

# The Brexit Papers



## Agriculture Paper 24



Bar Council Brexit  
Working Group  
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**THIRD  
EDITION**



## Brexit Paper 24: Agriculture

### Summary

For over 40 years, agricultural policy (including financial support for farmers and regulation of food production and marketing) has been an area of exclusive EU competence. Brexit means that all these issues return to the United Kingdom.

However, UK agricultural policy is likely to remain constrained by the terms of any free trade agreement with the EU and then by subsequent free trade agreements with third countries. These, as well as financial pressures, are likely to call into question existing levels of financial support for farmers. The United Kingdom will also face difficult trade-offs between liberalising regulation of food production and lowering tariff and non-tariff barriers to third country producers' access to the UK food market on the one hand and, on the other, maintaining "free and frictionless" access for UK food producers to the EU (presently by far their largest export market).

Further, there are substantial questions as to whether agricultural policy will remain essentially devolved (which will pose substantial challenges once the constraints imposed by EU law are removed) or re-centralised to Westminster (which is likely to be politically highly controversial).

Given the serious policy challenges in this area – on which there will be a range of political views – this paper does not make any specific recommendations. However, uncertainty as to the direction of future agricultural policy is profound and needs to be resolved as a priority after the general election.

No area of the UK economy will be more affected by Brexit than agriculture.

## The “CAP”

1. Since the foundation of the European Economic Community, and certainly since the United Kingdom joined the Communities in 1973, agricultural policy has been a matter of exclusive EU competence. So, for over 40 years, UK agriculture has been governed by the Common Agricultural Policy (“CAP”).
2. During that period, the CAP has not remained constant. Indeed, UK influence has played a large part in its development. In very general terms, the key element of the CAP – financial support for the farming sector – has moved from a system of production subsidies (responsible for the infamous “butter mountains” and “wine lakes”) to a system of payments based on the amount of land farmed and kept in good agricultural and environmental condition, capped so as to limit the demands placed by the CAP on the EU budget (the “Basic Payments Scheme” or “BPS”). BPS payments now account for a large proportion of farmers’ income
3. Other elements of the CAP include payments to producers’ organisations (essentially, producer co-operatives designed to co-ordinate their members’ production and sales and to provide a counter-balance to the power of food retailers) and rural development schemes.
4. There is also, under what is now Regulation 1151/2012, a well-developed system of protection for designations of origin, geographical indications, and traditional specialities. Those rules prevent products such as Melton Mowbray pork pies or Herefordshire cider from being sold anywhere in the EU unless they come from the designated areas.
5. There is also extensive EU regulation of food production and marketing, ranging from issues such as regulation of egg production including treatment of battery chickens<sup>1</sup> to grading and labelling of horticultural produce. Though some of that regulation is often ridiculed (eg the infamous “bent bananas” regulations) it needs to be remembered (a) that much of it has been enthusiastically supported by UK politicians (for example, the rules on battery chickens) and (b) that much of it existed in the United Kingdom before its accession to the EEC (for example, the United Kingdom had its own system of horticultural grading rules, including provisions on bananas, under the Agriculture and Horticulture Act 1964). The United Kingdom is therefore likely to want to maintain much of this regulation post-Brexit (and, indeed, is likely to incorporate much of it into UK law under the Great Repeal Bill).
6. Finally, the CAP is buttressed by external tariff walls and quotas on the import of agricultural produce into the EU.

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<sup>1</sup> Commission Regulation 589/2008

## Effect of Brexit

7. Any version of Brexit, from continued membership of the European Economic Area to any type of free trade agreement with the EU, will mean that the United Kingdom is no longer part of the CAP: the three EFTA/EEA Member States do not take part in the CAP.

8. It will therefore be for the United Kingdom to decide to what extent it retains the elements of the CAP. Apart from promising the maintenance of the current system of BPS until 2020, the Government has given very little indication of its thinking to date.

9. However, some important considerations for policy-making can be identified.

10. First, the UK agricultural sector has a profound interest in maintaining current tariff-free access to the EU. For example, almost 90% of Welsh exports of lamb, accounting for about a third of all Welsh lamb production, are exported to the EU<sup>2</sup>. Under WTO arrangements, effective tariff rates on such sales (taking into account the effects of quotas) have been estimated by the Welsh Government to be in the order of 40-50%<sup>3</sup>.

11. Similarly, there is a profound interest in keeping non-tariff barriers to a minimum.

12. The United Kingdom will therefore be seeking tariff-free arrangements with the EU in all areas of agricultural production. That means that the United Kingdom would not be free – even if it wanted to – to impose tariffs on EU exports of food to the United Kingdom.

13. Since the EU is likely for the foreseeable future to continue substantial subsidies to its farmers, that means that (absent a system of support for UK farmers), farmers in the UK will face zero-tariff competition from subsidised EU producers without benefiting from similar subsidies themselves. So there is bound to be political pressure to maintain farming subsidies in some form in order to maintain a level playing field. Whether that pressure is enough to outweigh other demands on public spending in difficult economic times remains to be seen. Further, any free trade agreement (“FTA”) with the EU – and in due course FTAs with countries such as the US, Australia and New Zealand – will constrain to some extent the ability of the United Kingdom to subsidise its farmers.

14. One further issue that will arise if the United Kingdom enters into FTAs with third countries is that such FTAs are very likely to provide for zero or reduced tariffs on food imports from those countries into the United Kingdom. That will mean that, in order to protect the EU’s system of external tariffs, UK exporters of those products to the EU will need to certify that their products come from the United Kingdom rather than from those third countries (under “rules of origin”). That will inevitably create some friction on exports, particularly of manufactured food products made from a mixture of imported and domestic foodstuffs.

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<sup>2</sup> See the March 2017 Report by the Climate Change, Environment and Rural Affairs Committee of the National Assembly: “The future of land management in Wales” <http://www.assembly.wales/laid%20documents/cr-ld10995/cr-ld10995-e.pdf>, §16

<sup>3</sup> Ibid, §40

15. Second, in relation to non-tariff barriers (such as production standards), while it is true that the United Kingdom currently complies with all relevant EU standards, it may as time passes cease to do so, particularly if it enters into free trade agreements with countries such as the US that are likely to insist that those standards are modified so as to allow their food products to be sold in the United Kingdom. That in turn means that the EU is likely to need to take measures to ensure that imports from the United Kingdom remain compliant with what will then be different EU standards.

16. Third, the EU is likely to insist on continued protection in the United Kingdom of EU designations of origin and geographical indications (in return for which, Regulation 1151 permits continued protection in the EU of UK designations). So we are not likely to see “British Roquefort” on our shelves after Brexit.

## **Devolution**

17. One of the most difficult issues arises from the devolution settlement. This can be illustrated by reference to Wales, but the same issues arise in Scotland and Northern Ireland.

18. In Wales, the area of “Agriculture, including animal health and welfare” has (with various specified exceptions) been within the legislative competence of the National Assembly for Wales (“the Assembly”): see paragraph 1 of Schedule 7 to the Government of Wales Act 2006 (the “GWA06”). Once the Wales Act 2017 is fully implemented, the model of specific devolved competences will be replaced by the “Scottish model” of a general legislative competence subject to powers reserved to the UK Parliament (see new Schedule 7A to the GWA06) (the ‘reserved powers’ model). As might be expected given that it has been a devolved matter to date, agriculture is not one of those reserved competences.

19. However, that has mattered little given the general inability of Member States under EU law to legislate in this area: the Assembly has no domestic competence to pass any measure incompatible with EU law (see section 108(6)(c) GWA06).

20. But, absent any other measures, after Brexit the Assembly would retain legislative competence in the area of agriculture but would no longer be constrained by EU law in exercising that competence. It could, for example, devise a wholly new system of support for farmers, more generous than the English system.

21. That raises serious issues for the United Kingdom as a whole. In particular, there would be serious difficulties for the UK agricultural market if systems of support for farmers varied substantially across national borders. To take an example, if subsidies for sheep farmers on the slopes of Pen y Fan are substantially higher than those offered to sheep farmers on the slopes of Skiddaw, that is likely to affect the price of Welsh lamb compared to English lamb. Since erecting tariff barriers on Offa’s Dyke is unlikely to be an option, there is scope for considerable distortion of competition within the UK.

22. So there will probably have to be a common UK-wide framework for agriculture in order to ensure that one part of the UK does not enjoy an unfair advantage over another.

23. The UK Parliament could either restrict the Assembly's devolved agricultural competence or legislate across the UK in that area. Either approach would involve, unless the Assembly agreed, a breach of the Sewel Convention that the United Kingdom will not legislate in areas of devolved competence without the consent of the devolved legislatures<sup>4</sup>. Such a breach would have significant, if not stormy, political consequences (if not legal ones, following the Supreme Court's approach to the Sewel Convention in Miller [2017] UKSC 5). The UK Government would doubtless contend that, in reality, no power currently available to the Assembly was being taken away: all that was happening was that powers repatriated from the EU were returning to London rather than to Cardiff. But the fact would nonetheless remain that in order to prevent repatriation to Cardiff, the UK Parliament would have to legislate in a way that engaged, and would be seen to breach, the Sewel Convention.

24. Another option would be for the devolved administrations and the UK Government to agree a common framework across the UK through the mechanism of an enhanced Joint Ministerial Committee (a "UK Council of Ministers"), but allowing "freedom" within that framework to develop agricultural policy for the devolved governments. But it is not clear how far agreement even of a common framework will be politically feasible, given the different political complexions of the devolved administrations and the UK Government: and there is plainly much room for disagreement as to what needs to go into a common framework and what should be left to the devolved governments.

## **Brexit Working Group**

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<sup>4</sup> Given statutory form in section 107(6) GWA06, which provides that "it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly".