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Agriculture (Retained EU Law and Data) (Scotland) Bill

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The Agriculture (Retained EU Law and Data) (Scotland) Bill is intended to provide Scottish Ministers with regulation-making powers to amend or replace the retained EU law in Scotland relating to the Common Agricultural Policy (CAP) after the UK leaves the EU. The Bill gives Scottish Ministers the power to enable current CAP schemes to continue operating beyond 2020 and to simplify or improve the legislation. The Bill also provides new powers for the collection of agricultural data. This briefing provides a summary of the Bill and its preceding consultation.



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Executive Summary

The Agriculture (Retained EU Law and Data) (Scotland) Bill was introduced on 6 November 2019 by Cabinet Secretary for the Rural Economy, Fergus Ewing MSP. The Bill gives powers for Scottish Ministers, by regulation to:

- Make changes to “simplify or improve the operation of” any part of the CAP legislation.
- Provide for the continued operation of the CAP legislation in domestic law in Scotland post-2020, with power to change how it operates and its financial provisions. For example, Scottish Ministers may by regulations set national ceilings for spending beyond 2020, modulate budgets (move money) between Pillar 1 and Pillar 2, and set a cap on payments paid to a single recipient.
- Revoke, suspend or modify legislation on public intervention and private storage aid, which currently allows Governments to intervene in the market under exceptional circumstances to buy up and/or store products to support agricultural producers.
- Amend the conditions for aid to fruit and vegetable producer organisations in ways that would simplify or improve the operation of this legislation.
- Revoke the EU Food Promotion scheme.
- Change the requirements for food marketed in Scotland.
- Amend the classifications for beef, pig and sheep carcasses.
- Amend the definition of agricultural activity.
- Make requirements of people engaged in agricultural activity and in the agricultural supply chain to provide information on their activities.
- Impose additional requirements for providing information.

The Scottish Government consulted on proposals for a rural funding transition period in June-August 2018, proposing a five-year period of "stability and simplicity" followed by a new scheme from 2024.

Since this consultation, a number of groups and processes have been set up to gather views and make recommendation on future policy. The [Simplification Task Force](#) is recommending changes to be made in the transition period, while the [Farming and Food Production Future Policy Group](#) is recommending policy changes for a long-term future rural policy.

This Bill is the first piece of primary legislation introduced in the Scottish Parliament which grants powers to amend retained EU law as a result of EU exit in a particular subject area. This Briefing elaborates on the potential implications of these powers, and goes through the sections of the Bill in more detail.

Introduction

The Agriculture (Retained EU Law and Data) (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament by the Cabinet Secretary for the Rural Economy, Fergus Ewing MSP on 6 November 2019. The Bill is the first piece of primary legislation introduced in the Scottish Parliament to make provisions for post-Brexit policy in relation to agriculture.

The purpose of this Bill as set out in the [Policy Memorandum](#) is:

- To enable Common Agricultural Policy (CAP) schemes to continue from 1 January 2021, and to give Scottish Ministers the power to 'simplify or improve the operation of schemes and policies.
- From 1 January 2021, to enable pilot projects to be run to test new policy approaches and inform longer-term policy development. The Scottish Government have previously indicated they would do this by releasing funds for pilots by capping the amount of support that can be received by a single recipient. In the 2018 Stability and Simplicity consultation, the Scottish Government consulted on "at what level to cap payments to release funds to test new policy priorities" ¹. Powers conferred through this Bill would allow the Scottish Government to cap payments.
- The Bill also updates the legal mechanism that allows the Scottish Government to collect agricultural data. ²

[Part 1](#) provides power to make changes to CAP legislation once it becomes [retained EU law](#); the provisions for the first two purposes stated above are included within part 1.

[Part 2](#) provides for collection and processing of agricultural data.

[Part 3](#) contains additional general provisions.

Within the Delegated Powers Memorandum, the Scottish Government state:

“ The decisions in respect of Part 1 of the Bill have been informed in particular by the policy objective of broadly maintaining the operation of current CAP schemes for a transitional period after exit day, subject to making simplifications and improvements. This does not require the wholesale replacement of the retained EU law. Rather, further consultation and engagement with stakeholders and the sector on the development of long term future rural policy is ongoing. ³ ”

Agriculture Policy in Scotland

The Common Agricultural Policy

Agriculture in all parts of the UK has been governed by the Common Agricultural Policy since the United Kingdom joined the EU in 1973.⁴

The Common Agricultural Policy refers to a body of EU law governing the agricultural sector. It is divided into [two pillars](#). Pillar 1 is focused largely on direct support to farming, while pillar 2 is focused largely on rural development.

Pillar 1 in Scotland includes:

- Direct payments to farmers paid per hectare for the area that is farmed.
- Greening payments for environmental interventions; these interventions are mandatory for farmers who fulfil certain criteria in order to receive direct payments.
- Support for young farmers and new entrants.
- Voluntary coupled support for specific sectors (in Scotland these are used for beef and sheep sectors).

Pillar 2 in Scotland is delivered by the Scottish Rural Development Programme (SRDP), and includes:

- Agri-Environment Climate Scheme for targeted environmental interventions.
- Forestry Grants Scheme for planting and managing forests and woodlands.
- Less Favoured Area Support Scheme, for supporting farming in less advantageous areas.
- Support for crofters and small farmers.
- Support for new entrants.
- Support for food processing, marketing and cooperation.
- Support for knowledge transfer and innovation.
- Beef Efficiency Scheme.
- Funding for rural communities.
- Funding for broadband.
- An advisory service.

Agriculture Policy, Devolution and EU Exit

Agriculture policy is devolved to the Scottish Parliament . This means that powers to design and implement policy flow directly from the EU to Scotland, and Scottish Government is free to set a new policy direction within the framework of the Common Agricultural Policy, independently of England, Wales and Northern Ireland.

If the UK leaves the EU, Scotland and the rest of the UK will not be subject to the framework of the Common Agricultural Policy in the long term. ⁵ However, discussions have been ongoing between the UK Government and devolved administrations regarding to the need for common UK or GB frameworks for specific policy areas.

One of the areas identified by both governments that is "subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part" ⁶ is in the area of agricultural support. As yet, it is unclear what such a framework might look like, or what policy objectives it might seek to achieve.

Agricultural Support

Funding for agricultural support comes from the EU, under the Common Agricultural Policy. Like the powers, funds flow directly to Scotland from the EU. For Pillar 1, all funding is received from the EU; for Pillar 2, the Scottish Government co-finances the programme. The [most recent announcement](#) on Scottish Rural Development Programme funding updated the co-financing arrangement. Currently, Scotland provides 48% of rural development funding, with the EU providing 52%.

Post-Brexit, funds would have to be apportioned by the UK Treasury for all four countries of the UK. The four UK countries would need to come to an agreement on what basis funds will be apportioned. ⁵

Scotland currently receives around 17% of the UK CAP budget. ⁷ However, funding is traditionally apportioned between the four UK countries using the Barnett Formula. The Barnett formula involves a calculation based on the population of a country as a proportion of the total UK population. For Scotland this is 9.85%. ⁸ If this was chosen as the method for apportioning agricultural funds across the UK, this would mean that Scotland would receive a smaller share. ⁹

In the short-term, the UK Government has pledged:

“ ...to continue to commit the same cash total in funds for farm support until the end of this parliament, expected in 2022: this includes all funding provided for farm support under both Pillar 1 and Pillar 2 of the current CAP. This commitment applies to the whole UK.”

UK Government, 2019¹⁰

However, some uncertainties surround what is meant by "farm support" and how this will be implemented.

The Financial Memorandum for the Bill states:

“ The guarantee in the event of no-deal covers CAP Pillar 1 Direct Payments for the 2019 scheme year. It also covers the EU element of all contracts under CAP Pillar 2 entered into by the end of 2020, for the lifetime of those projects. The guarantee for CAP Pillar 2 projects will also be honoured in the event of a deal. Separately, there is a UK Government commitment to maintaining the same cash total funds for "farm support" until the next UK election. However, there is still little clarity about how this will be calculated or whether "farm support" covers all CAP schemes, particularly those non-farming elements of Pillar 2 schemes such as LEADER, forestry and food and drink.”

Scottish Government, 2019¹¹

It is not clear whether these guarantees will carry over following the general election on 12 December 2019.

UK Agriculture Bill

The UK Government brought forward a new UK Agriculture Bill with the intention of creating powers to design a new long-term agriculture policy following EU exit for England. In addition to these provisions, the UK Agriculture Bill also included a number of other provisions on agricultural supply chains and producer organisations, among others. Wales and Northern Ireland opted to take powers via the UK Agriculture Bill. However, Scotland did not opt to take these powers as a result of concerns regarding the impact of the Bill on the devolution settlement.

The points of contention were regarding:

- The establishment of producers' organisations (POs) and the exemptions for these under competition law. Due to the interaction between POs and competition law, the debate surrounds whether the purpose of this clause is the promotion of an effective agricultural market (which is devolved) or the regulation of anti-competitive practices (which is reserved).
- Fair dealing obligations to prevent a disparity in bargaining power between primary producers and operators up the supply chain. The disagreement related to whether these provisions were related to unfair contractual terms, which is a devolved matter, or anti-competitive agreements and practices, which is reserved.
- Regulations to allow the UK Government to ensure that the UK is compliant with the WTO Agreement on Agriculture. The disagreement related to whether the purpose of this provision is to regulate international trade (which is reserved) or to implement and observe international obligations (which is devolved).

More information on the UK Agriculture Bill can be found in a [SPICe Briefing](#).

Following prorogation of the UK Parliament on 8 October 2019, this Bill has fallen and will not make further progress through Parliament without being reintroduced by the UK Government.

The Scottish Government states that the purpose of the Agriculture (Retained EU Law and Data) (Scotland) Bill is to allow the CAP legislation to continue operating for a transitional period after EU exit, and to introduce changes which "simplify or improve" CAP legislation;

although the powers are not time-limited, the Scottish Government states that the powers are not intended to make major changes to policy in the longer term.³ This differs from the intention of the UK Agriculture Bill, which was set out as a

“deliberate departure from the approach under the CAP.”

UK Government, 2018¹²

Post-Brexit Agriculture Policy

Since the EU referendum in June 2016, the Scottish Government have overseen a number of groups and processes to begin to shape the future direction of travel for post-Brexit agriculture and land use policy.

- In **January 2017** the Scottish Government appointed four Agriculture Champions, who were tasked with "guiding the long-term sustainable future for Scottish agriculture"¹³. The champions published their [final report](#) in May 2018.
- In **February 2017** the Scottish Government convened the Greening Group, chaired by Professor Russell Griggs. The group was given the task of "reviewing the Scottish Government's approach to greening and recommend how the available policy and support mechanisms can be used most effectively in Scotland to promote profitable farming while meeting the Scottish Government's environmental commitments"¹⁴. The Greening Group published their [final report](#) in February 2018.
- In **June 2017** the Scottish Government formed the National Council of Rural Advisors (NCRA), who were tasked with "providing evidence based advice to Scottish Ministers on the implications of Scotland leaving the EU" and "recommending future actions that could sustain a vibrant and flourishing rural economy"¹⁵. The NCRA held a [consultation](#) on the vision for Scotland's rural areas, and produced a [final report](#) in September 2018.
- In **June to August 2018** Scottish Government held a [consultation](#) on proposals for a rural funding transition, proposing a period of "stability and simplicity" from 2021 - 2024, with a new policy framework in place to replace the Common Agricultural Policy from 2024.¹
- Following the consultation, in **November 2018** Scottish Government established a Simplification Task Force "to advise on simplifications that could be made to the Common Agricultural Policy"¹⁶ in the short-term.
- In **June 2019** Scottish Government established the Farming and Food Production Future Policy Group, tasked with "exploring and make recommendations on future farming and food production policy"¹⁷ for the longer term.

Stability and Simplicity: a rural funding transition

The Agriculture (Retained EU Law and Data) (Scotland) Bill is intended to deliver the proposals for a period of "stability and simplicity" in the short-term as outlined in the Stability and Simplicity consultation noted above (expanded on more in the [next section](#)). [Section 2](#) of the Bill gives Scottish Ministers the power to make changes that would

"simplify or improve the operation of" CAP legislation as necessary. The Policy Memorandum states:

“ Work is underway to consider the potential simplifications and improvements that will be delivered by this Bill, based on responses to the 2018 “Stability and Simplicity” consultation and input from the Simplification Taskforce. The intention is to engage with stakeholders in the autumn of 2019. This work is going on in parallel with the long-term future policy discussion and, whilst it is a separate exercise, any ideas arising that could be delivered post-2024 are being passed to the post 2024 work stream. ”

Scottish Government, 2019²

Likewise the Scottish Government's 2019-2020 Programme for Scotland states:

“ We established a taskforce to help prioritise our proposals to provide stability and simplify Common Agricultural Policy (CAP) measures between 2021 and 2024. We will publish the taskforce’s report this autumn [2019] and develop substantive measures ready for implementation in 2021, including the level at which the largest direct payments made to individual recipients will be capped in order to redistribute the funds elsewhere within the CAP support. That includes introducing the Rural Support Bill to Parliament this year which will allow Scotland to amend EU retained law. ¹⁸ ”

As such, it does not appear that the Scottish Government intends to use this legislation to make longer-term changes.

Long-term rural policy: post-2024

The Scottish Government stated its intention to implement a new rural policy from 2024, following a period of stability and simplicity. ¹ .

Regarding the Farming and Food Production Future Policy Group, the 2019-2020 Programme for Scotland states:

“ Its work is underway and will be enhanced by advice from the recently-appointed panel of academic advisors. It will provide update reports on its considerations to Scottish Ministers every six months to allow more detailed work and activity to be commissioned where appropriate. ¹⁸ ”

The group is tasked with making recommendations on future policy in line with six principles:

- sustainability
- simplicity
- profitability
- innovation
- inclusion
- productivity

The group will also need to take on board wider policy priorities such as:

- global climate emergency and moving to net zero emissions faster
- maintaining populations in rural areas
- inclusive growth
- low carbon economy
- global, outward looking nation
- tackling poverty and inequality ¹⁷

The group is considering the previous reports from the Agriculture Champions, the National Council of Rural Advisors and the Greening Group, as well as the policy proposals made by stakeholders.

A number of stakeholders have set out policy proposals for after Brexit:

- Scottish Land and Estates: [#Route2050](#)
- Scottish Environment LINK: [Renewing Scotland's Rural Areas](#)
- National Farmers Union Scotland (NFUS): [Steps to Change](#)
- Scottish Wildlife Trust: [Land Stewardship Policy](#)

Common themes among these policies are:

- The need for resilient businesses in the face of political, market, and climate uncertainties.
- The need to deliver public goods from land management.
- The need for agriculture and land-based businesses to be profitable.
- The need for support for innovation and adaptation.

Scottish Government Consultation

The Scottish Government consulted on proposals for a rural funding transition period from June-August 2018. The consultation, [Stability and simplicity: proposals for a rural funding transition period](#), included 46 questions on wide-ranging aspects of the rural policy and funding landscape.

The consultation document set out the Scottish Government's intention for a rural policy in the event that Scotland leaves the EU:

“ We are proposing a transition period lasting for approximately five years from the day the UK leaves the EU on 29 March 2019. This would be comprised of the intended ‘implementation period’ of two years, during which Scotland as part of the UK would be expected to continue to implement all EU rules on CAP and would be followed by a further three years, from January 2021. During this period we will seek to introduce practical simplifications and improvements in customer service where this maintains or enhances delivery of public benefits and straightforward changes that improve delivery of policy outcomes. During this five year period of stability we will develop a new rural policy framework for Scotland aimed at ensuring that public investments in social, economic and environmental capital reflect our ambitions for sustainable, inclusive growth across rural Scotland. This government remains committed to continuing to support farming and food production as part of this wider approach. The intention would be to begin implementation of the new policy and support framework from financial year 2024-25: April 2019 to March 2024 **[Implementation/Transition Period]** – if a Withdrawal Agreement between the UK and EU is reached, we expect to align our ‘implementation period’ with the terms of the Agreement to ensure consistency for farmers. This is expected to be between March 2019 and December 2020. Beyond 1 April 2024 **[Scotland’s Rural Economy - New Policy Period]** ”

Scottish Government, 2018¹

This Bill is intended to legislate for the proposals consulted on through the Stability and Simplicity consultation. During the transition period from 2021-2024, the [Policy Memorandum](#) for the Agriculture (Retained EU Law and Data) (Scotland) Bill states that:

“ Overall, the respondents were content for current CAP support to continue as it is, with any improvements to process that are possible to be made. Broadly, all schemes received a reasonable level of support to continue in the short term, albeit all have some issues to address to improve delivery and outcomes. ”

Scottish Government, 2019²

The [analysis of the consultation responses](#) stated:

“ Overall respondents are content for current support to continue as it is, with any improvements to process that are possible to be made. It was clear from the responses however that we should begin to develop and consult on new funding arrangements now to ensure we are as ready as we can be. Continuing with the old EU approach is mostly disfavoured, but the importance of continued support is a common theme albeit with differing views on what the priorities should be. The overwhelming majority are in favour of support being directed towards public goods, but current disagreements on the split of funding between priorities remain (emphasis on food production versus enhanced encouragement of sustainable farming practices). ”

Scottish Government, 2018¹⁹

The consultation covered a broad range of topics and asked for views on:

- The stability and simplicity approach to the rural funding transition period, and the proposals for a five year transition.
- Application and administration of direct payments for farmers and crofters.
- Changes to [Greening payments](#).
- The balance of funding between schemes, and a potential cap on the payments that can be received by a single recipient.
- How support for less favoured areas should be delivered.
- Changes to mapping land.
- The approach to inspections, penalties, performance monitoring and compliance.
- Specific issues and processes that should be simplified.
- What new approaches should be piloted ahead of a new policy.
- What measures that should be introduced to support Scotland's climate change efforts.

And views on how well the following schemes are delivering their objectives and could be amended:

- [Forestry Grants Scheme](#)
- [Agri-Environment Climate Scheme](#)
- [New Entrants Scheme](#)
- [Crofting Agricultural Grants Scheme](#)
- [Small Farms Grants Scheme](#)
- [Food Processing Marketing and Cooperation](#)
- Capital support
- [LEADER](#)

- [Broadband](#)
- [Farm Advisory Service](#)
- [Knowledge Transfer and Innovation Fund](#)
- [Beef Efficiency Scheme](#)
- [Scottish Rural Network](#)

What does the Bill seek to deliver?

The Bill gives Scottish Ministers powers to make regulations to modify CAP legislation in such a way that it would be simplified or its operation improved ([section 2](#)). This means that Scottish Ministers could seek to implement the changes related to specific schemes that were consulted on in the Stability and Simplicity consultation.

More specifically, the Bill also allows Scottish Ministers to cap payments made to an individual recipient using powers to amend the financial provisions of the CAP legislation ([section 4](#)). The Stability and Simplicity consultation sets out that this mechanism is intended to be used to release funds for piloting new policy approaches. The same section also allows Scottish Ministers to change the balance of budgets between pillars and schemes of the CAP.

What was in the consultation that is not in the Bill?

The consultation is more specific on the changes that could be made by the Bill. The Bill does not set out what changes will be made or include any specific direction of travel on policy changes.

What is in the Bill that was not in the consultation?

The Bill includes power to modify the Common Organisation of Markets elements of retained EU law. This includes giving Scottish Ministers the power to make regulations:

- Pausing or revoking CAP legislation on public intervention and private storage aid, whereby governments can intervene to help agricultural producers in exceptional circumstances by buying up/storing products, or simplifying or improving the operation of this legislation ([section 5](#)).
- Simplifying or improving the operation of the legislation on aid for fruit and vegetable producer organisations ([section 6](#)).
- Revoking the EU Food Promotion Scheme ([section 7](#)).
- Regulating the marketing standards for agricultural products sold in Scotland ([section 8](#)).
- Regulating the provisions about the classification, identification and presentation of beef, pig and sheep carcasses by Scottish abattoirs ([section 10](#)).

In addition, the Bill includes powers to make regulations for:

- Amending the definition of "agricultural activity" ([section 12](#)).

- The collection and processing of agricultural data and enforcement of information requirements (sections [13](#), [14](#), [18](#)). However, the Policy Memorandum clarifies that the Scottish Government have consulted with the Information Commissioners Office.²

The Agriculture (Retained EU Law and Data) (Scotland) Bill

Retained EU Law

A large body of EU law has applied in Scotland and the UK for many years. In order to be able to ensure that public processes continue to function should the UK leave the EU, this body of law will be brought over into domestic legislation on exit day; this body of law is called 'retained' EU law.

The Policy Memorandum states:

“ The UK's exit from the EU will mean that EU law will cease to apply in Scotland. This includes the main CAP Regulations, and the other Regulations which sit under them. To avoid a legal vacuum, the European Union (Withdrawal) Act 2018 (EUWA) as passed by the UK Parliament provides for the retention of most of EU law, as it stands on exit 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. The new body of domestic law will be known as 'retained' EU law...The EUWA also created powers for UK and devolved administrations to fix, via secondary legislation, any deficiencies that arise as a result of this conversion to domestic law.”

Scottish Government, 2019²

For agriculture and rural policy, Scotland will remain subject to the regulations under the Common Agricultural Policy in the short-term, because this body of EU law is brought into domestic law, until such time as Scottish Ministers seek to amend it. The Agriculture (Retained EU Law and Data) (Scotland) Bill seeks to amend parts of this retained EU law for the [purposes set out by the Scottish Government](#).

Delegated Powers in the Bill

The Bill contains a number of delegated powers, whereby Scottish Ministers are given the power to bring forward secondary legislation in defined areas. This section looks at the potential implications of these powers.

Stated Policy Intentions

This Bill is intended to deliver the Scottish Government's plans for a period of transition from 2021-2024. As set out in the Policy Memorandum, Scottish Government's 2018 Stability and Simplicity consultation proposed a period of transition to a new agriculture and land use policy, via:

“ An initial period of “stability”, with little change to the current CAP schemes and policies, until the end of 2020, followed by; A period of “simplicity” from 1 January 2021 to approximately 2024, during which simplifications and improvements would be made to the current CAP schemes and policies, and during which potential new schemes for longer term rural policy could be piloted.”

Scottish Government, 2019²⁰

[Section 2](#) of this Bill gives powers to Scottish Ministers to "simplify or improve the operation of" CAP legislation in line with these intentions. However, the Bill does not provide details or guidelines on the kinds of changes that can be made, beyond that the power can be used to amend, revoke or repeal the CAP legislation but only where the Scottish Ministers consider that they would simplify or improve the operation of that legislation. The Bill also does not set a time-limit on the powers given to Scottish Ministers, or on the provisions brought forward in secondary legislation, which, as stated above are intended to apply in a transition period from 2021-2024.

For the longer-term, the Policy Memorandum states that:

“ This work [on Stability and Simplicity] is going on in parallel with the long-term future policy discussion and, whilst it is a separate exercise, any ideas arising that could be delivered post-2024 are being passed to the post 2024 work stream. ² ”

The Scottish Government have not yet explicitly consulted on a new long-term policy for agriculture and land use, though parts of the 2018 Stability and Simplicity consultation and responses to it touched on this. However, the Scottish Government established a stakeholder group in June 2019, the [Farming and Food Production Future Policy Group](#), for the purpose of making policy recommendations for the longer term. The group is tasked with making recommendations on future policy in line with six principles:

- Sustainability
- Simplicity
- Profitability
- Innovation
- Inclusion
- Productivity

These principles were agreed to in a Scottish Parliament debate in chamber on [10 January 2019](#). ²¹ Beyond these principles, the Scottish Government have not explicitly set out its intentions for a longer-term future policy.

In an evolving policy landscape, it may be useful to explore:

- The subjectivity of what constitutes a 'simplification' or an 'improvement'.
- The extent and limitation of the powers given to both current and future governments to make changes, and whether they can go beyond stated policy intentions.

- The time-limit (or lack thereof) on taking powers in relation to modifying CAP legislation, and the time-limit (or lack thereof) on those secondary provisions remaining in force.

Common frameworks

Both the outgoing UK Government and the present Scottish Government consider that when the UK leaves the EU it will be desirable to develop common GB or UK-wide frameworks in areas of current EU competence which are also devolved policy areas:

“ The Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.”

UK Government, 2017²²

One of the areas identified by both governments that is "subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part" ⁶ is in the area of agricultural support.

Agricultural support is currently delivered by the Common Agricultural Policies, under which there are two pillars (more information on this can be found in the section on [the Common Agricultural Policy](#)).

It is not currently clear what a common GB or UK-wide common framework on agricultural support might look like or what policy objectives it might seek to achieve. It is also unclear what has been agreed between the UK and Scottish Administrations, however, the UK Government's most recent [European Union \(Withdrawal\) Act and Common Frameworks report](#) stated:

“ The existing political agreement states that the devolved administrations will not create divergent policy in ways that would cut across future frameworks, where it has been agreed they are necessary or where discussion continues.”

UK Government, 2019²³

As there are no details of an agreement between Scottish and UK Ministers on a unified policy approach to agricultural support it is not yet clear to what extent there will be a common system for agricultural support across either Great Britain or the United Kingdom. With this in mind, the proposal to confer powers on Scottish Ministers to provide for the operation of CAP legislation beyond 2020 ([Section 3](#)) along with proposals to confer powers on Scottish Ministers to modify the CAP legislation ([sections 2, and 4 to 10](#)) may provide scope for Scottish Ministers to implement common GB or UK-wide agricultural support policies agreed with UK Ministers by secondary legislation.

If approaches to common frameworks are implemented using delegated legislation powers, the Scottish Parliament will need to consider how to approach scrutiny of this. The [Finance and Constitution Committee Report on Common Frameworks](#) set out the reasons why it believes parliamentary scrutiny is considered to be essential to developing effective common frameworks:

- it enables Parliament to fulfil their scrutiny role in holding government to account for their actions
- it enables Parliament to judge between potentially competing interpretations of intergovernmental discussions
- Parliament can provide a mechanism by which wider sectoral and stakeholder engagement can be delivered
- Parliament can ensure that in making final decisions, the different vested interests are properly balanced.²⁴

The Policy Memorandum for the Agriculture (Retained EU Law and Data) (Scotland) Bill states that the objectives of the Bill are to:

“ From 1 January 2021, to enable the continued operation of current CAP schemes and policies, but also to allow them to be progressively improved and simplified. From 1 January 2021, to enable pilot projects to be run in order to test out new policy approaches, so as to inform the development of longer term future rural policy.”

Scottish Government, 2019²

It may be useful to explore whether, or to what extent, the proposed conferral of powers on Scottish Ministers would allow the Scottish Government to implement a new system of agricultural support to replace the EU scheme after 2020 using secondary legislation.

Negative and Affirmative Procedures

This Bill grants Scottish Ministers powers which can be exercised through the use of secondary legislation. This section provides more detail on the functions of different types of legislation, and how secondary legislation is passed.

This Bill makes few concrete provisions in and of itself, compared to other pieces of primary legislation; rather this Bill most often gives powers to Scottish Ministers to allow them to bring forward secondary legislation in the future. "Secondary legislation" is an instrument (for example Regulations) made by the Scottish Ministers, often providing the detailed rules on a particular topic. Scottish Ministers can make secondary legislation on a particular topic as long as they have been given the power to do so in primary legislation.

When Scottish Ministers bring forward primary legislation it goes through the full [legislative process](#) in Scottish Parliament. However, when Scottish Ministers bring forward secondary legislation, they do so under a specified "procedure" which determines how much scrutiny the instrument receives in the Scottish Parliament.

If secondary legislation is brought forward under the "[negative procedure](#)", it will become law unless the Scottish Parliament explicitly objects. A Scottish Statutory Instrument (SSI) subject to the negative procedure will come into force on the date specified in the text of

the instrument, unless a resolution to annul (or cancel) it is agreed by the Parliament in the Chamber.

1. The process for annulment is normally triggered if a motion to annul the SSI is put before the parliamentary committee in charge of that topic (the "lead committee"). Any MSP can put down such a motion.
2. Where the lead committee recommends that the instrument should be annulled, it must report to the Parliament no later than 40 days from the date the instrument was laid.
3. Where the lead committee recommends annulment in its report to the Parliament, the Parliamentary Bureau must lodge a motion to annul the instrument and schedule time for consideration of the motion by all MSPs in the Chamber, to take place no later than 40 days from the date the instrument was laid.

If secondary legislation is brought forward under the "[affirmative procedure](#)", usually it will not come into force unless the Scottish Parliament explicitly consents. Affirmative instruments are subject to approval by resolution of the Parliament. They are normally laid in draft form. The procedure for dealing with an affirmative instrument is as follows:

1. The Delegated Powers and Law Reform Committee considers the technical and legal aspects of the instrument and has to report on these to the relevant lead committee, normally no later than 20 days after the instrument is laid.
2. The lead committee must report to the Parliament with its recommendations on approval no later than 40 days after the instrument is laid. This normally follows consideration of a motion from the Minister that the committee should recommend approval.
3. The motion to approve the instrument is normally lodged and considered at a meeting of the Parliament in the Chamber no later than 40 days after the instrument is laid, but it can be scheduled for a date after the 40-day period. (No time limit is set in legislation or the standing orders for the Parliament to agree a motion to approve an affirmative instrument, but a long delay is not desirable from a practical point of view.)

Bringing forward secondary legislation under the affirmative rather than the negative procedure gives the opportunity for the Scottish Parliament to apply a higher level of scrutiny to the instrument. This is because the lead committee is required to hold a debate on a motion to approve an affirmative instrument (whereas for a negative instrument the lead committee is only required to hold a debate if there is a motion to annul); and because an affirmative instrument will not become law until it has been considered and actively passed by a vote of the whole Parliament in the Chamber, whereas a negative instrument becomes law, by default, unless it is annulled.

What the Bill does

Part 1 - Retained EU Law

This part gives power to the Scottish Ministers to modify CAP legislation by regulations. 'CAP legislation' refers to the suite of EU regulations governing different aspects of EU agriculture policy. These include:

- The Direct Payments Regulation, which makes provision for how to pay direct payments for farmers.
- The Rural Development Regulation, which makes provision for rural development schemes. In Scotland rural development is delivered through the Scottish Rural Development Programme (SRDP). The programme includes the Less Favoured Area Support Scheme (LFASS), Agri-Environment Climate Scheme, and the Forestry Grants Scheme, among others.
- The CMO Regulation on the common organisation of the markets in agricultural products. This sets out rules on how member states may intervene in agricultural markets, for example by providing assistance to certain sectors, setting marketing standards, or by establishing protected food names.
- The Horizontal Regulation which sets out measures that are common to all areas of the CAP, such as financing, management and monitoring of CAP programmes.
- The Common Provisions Regulation on common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund.

Simplify and improve CAP Legislation

Section 2 of the Bill gives the Scottish Ministers power to modify (which includes amending, revoking or repealing) any part of the main CAP legislation, as long as the Scottish Ministers consider that the changes would "simplify or improve the operation of the provisions of the legislation". They can do this by the negative procedure, whereby a modification will become law unless the Scottish Parliament explicitly objects.

The [Policy Memorandum](#) explains that the purpose of this is to make some of the changes requested in the responses to the 2018 [Stability and Simplicity consultation](#), which have been considered by the [Simplification Task Force](#).

The [Delegated Powers Memorandum](#) states that the regulations under the power given to Scottish Ministers in this section are not *"intended to be used to make major changes"* but that *"there is also a clear argument for using the scope to make new arrangements that will follow from exit to simplify and improve the CAP in ways that are not possible as an EU Member State."*

In addition, *"It may be appropriate, for example, to run pilot schemes to test new processes. It may also be necessary to react quickly to changing circumstances, particularly if there is a "no deal" exit."*

One of the ways that the Scottish Government intends to use these powers is to retain the Less Favoured Area Support Scheme (LFASS). Under EU rules, this scheme would need to be phased out and replaced by a new Areas of Natural Constraint (ANC) scheme.³

The Stability and Simplicity consultation asked for views on specific ways that schemes, processes and policies could be changed (see [section above on the consultation](#)). This section would give Scottish Ministers the power to make some of these changes were they to "simplify or improve the operation of" the legislation, but the Bill and Policy Memorandum do not elaborate on what specific changes will be made beyond what is stated above.

Operation of CAP Legislation beyond 2020

Section 3 of the Bill gives Scottish Ministers the power to modify CAP legislation to ensure that it continues to operate in Scotland beyond 2020. CAP legislation sets a 'ceiling' on the amount of money that is allowed to be spent on direct payments by a member state. The law currently only specifies an amount of money that is allowed to be spent until 2020, after which time retained EU law would not provide a basis for Scottish Ministers to continue to make direct payments.

This section also gives Scottish Ministers powers to determine limits on spending for subsequent years beyond 2020. Regulations under this section are subject to the affirmative procedure, which means that the modification will not become law without the explicit consent of the Scottish Parliament.

Financial Provision in CAP Legislation

Section 4 refers to the Scottish Ministers' ability to set and modify the amount of money allocated to different CAP schemes. Under EU rules, a specified percent of the overall agricultural budget is allocated to Pillar 1 (direct payments, greening, voluntary coupled support, support for young farmers) and Pillar 2 (rural development schemes including Less Favoured Area Support Scheme, Agri-Environment Climate Scheme, Forestry Grants Scheme, new entrants schemes, and more). This section would allow Scottish Ministers to modify these amounts as well as the total agricultural spend.

This section gives Scottish Ministers the power to modify any provision of the main CAP legislation, but states that this includes power to modify the following specific provisions:

- Direct Payments Regulation
 - Articles 6 and 7 on the national ceiling, or maximum amount, that can be paid in direct payments.
 - Article 11 on the maximum amount of direct payments that can be granted to a single farmer in a given year, and the provisions for reducing this amount by a given percentage.
 - Article 14 on the flexibility to move funds between Pillar 1 and Pillar 2.
- Rural Development Regulation:

- Article 58 which determines the amount that is allowed to be spent on rural development until 2020.
- Article 59 which establishes contributions from sources of funding for rural development, determining the proportion to come from the European Agricultural Fund for Rural Development.
- Horizontal Regulation:
 - Article 30 prohibiting double funding, whereby the same expenditure cannot be financed more than once from different EU funding streams.
 - Article 32, which provides for the expenditure under the European Agricultural Fund for Rural Development to be set out within the ceilings for rural development.

While not specified in the text of the Bill, this section gives Scottish Ministers the power to, for example, by regulation set national ceilings for spending beyond 2020, modulate budgets between Pillar 1 and Pillar 2, and set a cap on payments paid to a single recipient.

The Scottish Government asked for views in the [2018 Stability and Simplicity consultation](#) on the possibility of "capping direct payments" and questions relating to capping all payments paid to any single business, and that funds released through this process would be used to pilot new policy approaches. There was general support for such pilots evidenced in the 2018 Stability and Simplicity [consultation analysis](#). A majority of respondents were also in favour of capping payments, though the consultation analysis is not clear about which funding streams stakeholders believe should be capped. A cap on "individual" payments as one of the objectives of this section is explicitly referenced in the Policy Memorandum, however, the link to using these funds for piloting new approaches is not made explicitly here.

In addition, the Stability and Simplicity consultation asked for views, given the current funding distribution between schemes, on "how the balance between these schemes should change in future to maximise outcomes" ¹. All respondents had views about how the balance between schemes should change to maximise outcomes in the future, but answers varied widely between the need to deliver environmental and social outcomes as opposed to a focus on Pillar 1; supporting smaller units over industrial sized ones; the definition of active farming; and views on coupled payments, new entrants schemes, and means testing. ¹⁹ This section of the Bill gives Scottish Ministers the ability to make these changes by moving funds between pillars of the CAP.

Public Intervention and Private Storage Aid

Section 5 gives the Scottish Ministers power to modify legislation on public intervention and private storage aid. Public intervention and private storage aid refer to the powers of a government to intervene in the market during difficult times, for example by buying up a certain product, or paying for private companies to store a product for a time rather than releasing it to the market.

As detailed in the [Policy Memorandum](#), these powers are now seldom used, and were proposed to be abolished in England, Wales and Northern Ireland through the UK Agriculture Bill. The UK Agriculture Bill instead made provision for support during

'exceptional market conditions'. While the UK Agriculture Bill has now fallen with the prorogation of the UK Parliament on 8 October 2019, it will be up to a new UK Government to decide the future of this legislation.

The Scottish Government express concern in the Policy Memorandum that without these powers, if changes are made to legislation covering England, Wales and Northern Ireland, the Scottish Government may be obliged to intervene in a market in Scotland while UK counterparts are not required to do so elsewhere in the UK.

This section allows Scottish Ministers to temporarily suspend, abolish or otherwise 'simplify or improve' these measures, including the rules for what support can be given for, and when and how it can be given. Ministers can do make regulations under this section by the negative procedure.

The provisions in this section were not explicitly consulted on.

Aid for Fruit and Vegetable Producer Organisations

Section 6 gives the Scottish Ministers power to amend the conditions for aid to fruit and vegetable producer organisations, which they consider would "simplify or improve the operation of" this legislation.

This section gives Scottish Ministers the power to amend retained EU law on:

- Funding for producer organisations
- The requirements of producer organisations, for example on:
 - Setting out their objectives in an operational plan.
 - Rules for crisis prevention.
 - Requirements for environmental protection and enhancement within the operational plan of a producer organisation, including rules and requirements for environmental funding.
- Requirements to produce a national framework for producer organisations and a national strategy for sustainable operational programmes in the fruit and vegetable market; and
- Certain European Commission delegated instruments as specified in the text of the Bill.²⁵

Regulations under this power are subject to the negative procedure.

The provisions in this section were not explicitly consulted on.

EU Food Promotion Scheme

Section 7 give Scottish Ministers the power, by regulations subject to the negative procedure, to revoke the EU Food Promotion Scheme. The EU Food Promotion Scheme

was not established through the [suite of CAP legislation](#), but rather through separate EU regulations.

The EU Food Promotion Scheme provides funding to promote EU farm products within the EU and abroad, "opening up new market opportunities for EU farmers and the wider food industry, as well as helping the build existing businesses" ²⁶

The [Policy Memorandum](#) states that while Scotland has received funding for promotion of Scotch Beef and Lamb, and the Agriculture and Horticulture Development Board (AHDB) has had some involvement in the scheme, Scotland has had little benefit. The Scottish Government aims to "rely on more straightforward existing domestic powers, such as those in section 94 of the Natural Environment and Rural Communities Act 2006" ² which allows grants to be paid for bodies under this act, including Quality Meat Scotland and AHDB.

Quality Meat Scotland and AHDB are both statutory levy boards. Both organisations raise levies and the resulting funds are ring-fenced to support the sectors. In Scotland, AHDB supports levy payers in the dairy, potatoes, horticulture, cereals and oilseeds sectors ²⁷, while Quality Meat Scotland supports the red meat sector. Both bodies are largely funded through levies. Quality Meat Scotland also get some funding from their quality assurance scheme. ²⁸

The provisions in this section were not explicitly consulted on.

Marketing Standards

Section 8 gives Scottish Ministers power to amend, by regulations subject to the negative procedure, marketing standards for agricultural products within specified sectors that are marketed in Scotland. This gives Scottish Ministers the power to change the requirements for different food products marketed to Scotland. For example, it may mean that Scottish Government can change the acceptable water content for certain products, or to specify the type of farming or production methods required for certain products.

The relevant sectors are:

- Olive oil and table oils
- Fruit and vegetables
- Processed fruit and vegetable products
- Bananas
- Live plants
- Eggs
- Poultry meat
- Spreadable fats intended for human consumption
- Hops

- Wine
- Beef and veal
- Milk and milk products
- Aromatised wine.

This section allows Scottish Ministers to make provisions for:

- Technical definitions, designation and sales descriptions
- Classification criteria (age, size, weight, category)
- Species, plant variety, animal breed, or commercial type
- Presentation, labelling, packaging, rules to be applied in relation to packaging centres, marketing, years of harvesting and use of specific terms
- Criteria such as appearance, consistency, conformation, product characteristics and percentage of water content
- Substances used in production, or components or constituents, including their quantitative content, purity and identification
- Type of farming and production methods, including wine-making practices
- Blending wine and must (a precursor to wine that includes the skins, stems and seeds of fruit, and restrictions on blending)
- Frequency of collection, delivery, preservation and handling, the conservation method and temperature, storage and transport
- The place of farming or origin, excluding poultry meat or spreadable fats
- Restrictions on the use of certain substances and practices
- Specific use productions
- Conditions for the disposal, holding, circulation and use of products not conforming with marketing standards, and the disposal of by-products
- Use of terms communicating value-added characteristics or attributes ²⁹ .

This section also allows Scottish Ministers to make rules for monitoring and record-keeping, enforcement powers, offences and penalties.

The provisions in this section were not explicitly consulted on, but before making regulations under this section, the Scottish Ministers must consult stakeholders who they consider are likely to be affected.

Carcass Classification

The [EU regulation on the common organisation of markets](#) (Article 10) includes rules on the classification, identification and presentation of bovine, pig and sheep carcasses. Section 10 Part 1 gives Scottish Ministers the power, by negative procedure, to change the law in this area.

In the EU regulations, carcasses are classified based on different criteria, e.g. whether the animal is male or female, its age, and the quality of the animal and its muscle development and the amount of fat. Rules also stipulate how in what condition carcasses should be presented, and how they must be able to be identified.

These powers allow Scottish Ministers to amend the classification, identification and presentation of carcasses by slaughterhouses in Scotland. In particular, the [Policy Memorandum](#) highlights a potential need to introduce mandatory sheep carcass classification in Scotland, following the Scottish Sheep Sector review and future engagement with the industry.

Regulations under this section are subject to the negative procedure. The provisions in this section were not explicitly consulted on, but before making regulations, Scottish Ministers would be required to consult stakeholders who may be affected by the change.

Part 2 - Collection and Processing of Data

Part 2 of this Bill sets out new powers for Scottish Ministers to collect data related to agricultural activities. The [Policy Memorandum](#) for the Bill explains that the current powers to collect data come from the Agriculture Act 1947, and that while the CAP regulations require the Scottish Government to share some data with the EU, they do not make explicit provision for the collection of it.

Since the General Data Protection Regulation (GDPR) came into force in May 2018, anyone collecting or processing data is bound to stricter rules on the means and purpose of collecting, processing and storing data. The provisions in this Bill are clearer than the provisions of the Agriculture Act 1947 in providing the legal basis for the collection of agricultural data.

Definitions and powers to amend definitions

Section 12 defines the terms used in Part 2 of the Bill. This includes a definition of "animal", "agri-food supply chain", the persons in an agri-food supply chain, the persons closely connected with an agri-food supply chain, what is meant by being "connected" with the supply chain, what is meant by "processing" and what is meant by "agriculture", "plants" and "seeds".

Notably, this section also includes a definition of "agricultural activity", which this Bill continues to define in line with EU Regulations (Regulation (EU) No 1307/2013) as:

“ (i) production, rearing or growing of agricultural products, including harvesting, milking, breeding animals, and keeping animals for farming purposes, (ii) maintaining an agricultural area in a state which makes it suitable for grazing or cultivation without preparatory action going beyond usual agricultural methods and machineries, based on criteria established by Member States on the basis of a framework established by the Commission, or (iii) carrying out a minimum activity, defined by Member States, on agricultural areas naturally”

European Parliament, 2013³⁰

Section 12(10) gives power to Scottish Ministers to amend the definition of "agricultural activity", by regulations subject to the affirmative procedure.

The [Delegated Powers Memorandum](#) for the Bill states that the purpose for granting Scottish Ministers this power is in case the definition ceases to operate effectively, for example "if the underlying definition in the Direct Payments Regulation was to be changed or repealed, or if farming practices changed (such as in response to climate change, technological advances, etc.)."

Changes to the definition of agricultural activity has not been explicitly consulted on, however, a number of respondents to the Stability and Simplicity consultation commented on the definition of activity and active farming.

Requirements to Provide Information

Sections 13 and 14 give Scottish Ministers the power to require a person in, or closely connected with, an agri-food supply chain, or a person carrying out an agricultural activity, to provide information in relation to matters connected with their activities. Scottish Ministers may also, by regulations subject to the affirmative procedure, impose additional requirements to provide information on activities of a person in, or closely connected to, an agri-food supply chain, or a person undertaking agricultural activities. They may do so as long as:

- The activities take place in Scotland
- In the case of people in or connected to agri-food supply chains, the people required to provide the information are not the ultimate consumers
- In the case of people undertaking agricultural activities, the people required to provide the information are engaged in the activity for profit or reward
- In the case of people involved in agri-food supply chains, the people required to provide the information are engaged in the activity for profit or reward, unless the activity is affecting the health of animals or plants involved in the supply chain, or affecting the safety or quality of food or drink provided to consumers.

The [Delegated Powers Memorandum](#) clarifies that Scottish Ministers would be granted the power to by regulation impose additional requirements on a group of people within agri-food supply chains or carrying out agricultural activities, as opposed to individuals. This could be, for example, requirements for co-operatives, abattoir operators, or farms of a certain output.

Section 15 provides more detail on what the requirement to provide information under sections 13 and 14 can involve, such as the timing and form of the information required.

The [Policy Memorandum](#) clarifies that the Scottish Government does not intend to collect new data, but to rely on existing data collected through the June Census and sector specific surveys. This was not consulted on in the 2018 Stability and Simplicity Consultation, but has followed consultation with the Information Commissioners Office. The Scottish Government state in the Policy Memorandum that the data is important for economic analyses of the farming sector, and to shape and improve policy delivery, in addition to providing information on the Sustainable Development Goals.

Purposes and limitations for requiring information

In line with the principles of GDPR, Section 16 sets out the legitimate purposes for requiring and processing information, and Section 17 sets out the limitations on the processing of information.

Section 16 sets out the list of purposes for which information on agricultural activity or activity in the supply chain can be required and may be processed, which can be summarised as:

- Supporting agricultural development.
- Promoting transparency and fairness.
- Promoting health, welfare, and traceability of animals and the health of plants.
- Minimising adverse environmental impacts.
- Minimising waste.
- Monitoring markets.
- Any function of a public authority related to agri-food supply chains and related activities, agricultural activities, health and welfare of people or animals, health or quality of plants and soils, food and drink safety, waste, environmental protection or the countryside.

However, Section 17 places limitations on the use of information which persons have been required to provide, specifying that it may only be used for the above purposes, by the person for whom the data is collected and by anyone to whom it is disclosed. This section also states that if information is to be disclosed that is not anonymised, consideration must be given to whether disclosure would prejudice anyone's commercial interests, and if so, the information must be provided in anonymised form unless it is in the public interest to disclose identifying details.

Enforcement of information requirements

Section 18 gives Scottish Ministers the power to make provision for the enforcement of information requirements, including monitoring compliance, and investigating and dealing with non-compliance. Scottish Ministers are given power to set penalties by requiring a

specified fee or by withholding payment, and a variety of additional functions connected to enforcement and non-compliance. Regulations under this section are subject to the affirmative procedure.

The maximum period of imprisonment that can be imposed as a punishment for an offence created under the provisions in this Bill is 5 years for conviction on indictment and 12 months for summary conviction (Section 20(3)).

Part 3 - General

Part 3 includes additional provision in relation to powers for Scottish Ministers to make regulations under the Bill.

Section 20 states that the power to make regulations under this Bill may make provision for different purposes and may make incidental, supplementary, consequential, transitional and saving provision, but that where regulations modify the text of the primary legislation, they must be made under the affirmative procedure (whereby Scottish Parliament must give explicit consent).

Section 21 gives Scottish Ministers power by regulations to make ancillary provision that may be deemed necessary as a result of any other provisions of this Bill. As in section 20, these would need to be made under the affirmative procedure if they add, remove or change any part of the text of the primary legislation.

Finally, Section 22 (2) provides that if any provision of the Bill (or of any regulations made under it) would be incompatible with EU law if it were in force before the UK leaves the EU, the provision is to have no effect until that point in time. This section concerns a timing issue in relation to the legislative competence of the Scottish Parliament: while the UK is still in the EU, the Scottish Parliament cannot pass legislation which is incompatible with EU law (under s. 29(2) of the Scotland Act 1998). Section 22(2) provides that any provision which would fall foul of the legislative competence restriction has no effect until EU law ceases to apply to the UK (i.e. on “exit day”, currently 11pm on 31 January 2020).

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