



ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

AGENDA

7th Meeting, 2004 (Session 2)

Wednesday 3 March 2004

The Committee will meet at 10.00 am in the Chamber, Assembly Hall, The Mound, Edinburgh

1. **Nature Conservation (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 5).
2. **Subordinate legislation:** Richard Lochhead MSP to move motion S2M-937— That the Environment and Rural Development Committee recommends that nothing further be done under the Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2004, (SSI 2004/44).
3. **Subordinate legislation:** The Committee will consider the following negative instrument—

the Registration of Establishments Keeping Laying Hens (Scotland) Amendment Regulations 2004, (SSI 2004/27).
4. **Reform of the Common Agricultural Policy:** The Committee will take evidence from Allan Wilson MSP (Deputy Minister for Environment and Rural Development) on the implementation of CAP Reform in Scotland.

Tracey Hawe
Clerk to the Committee
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The following papers are attached:

<p><u>Agenda Item 1</u></p> <p>Members are reminded to bring with them copies of the Nature Conservation (Scotland) Bill.</p> <p>The Marshalled List of amendments will be published on Tuesday. The groupings will be available from document supply on Wednesday morning and will also be available at the meeting.</p>	
<p><u>Agenda Item 2</u></p> <p>The Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2004, (SSI 2004/44)</p> <p>Extract from the Subordinate Legislation Committee's 7th Report 2004 (to follow)</p>	<p>ERD/S2/04/07/2a</p> <p>ERD/S2/04/07/2b</p>
<p><u>Agenda Item 3</u></p> <p>The Registration of Establishments Keeping Laying Hens (Scotland) Amendment Regulations 2004, (SSI 2004/27)</p> <p>Extract from the Subordinate Legislation Committee's 7th Report 2004 (to follow)</p>	<p>ERD/S2/04/07/3a</p> <p>ERD/S2/04/07/3b</p>
<p><u>Agenda Item 4</u></p> <p>A SPICe briefing on CAP Reform is attached</p> <p>A letter on CAP Reform from the Deputy Minister for Environment and Rural Development is attached</p> <p>A SPICe briefing on the Scottish Executive's Rural Development Plan is attached</p> <p>A paper from the SPICe is attached (<i>for members only</i>)</p>	<p>ERD/S2/04/07/4a</p> <p>ERD/S2/04/07/4b</p> <p>ERD/S2/04/07/4c</p> <p>ERD/S2/04/07/4d</p>

CAP REFORM: IMPLEMENTATION IN SCOTLAND

TOM EDWARDS

This briefing has been prepared for Members of the Environment and Rural Development Committee.

It looks at:

- the choices which Member States could make in deciding how to implement the CAP reform which was agreed
- the choices which the Scottish Executive announced on 12 February 2004.

It then focuses on two key issues:

- the choice the Scottish Executive had to make between the historical and area bases for making the new Single Farm Payments
- the Scottish Executive's decision that farm payments will be modulated at a rate of at least 10% from 2007

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Tom Edwards on extension 85198 or email tom.edwards@scottish.parliament.uk. Members of the public or external organisations may comment on this briefing by emailing us at spice.research@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers.

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KEY POINTS OF THIS BRIEFING

- The CAP reform agreement concluded in June 2003 included significant flexibility in how it was implemented by Member States
- The centrepiece of the reforms is “decoupling”, breaking the link between farm subsidies and production
- Member States could choose how to implement the Single Farm Payment. This will be done with Single Farm Payments, based either on the historic basis (amounts farmers received from 2000-02) or area basis (a flat rate per hectare) or a combination of these
- Member States could also choose to delay implementation of Single Farm Payments up to 2007, and to keep the link between some of the payments and production
- The Scottish Executive announced the decisions it has taken on how to implement CAP reform on 12 February 2004
- Fully decoupled Single Farm Payments will be introduced in Scotland from 2005
- Payments will be made on the historic basis – the average of the amounts farmers received from 2000-02
- The CAP reform also introduces compulsory EU wide modulation of farm payments at a rate of 3% in 2005 rising to 5% in 2007
- Farm Payments are already modulated in Scotland. A rate of 4.5% was planned from 2005.
- The Scottish Executive also announced that a combination of compulsory EU and national modulation of farm payments will be raised to at least 10% from 2007
- This will generate an additional £40 million for rural development spending

CAP TERMINOLOGY

Agricultural Market Support: term used in the EU budget to describe all price support payments, and subsidies paid direct to farmers, also known as “Pillar 1” of the CAP

Area basis: an option for implementing the Single Farm Payment where payments are set by dividing the total amount allocated for Single Farm Payments by the farmed area to establish a flat rate per hectare. Different rates can be set for grassland and arable land

Cross-compliance: making receipt of support payments conditional on fulfilling certain criteria

Decoupling: removing the link between the need to produce agricultural goods and the receipt of support payments. Decoupling is implemented through the Single Farm Payment

Degressivity: cutting subsidies over time. The term “financial discipline” is now used in the legal text instead of degressivity

Financial discipline: cutting subsidies when spending is forecast to come within €300m of the CAP budget ceiling

Historical basis: an option for implementing the Single Farm Payment where payments are based on the average amounts farmers received in a 2000-02 reference period

Hybrid: an option for implementing the Single Farm Payment where area and historical payments are combined. This could be “static”, where the proportion of historic and area components is fixed over time, or the proportion of the historic and area components could be changed over time, for example with a gradual shift from historic to area payments.

Land management contracts: a whole farm system of support where farmers are contracted to deliver a range of economic, social and environmental benefits in return for support payments

Modulation: removing some of the payments given direct to the farmer, and transferring them into rural development support, such as agri-environment schemes

National Envelope: Member States may retain up to 10 % of payments within each sector for specific types of farming which are important for the protection or enhancement of the environment or for improving the quality and marketing of agricultural products

Partial Recoupling: keeping part of the sector specific subsidies

“Pillars” of the CAP: the CAP is commonly seen as having 2 pillars. Pillar 1 includes price support payments, and subsidies paid direct to farmers, which accounts for around 90% of CAP spending. Pillar 2 is rural development spending, which currently accounts for around 10% of CAP spending.

Rural development: Payments made under the Rural Development Regulation¹, also known as Pillar 2 of the CAP.

Single Farm Payment: a payment made from combining payments under previously separate schemes

¹ Official Journal of the European Union L160 vol 42, 26 June 1999

INTRODUCTION

In June 2003, the Council of Agriculture Ministers reached a political agreement on CAP reform. The Regulations which implement this agreement were adopted at the Agriculture Council meeting on 29 September 2003 (Council Regulations (EC) No 1782/2003 - 1788/2003)². The background and content of the reforms is described in SPICe Briefing 03-86 (Edwards 2003).

The reforms give Member States more freedom to decide on agricultural policy than they have had for forty years. The main options open to Member States are summarised in the box below:

WHAT WERE THE OPTIONS FOR IMPLEMENTING CAP REFORM?

- The Single Farm Payment can be implemented at a regional level (a “region” must have 3 million hectares of eligible farmland). In this case the Member State ceiling for total payments is subdivided into regional ceilings on the basis of objective criteria.
- Single Farm Payments can be introduced in either 2005, 2006, 2007
- Choice of basis for implementing Single Farm Payment:
 - Historical basis
 - Area basis
 - “Hybrid”
- Option to partially recouple schemes incorporated into the Single Farm Payment:
 - Up to 25% of Arable Area payments
 - Up to 50% of Sheep Annual Premium payments
 - Choices for beef: either up to 100% of Suckler Cow Premium and up to 40% of Slaughter Premium; or up to 100% of Slaughter Premium; or up to 75% of the Beef Special Premium
- Option to use up to 10% of the national or regional ceiling to create national envelope(s) in any or all of the sectors covered by the single farm payment. They can use this money to address particular concerns to counterbalance the impacts of decoupling, but the payments must also be linked to either environmental protection/enhancement or improving the quality of agricultural products.
- Option to decouple and incorporate payments to dairy farmers within the Single Farm Payment early, in 2005 instead of in 2007
- Four new options for rural development spending added to the existing 22 under the Rural Development Regulation

² Official Journal of the European Union L270 vol 46, 21 October 2003

DECISION IN SCOTLAND

The UK Government and Devolved Administrations decided at an early stage that the CAP reforms would be implemented regionally in England, Scotland, Northern Ireland and Wales.

To inform decisions in Scotland the Scottish Executive held a public consultation which ran from 6 October 2003 until 6 January 2004, including a series of public meetings and discussion groups held around Scotland. There were 293 written responses to the Executive's consultation paper (Scottish Executive 2003). A summary of the responses is available on the Executive website (Scottish Executive 2004a).

The Deputy Minister for Environment and Rural Development, Allan Wilson MSP, announced the choices the Scottish Executive had made on how to implement CAP reform in Scotland in a statement to the Parliament on the 12 February 2004 (Scottish Parliament 2004). The Minister announced the following decisions:

- Single Farm Payments will be introduced in Scotland in 2005. They will be made on a historical basis. They will be fully decoupled and none of the options for maintaining a coupled element will be used
- The Executive intends to use a national envelope in the beef sector to address the possible short-term consequences of decoupling. Decisions on the national envelope will be taken in the light of further discussions with the industry and after the EU implementing legislation has been agreed
- There will be a separate consultation on cross-compliance conditions
- Dairy payments will be decoupled and incorporated within the Single Farm Payment from 2005
- National Modulation together with compulsory EU modulation will be applied at a combined rate of 10%, and may be further increased subject to allocation of more money by HM Treasury for match funding. No decision has yet been taken about how the funds resulting from extra modulation will be spent.

HISTORICAL v AREA BASIS FOR SINGLE FARM PAYMENT

ARGUMENTS FOR AND AGAINST

Some of the main arguments which have been advanced for and against historical and area payments are shown below:

	Historic	Area
FOR	<p>Minimises redistribution of income between farmers which helps adjustment to the new regime</p> <p>The most efficient farmers would do better with historic payments than area payments because they reflect past activity and business development</p>	<p>Extends CAP payments to farmers in previously unsupported sectors. This would allow cross-compliance conditions for crops like potatoes, for which there are no payments at present (though this would only be a very small area in Scotland)</p> <p>Breaks the link with historic production</p>

	<p>This is the system which was envisaged by the European Commission when CAP reform was initiated – decoupling is intended to provide farmers with stability and give them freedom to farm and respond to market signals, not to redistribute subsidies between farmers</p>	<p>Simpler, more transparent distribution of support</p> <p>Aid would be targeted at those less able to respond to market alone, and generally towards small scale, extensive farming which may be more environmentally beneficial</p>
AGAINST	<p>Farmers may have taken decisions during the reference period which now have consequences for their Single Farm Payment that they could not have foreseen</p> <p>May act against structural change in agriculture</p> <p>Difficult to justify over the mid to longer-term, i.e. making payments to farmers based on what they were doing 5 or 10 years ago. This may be an advantage or a disadvantage – opponents of subsidising farming may use this to argue for abolition of farm subsidies</p> <p>Maintains current inequalities in distribution of support payments</p>	<p>Depending on chosen method would result in large redistribution of income. This could force farmers out of business or force them to change their business, rather than giving the choice to change. This was not the intention of decoupling</p> <p>As the payment is more visible it may be more easily capitalised into land prices</p> <p>Tenant farmers fear they would not benefit, since area payments will result in increased rents</p> <p>Trying to reduce income redistribution by designing a more complex scheme risks losing the big advantage of decoupling of simplification</p> <p>As arbitrary as historical basis – does not necessarily result in more money going to farmers who are farming in the way the public/government want, or in a more equitable distribution of subsidy between farmers</p> <p>Because of redistribution choosing the area basis risks putting farmers at a competitive disadvantage with counterparts in other EU countries which choose the historical basis</p>

SELECTED VIEWS

The European Commission wants Member States to adopt the historical basis. This was at the core of its original proposal, and the Commission does not want decoupling to force farmers to change their businesses, which might be the consequence of shifting to area payments. The Commissioner, Franz Fischler, has warned EU agriculture ministers that they must be able to provide objective justifications for choosing the area basis (Farmers Weekly Interactive 2004).

Lord Whitty, DEFRA Parliamentary Under-Secretary in the House of Lords, gave some of the arguments against the historic basis in a speech at the Oxford Farming Conference (DEFRA 2004):

Can I say as a politician and a one time economist - that the historic basis is not a sustainable system for any length of time.

Nor is it a politically justifiable system to a wider electorate. As my Hungarian colleague remarked “we are asking the people to support a change from a system which paid a farmer so many euros for having 20 cows to one which would pay him for having had 20 cows 10 years ago.” That in presentational and potential terms this is just not sustainable.

I am a benign politician. Unlike some, I try to make the life of my successors less difficult not more so. How can a successor of mine in 5 let alone 10 years time be able to justify a system that creates such huge anomalies between apparently equivalent enterprises, types of land and individual fields growing similar crops on the basis of what was the position 7 years ago and haphazard trading of entitlements.

I therefore say that if we were to adopt a simple historic basis for payment of the Single Farm Payment that system will not last long. We need to take decisions on the immediate options bearing that in mind.

The National Farmers Union of Scotland (NFUS) (2003) supports the historic basis:

Simply redistributing support by calculating the Single Farm Payment on the average area model does not provide an objective, long-term basis for that support. However, we recognise that in the long-term a historic payment will become increasingly difficult to justify. We believe that Land Management Contracts, or a similar model, which bases support on the social, economic and environmental benefits provided by agricultural businesses, can provide the start point for discussions with all parties about a sustainable basis for payments. In the short-term however, a period of stability in the level of support to individual businesses is essential to allow them to adjust to the more market orientated environment in which they will operate under the new CAP regime. NFUS therefore supports the historic based model of decoupling at this point in time.

The Scottish Crofting Foundation (2004) advocates a gradual move from historic to area based payments:

An area-based system offers the potential to be justifiable in the longer term and can be more directly related to payment for land management than the continuation of an historic system, which may bear very little relation to activities subsequently carried on, on the land. [...] However we recognise that many businesses are based around current subsidy levels and that any quick change would be disruptive to agriculture as a whole. For that reason, we suggest that a transition phase is necessary, to allow for businesses to change and adapt to the changing market.

We advocate a move over time away from a mostly historic system towards a mostly area-based system.

Tenant farmers have been among the most critical of the area based approach. The Tenant Farmers Association (2004) called the decision in England to move from historic to area payments over an 8 year transition period a “disaster”:

There is really a sense here that we have snatched defeat from the jaws of victory. There was a real chance following the reforms of last June to start a process of change that would lead to a more sustainable future for farming and the wider rural environment. The decision to focus on a move to area payments squanders that chance".

For the tenanted sector, area payments will simply add costs, as they will be quickly factored into land values. There will be a long-term bias against letting land as landowners try to maintain control of the area payment

RSPB Scotland (2004), support the area basis for establishing the Single Farm Payment. They favour a transition over 5 years from a hybrid model to an all area-basis:

Flat rate area-based Single Farm Payments (SFPs) are supported by RSPB Scotland as the preferred future option for support payment. They secure full decoupling and sever the link to historic production, provide administrative and social equity benefits, and signal a move to a more rational structure for Pillar I, rewarding public goods and services provided by farming, and providing potential environmental enhancement. They are also World Trade Organisation compliant. They should be adopted in the medium term.

Sudden and wholesale changes to payment structure may, however, have a damaging effect on some farm businesses, so we recommend the adoption of a five year hybrid system, that moves from historic to flat rate area payments over that time.

The Scottish Executive recognises the shortcomings of both the area and historic bases. Speaking at the NFUS AGM, the Deputy Minister for Environment and Rural Development, Allan Wilson MSP, said (Scottish Executive 2004b):

Our decision (to adopt the historic basis for the SFP) was very much dictated by the need for short term stability - and the avoidance of potentially radical redistribution of payments. Redistribution was not an objective of the reform. Having said that, I have to tell you that the historic basis for payment does not provide a long- term rationale for agricultural support payments. We plan to review this decision as soon as EU arrangements permit. No deadlines for review are set in the legislation but on the basis of past experience we can expect review within a reasonable period - perhaps 5 years.

MODULATION

Modulation provides a way of shifting support between the two "pillars" of the CAP, from Agricultural Market Support payments to rural development.

Compulsory modulation will apply in all Member States from 2005 at a rate of 3%, increasing to 5% from 2007 onwards. The first €5,000 that farmers receive will not be modulated. The modulated money will be reallocated by the Commission, according to an allocation key (agricultural area, agricultural employment, gross domestic product (GDP) per capita in purchasing power), but each Member State will be guaranteed to get back at least 80% of the money it contributes.

At the moment, Member States can modulate up to 20% of farm payments. The UK is the only Member State which is currently doing this, at a rate of 3.5% in 2004, rising to 4.5% in 2005. The UK will not get enough money back from the compulsory modulation to meet spending

commitments which have already been made for funds from the UK's own voluntary modulation scheme (Scottish Executive 2003). A transitional arrangement has been negotiated which will allow the Member States to use national modulation over and above the compulsory EU-wide modulation. They will be able to continue with national modulation after 2006 to fund spending commitments they have made before 2006. While money from the compulsory EU wide modulation can be used to support any of the eligible measures under the Rural Development Regulation, national modulation can only be used for the so-called "accompanying measures" (Less Favoured Area (LFA) support, agri-environment, early retirement payments for farmers and farm woodlands).

Changes to the measures which can be supported under the Rural Development Regulation have also been made as part of the reforms³. New measures eligible for support are:

- Help for farmers to meet standards imposed by EU law
- To improve food quality, payments for farmers who take part in quality assurance schemes
- Payments for farmers who make animal welfare improvements which go beyond minimum statutory requirements
- Support for farmers to help them with the cost of using farm advisory services

These measures will be eligible for support from 2005. The funds from EU modulation could be used to support these measures. Member States could also support them by re-allocating existing rural development spending.

The Scottish Executive (2003) consulted on 3 options for modulation:

- Enough national modulation added to EU modulation to cover existing spending commitments – implies national modulation at a rate of 2.2% in 2005, 1.6% in 2006 and 1% in 2007.
- National modulation as planned (4.5% 2005-07), plus EU modulation
- 10% national modulation plus EU modulation

The Scottish Executive has decided on a different option, where national and EU modulation will be combined at a total rate of at least 10% by 2007. The Executive has said that it would consider applying a higher rate of modulation if it can obtain the money needed for match-funding through the UK spending review. The Executive has also said it will consult further on how the money raised by modulation will be spent (Scottish Parliament 2004).

There are uncertainties about the way modulation will be applied, for instance about whether it will be applied to money in a national envelope. Therefore it is not possible to give exact figures for how much the additional modulation will raise for rural development. As an indication, the previous plans to apply national modulation at a rate of 4.5% in 2007, would add £34 million to the rural development budget (including match funding). Applying a combined EU and national modulation rate of 10% in 2007 would add in the order of £74 million (again, including match funding), implying an additional £40 million for rural development.

The Scottish Council for Voluntary Organisations (SCVO 2004) favoured national modulation of at least 10%. They argued that this should be used to support the wider rural development options available under the Rural Development Regulation:

³ by Council Regulation 1783/2003 which amends the Rural Development Regulation (Official Journal of the European Union L270 vol 46, 21 Oct 2003)

Although the nationally modulated money can only be spent on a limited range of accompanying measures, such a rate would have the effect of freeing up EU modulated money for a wider range of rural development activities.

They argued that money freed up in this way should be used to fund the wider rural development measures available under the Rural Development Regulation, such as support for public services, and village renewal.

Environmental groups also advocated high modulation rates, to boost funding for agri-environment schemes. WWF Scotland (2004) criticised the Scottish Executive's decision to set modulation at a combined rate of 10%:

The Executive has only committed itself to shift 10% of direct payments to environment and rural development schemes by 2007. Half of that (5%) is compulsory under the new EU rules. So the Executive is only volunteering a further £18 million a year, as opposed to the £60 million WWF Scotland was looking for. Using Executive figures this is not even enough for a fifth of Scottish farmers to enter into environmentally friendly farming schemes, is only enough for minuscule fraction of farmland to be planted with trees or for only 1 in 20 farmers to be helped to develop new businesses.

Along with a significant number of people and organisations (including some farming groups), WWF wanted to see at least 20% of these new direct payments shifted over to environmental and rural development schemes. Only then could we be sure that public money was delivering for the public good. But the Executive has failed to live up to its own commitments in the Partnership Agreement, in the Water Environment Act, and in the forthcoming Nature Conservation Act and has shown no sign that it was listening during consultations.

The NFUS (2003) thought that national modulation should not be increased above the amount needed to match existing spending commitments:

[Modulation] raises funds from all, but few [farmers] have had a chance to access the schemes to which their money is put. [...] No other country currently uses the tool of discretionary national modulation and to our knowledge none plan to use it in the future. The use of national modulation in Scotland thus puts our farmers at a competitive disadvantage vis-à-vis other farmers in the EU. Despite this NFU Scotland recognises that some national modulation has to be raised, as it is likely to be the only means of funding existing RDR commitments. However, we do not believe that the case has been made to raise any more funds at this stage through national modulation, other than the minimum required to meet existing RDR commitments [...] unless Scotland's use of RDR measures is broadened beyond their current limited scope.

SOURCES

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SUPPORT FOR RURAL DEVELOPMENT THROUGH THE CAP

TOM EDWARDS

This briefing has been prepared for Members of the Environment and Rural Development Committee.

It looks at:

- Current support for rural development through the CAP
- The Rural Development Regulation which governs the use of this money
- The way the Regulation is implemented in Scotland through Rural Development Plans, and the uses to which the money is put
- The steps towards developing a new plan which will implement support for rural development through the CAP from 2007-13

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KEY POINTS OF THIS BRIEFING

- Support for rural development from the CAP has increased in importance as the objectives of the policy have shifted from supporting agricultural production to promoting sustainable agriculture
- The budget for rural development spending through the CAP is set by Heads of State and of Government as part of discussions about the overall size of the EU budget. Spending limits are set for several years at a time in multiannual “financial perspectives”. The current perspective runs from 2000-06; the next one will run from 2007-13
- The way money from the EU budget is spent on rural development is governed by the Rural Development Regulation (RDR), which sets out the 26 measures¹ which can be supported. Spending on each measure is co-financed with EU money and national funds
- One measure, agri-environment, is compulsory. Member States can choose between the other measures
- The Rural Development Regulation is implemented by Rural Development Plans
- The Scottish Rural Development Plan (SRDP) focuses support on 3 measures: Less Favoured Area support, agri-environment and farm woodlands. Just under €1.2 billion of spending is planned for these measures from 2000-06
- Limited support (€66 million from 2000-06) for a wider range of measures is available in the Highlands and Islands through the Highlands and Islands Special Transitional Programme (HISTP)
- An independent mid-term evaluation of the SRDP was completed in 2006. Among the conclusions of the evaluation were that: “there is an argument for the SRDP to widen its objectives to be more holistic in a rural development and environmental sense. The widening is subject to the constraints of the RDR and to funds being available”
- Although important decisions on the Agricultural Market Support element of the CAP were taken in 2002, fixing spending up to 2013, and the 2003 CAP reform has made important changes to the way this money will be spent (introduction of a decoupled Single Farm Payment), decisions on the size and share out of the rural development budget from 2007-13 will be taken between now and June 2005
- The UK (and Scotland) currently has a low-share of the rural development budget. A key objective for the UK government and the Scottish Executive in these negotiations will be to try to secure an improved share of the budget

¹ 22 measures originally plus 4 added by the 2003 CAP reform

RURAL DEVELOPMENT TERMINOLOGY

Accompanying measures: Rural development measures which were introduced to “accompany” the CAP reforms of 1992. They are Less Favoured Area (LFA) support, Agri-environment, early retirement payments for farmers and afforestation of farmland.

Agenda 2000: A programme of reforms designed to prepare the EU for enlargement, including reform of the CAP

Agricultural Market Support (AMS): term used in the EU budget to describe all price support payments, and subsidies paid direct to farmers, also known as “Pillar 1” of the CAP

Article 33 measures: Rural development measures which promote the adaptation and development of rural areas, so called because they are listed in Article 33 of the Rural Development Regulation

Co-financing or match-funding: The ratio of EU:national funds which must be used to support a rural development measure. All rural development measures are co-financed.

EAGGF: The European Agricultural Guidance and Guarantee Fund. It funds the CAP. It has two sections: the Guarantee section which funds “agricultural market support” i.e. direct payments to farmers and price support payments. It also funds spending on some rural development measures, called “accompanying measures” throughout the EU, and all rural development measures (non-accompanying measures) in non-Objective 1 areas. The Guidance section funds spending on non-accompanying measures in Objective 1 areas.

EU-25: The 25 Member States the EU will have after the latest enlargement is completed during 2004.

Modulation: the transfer of EAGGF Guarantee funds from Agricultural Market Support (AMS) to rural development. There are two types optional “national” modulation, and compulsory EU wide modulation (introduced by the 2003 CAP reform, it will begin in 2005). Receipts from “national” modulation can only be used to fund accompanying measures. Receipts from the EU modulation will be allowed to fund any rural development measure.

“Pillars” of the CAP: the CAP is commonly seen as having 2 pillars. Pillar 1 includes price support payments, and subsidies paid direct to farmers, which accounts for around 90% of CAP spending. Pillar 2 is rural development spending, which currently accounts for around 10% of CAP spending.

Rural Development Regulation: currently Council Regulation (EC) No. 1257/99², passed as part of the Agenda 2000 CAP reforms.

RURAL DEVELOPMENT 2000-06

THE BROADER POLICY CONTEXT

The European Commission (2003a) has summarised the recent evolution and role of rural development policy as follows:

² Official Journal of the European Union L160 vol 42, 26 June 1999

The viability of rural areas cannot depend on agriculture alone, but to ensure agriculture's role in protecting the rural environment, in producing safe and high quality food and in contributing to maintaining the attractiveness of rural areas for young people and new residents, rural development policy has to place agriculture in its broader rural context. Equally, rural development policy has an essential role to play in promoting the viable rural areas and communities on which a healthy agricultural sector depends.

The EU's Common Agricultural Policy (CAP) has been developing in recognition of this. Over recent years the policy has shifted from supporting production to supporting producers' income directly and towards the objective of sustainable agriculture. An important part of this reform process is the encouragement that farmers receive, via rural development measures, to adjust their businesses, land management methods and agricultural practices to society's demands. Rural development policy increasingly targets individuals and groups, other than farmers, who are active in these areas in order to promote the integrated and sustainable development of rural areas.

The strengthening of EU rural development policy has become an overall EU priority. The conclusions of the Göteborg European Council of June 2001 make this clear: 'During recent years, European agricultural policy has given less emphasis to market mechanisms and through targeted support measures become more oriented towards satisfying the general public's growing demands regarding food safety, food quality, product differentiation, animal welfare, environmental quality and the conservation of nature and the countryside'.

RURAL DEVELOPMENT BUDGET

Decisions on how much to spend on rural development through the CAP are taken as part of decisions on the size of the overall EU budget. These decisions are taken by Heads of State and Government in the European Council, based on proposals from the European Commission. Spending limits are set for several years at a time in multiannual "financial perspectives". The current perspective runs from 2000-06; the next one will run from 2007-13.

The EU budget for rural development spending from the EAGGF Guarantee section from 2000-06 was set at just under €33 billion. This is just over 10% of all spending from the Guarantee section. The table below shows how this money was allocated between Member States.

Table 1 – Spending on Rural Development from the EAGGF Guarantee section 2000-06

	<i>million €</i>	<i>%</i>
France	5763.6	17.5
Germany	5308.6	16.1
Italy	4512.3	13.7
Spain	3480.9	10.6
Austria	3207.9	9.7
Ireland	2388.9	7.3
Finland	2199.3	6.7
Portugal	1516.7	4.6
UK	1167.9	3.5
Sweden	1130.0	3.4
Greece	993.5	3.0

Netherlands	417.1	1.3
Belgium	379.2	1.2
Denmark	348.9	1.1
Luxembourg	91.0	0.3
Total	32905.8	

Source European Commission (2003b)

Ward (2002) commented on the UK's allocation of Rural Development money:

The allocation of future funding to Member States for the RDR following the Agenda 2000 agreement was largely based upon their historic spending on agri–environment, agricultural structures and rural development measures. Previous UK Governments had been unwilling to spend significant amounts on such non–compulsory elements of the EAGGF. These elements required domestic match funding which was strenuously resisted by the UK Treasury. Because of its low spending record, the UK was allocated only 3.5 per cent of the European RDR budget for 2000–2006 (compared, for example, with 17.6 per cent for France).

At present Scotland receives approximately 17% of the UK allocation.

Modulation

Modulation provides a way of shifting support between the two “pillars” of the CAP, from Agricultural Market Support payments to rural development.

At the moment, Member States can modulate up to 20% of farm payments. The UK is the only Member State which is currently doing this, at a rate of 3.5% in 2004, rising to 4.5% in 2005.

Compulsory modulation was introduced by the 2003 CAP reforms and will apply in all Member States from 2005 at a rate of 3%, increasing to 4% in 2006 and 5% from 2007 onwards. The first €5,000 that farmers receive will not be modulated. The modulated money will be reallocated by the Commission, according to an allocation key (agricultural area, agricultural employment, gross domestic product (GDP) per capita in purchasing power), but each Member State will be guaranteed to get back at least 80% of the money it contributes.

The UK will not get enough money back from the compulsory modulation to meet spending commitments which have already been made for funds from the UK's national modulation scheme (Scottish Executive 2003). A transitional arrangement has been negotiated which will allow the Member States to apply national modulation over and above the compulsory EU-wide modulation. They will also be able to continue with national modulation after 2006 to fund spending commitments they have made before 2006. While money from the compulsory EU wide modulation can be used to support any of the eligible measures under the Rural Development Regulation, national modulation can only be used for the so-called “accompanying measures”.

The Scottish Executive (2003) consulted on 3 options for modulation as part of its consultation on implementing the CAP reforms:

- Enough national modulation added to EU modulation to cover existing spending commitments – implies national modulation at a rate of 2.2% in 2005, 1.6% in 2006 and 1% in 2007.
- National modulation as planned (4.5% 2005-07), plus EU modulation

providing research and information services to the Scottish Parliament

- 10% national modulation plus EU modulation

The Scottish Executive has decided on a different option, where national and EU modulation will be combined at a total rate of at least 10% by 2007. The Executive has said that it would consider applying a higher rate of modulation if it can obtain the money needed for match-funding through the UK spending review. The Executive has also said it will consult further on how the money raised by modulation will be spent (Scottish Parliament 2004). As an indication of how much this additional modulation will raise, the previous plans to apply national modulation at a rate of 4.5% in 2007, would add £34 million to the rural development budget (including match funding). Applying a combined EU and national modulation rate of 10% in 2007 would add in the order of £74 million (again, including match funding), implying an additional £40 million for rural development.

RURAL DEVELOPMENT REGULATION

The Rural Development Regulation (RDR) governs spending of EU money on rural development through the EAGGF from 2000-06. It was part of the “Agenda 2000” reforms of the CAP in 1999. It brought together the measures which “accompanied” the previous CAP reforms of 1992³, and other rural development measures funded through the CAP into one Regulation.

The Regulation contained 22 specific measures in total (and these are listed in Appendix 1), but they can be separated into the following broad groups:

Accompanying measures:

- Agri-environment
- Early retirement for farmers
- Afforestation of agricultural land
- Less Favoured Areas

Non-accompanying measures:

- Investment in agricultural holdings⁴
- Aid for young farmers
- Training
- Processing and marketing of agricultural products
- Other forestry
- Promoting the adaptation and development of rural areas (sometimes called Article 33 measures, as they are listed in Article 33 of the Regulation)⁵

Changes to the measures which can be supported under the Rural Development Regulation have also been made as part of the reforms⁶. New measures eligible for support are:

- Help for farmers to meet standards imposed by EU law

³ often referred to as the “MacSharry” reforms after the then Commissioner, the Irishman Ray MacSharry

⁴ e.g. assistance for growing alternative crops or keeping different types of farm animals, assistance for developing farm shops

⁵ e.g. to encourage diversification, tourism and craft activities, renovation of villages or provide basic services for the rural population

⁶ by Council Regulation 1783/2003 which amends the Rural Development Regulation (Official Journal of the European Union L270 vol 46, 21 Oct 2003)

- To improve food quality, payments for farmers who take part in quality assurance schemes
- Payments for farmers who make animal welfare improvements which go beyond minimum statutory requirements
- Support for farmers to help them with the cost of using farm advisory services

These measures will be eligible for support from 2005. The funds from EU modulation could be used to support these measures. Member States could also support them by re-allocating planned rural development spending.

Member States could choose how to implement the RDR:

- all Member States had to implement agri-environment schemes but could choose to implement highly targeted schemes focusing on particular objectives or geographical areas, or much broader schemes covering most farmed land
- all the other measures in the Regulation are optional
- Member States could also decide to “state aid” RDR-type schemes which are funded entirely with their own money. These must follow broadly the same rules as the RDR and must be approved by the Commission.

Although there are wider rural development measures which can be supported under the Regulation, most of the measures are targeted at supporting farmers, rather than rural communities. One report (Dwyer et. al 2002) on rural development in Europe commented on this:

[...] the rhetoric of broad, integrated rural development seems to have been refined by a pragmatic view that the RDR, as part of the CAP, remains primarily a structural adjustment policy for agriculture, with only limited use of its scope for providing support beyond the farm gate.

Implementation has revealed a largely agricultural, as opposed to a rural development, agenda.

Member States must explain how they intend to implement the RDR in a Rural Development Plan. In the UK the RDR has been implemented regionally, with separate plans for England, Wales, Northern Ireland and Scotland.

IMPLEMENTATION IN SCOTLAND

Spending from the EAGGF guarantee section on the accompanying measures throughout Scotland, and all rural development spending in the non-Objective 1 area of Scotland is implemented through the Scottish Rural Development Plan (Scottish Executive 2002⁷). SEERAD is responsible for the Scottish Rural Development Plan.

Spending from the EAGGF Guidance section on non-accompanying measures in the Highlands and Islands Objective 1 area has been incorporated into the Highlands and Islands Special Transitional Programme which is managed by the Highlands and Islands Programme Partnership (2002).

⁷ This reference is to the plan as amended. The first version of the plan was published in 2000. The Commission has recently approved an amendment to the plan during 2003, but the revised version has not yet been posted on the Scottish Executive website

Scottish Rural Development Plan (SRDP)

The Scottish Rural Development Plan provides for co-financing of 3 accompanying measures throughout Scotland. These are:

- Agri-environment: Rural Stewardship Scheme (RSS); Organic Aid Scheme (OAS)
- Support for Less Favoured Areas: Less Favoured Area Support Scheme (LFASS)
- Afforestation of Agricultural Land: Scottish Forestry Grant Scheme (SFGS)⁸

The plan also provides state-aid for other measures in the non-Objective 1 area as follows:

- Processing and Marketing of agricultural products
- Marketing of quality agricultural products (one of the Article 33 measures): both supported by Agricultural Processing and Marketing Grants
- Investment in agricultural holdings
- Diversification of agricultural activities (one of the Article 33 measures): both supported by the Farm Business Development Scheme (FBDS)

Highlands and Islands Special Transitional Programme (HISTP)

The Highlands and Islands Transitional Programme provides co-financed contributions from the EAGGF “Guidance” section and state-aid for the following measures:

- Investment in agricultural holdings
- Processing and Marketing of Agricultural Products
- Forestry
- Training
- Promoting the adaptation and development of rural areas (Article 33 measures):
 - Marketing of quality agricultural products
 - Diversification of agricultural activities
 - Basic services for the rural economy and population
 - Renovation and development of villages and protection and conservation of the natural heritage
 - Encouragement for tourism and craft activities
 - Protection of the environment

Spending on rural development through these two programmes is shown in the table below:

Table 2 Rural development spending in Scotland 2000-06 (€m)

		National Contribution	EU contribution	Total
SRDP	Less Favoured Areas	533.27	107.5	640.77
	Afforestation of Agricultural Land	103.13	102.82	205.95
	<i>Of which modulated funds</i>	20.3	20.2	40.4
	Other forestry	6.8	6.8	13.6
	Agri-Environment	127.49	201.8	329.29
	<i>Of which modulated funds</i>	63.5	77.7	141.2
	Total	770.69	418.92	1189.61

⁸ prior to 2003 under the Farm Woodland Premium Scheme (FWPS) and Woodland Grant Scheme (WGS)
providing research and information services to the Scottish Parliament

HITP	Investment in agricultural holdings	11.0	11.0	22.0
	Processing and marketing of agricultural products	0.9	6.5	7.4
	Promoting the adaptation and development of rural areas	14.3	17.1	31.4
	Forestry	2.3	2.3	4.7
	Training	0.4	0.4	0.8
	Total	28.965	37.399	66.364

Source: SRDP, Chapter 8 and HITP Annex A

Notes: Does not include private sector investment for measures under the HITP; Does not include state aided expenditure on FBDS or Agricultural Processing and Marketing Grants; Totals may not sum due to rounding

Changes to the plan

The contents of Rural Development Plans must be approved by the Commission. However, once the plan is approved it is not set in stone. There is an opportunity to amend the plan once a year, and the Scottish Executive has made use of this possibility in 2001, 2002 and in 2003 to allow it to implement changes to the Less Favoured Area Support Scheme and agri-environment schemes.

The Executive will submit further changes to the plan to set out how it intends to spend the additional funds which will be available in 2005 and 2006. The Executive intends to consult on how these funds should be spent.

Mid-Term Evaluation of the plan

An independent mid-term review of all Rural Development Plans is required by the Commission. In Scotland, this review was carried out by DTZ Pidea (2003) during 2003, and their report has now been submitted to the Commission. Some of the main conclusions of the review were:

There was evidence to show that the SRDP was keeping people in farming (LFASS⁹ in particular) but no real evidence of wider stabilisation of the rural population

There was strong evidence of protection and improvement of the environment

Whilst awareness and uptake of the schemes are high, SEERAD has found that the regulations surrounding the different schemes have prevented implementation being as effective as it could be

The policy environment has moved on considerably since the RDR and SRDP objectives were framed and this has been a source of friction between SEERAD and some stakeholders.

At the EU level, the narrow scope of the SRDP limits its ability to meet the full objectives of the RDR [...] there was little evidence that the Code of Good Agricultural Practice was leading to any change in practice at the farm level.

In terms of the 'future viability and sustainability of Scottish farming and forestry' other factors out with the SRDP are much more important. Current timber prices are too low to encourage woodland owners to undertake active forest management and provide public benefits which cost them money. The milk price is below the cost of production for many farmers, and future organic production depends on the organic market and supply chain [...] We therefore conclude that the SRDP has only a small impact on this objective.

⁹ Less Favoured Area Support Scheme

As the policy context has moved on since 1999 to be much wider, there is an argument for the SRDP to widen its objectives to be more holistic in a rural development and environmental sense. The widening is subject to the constraints of the RDR and to funds being available. Therefore we note this point for future programmes rather than making any specific recommendation about widening the SRDP objectives within the remaining time of this programme.

RURAL DEVELOPMENT 2007-13

The current Rural Development Plan runs until 2006, and will be replaced with a new plan from 2007, which will run until 2013.

In outline, the steps to be taken before the new plan is in place are as follows:

- On 11 February the European Commission (2004) published proposals for the EU budget for 2007-13
- These proposals will be debated intensely in various Council formations – for example, the EU agriculture ministers will debate the proposals for rural development spending, but the final decision will be taken by Heads of State and of Government in the European Council
- The European Council will aim to reach a political agreement on the EU budget by June 2005. The European Council will also decide on the allocations of funds to Member States
- The Commission will make separate proposals for a Regulation or Regulations to replace the RDR which will establish rules for rural development spending from 2007-13
- The Agriculture Council will aim to agree on the new rules during the course of 2005
- Once the budget, and the rules have been decided on, Member States will prepare a new set of Rural Development Plans, and submit them to the Commission for approval
- The plans will come into operation from 1 January 2007

A single source of rural development funds

The rules for rural development spending are currently complicated by the fact that there are different funding sources, and different rules to follow for Objective 1 and non-Objective 1 areas. The Commission (2004) makes clear in its proposal for the EU budget from 2007-13 that from now on it intends to follow the principle of “one instrument per policy area, one fund per programme”. For rural development this means that “all rural development measures will be regrouped for all regions (including the less developed Member States and regions) under a single funding, programming, financial management and control system”.

Agra Europe (2004) published figures which show the Commission’s proposals for rural development spending for the EU-25 as a whole from 2006-13 from a single rural development fund. The 2006 figures allow comparisons to be made between what spending would be from this fund if it existed in 2006, and what it will be in the next financial perspective from 2007-13. The figures show an increase in Rural Development spending from €10.5 billion in 2006 to €13.2 billion in 2013. However, Agra Europe (2004) also reports that much of this increase is likely to be taken up by Bulgaria and Romania if and when they join the EU in 2007.

Can the UK increase its share of EU rural development funds?

The UK currently has a low allocation of EU rural development funds. This is because the share out of funds in the 2000-06 period was based on historic spending on rural development

measures which was low in the UK. If different criteria were used the UK would get a better share, for instance, if allocation was based on agricultural area the UK would get around 10-12%. The criteria which are being used to reallocate the funds raised from compulsory modulation (agricultural area, agricultural employment and a GDP criterion) mean the UK will get around 10% of the funds raised in this way. If the UK can argue that similar criteria should be used to allocate the rural development budget from 2007-13 then its allocation relative to the existing EU 15 would improve. Also modulation means that if a historical criterion is used spending on rural development will have been higher in the UK. Any increase in rural development funding which the UK can negotiate would also mean more money for Scotland. This will therefore be an important factor in determining the breadth of measures which can be supported in the new Rural Development Plan and will also affect decisions on whether to raise more funds for rural development through modulation.

APPENDIX - MEASURES ELIGIBLE FOR SUPPORT UNDER THE RURAL DEVELOPMENT REGULATION¹⁰

1. Investments in farms (I)
2. Young farmers (II)
3. Training (III)
4. Early retirement (IV)
5. Meeting standards - temporary support (Va)
6. Meeting standards – support farm advisory services (Va)
7. Less favoured areas and areas with environmental restrictions (ch V)
8. Food quality – incentive scheme (VIa)
9. Food quality – promotion (VIa)
10. Agri-environment/animal welfare (VI)
11. Investments in processing/marketing (VII)
12. Afforestation of agricultural land (VIII)
13. Other forestry (VIII)
14. Land improvement (art 33)
15. Reparcelling (art 33)
16. Setting-up of farm relief and farm management services (art 33)
17. Marketing of quality agricultural products (art 33)
18. Basic services for the rural economy and population (art 33)
19. Renovation and development of villages and protection and conservation of the rural heritage (art 33)
20. Diversification of agricultural activities and activities close to agriculture to provide multiple activities or alternative incomes (art 33)
21. Agricultural water resources management (art 33)
22. Development and improvement of infrastructure connected with the development of agriculture (art 33)
23. Encouragement for tourist and craft activities (art 33)
24. Protection of the environment in connection with agriculture, forestry and landscape conservation as well as with the improvement of animal welfare (art 33)
25. Restoring agricultural production potential damaged by natural disasters and introducing appropriate prevention instruments (art 33)
26. Financial engineering (art 33)

¹⁰ Official Journal of the European Union L160 vol 42, 26 June 1999: The measures are listed below in the order in which they appear in the text of the Regulation (as amended). The Roman numerals refer to the chapter numbers of the Regulation

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**Subordinate Legislation Committee
Extract of 7th Report, 2004**

1. At its meeting on 24th February the Committee determined that it did not need to draw the attention of the Parliament to the instruments listed in the Annexe to this report on any of the grounds in its remit.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Environment and Rural Development SSI 2004/44

Instruments subject to annulment

The Sea Fishing (Restriction on Days at Sea) (Scotland) Order 2004
(SSI 2004/44)

Background

1. The Committee referred a large number of points to the Executive, most of which are minor and ought not to affect the operation of the Order. However, given the sensitivity of the subject matter the Committee considered that it was important that there should be no errors in the Order.
2. The Executive has indicated that it expects amendments to be made in March to the relevant Community rules that will in turn require amendments to domestic implementing legislation. It would intend to take that opportunity to put right the various defects identified by the Committee. The Executive's response is reproduced at Appendix 5.

Question 1

3. With regard to the drafting of article 13 the Committee asked the Executive for explanation of the following points—

- (a) *Why paragraph (1) has a sub-paragraph (a) but no subsequent sub-paragraphs, to which the Executive has replied that the inclusion of "(a)" is indeed an error.*
- (b) *Whether the full-out to paragraph (2) is intended to apply to paragraph (1) as well as paragraph (2) as it refers to "those Regulations" whereas paragraph (2) refers to only one EC Regulation. Again, the Executive has confirmed that this is an error and that the full-out is intended to apply to paragraph (1) only.*
- (c) *What are the other entries that are referred to in the full-out to paragraph (2)? The Executive has supplied the necessary information although it might have been clearer had the Order spelled this out in greater detail.*
- (d) *To what do the words "paragraph (4)" in paragraph (3) refer? The Executive has confirmed that this is another error. The reference*

should be to paragraph (1) though the Executive considers that in the context the meaning of the regulation is clear.

Report 1

4. **The Committee therefore reports regulation 13 on grounds of defective drafting in respect of points (a), (b) and (d) above, as acknowledged by the Executive and point (c) on the grounds that its meaning could be clearer.** These are minor errors which the Executive has undertaken to correct following the expected further amendment of the EC Regulations.

Question 2

5. The Committee asked the Executive to confirm whether, in article 14(2), the reference to “paragraph (2)” should read “paragraph (1)”.

Answer 2

6. The Executive confirms the Committee’s understanding on this point. **The Committee reports the order on the ground of defective drafting in this respect again acknowledged by the Executive.** This is another minor error.

Questions 3 and 4

7. The Executive was asked to explain why article 17(1), which confers enforcement powers on British sea-fishery officers in relation to fishing boats including powers of entry on to boats, is applied for the purposes of enforcing articles 8 and 10 of the Order which respectively make textual amendments to SSI 2000/7 and impose conditions on the transport of cod by road.

8. The Committee also asked why article 18(1) similarly confers powers for the enforcement of article 8 of the Order.

Answers 3 and 4

9. As regards article 8, the Executive explains that SSI 2000/7 (which is amended by article 8) makes provision for enforcement powers but those powers are not absolutely identical to the enforcement powers provided for in article 17 and 18 of the current Order.

10. The reference to article 10 in article 17 is considered necessary to ensure that there are appropriate powers of entry into vehicles.

Reports 3 and 4

11. It seems that the Executive wishes to ensure that the specific and further powers conferred by articles 17 and 18 of this Order are available to British Sea Fishery Officers in relation to enforcement of the amendment made to SSI 2000/7 by article 8. The Executive appears to believe that this policy intention is achieved simply by applying sections 17 and 18 to the enforcement of article 8 itself. However, all that article 8 actually does is to insert a provision into another piece of legislation. Once that has been done article 8 ceases to have any function.

12. In the Committee's view, if the Executive wishes the provisions of articles 17 and 18 of this Order to apply to the enforcement of provisions of SSI 2000/7 then (assuming that it is competent so to do) that instrument will have to be either textually amended to that effect or the provisions of articles 17 and 18 applied specifically for the enforcement, not of article 8, but in relation to the amendments to SSI 2000/7 made by article 8. Simply applying articles 17 and 18 to article 8, in the Committee's view, will not achieve the Executive's intention.

13. It might be added that if the intention is that the enforcement provisions in the present Order should apply for certain purposes to enforcement of SSI 2000/7 then rather more sophisticated provisions would be required. Even if the reference to article 8 in articles 17 and 18 could be interpreted as applying to the amendments made to SSI 2000/7 it is by no means clear how those articles would apply.

14. The Committee observes that freestanding provisions in an instrument will not be attracted to amendments made by that instrument to other legislation unless that other legislation is textually amended to that effect or the provisions are specifically applied to that other legislation. **Articles 17 and 18 are therefore plainly defectively drafted and the Committee reports the instrument to the lead committee and the Parliament on this ground.**

15. With respect to the reference in article 17(1) to article 10, article 17 refers specifically to fishing boats. The powers of entry and search are powers of entry to and search of boats, not vehicles, and paragraph (4) confers a power to seize and detain boats not vehicles. The Committee does not doubt that powers of entry may be needed for vehicles and premises for, amongst other things, the reasons given by the Executive in its reply. Appropriate provision for this purpose is, however, already provided for in the Order in article 18 and in particular paragraph (2) of that article.

16. **It follows that, in so far as it refers to article 10, article 17 is defectively drafted and the Committee reports it on that ground for that reason also.**

Question 5

17. The Executive was asked why the words "of 12th October" appear in the full out to article 23(1) given the definition of the Council Regulation in article 2.

Report 5

18. The Executive agrees that the words in question should not have been included in article 23(1) but is of the view that the error will have no effect on the interpretation of the Order. **The Committee agrees with the Executive as regards the effect of the defect but the inclusion of the words in question does mean that article 23(1) is defectively drafted to this extent and the Committee so reports.**

Question 6

19. The Committee asked why the Executive omitted to forward a copy of the relevant Community legislation with the Order. The Executive explains that this was an oversight for which it apologises.

Comment 6

20. Although the EC Regulations are available online, the Committee notes that Guidance suggests that copies of relevant EC legislation should always accompany instruments implementing or supplementing EC legislation. **The Committee therefore reports the instrument on the ground of failure to follow proper legislative practice in this respect.**

Appendix

THE SEA FISHING (RESTRICTION ON DAYS AT SEA) (SCOTLAND) ORDER 2004, (SSI 2004/44)

1. On 10 February the Committee considered the above instrument and requested an explanation of the following matters:-

“With regard to the drafting of article 13 the Executive is asked to explain-

- *Why paragraph (1) has a sub-paragraph (a) but not subsequent sub-paragraphs;*
- *Whether the full-out to paragraph (2) is intended to apply to paragraph (1) as well as paragraph (2) as it refers to “those Regulations” whereas paragraph (2) refers to only one EC Regulation;*
- *What the other entries are that are referred to in the full-out to paragraph (2);*
- *To what the words “paragraph (4)” in paragraph (3) refer.*

The Committee asks the Executive to confirm whether, in article 14(2), the reference to “paragraph (2)” should read “paragraph (1)”.

The Executive is asked to explain why article 17(1) which confers powers of entry on British sea-fishery officers in relation to fishing is applied for the purposes of enforcing articles 8 and 10 of the Order which respectively make textual amendments to SSI 2000/7 and impose conditions on the transport of cod by road.

The Committee also seeks explanation of why article 18(1) similarly confers powers for the enforcement of article 8 of the Order.

The Executive is asked why the words “of 12th October” appear in the full out to article 23(1) given the definition of the Council Regulation in article 2.

The Committee notes that the Executive omitted to forward a copy of the relevant Community legislation with the Order. Although the EC Regulations can be accessed online it is always useful to have a hard copy and the Guidance suggests that copies of relevant EC legislation should always accompany instruments implementing or supplementing EC legislation. The Executive is asked to explain the omission in this instance.”

The Scottish Executive responds as follows:-

First question

First bullet point

1. This is an error. The provision in question should be numbered article 13(1).

Second bullet point

2. The full-out to paragraph (2) is intended to attach to paragraph (1) only. The Executive will rectify this error at the next appropriate legislative opportunity (see paragraph 12 below).

Third bullet point

3. The other entries referred to in the full-out to paragraph (2) are the entries that fishermen are required as a matter of Community law to make under Regulation 2807/93 (as read with the detailed rules set out in Regulation 2807/83). That is to say other entries made in the EU fishing logbook in respect of voyages where fishing operations are undertaken whereas paragraph (1) makes provision in relation to circumstances where a vessel is absent from port carrying relevant fishing gears but conducts no fishing operations.

Fourth bullet point

4. The reference to paragraph (4) in paragraph (3) is erroneous. The reference to paragraph (4) should be a reference to paragraph (1). While this error is regrettable the Executive is of the view that no real confusion occurs. When article 13 is considered as a whole it is clear that it is paragraph (1) of that article which makes provision for the requirement to make a logbook entry.

Second question

5. The Executive confirms that the reference in article 14(2) to “paragraph (2)” should be a reference to “paragraph (1)”.

Third and fourth question

6. As the Committee states article 8 of the Order makes textual amendments to the Sea Fishing (Enforcement of Community Control Measures (Scotland) Order 2000 (“the Control Order”). Article 8 of the Order amends the Control Order to add a reference to Annex V to the definition of the Council Regulation (Council Regulation 2847/93 - one of the pieces of Community legislation that the Control Order implements) and to apply the provisions of Article 19 of the Council Regulation as applied and modified by the provisions of Annex V specified in article 8 of the Order.

7. The Control Order makes provision for enforcement powers. The enforcement powers provided for in the Order are however not absolutely identical to the enforcement powers provided for in the Control Order. For example the powers conferred by article 6(3) of the Control Order are slightly different to those conferred by article 17(3) of the Order. A more important difference can be seen article 18(1)(f) of the Order when compared with the enforcement power in article 7(1)(f) of the Control Order. The Order requires any person on the premises to produce any documents relating to the catching, landing, transportation, trans-shipment, sale or disposal of any fish (which are all powers specified in the article 7(1)(f) of the Control Order) but also in addition, to the entry to, or exit from, any port or harbour by any fishing vessel.

8. It was to ensure that the specific and further powers conferred by articles 17 and 18 of the Order were available to British Sea Fishery Officers that the Order conferred those powers for the enforcement of article 8 of the Order.

9. Article 10 which makes provision in relation to the transportation of cod. The Committee asks why it was necessary to confer the powers in article 17 of the Order (powers of BSFOs in relation to fishing boats). It was necessary to confer these powers as despite the fact that the offence of transportation takes place in respect of a vehicle and not a boat it may be necessary to seize specific documents such as the logbook of a boat as evidence to be used to establish the offence. In order to seize a document such as a logbook (which is kept on board a boat) in respect of an offence under article 10 it is necessary to confer the powers in article 17(1) for the purpose of enforcing article 10.

Fifth question

10. The words “of 12th October” should not appear in the full out to article 23(1) given the definition of the Council Regulation in article 2 of the Order. While this error is regrettable the Executive is of the view that the otiose words will not cause any real confusion to those using the Order.

Sixth question

11. The Executive apologises for the failure to forward a copy of the relevant Community legislation. This was an oversight on the part of the Executive.

Conclusion

12. The Executive is grateful to the Committee for raising the matters discussed above. As the Committee states in the Official Report most of the drafting errors identified are fairly minor. The Executive understands that the Commission proposes further amendments to Annex V of Council Regulation 2287/2003. These amendments will be considered at the March Fisheries Council. If these amendments are agreed to Regulation 2287/2003 will be amended. The Executive will require to amend the Order to implement the amended provisions of Regulation 2287/2003. The Executive will also take that legislative opportunity to amend the Order to correct the errors identified by the Committee and discussed in paragraphs 1, 2, 4 and 5 above.

Scottish Executive Environment and Rural Affairs Department

**Subordinate Legislation Committee
Extract of 7th Report, 2004**

1. At its meeting on 24th February the Committee determined that it did not need to draw the attention of the Parliament to the instruments listed in the Annexe to this report on any of the grounds in its remit.
2. The report is also addressed to the following committees as the lead committees for the instruments specified:

Environment and Rural Development SSI 2004/27

Instruments subject to annulment

The Registration of Establishments Keeping Laying Hens (Scotland) Amendment Regulations 2004 (**SSI 2004/27**)

Background

1. This instrument was made in response to an undertaking to the Environment and Rural Development Committee by the Minister immediately before the Christmas recess to bring forward amendments to address defects in the principal Regulations (the Registration of Establishments Keeping Laying Hens (Scotland) Regulations (SSI 2003/576) - “the principal Regulations”) that had been identified by the Subordinate Legislation Committee and acknowledged by the Executive.
2. As the principal Regulations came into force on 31st December last year and the Executive has chosen to proceed by way of amendment to those Regulations rather than replacing them in their entirety it has not been technically possible, for reasons of retrospectivity, to correct all the defects in the principal Regulations identified by the Committee, a number of which were related to the commencement of the Regulations.
3. Although the amending Regulations do correct a number of other errors in the principal Regulations, they fail to reflect all the comments of the Subordinate Legislation Committee. The Committee therefore referred a number of points to the Executive for further comment.

Question 1

4. The Committee asked why the principal Regulations as amended continued to impose the obligation to register establishments and changes to the registered details on the “owner or keeper” of the establishment (see, for example, regulation 2(4) of the amending Regulations).

Answer 1

5. The Executive’s response, reproduced at Appendix 2, states that it took the Committee’s comments on the principal Regulations into account but decided that the policy of requiring the owner or keeper to undertake those duties was appropriate since the Executive believes that it provides clarity about where responsibilities lie. Failure to specify the responsible persons – as per the English Regulations to which the Committee referred – is, in the

Executive's view, a less satisfactory arrangement, particularly when it comes to enforcement and offences.

Report 1

6. The Committee had some difficulty in following the Executive's arguments. Although it can only speculate, it appeared to the Committee that the English Regulations may deliberately fail to place a duty on a defined person to register in order to avoid enforcement difficulties that might arise as a result of doubts as to on whom it is that the duty is to lie. If, as seems to be the case, the purpose of the Regulations (and the Community legislation) is to ensure that no relevant establishment is to be used without having been registered, it is not necessary to specify who is to do the registering or create an offence of not making an application to register. All that is necessary to ensure compliance is to create an offence of using premises for the relevant purpose without those premises having been registered. Both the Scottish and English Regulations contain a provision to that effect.

7. As regards notification of changes to registration details, there may be more need to place the duty to comply on a specified person. The English Regulations place the duty on the operator of the establishment. Failure to notify changes within a reasonable time carries a criminal penalty.

8. The Scottish Regulations, by contrast, place a duty on the "owner or occupier" both to register the premises and to notify changes in the registration details. In the view of the Committee, far from clarifying the position, this actually creates uncertainty as to the person on whom the duty to register or notify changes in the registration is to fall. This, it seems to the Committee, will cause obvious problems for enforcement as, unlike under the English Regulations, failure to register carries a criminal sanction in addition to the penalty that attaches to the use of premises that have not been registered.

9. Moreover, it is not clear what is to constitute the offence under regulation 5(1). That regulation states that, as well as an application being made by the "owner or keeper", it must be made "in such form as the Scottish Ministers may require". There is no indication as to what form this might be. **It therefore seems to the Committee that to impose a criminal sanction for failure to submit an application in the correct form especially when that form is left to ministerial discretion is, at the least, an unusual or unexpected use of the power. The Committee reports the instrument to the lead committee and the Parliament on that ground.**

10. If a provision creating an offence is to be effective, the legislation must be clear as to the person on whom the duty to comply is to fall and what exactly that person has to do. As, in the view of the Committee, regulation 5 of the principal Regulations as amended is defective in both respects, it would seem that unless the owner or keeper are the same person, the Regulations may be unenforceable to this extent. The Committee observes, however, that this should not render the Regulations wholly ineffective given the additional prohibition in the principal Regulations (as in the English Regulations) against the use of premises that have not been registered.

Question 2

11. The Committee asked why the amendment to regulation 5(2) of the principal Regulations effected by regulation 2(4) still appears to leave the operator at risk of a third party failing to notify a change to the registered particulars.

Answer 2

12. The Executive continues to maintain that it is the policy that the owner or keeper should be responsible for the proper registration of their establishment and for notification of changes of information. In the Executive's opinion, the amendment to regulation 5(2) of the principal Regulations ensures that the owner or keeper has responsibility for notifying changes to a registration even when that owner or keeper was not the owner or keeper at the time of the original application. This consistency of approach will avoid confusion and lessen any risk of failure to notify changes. It is the Executive's view that the owner or keeper should then make their own arrangements for confirming the position in relation to the outcome of application to any third person.

Report 2

13. The Committee reiterates its comments in relation to question 1 above. It seems to the Committee that, rather than clarifying the issue, the confusion appears to have been increased. Not only is it unclear who is to notify the changes but the operator (if that is not either the owner or the keeper) could lose the business without having itself breached the Regulations or being aware of the breach. Again, the uncertainty as to the identity of the person on whom the duty to comply is to fall will mean that, except perhaps where the owner and the keeper are the same person, the criminal penalty for failure to notify changes may be unenforceable.. **The Regulations therefore, in the Committee's view, are defectively drafted and the Committee draws the attention of the lead committee and the Parliament to the Regulations on that ground.**

Question 3

14. The Committee asked whether the reference to 'laying hens' in the amendment made to regulation 7 of the principal Regulations catches only establishments meeting the requirements of regulation 3 of the principal Regulations or all establishments within the meaning of regulation 2 of those Regulations.

Answer 3

15. The Executive states that the reference to "laying hens" (as defined in regulation 2 of the principal Regulations) in regulation 7(3) (as added by regulation 2(5)(b) of the amending Regulations) catches all establishments to which the principal Regulations apply by virtue of regulation 3.

Report 3

16. It seems to the Committee that the Regulations are not as clear as the Executive believes because of the presence of a definition of "establishment" and "laying hens" in regulation 2(1) of the principal Regulations and the

inconsistency throughout the Regulations in the use of the term “establishment” in the Regulations, which is sometimes accompanied by the words “laying hens” (e.g. regulation 7) and sometimes not (regulation 5). Where a legislative instrument uses different words or phrases in the same instrument, the presumption is that a different meaning is intended. In the case of regulation 7, the meaning of the phrases “establishment ceases to be used for the keeping of laying hens” and “establishment for the keeping of laying hens” seem particularly obscure. The Committee observes that the approach of the Scottish Regulations in defining “establishment” and then including a regulation defining the scope of the Regulations is very confusing. The Committee notes that this is avoided in the English Regulations by defining “establishment” simply in terms of any site where 350 or more laying hens are kept. **The Committee therefore reports the Regulations on the ground of defective drafting as above.**

Question 4

17. The Committee considered that the amendment to regulation 7(2) of the principal Regulations effected by regulation 5(2) may raise issues of proportionality both under Community law and Human Rights. To allow Ministers to remove an establishment from the register because of a failure by a person (who need not be the operator) to register a change in the particulars of registration appears disproportionate to the offence, especially as failure to register such a change carries, in addition, a maximum penalty level of 5 on the standard scale.

Answer 4

18. The Executive notes the Committee’s concern and acknowledges the possibility that there may be criticism that the effect of not complying with regulation 7(2) (as amended by regulation 2(5), as opposed to regulation 5(2)) may be a severe sanction, including criminal prosecution. However, the Executive considers the sanctions available to the Scottish Ministers for failure to update changes in information to be appropriate to ensure that such changes are notified properly and quickly, ultimately in the interests of public health.

19. At an operational level, the Department would not seek to exercise any power of removal until it had taken steps to contact the owner or keeper and offered an opportunity to provide the new information.

Report 4

20. The Committee notes that the Executive itself appears to have some doubts about this provision and has not addressed the question of its compatibility either with Community law or with the ECHR. There is no equivalent in the English Regulations and the Committee continues to have doubts as to whether it is compatible as it stands with EC or ECHR law (in particular with Article 1 of Protocol 1, see below) on grounds of proportionality and to that extent may raise a devolution issue. **At the least, it appears to be an unusual or unexpected use of the power and the Committee reports the instrument to the lead committee and the Parliament on that ground.**

Question 5

21. The Committee invited the Executive to comment in relation to its concerns regarding regulation 9 of the principal Regulations and the issues it considers arise under Article 1 of Protocol 1 and Article 6 of the ECHR.

Answer 5

22. The Executive observes that regulation 9 is not amended by the amending Regulations under consideration by the Committee.

23. In general terms, the Executive considers the possibility of raising Judicial Review proceedings against the final decision to be sufficient for Article 6 purposes. Specifically on the concern of the Committee about the effect of regulation 9 on “failure to notify changes” cases, the “operational level” comment made at paragraph 4 of the Executive’s reply is relevant. The principal concern is to ensure that the Register is updated as required by the Commission Directive. In relation to Article 1, Protocol 1 (as opposed to Article 1 of the ECHR) the Executive refers to its comments in relation to question 7 below.

Report 5

24. The Committee’s question was linked to question 4 and was not intended as a separate point (although regulation 9 has wider application than with respect to regulation 7). Regulation 9 is, as the Executive states, not amended by the current Regulations but the amendment made to regulation 7 must be considered in the light of regulation 9 as the “appeal” provisions in regulation 9 will apply to regulation 7.

25. Furthermore, in its consideration of the principal Regulations, the Committee drew attention to what it considered to be the unfortunate effects of regulation 9 and was disappointed to see that its comments had not been taken into account in the amending Regulations.

26. Again, with respect to the Executive, it seems very doubtful to the Committee whether administrative discretion at the “operational level” is sufficient to justify a provision that, in terms, allows the Scottish Ministers to deprive the operator of its business simply because someone (not necessarily the operator) has omitted to notify a change in the particulars of registration. There is nothing in the EC legislation that requires such action (nor is it replicated in the English Regulations). Similar considerations are also relevant to a decision of the Scottish Ministers not to register an establishment in the first place.

27. It is settled law that the right to carry on a business is a civil right for the purposes of Article 6 of the ECHR. Accordingly, in the determination of this right a person is entitled under that Article to a fair and public hearing before an independent and impartial tribunal established by law.

28. Regulation 9 provides for a right of appeal against any decision of the Scottish Ministers but the “appeal” is to a person appointed by the Scottish Ministers (which cannot be considered to be an independent tribunal for the purposes of Article 6 of the ECHR). Although the decision of the person

hearing the appeal would be open to judicial review, there is no provision in the Regulations for an appeal on the merits to the courts. It is clear from a line of consistent decisions of the European Court of Human Rights (for example, *Albert and le Compte v Belgium*) that where a person's livelihood is affected by an administrative decision, there must be an appeal to the courts on the merits. Judicial review is not enough.

29. The Committee notes that the effects of regulation 7 as read with regulation 9 are particularly severe in that there is no provision for the revocation of a licence to be suspended pending the determination of an appeal (unlike, so far as the Committee is aware, most if not all other legislation in the area of food safety) nor is there any provision for compensation should a decision of the Scottish Ministers be overturned on appeal.

30. In the Committee's view therefore, the Regulations continue to raise serious questions as to their compatibility with Article 6 of the ECHR in this respect and the Committee therefore reports the Regulations on the ground that they raise a devolution issue in this respect.

Question 7

31. Also in connection with regulation 7, the Committee raised concerns relating to the absence in the English Regulations of a similar provision. It seemed possible to the Committee that an operator in Scotland might have a claim under Article 14 for discrimination in that his rights under Article 1 of Protocol 1 are affected in Scotland but not in England, unless there is some objective reason for such discrimination.

Answer 7

32. The Executive notes the concern of the Committee in relation to the ECHR by reference to the English Regulations. It comments that, insofar as there is a property right (*Tre Traktor Aktiebolag v. Sweden* 13 EHRR 309 is relevant), it is appropriate that action can be taken against that right where there is non-compliance with a European requirement. On that basis, any question of discrimination under Article 14 would only arise if the effect on that property right is truly interference which is not justified.

Report 7

33. The Committee agrees that registration of premises is a property right for the purposes of Article 1 Protocol 1 ECHR (see above) and that, as mentioned by the Executive, this is illustrated by the case cited (amongst many others).

34. As Article 1 Protocol 1 is engaged, removal of a registration is plainly a deprivation of property which, if it is to be justified, must be "in the public interest". What is in the public interest will depend, amongst other things, on the proportionality of the measure and, although a very wide margin of appreciation is allowed to States in this respect, the court will look at the considerations that underpinned the measure.

35. It seems to the Committee that it might be hard to argue for the removal of a registration as a sanction where such a provision was not considered necessary in England, particularly where failure to comply with a requirement under the Regulations already carries a criminal penalty of a maximum fine of £5000 which is double the maximum fine for a similar offence in England (although in England an offence carries the additional penalty of imprisonment for a period not exceeding 3 months). A Scottish operator might also claim, with some possibility of success, under Article 1 of Protocol 1 as read with Article 14 that it had been unfairly discriminated against in this respect. The Committee notes that the Executive has offered no justification, objective or otherwise, for the different approach to enforcement in Scotland than in England.

36. The Committee therefore reports the Regulations on the grounds that they raise a devolution issue in this respect.

Appendix

THE REGISTRATION OF ESTABLISHMENTS KEEPING LAYING HENS (SCOTLAND) AMENDMENT REGULATIONS 2004, (SSI 2004/27)

On 10th February the Subordinate Legislation Committee raised a number of points with the Executive in relation to the above instrument. Each of those points is dealt with below.

1. In paragraph 2, the Committee asks for an explanation as to why the principal Regulations as amended “continue to impose the obligation to register establishments and changes to the registered details on the “owner or keeper” of the establishment”.

In preparing the amendment to the principal Regulations on this point, options were considered as to who should be responsible for registration and notifying changes of information. The Committee’s earlier comments were taken into account. It was decided that the policy of requiring the owner or keeper to undertake those duties was appropriate since it provides clarity about where responsibilities lie. Failure to specify the responsible persons – as per the English Regulations, to which the Committee refers – is, in the Executive’s view, a less satisfactory arrangement, particularly when it comes to enforcement and offences.

2. In paragraph 3, the Committee asks for clarification of the “effect of the amendment to regulation 5(2) of the principal Regulations effected by regulation 2(4) which still appears to leave the operator at risk of a third party failing to notify a change to the registered particulars”.

The policy is that the owner or keeper should be responsible for the proper registration of their establishment and for notification of changes of information. The amendment to regulation 5(2) of the principal Regulations ensures that the owner or keeper has responsibility for notifying changes to the registration even when that owner or keeper was not the owner or keeper at the time of the original application. This consistency of approach will avoid confusion and lessen any risk of failure to notify changes.

The Executive touched upon this in paragraph 6 of the letter to the Committee Clerk in response to the Committee’s letter dated 2nd December where, in relation to receipt of the distinguishing number, the point was made that “the owner or keeper should then make their own arrangements for confirming the position in relation to the outcome of application to any third person”.

3. In paragraph 4, the Committee asks for clarification as to whether the reference to ‘laying hens’ in the amendment made to regulation 7 of the principal Regulations catches only establishments meeting the requirements of regulation 3 of the principal Regulations or all establishments within the meaning of regulation 2 of those Regulations.

The reference to “laying hens” (as defined in regulation 2 of the principal Regulations) in regulation 7(3) (as added by regulation 2(5)(b) of the

amending Regulations) catches all establishments to which the principal Regulations apply by virtue of regulation 3.

4. In paragraph 5, the Committee seeks comments on the follow issue:

“The Committee considers that the amendment to regulation 7(2) of the principal Regulations effective by regulation 5(2) may raise issues of proportionality both under Community law and Human Rights. To allow Ministers to remove an establishment from the registers because of a failure by a person (who need not be the operator) to register a change in the particulars of registration appears disproportionate to the offence especially as failure to register such a change carries in addition a maximum penalty level of 5 on the standard scale.”

The Executive notes the Committee’s concern and acknowledges the possibility that there may be criticism that the effect of not complying with regulation 7(2) (as amended by regulation 2(5), as opposed to regulation 5(2)) may be a severe sanction, including criminal prosecution. However, the Executive considers the sanctions available to the Scottish Ministers for failure to update changes in information to be appropriate to ensure that such changes are notified properly and quickly, ultimately in the interests of public health.

At an operational level, the Department would not seek to exercise any power of removal until it had taken steps to contact the owner or keeper and offered an opportunity to provide the new information.

5. In paragraph 6, the Committee invites comments in relation to concerns the Committee has with regulation 9 of the principal regulations and the issues it considers arise under Article 1 and 6 of the ECHR.

The Executive notes the concerns of the Committee in relation to regulation 9 of the principal Regulations. The regulation is not amended by the amending Regulations under consideration by the Committee.

In general terms, the Executive considers the possibility of raising Judicial Review proceedings against the final decision to be sufficient for Article 6 purposes. Turning specifically to the concern of the Committee to the effect of regulation 9 on “failure to notify changes” cases, the “operational level” comment made at paragraph 4 above is relevant. The principal concern is to ensure that the Register is updated as required by the Commission Directive. In relation to Article 1, Protocol 1 (as opposed to Article 1 of the ECHR) the Committee is referred to paragraph 6 below.

6. In paragraph 7, the Committee raises concerns relating to the absence in the English Regulations of a provision relating to removal of registration (as found in regulation 7 of the principal Scottish regulations). The Committee asks for an explanation on the following:

“It therefore also seems possible to the Committee that an operator in Scotland might have a claim under Article 14 for discrimination in that his rights under Article 1 of Protocol 1 are affected in Scotland but not in England unless there is some objective reason for such discrimination.”

The Executive notes the concern of the Committee in relation to the ECHR by reference to the English Regulations. Insofar as there is a property right (*Tre Traktor Aktiefbolag v. Sweden* 13 EHRR 309 is relevant), it is appropriate that action can be taken against that right where there is non-compliance with a European requirement. On that basis, any question of discrimination under Article 14 would only arise if the effect on that property right is truly interference which is not justified.

Scottish Executive Environment and Rural Affairs Department