry, tree health, woodland improvement, processing and marketing and sustainable management of forests,
  - Agri-Environment Climate Scheme (including support for organics and footpaths), which provides targeted support for land managers to undertake management and capital work for environmental purposes,
  - Beef Efficiency Scheme, to deliver economic and environmental improvements in the beef sector,
  - New Entrants, which provides start-up grants for new entrant young farmers of up to 40 years old, and capital funding for new entrants regardless of age to improve their business,
  - Crofting Agricultural Grant Scheme, which provides grants to improve crofts in order to help to sustain crofting business,
  - Small Farms Grant Scheme, which provides targeted support for small farms that face similar issues to crofters regarding sustainability,
  - Food Processing, Marketing and Co-operation, which supports small and medium sized enterprises in the food and drink sector with start-up grants for new enterprises, and business development grants,
  - LEADER,<sup>18</sup> which provides opportunities for individuals, businesses and communities to come together and support rural development and provide long lasting benefits to the local area (and includes support for non-agricultural small businesses including farm diversification),
  - Knowledge Transfer and Innovation Fund (KTIF), which supports the sharing of innovative ways of improving working practices along with continuing support for Monitor Farms,

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<sup>16</sup> See <http://www.legislation.gov.uk/eur/2013/1305/article/11> for the EU law version.

<sup>17</sup> More information can be found at <https://www.gov.scot/policies/agriculture-payments/scottish-rural-development-programme-srdp/>.

<sup>18</sup> The acronym is French in origin i.e. *liaison entre actions de developement rural*. This translates as ‘links between actions of rural development’, as set out in this basic guide from the European Commission:

[https://ec.europa.eu/agriculture/sites/agriculture/files/publi/fact/leader/2006\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/publi/fact/leader/2006_en.pdf).



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- Farm Advisory Service, which provides advice and assistance to farmers, crofters and other land managers,
  - Broadband, which provides support for broadband provision in rural areas, and
  - Scottish Rural Network, which supports and promotes rural development through the sharing of ideas and best practice.
62. Financial support provided through each programme is intended to contribute to meeting the EU's priorities for Rural Development, which include objectives such as restoring, preserving and enhancing ecosystems related to agriculture and forestry.
63. The money for the support comes from both Europe through the EAFRD, and the Member States. Financial support must comply with the rules on state aid, except where a particular exemption operates for agricultural activities provided through the programme.

### ***Financing of the CAP***

64. For many years, the CAP was financed from a single fund, the European Agricultural Guidance and Guarantee Fund (EAGGF). On 1 January 2007, the EAGGF was replaced by two funds which form part of the EU's general budget: the European Agricultural Guarantee Fund ("the EAGF") which finances measures under Pillar 1, and the European Agricultural Fund for Rural Development (EAFRD) which finances measures under Pillar 2.
65. The legal basis for the setting up of the funds is Article 40(3) of the TFEU.
66. The Financial Memorandum<sup>19</sup> that accompanied the Bill for this Act explains how the CAP has been funded in Scotland.

### ***CAP reforms***

67. The CAP has undergone five major reforms in recent decades, the most recent dating from 2013 when the legal framework was set for the current CAP in respect of the period 2014-2020.
68. On 1 June 2018, the European Commission presented legislative proposals for the CAP beyond 2020.<sup>20</sup> These proposals aim to make the CAP more responsive to current and future challenges such as climate change or generational renewal, while continuing to support European farmers for a sustainable and competitive agricultural sector. As these proposals are still subject to agreement by the Member States, a two year transition period has been agreed, with the intention that the new legislative proposals (if agreed) would take effect in the EU from 2023.

### ***Exiting the European Union***

69. EU law was given effect in Scotland by the European Communities Act 1972 (the "1972 Act").
70. The European Union (Withdrawal) Act 2018 ("EUWA") repealed the 1972 Act with effect from exit day, whilst also preserving its continued effect in UK law during the transition period until IP completion day, which is currently due to be 31 December 2020 (see sections 1 and 1A of EUWA). The practical effect is that this will remove the constitutional basis for EU law having effect in the United Kingdom on IP completion day.

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19 <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/agriculture-retained-eu-law-and-data-scotland-bill/introduced/financial-memorandum-agriculture-retained-eu-law-and-data-scotland-bill.pdf>

20 [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/future-cap_en)

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71. The basis in international law for EU law having effect in the UK was simultaneously extinguished by the operation of Article 50 of the Treaty on European Union, but the legal effect of EU law in the UK was also preserved during the transition period to IP completion day under Article 127 of the Withdrawal Agreement.
72. EUWA also provides for the retention of most of that law, as it stands on IP completion day, by converting it into a new body of domestic law. The effect is to adopt a rulebook and set of institutional arrangements that is – at least at first – close to that which currently exists under EU law.
73. This new body of domestic law is called “retained EU law”, and rolls the former EU law into national law under three distinct provisions:
  - section 2 of the EUWA preserves EU-derived domestic legislation. This typically concerns the subordinate legislation made (usually, but not always, under the 1972 Act) or any primary legislation passed in order to implement one or more EU directives,
  - section 3 of the EUWA preserves direct EU legislation. This is defined as all EU regulations, decisions or tertiary legislation and certain parts of the EEA Agreement,<sup>21</sup> and
  - section 4 of the EUWA preserves any directly effective residual rights, powers, liabilities, obligations, restrictions, remedies and procedures in EU law, subject to several specified exceptions.
74. Separately, Article 137 of the Withdrawal Agreement dis-applied EU direct payment rules for the 2020 claim year. Those rules were therefore converted into domestic law on 31 January 2020 by section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020. Those rules are, as modified, now retained EU law.
75. This retained EU law will otherwise take effect at the end of the transition period.
76. The UK is also retaining:
  - most general principles of EU law as they existed on IP completion day,
  - most rights and obligations that currently exist in domestic law because of section 2(1) of the 1972 Act as they exist on IP completion day, and
  - relevant case law of the Court of Justice of the European Union issued before IP completion day (though the UK Supreme Court and High Court of Justiciary need no longer follow it).
77. The UK is not, however, retaining the Charter of Fundamental Rights of the European Union, EU directives themselves, the principle of the supremacy of EU law, or the Francovich principle of state liability (in relation to post-exit facts).
78. The EUWA also provides a scheme that determines the constitutional status of these elements of former EU law. Whereas previously the principle of supremacy of EU law would have given all EU law priority over any domestic law or legislation, the same is not true for retained EU law.
79. EU law retained under section 2 of the EUWA already has a domestic status, as it is either in an act of the UK or Scottish Parliament or in subordinate legislation (mainly but not exclusively made under the 1972 Act).
80. EU law retained under sections 3 and 4 of the EUWA, however, is neither primary nor secondary legislation. It is instead a new category of domestic law subject to bespoke rules determining how it may be modified. Section 7 and schedule 8 of the EUWA sets out those rules.

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<sup>21</sup> See <https://www.efta.int/eea/eea-agreement>.

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81. The status of retained EU law not falling into existing domestic categories is defined by section 7 of the EUWA. It subdivides retained direct EU legislation into two categories:
- retained direct “principal” EU legislation, and
  - retained direct “minor” EU legislation.
82. These two categories do not directly correspond to “primary” and “secondary” legislation, which are the normal distinctions drawn in domestic law. Instead, the EUWA sets out the rules that govern how those two categories of law can be modified or repealed, and by what type of conventional domestic legal instrument.
83. The key difference between “minor” and “principal” retained direct EU legislation is that minor legislation can be modified by secondary legislation, but principal legislation must be modified by primary legislation unless and to the extent that the provisions under which any secondary legislation is made provide otherwise.
84. The CAP Regulations as defined in section 1 of the Act are for the most part principal EU legislation, and it follows that the express powers in Part 1 of the Act are required in order to enable the Scottish Ministers to modify those Regulations after exit.
85. EU law applies in all the Member States, and so confers duties and powers on the European Commission including, for example, the power to make EU implementing and delegated legislation. It follows that retained EU law needs to be modified to correct any provisions which would cease to operate, or not be appropriate, outside of the EU. These changes (known as ‘deficiency fixes’) have effect from IP completion day in measures made by and under the EUWA. Deficiency fixes in respect of retained Direct Payments legislation made by and under the Direct Payments to Farmers (Legislative Continuity) Act 2020 took effect on exit day.
86. The CAP rules as they form part of retained EU law will therefore have effect subject to those deficiency fixes, which include for example powers for the Scottish Ministers to make subordinate legislation on matter formerly delegated to the Commission.

## **OVERVIEW OF THE ACT**

87. The Act provides powers for the Scottish Ministers to modify the effect of retained EU law relating to the CAP, and to collect and process agricultural data.
88. The Act contains 27 sections, in 3 Parts, and 1 schedule.

### **Part 1 – Retained EU law**

89. Part 1 provides the Scottish Ministers with powers to modify CAP legislation, which it defines for that purpose. It enables the Scottish Ministers—
- to simplify and improve the legislation,
  - to extend the operation of the main CAP legislation beyond 2020,
  - to modify financial provision in that legislation, and to modify the CMO Regulations for specified purposes,
  - to modify CAP legislation in respect of public intervention and private storage aid, and aid for fruit and vegetable producer organisations, and
  - to revoke the EU Food Promotion Scheme.
90. Part 1 provides powers for the Scottish Ministers to regulate marketing standards in the agriculture sector, and the classification, identification and presentation of carcasses by slaughterhouses.
91. Part 1 also provides for consequential modifications of the CMO Regulation.

## **Part 2 – Collection and processing of data**

92. Part 2 provides the legal powers for the Scottish Ministers to be able to collect information from persons in or closely connected with an ‘agri-food supply chain’, and from those carrying out an ‘agricultural activity’ (both terms as defined in that Part).
93. Although the powers in respect of agri-food supply chains and agricultural activities are related, i.e. they both relate to agricultural production, they are distinct. An agri-food supply chain captures every stage of production where agricultural products are intended for human consumption as food or drink. The farmer who grows the crop, the miller who grinds the flour, the baker who bakes the dough and the shopkeeper who sells the bread will all be part of the same agri-food supply chain. On the other hand, a person involved in the production of agricultural products will be carrying on an agricultural activity regardless of whether or not those products are destined for human consumption as food or drink. However, the definition of agricultural activity (which applies the definition used in the Basic Payment Regulation) doesn’t extend to onward supply chains. Of course, a person may be both part of an agri-food supply chain and carrying out an agricultural activity and so the Act explicitly provides that, in those circumstances, only the agri-food supply chain provision will apply to such a person.
94. The data collection powers in relation to both agri-food supply chains and agricultural activities are twofold. Firstly, a direct power for the Scottish Ministers to compel applicable persons to supply data and, secondly, a regulation-making power. The direct power allows the Scottish Ministers to compel known persons to provide data. For example, businesses that the Scottish Government can use business records to contact directly. The regulation-making power may be used to make regulations which compel the provision of data from defined categories of persons where the particular individuals or businesses who fall into that category are unknown. For example, any person who is part of a co-operative that runs a community abattoir.
95. Part 2 also provides for the purpose for which such information may be required and processed (including limitations on processing), and for a power for the Scottish Ministers to make regulations providing for the enforcement of information requirements.

## **Part 3 – General**

96. Part 3 provides for:
- powers to make regulations (including supplementary and ancillary powers),
  - the Scottish Ministers to report to the Scottish Parliament on progress towards establishing a new Scottish agricultural policy,
  - interpretation and effect,
  - an exemption of the Crown from criminal liability,
  - commencement, and
  - the short title of the Act.

## **COMMENTARY ON PROVISIONS**

### **Part 1 – Retained EU law**

#### ***Section 1 – Defined terms***

97. This section defines terms used in Part 1 for the purposes of that Part.
98. It defines the “main CAP legislation” as being:

*These notes relate to the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

- the Direct Payments Regulation, the Rural Development Regulation, the Horizontal Regulation, and – so far as relating to the Rural Development Regulation - the Common Provisions Regulation (each of which are further defined in the section),
  - delegated or implementing regulations made by the EU in respect of those Regulations, and
  - subordinate legislation made in the UK, implementing or otherwise relating to those Regulations.
99. It also defines the “CMO Regulation”, which forms part of the CAP, but is not included in the main CAP legislation for the purposes of the Act.
100. All references in the Act to EU regulations are to be read as references to the regulations as incorporated into domestic law (i.e. as part of “retained EU law”) by virtue of section 3 of the European Union (Withdrawal) Act 2018 or section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020 (see section 24(1) of the Act).
101. It provides for “modify” to include amend, revoke and repeal, and states that any related expressions are to be interpreted accordingly. This in particular covers revocation in relation to subordinate instruments.

### ***Section 2 – Power to simplify or improve CAP legislation***

102. This section provides for the Scottish Ministers to be able, by regulations, to modify the main CAP legislation, but only if they consider that the modification would simplify or improve the operation of the legislation.
103. An example of the type of simplification or improvement that could be made using this power involves the CAP Pillar 2 support for less favoured areas (LFA). Under EU CAP legislation the options currently open to the Scottish Government are to continue with the “Less Favoured Area Support Scheme” (LFASS) but with a much reduced payment available to farmers in 2020, and then move to a replacement “Areas of Natural Constraint” (ANC) scheme from 2021. This power in the Act would provide an additional option as it would enable the Scottish Ministers to modify the retained CAP legislation to ensure that support can continue for farmers whose land is designated as being in an LFA under the current CAP, and who receive payments under LFASS. This will allow any changes to support for constrained areas to be considered as part of the future overall income support package for farmers and crofters.
104. Regulations made under this section which have not been subject to the affirmative procedure, are subject to the negative procedure. This is sometimes known as an ‘either way’ power, and the effect is that the Scottish Ministers can choose which procedure is to apply to any particular use of the power.

### ***Section 3 – Power to provide for the operation of CAP legislation beyond 2020***

105. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to modify the main CAP legislation in order to ensure that the provisions of the CAP legislation can continue to operate in Scotland for one or more years beyond 2020.
106. Subsections (2) and (3) provide that the power extends to determining for any year a national ceiling as referred to in Article 6 of the Direct Payments Regulation.<sup>22</sup> This ceiling sets a limit on the amount that can be paid out as direct payments.
107. The national ceiling for each Member State is as specified in Annex II to that Regulation, and that ceiling became part of retained EU law after exit (but see paragraph 109 below). Article 6, as it has effect as retained EU law, has also been modified so

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<sup>22</sup> See <http://www.legislation.gov.uk/eur/2013/1307/article/6> for the EU law version of that Article.

*These notes relate to the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

that it can be adapted by regulations made by the Secretary of State with the consent of each of the relevant authorities for Wales, Scotland and Northern Ireland. The Scottish Ministers are the relevant authority for Scotland.

108. Subsection (3)(b) allows the Scottish Ministers to confer functions on any appropriate person in the making of such a determination for any year.
109. As set out above, the current CAP framework provides for the period 2014 to 2020. The power will therefore enable the Scottish Ministers to modify the main CAP legislation for the purpose of ensuring that it will operate after 2020. For example, there is currently no ceiling for direct payments in respect of any year after 2020. The power can be used to specify a new ceiling or ceilings for the purposes of Article 6 of the Direct Payments Regulation so ensuring that direct payments can be made from 2021 onwards.
110. A separate power is required as provision extending the operation of the main CAP legislation may require to do more than just simplify or improve the operation of that legislation (for which see section 2).

#### ***Section 4 – Power to modify financial provision in CAP legislation***

111. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to modify any provision of the main CAP legislation relating to the setting or determining of ceilings on the amounts of any payments or expenditure for any purpose under the legislation, or to the reallocation or transfer of amounts or proportions of such ceilings between or among different purposes under the legislation. Subsection (2) lists some of the specific provisions that may be modified under this power.
112. Provision that might be made under this power will include reducing the sum available to be spent under a particular ceiling (also known as “capping”), or provision giving effect to flexibility between the CAP Pillars (also known as “Pillar to Pillar Transfer”). It might also include changing the ceiling on the total amount of a rural development programme that may be devoted to technical assistance, currently set at 4% by Article 51 of the Rural Development Regulation.
113. A modification of a “financial” provision may also be a simplification or improvement of the main CAP legislation (for which see section 2), but this power will be available when that is not the case which might for example be a consideration when capping a ceiling.

#### ***Section 5 – Duration of the powers under sections 2, 3 and 4***

114. Subsection (1) provides that the powers in sections 2, 3 and 4 cannot be exercised by the Scottish Ministers after 7 May 2026, which is the expected date of the elections to follow the 2021 to 2026 session of the Scottish Parliament.
115. Subsection (2) ensures that the expiry of those powers does not affect the continuation in force of any regulations made under those sections prior to 7 May 2026.

#### ***Section 6 – Power to modify CAP legislation on public intervention and private storage aid***

116. This section provides for the Scottish Ministers to be able, by regulations, to modify the CAP legislation governing public intervention and private storage aid,<sup>23</sup> as specified in subsection (3).
117. The power in section 6 of the Act allows these measures to be dis-applied temporarily or permanently, or to be otherwise simplified and improved.

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<sup>23</sup> See paragraph 45 of the Policy Memorandum that accompanied the Bill for this Act for information about market intervention under the CMO, “private storage aid” is the purchase of product by public authorities and its removal from the market (“intervention purchasing”), or by paying private companies to store product rather than placing it immediately on the market.

*These notes relate to the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

118. The Scottish Ministers are able to decide whether regulations made under this section are to be subject to the negative or affirmative procedure (see paragraph 104 in that respect).

### ***Section 7 – Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations***

119. This section provides for the Scottish Ministers to be able, by regulations, to modify the CAP legislation governing aid for fruit and vegetable producer organisations, as specified in subsection (3).
120. Subsection (2) provides that the power in subsection (1) may only be used to make such modifications which the Scottish Ministers consider would simplify or improve the operation of provisions of that legislation.
121. The Scottish Ministers are able to decide whether regulations made under this section are to be subject to the negative or affirmative procedure (see paragraph 104 in that respect).

### ***Section 8 – Power to revoke the EU Food Promotion Scheme***

122. This section provides for the Scottish Ministers to be able, by regulations subject to the negative procedure, to modify the CAP legislation establishing the EU Food Promotion Scheme<sup>24</sup> as specified in subsection (2), for the purpose of ensuring that it ceases to have effect in Scotland.
123. The Scheme aims to promote food from the EU, both within the EU and internationally. It combines programmes operating within single Member States and multi-national programmes. Quality Meat Scotland (QMS) received €1.2 million in the period 2015 to 2017 for a campaign to enhance knowledge of protected geographical indication symbols, and to stimulate demand for Scotch beef and Scotch lamb in northern Europe. There is however no significant ongoing benefit for Scotland, such that Ministers may consider it appropriate to revoke the Scheme.

### ***Section 9 – Marketing standards***

124. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to make provision about standards to which certain products listed in section 10(1) must conform when marketed in Scotland (see also section 12 below).
125. Subsection (2) provides that regulations made under this section may in particular include provision about the matters specified in this subsection. Those matters are a non-exclusive list of the types of standards to which the products may be subject. The list mirrors the types of marketing standards which may be established in EU law under the CMO Regulation. These matters may affect how products are marketed to consumers (for example, how they are described at the point of sale) or may impose requirements during production (for example, the type of production method used, or the use of specific substances in production).
126. Subsection (3) provides that regulations made under this section may provide for enforcement of the provisions of the regulations, including in particular in respect of the matters specified in this subsection which include the creation of offences and the imposition of monetary penalties. A monetary penalty is a civil penalty rather than a criminal fine.
127. Subsection (5) has the effect that the Scottish Ministers must consult such persons as they consider are representative of the interests of persons likely to be affected before

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<sup>24</sup> See paragraph 49 of the Policy Memorandum that accompanied the Bill for this Act.

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laying a draft of a Scottish statutory instrument containing regulations under this section before the Scottish Parliament.

### ***Section 10 – Marketing standards: agricultural products***

128. This section lists the agricultural products in respect of which the Scottish Ministers are able to make regulations under section 9. The list provides further detail of the products covered by reference to the detailed Annexes of the CMO Regulation.
129. Subsections (3) and (4) provide for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to amend the list of products in subsection (1) by adding or removing products, or by altering the description of the products

### ***Section 11 – Carcass classification***

130. This section provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to provide for the classification, identification and presentation of bovine, pig and sheep carcasses by slaughterhouses in Scotland.
131. Subsection (2) provides that regulations made under this section may provide for enforcement of the provisions of the regulations, including in particular in respect of the matters specified in this subsection which include the creation of offences and the imposition of monetary penalties. A monetary penalty is a civil penalty rather than a criminal fine.
132. Subsection (4) has the effect that the Scottish Ministers must consult such persons as they consider are representative of the interests of persons likely to be affected before laying a draft of a Scottish statutory instrument containing regulations under this section before the Scottish Parliament.

### ***Section 12 – Marketing standards and carcass classification: consequential amendments and savings***

133. This section gives effect to the schedule of the Act, which makes modifications to the CMO Regulation providing for the effect of any regulations made under sections 9 and 11, and includes a saving provision in connection with those modifications.
134. Marketing standards in Scotland will be set by regulations made under section 9 of this Act. This section has the effect of removing what would otherwise be concurrent powers to establish marketing standards in the CMO Regulation.

## **Part 2 – Collection and processing of data**

### ***Section 13 – Defined terms***

135. Subsection (2) defines “agricultural activity” to have the same meaning as in Article 4(1)(c) of the Direct Payments Regulation.<sup>25</sup> However, this is subject to subsection (10) which enables the Scottish Ministers to amend this definition by regulations subject to the affirmative procedure.
136. Subsection (3) defines “animal” as meaning a vertebrate (other than a human) or invertebrate but does not include fish.
137. Subsection (4) defines an “agri-food supply chain” as a supply chain for providing individuals with items of food or drink. It further provides that the products in such a supply chain must have been produced using anything grown, or any animal kept, for agriculture or any animal taken from the wild.



138. Subsection (5) defines the persons who are in an agri-food supply chain. These are the persons who originally farmed (or took from the wild) the raw agricultural products, the persons who finally consume the products, and every person in between.
139. Subsection (6) defines the persons who are “closely connected” with an agri-food supply chain. These are persons who provide goods as specified, persons who provide services relating to animal or plant health or the safety or quality of food and drink, persons carrying on activities capable of affecting such health, safety or quality, and representative bodies.
140. Subsection (7) provides that persons carrying out activities capable of affecting such health, safety or quality as is mentioned in subsection (6)(b), are to be treated as connected with the supply chain for the purposes of section 14(1) and (2), but does not limit the generality of what is meant by “connected” with the supply chain.
141. Subsection (8) defines “processing” by reference to an operation performed on information, and sets out a non-exhaustive list of the types of such operations.
142. Subsection (9) provides definitions for “agriculture”, “plants”, and “seeds” in relation to this section of the Act.
143. Subsection (10) provides that the Scottish Ministers may, by regulations subject to the affirmative procedure, amend the definition of “agricultural activity”.

#### ***Section 14 – Agri-food supply chains: requirement to provide information***

144. This section provides the Scottish Ministers with a power to require, in writing, any person in or closely connected with an agri-food supply chain to provide information about their activities connected with the supply chain.
145. Subsection (2) provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to impose requirements on persons in, or closely connected with, an agri-food supply chain to provide information about their activities connected with the supply chain.
146. The direct power in subsection (1) and measures under the regulation-making power in subsection (2) will attach to the same categories of persons and the same types of data. However, the two powers are appropriate as in some circumstances the most effective way to collect data is to request it by notice. This would be the case, for example, where data is to be requested from a group of persons and the identity of each of those persons is known. However, there are other cases where data cannot be collected directly as the details of the persons to whom the request relates are unknown or subject to change. In that case, the data would be more effectively gathered using the regulation-making power.<sup>26</sup>
147. Subsection (3) provides that the requirements under subsection (1) or (2) may not be imposed on individuals in the supply chain if they are in the supply chain for the reason that they or a member of their household are the ultimate consumers.
148. Subsection (4) provides that requirements under subsection (1) or (2) may not be imposed on persons in relation to any of their activities connected with the supply chain if the activity is not carried on for profit or reward. This exempts persons who are in an agri-food supply chain but only as a hobbyist or in an amateur capacity. For example, an allotment keeper who gives vegetables to a neighbour is in an agri-food supply chain but is excluded from this provision. However, subsection (5) provides that the exemption in subsection (4) does not apply where the activity being carried on other than for profit or reward is capable of affecting a matter mentioned in section 13(6)(b)(i) or (ii), namely animal or plant health, or the quality or safety of food.

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<sup>26</sup> Please see paragraph 94 for information regarding the distinction between these powers.

***Section 15 – Agricultural activity: requirement to provide information***

149. This section provides the Scottish Ministers with a power to require, in writing, any person who carries on an agricultural activity in Scotland (and who is not a person in, or closely connected with, an agri-food supply chain) to provide information about that activity.
150. Subsection (2) provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to impose requirements on persons who carry on agricultural activities to provide information about those activities.
151. The reasons for including a direct power and a regulation-making power in this section are the same as for section 14. As with section 14, the distinction between the two powers is not the data which can be collected but rather the most effective way to collect it.
152. Subsection (3) provides that requirements under subsection (1) or (2) may not be imposed on persons in relation to an agricultural activity if the activity is not carried on for profit or reward. Similar to section 14(4), this exempts persons who are carrying on agricultural activities as a hobby or pastime. For example, a person who keeps a few animals to produce a small amount of wool or hides.

***Section 16 – Provision of information etc.***

153. This section relates to a requirement to provide information imposed under section 14(1) or (2) or 15(1) or (2). It sets out what a requirement under those sections may specify, such as how and when the information is to be provided, the types of processing the information may be subjected to, and the form in which information may be disclosed.

***Section 17 – Purposes for which information may be required and processed***

154. This section relates to a requirement to provide information imposed under section 14(1) or (2) or 15(1) or (2).
155. Subsection (2) provides that any requirement must specify the purposes for which the information is required and may be processed, and subsection (3) provides that they must be purposes which are listed in subsection (4). The information cannot be used for purposes which fall outside those stated in the requirement to provide information.
156. Subsection (5) defines the terms “plants” and “public authority” in relation to subsection (4).

***Section 18 – Limitations on the processing of required information***

157. This section provides for limitations on the use of information provided in response to a requirement imposed under section 14(1) or (2) or 15(1) or (2).
158. Subsection (2) provides that information given in response to a requirement can only be processed for the purpose that was set out in that requirement, and subsection (3) states that this applies both to the person to whom the information is initially provided (which may be the Scottish Ministers or any other person specified in the requirement in accordance with section 16(2)(a)(i)) and any person to whom it is subsequently disclosed.
159. Subsection (4) specifies that any person to whom the information is subsequently disclosed cannot process the information in a way that is contrary to the terms on which it was disclosed.
160. Subsection (5) sets out that, where a requirement specifies a certain type (or types) of processing that information may be used for, that information may not be used for any other types of processing except in circumstances specified in the requirement.

*These notes relate to the Agriculture (Retained EU Law and Data)  
(Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

161. Subsection (6) provides that the additional safeguards in subsections (7) and (8) apply where a person proposes to disclose information collected under the powers of this Part. They place restrictions on its disclosure, as a specific type of data-processing. The restrictions apply to any person making such a disclosure. Similar to the purpose limitation in subsection (2), this includes both:
- the initial recipient of the information (for example, the Scottish Ministers), and
  - any subsequent recipient who proposes to further disclose the information (for example, a contracted data processor operating in accordance with a data-sharing agreement).
162. So, for instance, the restrictions in this section would apply to any company or expert consultant contracted by the Scottish Government to conduct analysis of agricultural data on its behalf (for the purposes, say, of developing analysis to provide evidence for a range of policy options or modelling scenarios for contingency planning such as disease outbreak).
163. Subsection (7) safeguards certain commercially sensitive information from being disclosed in a non-anonymised form. It requires that, where the person making the disclosure considers that doing so would or might prejudice the commercial interests of any person (which includes both the person who provided the information and any other person), the information must be disclosed in anonymised form. The only exception to this is if the Scottish Ministers consider that it is in the public interest for the disclosure to be in some other form.
164. Subsection (8) clarifies that where a disclosure is not considered commercially harmful, but the requirement specified the form in which information may be disclosed, disclosure must not be in any other form (except where circumstances specified in the requirement apply to the disclosure).

***Section 19 – Enforcement of information requirements***

165. Subsection (1) provides for the Scottish Ministers to be able, by regulations subject to the affirmative procedure, to make provision for the enforcement of information requirements imposed under section 14(1) or (2) or 15(1) or (2). This will enable sanctions to be applied where any person fails to provide information, or provides false information.
166. Subsection (2) clarifies that the provisions for enforcement include how compliance will be monitored and how non-compliance will be investigated and addressed.
167. Subsection (3) has the effect that, amongst other matters, the regulations may provide for the imposition of monetary penalties for non-compliance, and for the recovery of those penalties. A monetary penalty is a civil penalty rather than a criminal fine.
168. Subsection (4) defines “specified” and “specified manner”, and has the effect in particular that regulations may provide that the amount of a monetary penalty is framed by reference to the income, turnover or profits of a person.

***Section 20 – Consequential repeals***

169. This section repeals sections 78 to 81 of the Agriculture Act 1947 (power to obtain agricultural statistics, etc.). The repealed provisions provide for data-gathering powers which are replaced by the powers in Part 2 of the Act.

### **Part 3 – General**

#### ***Section 21 – Regulations: supplementary***

170. This section provides in subsection (1) for the powers of the Scottish Ministers in this Act to make regulations to include the power to make different provision for different purposes.
171. Subsection (1) also provides for the powers of the Scottish Ministers in this Act to make regulations to include a power to make incidental, supplementary, consequential, transitional, transitory or saving provision. Subsection (2) has the effect that provision made by virtue of that power may amend enactments, and subsection (3) has the effect that any regulations that modify any part of the text of an Act will always be subject to affirmative procedure.
172. Subsection (4), provides that regulations under this Act that create an offence may not provide for the offence to be punishable with imprisonment for a period exceeding 5 years in the case of conviction on indictment, and 12 months in the case of summary conviction.
173. Subsection (5) provides that this section does not apply to commencement regulations under section 26.

#### ***Section 22 – Requirement for new Scottish agricultural policy***

174. Subsection (1) of this section requires the Scottish Ministers to lay a report before the Scottish Parliament on progress towards establishing a new Scottish agricultural policy.
175. Subsection (2) specifies what must be included in that report. In particular, the report must include details of the Scottish Ministers' policies and proposals in relation to the six matters that are listed in paragraph (a). It must also include an outline of any legislation required to implement those policies and proposals, a timeline for when any such legislation will be introduced (as defined by subsection (4)), details of any consultations undertaken on proposed policies and legislation, and any other matter related to Scottish agriculture that the Scottish Ministers consider appropriate.
176. Subsection (3) provides that a report under subsection (1) must be laid before the Scottish Parliament no later than 31 December 2024.

#### ***Section 23 – Ancillary provision***

177. Subsection (1) of this section provides for the Scottish Ministers to be able to make by regulations such incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purpose of, or in connection with, or for giving full effect to the Act or any provision made under it.
178. Subsection (2) has the effect that such regulations may modify enactments.
179. Subsection (3) has the effect that regulations made under this section will be subject to the negative procedure, unless they modify the text of an Act in which case they will be subject to the affirmative procedure.

#### ***Section 24 – Interpretation and effect***

180. The powers in Part 1 of the Act provide for the Scottish Ministers to be able to make provision that modifies or relates to retained EU law.
181. This section makes certain interpretative provision and also makes it clear that no provision in this Act may have an effect that is incompatible with EU law, as defined by section 126(9) of the Scotland Act 1998.

*These notes relate to the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

182. Subsection (1) provides that a reference in this Act to any EU regulation will be a reference to that regulation as it forms part of domestic law (that is, retained EU law) by virtue of either section 3 of the European Union (Withdrawal) Act 2018 or section 1 of the Direct Payments to Farmers (Legislative Continuity) Act 2020.
183. This section also provides for the Scottish Ministers to be able, by regulations subject to the negative procedure, to specify any other enactment that ‘rolls over’ EU law into domestic law.
184. Subsection (2) provides that any provision of this Act, or any provision made under it, that could be incompatible with EU law can only come into effect after the provision of EU law with which it would be incompatible has ceased to have effect in Scots law by virtue of the UK’s withdrawal from the EU.

### ***Section 25 – Crown application***

185. Subsection (1) of this section has the effect that nothing in or under this Act makes the Crown criminally liable.
186. By virtue of subsection (2), however, the Lord Advocate may apply to the Court of Session for a declarator of unlawfulness in respect of any act or omission for which the Crown would be criminally liable but for this section.
187. Subsection (3) provides that the Crown exemption from criminal liability in subsection (1) does not affect the criminal liability of persons in the service of the Crown.

### ***Section 26 – Commencement***

188. This section provides for sections 5 and 21 to 27 to come into force on the day after Royal Assent, and for the Scottish Ministers to be able to commence by regulations the other provisions of the Act. The power to make regulations under this section includes the power to make different provision for different purposes, and to make transitional, transitory or saving provision.

### ***Section 27 – Short title***

189. This section provides for the short title of the Act, Agriculture (Retained EU Law and Data) (Scotland) Act 2020, by which it may be cited.

### ***Schedule – Modifications of the CMO Regulation***

190. The schedule is introduced by section 12.
191. It provides for amendments of the CMO Regulation consequential on sections 9 and 11 of the Act, and makes certain savings provision in relation to those amendments.
192. The amendments in paragraph 1 have the effect that certain powers in the CMO Regulation will no longer be available in Scotland.
193. Paragraph 2 provides a saving provision for measures made by the Commission under the powers being amended. The effect is that those measures will continue to apply as retained EU law, and that any new measures will be made by the Scottish Ministers under the powers in the Act.

## **PARLIAMENTARY HISTORY**

194. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill’s parliamentary passage.

*These notes relate to the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

<b><i>Proceedings and Reports</i></b>	<b><i>References</i></b>
<b>INTRODUCTION</b>	
Bill as introduced, 6 November 2019	<a href="#">SP Bill 59 Session 5 (2019)</a>
Policy Memorandum	<a href="#">SP Bill 59-PM Session 5 (2019)</a>
Explanatory Notes	<a href="#">SP Bill 59-EN Session 5 (2019)</a>
Financial Memorandum	<a href="#">SP Bill 59-FM Session 5 (2019)</a>
Delegated Powers Memorandum	<a href="#">SP Bill 59-DPM Session 5 (2019)</a>
SPICe briefing on Bill as introduced, 18 November 2019	<a href="#">SPICe briefing SB 19-72</a>
<b>STAGE 1</b>	
<b>Lead Committee - Rural Economy and Connectivity Committee</b>	
32 <sup>nd</sup> Meeting 2019, 20 November 2019 (evidence)	<a href="#">Col 2 - 31</a>
33 <sup>rd</sup> Meeting 2019, 27 November 2019 (evidence)	<a href="#">Col 1 - 30</a>
34 <sup>th</sup> Meeting 2019, 4 December 2019 (evidence)	<a href="#">Col 1 - 46</a>
35 <sup>th</sup> Meeting 2019, 18 December 2019 (evidence)	<a href="#">Col 1 - 36</a>
2 <sup>nd</sup> Meeting 2020, 15 January 2020 (evidence)	<a href="#">Col 18 - 50</a>
Stage 1 Report, 3 March 2020	<a href="#">Report (RECCS052020R3)</a>
<b>Delegated Powers and Law Reform Committee</b>	
3 <sup>rd</sup> Meeting 2020, 21 January 2020	<a href="#">Col 2 - 15</a>
Stage 1 Report, 6 February 2020	<a href="#">Report (DPLRS052020R11)</a>
<b>Consideration by the Parliament</b>	
Stage 1 Debate, 5 May 2020	<a href="#">Col 43 - 80</a>
<b>STAGE 2</b>	
<b>Rural Economy and Connectivity Committee</b>	
Marshalled list of amendments for Stage 2	<a href="#">SP Bill 59-ML Session 5 2020</a>
Groupings of amendments for Stage 2	<a href="#">SP Bill 59-G Session 5 2020</a>
Stage 2, 15 <sup>th</sup> Meeting 2020, 17 June 2020	<a href="#">Col 1 - 54</a>
Bill as amended at Stage 2, 17 June 2020	<a href="#">SP Bill 59A Session 5 (2020)</a>
Revised Explanatory Notes	<a href="#">SP Bill 59A-EN Session 5 2020</a>
Supplementary Delegated Powers Memorandum	<a href="#">SP Bill 59A-DPM Session 5 2020</a>
<b>STAGE 3</b>	
<b>Consideration by the Parliament</b>	
Marshalled list of amendments for Stage 3	<a href="#">SP Bill 59A-ML Session 5 2020</a>

*These notes relate to the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 (asp 17) which received Royal Assent on 1 October 2020*

<b><i>Proceedings and Reports</i></b>	<b><i>References</i></b>
Groupings of amendments for Stage 3	<a href="#">SP Bill 59A-G (Timed) Session 5 2020</a>
Stage 3 (consideration of amendments and debate), 26 August 2020	<a href="#">Col 43 - 130</a>
Bill as passed, 26 August 2020	<a href="#">SP Bill 59B Session 5 (2020)</a>
<b>ROYAL ASSENT</b>	
Royal Assent, 1 October 2020	<a href="#">Agriculture (Retained EU Law and Data) (Scotland) Act 2020, asp 17</a>