

UK Report on behalf of the Agricultural Law Association

Commission III

CEDR Congress Poznan Poland September 2019

Rapporteur: Dr Nerys Llewelyn Jones

---

Given the current political climate in the UK following the referendum in 2016 to leave the European Union, this has been an extremely difficult Report to prepare and finalise due to the fact that law and policy in the UK is in a constant state of flux. As this Report is presented at Congress the Supreme Court of England and Wales is sitting to decide whether or not the Prime Minister was lawful in declaring a 5 week prorogation of Parliament and the decision is to be provided today (or at the latest by Monday). Following the decision to prorogue Parliament a number of Bills which had been drafted, and were being debated with a view to them being introduced on Brexit, have been put to one side. These include an Agriculture Bill, and Trade Bill which are of course very relevant to us in terms of rural law.

The Agricultural Law Association have as a consequence had an extremely busy 2 years reviewing and considering draft legislation and has responded to a number of Government consultations on matters such as the new agricultural policy, environmental law proposals, tenancy law reform and conservation covenants to name but a few. We also provided input and commentary on the Withdrawal Act 2018 which is due to come into effect on exit of the EU, which involved significant constitutional and administrative law matters which had an impact on where and how decisions on rural and agricultural law are taken.

Even before the decision to exit the EU, there was an increasing divergence between the interpretations adopted by the various devolved administrations regarding the implementation of EU Regulations in agriculture. Agriculture, fisheries and rural affairs, animal health and welfare, food and environment are devolved competences, and this has resulted in significant differences in approach within the various administrations. The final version of the Withdrawal Act has led to the creation of a number of shared areas of competency establishing a UK wide agricultural policy where it was felt that there should not be divergence within the UK, in addition to separate agricultural policies for each of the devolved administrations. The latter will inevitably lead to further divergence.

Before delving into our proposed agricultural policy post-Brexit, the paper will provide an update on the specific areas which Commission III focuses upon.

### **1. Regulation and use of new technologies**

There have been no real developments in law within the UK on the Regulation and use of new technologies. However, there has been a significant emphasis on this within the Knowledge Transfer Programmes funded under Pillar 2 to ensure that farmers are aware of the latest technologies available for use on farm and also about technologies which are currently not used in agriculture but could have application. A number of projects have also been funded via the European Innovation Partnership in order to support and encourage groups of farmers to come together to investigate, test and trial new technologies and ideas with a view to creating tested outcomes which can then be taken up by others. There are also a number of demonstration farms which are organised by AHDB

(England and Wales) and Farming Connect (Wales) which ensure that the most innovative farmers transfer their knowledge to other farmers by inviting them on to their farms to see the new technologies in practice. The use of data and the ability for sharing of data collected on different platforms remains an area where further work is required to ensure data can be used responsibly and that the dataset provides a sufficient evidence base for farmers across the UK to draw conclusions from to inform business decisions.

## **2. Regulation of Livestock and Livestock Health**

Between 2010 and 2030, the global consumption of antimicrobials is predicted to increase by 67%. Up to a third of the expected increase in livestock is based on a prediction that routine use of antibiotics for disease prevention or growth promotion will rise in many middle-income countries. In Europe, use of antibiotics for growth promotion has been banned since 2006.

By 2040, the UK Government's vision is of a world in which antimicrobial resistance is effectively contained, controlled and mitigated. It is determined to sustain its efforts to combat resistance, taking local, national and global 'One-Health' approaches across humans, animals, the environment and food, in line with global ambitions and in collaboration with other nations, partners and the international community.

In the animal health sector, the UK has reduced use by 40% between 2013 and 2017 and is expected to reduce further. This is a significant reduction. The UK want to achieve antimicrobial use levels per animal that are among the best in the world, without jeopardising animal health and welfare. This will be done by reducing the impact of resistance in our animals, including aquaculture, through best husbandry practices that can be shown to achieve low prevalence of infectious diseases.

In line with the EU legislation, the UK will implement the provisions of the new EU Veterinary Medicines legislation on the use of antibiotics, subject to public consultation and through collaboration with stakeholders to agree how it can be applied in practice.

In practice, again, there has been a significant emphasis on this in Pillar 2 funded knowledge transfer and training of farmers. The reductions that are outlined above are therefore not necessarily being effected by a change in legislation but rather by a process of education, training and learning to change behaviour, provide up to date and useful information to farmers about how they can reduce antimicrobial use on their farms. Again, having farmer ambassadors who have been able to explain to others how they have achieved these reductions in practice has been vital.

The UK Government target to reduce UK antibiotic use in food-producing animals by 25% between 2016 – 2020 through implementing industry changes is therefore likely to be achieved without the need for implementation of new legislation. Thereafter, new objectives will be defined for individual animal sectors by 2021 for the next 5-year period of reductions as part of a longer-term plan to reach the 2040 target.

## **3. Food Production and Labelling**

The UK Government has acknowledged that following Brexit there will be further opportunities to look at what consumers would like to see with regards to food labelling. This could entail increasing the food information that is available, improvements to consumer transparency and promotion of high-quality British food.

A number of UK products currently benefit from the EU protected names status – PGI or PDO and therefore looking to protect the status, brand and quality assurance that goes hand in hand with such certifications will be vital for those producing food in the UK going forward.

Nutrition labelling is regulated at a European level by the Regulation (EU) No. 1169/2011 on the provision of food information to consumers (EU FIC). The EU FIC is implemented in England by the Food Information Regulations 2014. Similar legislation applies in Scotland, Wales and Northern Ireland.

The nutrition labelling rules do not apply to food supplements (these fall within the scope of Directive 2002/46/EC) or natural mineral waters (these fall within the scope of Directive 2009/54/EC). In addition, the nutrition labelling rules in EU FIC apply without prejudice to the Directives on foods for particular nutritional uses (PARNUTS) and Regulation (EU) 609/2013 on Food for Specific Groups (FSG). In other words, where there are separate nutrition labelling provisions in the PARNUTS or FSG legislation, these will take precedence over the EU FIC requirements.

There is no requirement to register food supplements in the UK. As long as they comply with the law (the law specific to food supplements and all other applicable food law) then they are permitted for sale. It is the responsibility of the manufacturer, importer or retailer to ensure that they comply with the law. Food supplements are regulated in the UK under the EC Food Supplements Directive 2002/46/EC as well as all other applicable food law. This is implemented in national law by the Food Supplements (England) Regulations 2003, which has been amended several times to reflect updates to the Annexes of permitted vitamin and mineral substances. There is equivalent legislation in Scotland, Wales and Northern Ireland. The Regulations do not control the use of substances other than vitamins and minerals added to food supplements, but any other ingredients used must be safe for human consumption and not be injurious to health.

The UK Government was due to announce new legislation regarding food labels concerning allergens in the summer of 2019. However, it is proposed that the new laws won't be in force in England, Wales and Northern Ireland until 2021. This is commonly referred to as Nastasha's law following an inquest in 2018 into a death caused by lack of allergen labelling by Pret a Manger. 'Prepacked foods for direct sale' are foods that have been made and packed on the same premises from which they are being sold. For example, a packaged sandwich or salad made by staff earlier in the day and placed on a shelf for purchase. Currently, these foods are not required to carry labels and information on allergens, as it is expected that the customer can speak with the person who made or packed the product for this information. This has led people to mistakenly assume that the food does not contain any allergens.

The primary enforcement mechanism in England for failure to comply with the EU Food Information for Consumers Regulation is Improvement Notices under UK legislation. However, failure to comply with allergen labelling/information requirements can be dealt with by way of criminal prosecution in the magistrates' court. Injury or even death being caused can lead to businesses being prosecuted under other legislation both criminally and under civil law. Financial penalties for breach of food information and food safety laws for manufacturers, restaurateurs and supermarkets are also significant, and can now lead to an unlimited fine being applied. Examples include compliance with safety requirements; misrepresentation of food being sold and falsely describing food.

There is FSA Guidance on how allergen information is provided to customers for loose foods (which would cover food supplied in restaurants). It states that where allergen information is not provided upfront in writing, signposting a customer to where they can get this information is required which

could include directing customers to ask staff for allergen information. Cross-contamination is something which providers of food must also take into account.

Many food businesses have already taken steps to improve food labelling. Others who have yet to make changes are being urged to do all they can ahead of the implementation date to help consumers make safe food choices. This is also very important in light of recent cases.

#### **4. Chemicals in Agriculture**

The UK currently works within an EU regulatory system of pesticide approval. UK Gov has said it is 'considering future arrangements for the regulation of pesticides' as part of the preparation for Brexit.

The 25 Year Environment Plan which was introduced in early 2019 does not indicate how the UK might approach this area post-Brexit. However, it includes commitments to encourage the minimum use of pesticides with a stronger emphasis on the holistic Integrated Pest Management approach (IPM) e.g. using effective crop rotation and natural predators. This will include reviewing the UK National Action Plan for the Sustainable Use of Pesticides introduced in 2018. The 25 Year Environment Plan indicates that the UK will maintain EU restrictions post-Brexit on the use of neonicotinoid pesticides because of the "growing weight of scientific evidence" that they are harmful to bees and other pollinators. The Plan states that any continuing use should be limited and permitted only where the environmental risks are shown to be very low.

There are calls from the UK Pesticides Campaign to amend the Agriculture Bill to reflect the health and environmental protections to secure the protection for rural residents and communities from pesticides and to adopt and utilise a truly sustainable non-chemical farming system for the overall protection of human health and the environment. This is a debate which will no doubt be one which continues post-Brexit.

There is some discussion in the UK at the moment as to whether a fertiliser tax should be introduced in the UK. This would be an interesting development.

#### **5. Agri-Environment**

Over the past 2 years there have been a number of discussions and proposals made within the UK as to how our agri-environment will be protected and enhanced post-Brexit. This Report will highlight some of those discussions and consultations. The Environment (Principles and Governance) Bill sets out a number of environmental principles. The Policy Statement which outlines them is put forward as guidance and this suggests therefore that the UK Government will only give regard to them as opposed to them being a binding matter of law. It proposes the preparation of Environmental Improvement Plans in respect of which there will be annual reports and reviews however it is unclear who will be consulted in the preparation of those plans. It sets out the introduction of an Office for Environmental Protection to advise on changes to environmental law and deal with complaints about breaches to environmental law within the UK.

The introduction of Conservation Covenants in the UK has been mooted before in 2012 (by the Law Commission) however this has been resurrected as part of the discussions as to how to manage

conservation of land in a post-Brexit UK. The concept of conservation covenants must pay regard to an inevitable measure of commerce on the part of the covenantor. Whilst there may be some landowners who wish to enter into such arrangements out of a sense of public well-being or even duty, they are very much in the minority. The majority will seek a commercial outcome from entering into such covenants, but which recognises the public benefits of conservation and offers an incentive to enter into a longer-term covenant. There are shortcomings of positive and restrictive covenants as currently known to the law, and to the sometimes complex and expensive workarounds which are necessary in the broad context of conservation to overcome them.

Insofar as conservation covenants may provide another tool which could be more easily and conveniently used to engineer the result the parties desire, they are to be welcomed. But the agreements underlying the process must be privately and freely negotiated between the covenantors and the relevant responsible bodies. A private, freely negotiated agreement offers significant flexibility to those who are currently frustrated by limited options to produce both a commercial return and fulfilment of environmental aims and objectives.

With reference to Government's proposed agriculture policy and the introduction of an Environmental Land Management Scheme, conservation covenants may offer an alternative to entry into the Scheme, although this will clearly turn on a case by case basis but would most likely be an option for a minority.

Uptake will also depend in part on the adoption of the use of conservation covenants by Local Planning Authorities through the planning system. Further, there is work to be done to ensure that management plans/long term obligations directed through the planning system and using conservation covenants as the 'mechanism' dovetails with other initiatives for example Sustainable Alternative Natural Green Spaces ('SANGS') in the context of the Thames Basin Heaths Special Protection Area.

### **The New Agriculture Policy**

In future, three strong indicators of effective environmental management schemes, to achieve the aspirations of the Government's 25 Year Environment Plan alongside a profitable farming sector, will be:

- a) simplicity
- b) successful delivery of outcomes
- c) extensive uptake by the farming sector

Further work is required to establish the level of administrative cost which will be incurred to achieve targeted and bespoke outcomes.

It could be argued that the consultation failed to recognise that delivery of the best level of protection and enhancement of the environment, including the active management of the environment, is directly influenced by the profitability of the farming sector and its ability to produce food at viable financial levels.

It endorses a Continuing Professional Development approach in order to improve competitiveness and also to further develop skills within the agricultural industry. The sector is a skilled sector throughout the layers of labour on farm but enabling all farmers to recognise the broad range of skills they have requires support; whether that is through local benchmarking exercises or on a wider scale through organisations, such as the Agriculture and Horticulture Development Board (AHDB).

Further to the Consultation exercise, an Agriculture Bill was drafted for consideration.

The Bill is drafted with broad and flexible powers for the Secretary of State and with a significant focus on market orientated measures together with reference to future financial assistance for the provision of public goods from agriculture. Whilst the Bill suggests support for improving productivity in the sector, and is expressly titled 'the Agriculture Bill', it stops short of referring to the production of food as the core principle of 'agriculture'. If the Bill is to bring forward an appropriate Act, the Government must give due regard to the importance of securing a viable and sustainable sector for the production of food. This in turn will provide the legislative support that farming businesses need from Government; to provide certainty as to the Government's commitment to primary food production in the UK. We note that the Bill proposes a transition period for the phasing out of Direct Payments by 2027 (subject to the provisions for delinked payments and varying the transition period). We also note that pilot schemes for the proposed new environmental land management schemes will be undertaken during the transition period (and have already started to a limited number)

Notwithstanding that there is a proposed transition period to 2027 and, by implication, funding commitments by Government during that period, the Government's stated commitment to funding in the sector is currently limited to 2022, both for the UK as a whole and the devolved administrations where agricultural policy is a devolved matter. Given the long-term nature of decision making in farming businesses, clarity from Government at the earliest possible stage as to future funding would be extremely useful. Otherwise, there is a risk that the sector is restrained from making significant strategic and investment decisions over the next few years.

## **Welsh Government Consultation – Sustainable Farming and Our Land**

### **Welsh Government Agricultural Policy Proposals**

Aptly entitled Sustainable Farming and Our Land the consultation on the new Welsh Government scheme promises to make farm businesses more reliant by providing an annual farming payment to reward environmental outcomes and provide business support. They propose to justify the continued significant financial support of farmers to the taxpayer by applying the majority of the budget for environmental outcomes, acknowledging the pressing need to mitigate climate change, something that is not currently targeted by the current BPS. payment. They propose payments in return for delivery of outcomes above and beyond the requirements of regulation such as soil nutrient management, habitat and woodland, and animal health planning.

They intend creating a single scheme to support farmers which is made up of two elements, Sustainable Farming Payment and Business Support. It promises, post Brexit, once agricultural funding is returned to Wales, that the Welsh Government will ensure that funds are directed at farming and other land management, and not elsewhere. The scheme promises to make farm businesses more resilient by providing an annual sustainable Farming Payment to reward environmental outcomes and business support to develop farm businesses.

This proposed support will be designed around the concept of Sustainable Land Management ("SLM"), an internationally recognised concept defined as: the use of land resources, including soils, water, animals and plants for the production of goods to meet changing human needs, while simultaneously ensuring the long-terms potential of these resources and the maintenance of their environmental benefits.

The Farm Sustainability Plan would replace the Basic Payment scheme and Glastir (the current Welsh Agri-Environment scheme under Pillar II) with a payment for aspects of the sustainable agriculture not already rewarded by the market, which are driven by environmental outcomes.

The Welsh Government acknowledge that farmers need support and this consultation seeks to gauge how best to do this. It will design the support around the principle of sustainability as it brings together the economic, environmental and social contributions farmers make.

The Welsh Government believe that food production, and some elements of the market, are already rewarded by the market and therefore Welsh Government should not provide a payment for it. However, they acknowledge the market does not reward the true value of sustainable food and the range of environmental benefits farming can provide and therefore propose to fill the significant gap via the SLM. For example, reward for improving food production farming practices that have a positive impact on air quality.

Entering the scheme will require a farmer to undertake a Farm Sustainability Review. They will have to provide a business plan, including farm size, type, productivity, performance and capital assets. At the point of entry, the Welsh Government states that it is important to consider all aspects of the farm business and current practice and this will be undertaken by an adviser, with input from the farmer, via a review and plan. Once the plan is agreed it would form the basis of a multi-year signed contract between the farmer and the Welsh Government and would form the basis for receiving payment. To ensure the scheme is accessible to all types of farm, there will be a range of outcomes that can be delivered on all types of farms with the farmer choosing a set of actions that work best for their business. Following entry, the farmer can access two elements of support;

- The Sustainable Farming Payment providing an annual stable and meaningful income stream to farmers in the scheme.
- Business Support providing advice, capital investment and skills development

Payment will be based on certain conditions being met including keeping a record of certain information and providing evidence of such implementation, such as soil samples - the more outcomes the farmer delivers, the greater the payment. Payment will relate to both the continued maintenance of ongoing sustainable practices and the creation of new ones. The Welsh Government acknowledges that any outcome not achieved for reasons beyond the farmers' control, would be a risk borne by Welsh Government and payment would still be made.

Business Support: to include; general business skills improvement, performance benchmarking, loans, grants, demonstrations and training to access market information.

It is proposed to build on the existing support achieved through the Rural Development Programme and provide a wider range of business support, consistent with the SLM outcomes, to farmers within the scheme. The support available will be conditional on a robust business case which demonstrates the impact the investment would have on the farm's sustainability.

The Welsh Government are consulting on what the transition period needs to achieve and the options for moving farmers from the current schemes to the proposed schemes. They state they are clear that they cannot make changes until they can demonstrate a new system is adequately designed, a relevant impact assessment has been undertaken and they are confident that it is administratively practical.

## **Scotland**

Given that they voted to remain in the EU, there has been resistance within the Scottish Administration to engage in any discussions about policy post-Brexit. There has been a consultation entitled: 'Support for Agriculture and the Rural Economy - Post Brexit Transition Scottish Government; STABILITY and CERTAINTY' which closed in September 2018. It stated that it was "aimed at those who currently benefit from Direct Payments or SRPD funding and includes farmers and crofters, land managers, agents and businesses and workers in the rural economy. It is also aimed at those who wish to influence the direction of policy in this area, as powers over agriculture return from Europe to Scotland in the period ahead."

The Scottish Affairs Committee has released its report on the future of Scottish agriculture post-Brexit. The inquiry covered agricultural funding, future policy, trade, labour and innovation.

It provided detailed recommendations including:

- i. There should be a fair and transparent funding arrangement which meets the individual circumstances of all UK nations.
- ii. Proportion of Less Favoured Area which is particularly relevant in Scotland should be a central criterion in determining funding allocation.
- iii. Budgets should be set for a seven-year period with a commitment for mid-term review i.e. mirror the CAP
- iv. Emphasis that the UK Government must publish their Frameworks as soon as possible.
- v. Bids for UK funding for agricultural research must include proposals for how the outcome of the research will be shared with agricultural businesses, including proposals to trial or demonstrate new technologies where appropriate.
- vi. Groups of farmers and farming cooperatives should be utilised to trial new practices and be paid for doing so.
- vii. The Shared Prosperity Fund's rural development budget should be utilised to help farms purchase new technology and equipment through innovation grants.

### **Implications of this period of uncertainty**

The advice given to farmers on their land occupation arrangements requires significant thought. The terms of occupation being granted, how they will be brought to an end and how to deal with the ownership of entitlements in the interim period while we still work under the CAP must be resolved. Determining a fair rent for a holding is also difficult in the current climate. It will be interesting if we see an increasing number of rent review notices being served by tenants who see this as an opportunity to negotiate reduced rents on their holdings.

Under Pillar 2, there are a number of existing agri-environment schemes (which it is understood will be honoured by the relevant Governments) and will continue until their contracted terms (usually 5 years) are completed. The grant of new schemes seems to be on hold at the moment and decisions are awaited on this which will be heavily influenced of course by the source of funding for such schemes. Decisions from the Treasury are currently awaited on the allocation of funds. Care should be taken in dealing with the transfer of those schemes in the interim period and any undertakings given in relation to them.

It is hoped that creating a sustainable agricultural policy going forward will result in policy makers focussing on what objectives our new policy should have for a long-term viable agricultural industry within the UK. This requires consideration of economic, environmental and social factors i.e. sustainable development as a whole and getting the right balance between these will be crucial. It is difficult when faced with imminent decisions to focus on what the legislative requirements need to be addressed to deal with Brexit, but failure to do this would be a missed opportunity to create a new policy and set of legislative measures which allow the industry to grow and be competitive in a world market.

## **Conclusion**

So, in answer to the question what has happened in the UK during the last 2 years? Too much to mention in this Report but not enough in terms of actual changes as there have been no real changes to the law whilst we have been in this period of uncertainty. It is about what comes next, but the problem is we do not know what that will be.