

SL(5)336 – THE COMMON AGRICULTURAL POLICY (MISCELLANEOUS AMENDMENTS)(WALES)(EU EXIT) REGULATIONS 2019

Background and Purpose

These draft Regulations are to be made under paragraph 1(1) of Schedule 2, and paragraph 21 of Schedule 7, to the European Union (Withdrawal) Act 2018 (“the EUWA”). They seek to address failures of retained EU law to operate effectively, and other deficiencies, arising from the withdrawal of the United Kingdom from the European Union.

They amend four pieces of Wales subordinate legislation in the field of agriculture: the Agricultural Subsidies and Grant Schemes (Appeals) (Wales) Regulations 2006; the Rural Development Programmes (Wales) Regulations 2014; the Common Agricultural Policy (Integrated Administration and Control System and Enforcement and Cross Compliance) (Wales) Regulations 2014; and the Common Agricultural Policy Basic Payment and Support Schemes (Wales) Regulations 2015. All of these constitute retained EU law under the EUWA.

The provisions are minor, technical and do not change the effect on citizens of the subordinate legislation being amended. The Explanatory Memorandum (EM) is correct in stating that “The current CAP arrangements will continue unchanged” by these Regulations, with one minor exception relating to regulation 4, which is dealt with below.

Procedure

Affirmative.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

Standing Order 21.3 – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

Regulation 4 amends the Common Agricultural Policy (Integrated Administration and Control System and Enforcement and Cross Compliance) (Wales) Regulations 2014 (SI 2014/3222 (W. 327)) in several ways.

The only one that appears to produce a change from the current situation is regulation 4(2), which removes references to the “co-ordinating body”. European Union legislation (specifically, Regulation (EU) no. 1306/2013 of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy) requires Member States who appoint more than one paying agency for CAP payments to also designate a body to co-ordinate between those agencies and to act as the single point of contact with the EU Commission. The UK has a separate paying agency for each



of its constituent nations, and a unit within the UK Department for Environment, Food and Rural Affairs (DEFRA) acts as the co-ordinating body. The unit is not a separate legal person from DEFRA.

The amendments made by regulation 4(2) suggest that this unit will no longer exist or will no longer carry out all its current functions, post-Brexit. Most of those functions are EU-facing and therefore will no longer be relevant once the UK leaves the EU. We understand from the Welsh Government that, any remaining functions post-Brexit, will be carried out jointly by the Welsh Ministers, the Scottish Ministers, the relevant Northern Ireland Department and the Secretary of State (in the latter case for England). It would be useful for the Welsh Government to set out further information about this for the benefit of the Assembly and of the public. This matter is not touched on in either the Explanatory Note or the Explanatory Memorandum to the draft Regulations.

Regulation 5 amends the Common Agricultural Policy Basic Payment and Support Schemes (Wales) Regulations 2015 (SI 2015/1252 (W. 84)). The preamble to the 2015 Regulations states that all references in the SI to European instruments are to be construed as references to those instruments as amended from time to time (i.e., as amended by the EU bodies with the power to make those EU instruments). In technical terms, the references are ambulatory. We refer to this as "EU-ambulatory".

Under section 3 of, and paragraph 1 of Schedule 8 to, the EUWA, existing ambulatory references, in domestic (including Welsh) legislation, to most EU regulations are no longer to be read in this way. Instead, they are to be read as references to the EU regulations as they applied in EU law immediately before exit day (as defined in the EUWA, i.e., currently, 11pm on 29 March 2019), but references to them will also pick up any amendments to them made by **domestic law** from time to time. Thus, they will remain ambulatory, but not "EU-ambulatory"; they will automatically include amendments made by future domestic law, not changes made by future EU law.

The provision that such references are to be read as including amendments made by domestic law from time to time can be ousted by a contrary intention.

Paragraphs (3) and (4) of regulation 5 amend, in each case, a specific reference to an EU instrument so as to remove its "EU-ambulatory" status. Instead, those references are to be read as references to the EU instrument in question as they applied immediately prior to exit day. It appears to us that this fixes the interpretation of the relevant EU-derived provisions in time, and that they will not be domestically ambulatory either.

The Common Agricultural Policy Basic Payment and Support Schemes (Wales) Regulations 2015 contain other references to EU instruments that are not amended in this manner. Therefore, those references will be converted, by Schedule 8 to the EUWA, from "EU-ambulatory" references into domestically ambulatory references and will automatically pick up modifications to those instruments made by domestic law after the EU leaves the UK.

The Welsh Government has explained to us its reasons for making certain provisions (described above) non ambulatory. The explanation is that certain payments were only available in 2015. Therefore, it is necessary to fix the application of the payments at a particular point in time. We are grateful for this indication, but we invite the Welsh Government to explain its rationale fully and publicly. It is of political and legal importance, and of interest to the Assembly, for the reasoning to be made transparent.



Implications arising from exiting the European Union

- 1 The Regulations demonstrate the difficulty, for the scrutinising body and for those affected by the legislation, of understanding the exact effect of EU Exit-related statutory instruments in the field of the Common Agricultural Policy.
- 2 Amongst many barriers to understanding, including referential drafting, a particular example, seen in these Regulations, is the extreme difficulty of understanding exactly what version of EU instruments are in force at any particular time as part of domestic law under the EUWA.
- 3 The already complex interpretative provisions of sections 3 and 6 of , and Schedule 8 to, the EUWA are, we understand, soon to be added to by The European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2019, currently in draft, which deal with pre-Brexit non-ambulatory references to EU legislation.
- 4 This opacity derives from the EUWA. However, we consider that it is incumbent on the Welsh Government to seek to explain, better and more fully, to the Assembly and to citizens how each piece of Welsh EU exit legislation fits into the whole picture of UK and EU legislation – current and intended - on the particular subject-matter. The appropriate place for this would appear to be the EM accompanying statutory instruments.
- 5 However, an additional concern is that end-users of legislation may not be aware of the existence of EMs or able to access them easily, and we would ask the Welsh Government to give consideration to how this situation could be improved, so as also to improve access for the citizens of Wales to the meaning of legislation.

Government Response

A government response is required.

Legal Advisers

Constitutional and Legislative Affairs Committee

5 March 2019

