# EXPLANATORY MEMORANDUM TO

# THE AGRICULTURE (DELINKED PAYMENTS AND CONSEQUENTIAL PROVISIONS) (ENGLAND) REGULATIONS 2023

## 2023 No. 1430

## 1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs ("Defra") and is laid before Parliament by Command of His Majesty.

## 2. Purpose of the instrument

2.1 This instrument requires the Secretary of State to introduce delinked payments in 2024. Delinked payments will be in place of Direct Payments to farmers under the Basic Payment Scheme ("BPS") in England.

2.2 This instrument also revokes the law relating to the BPS as it applies in relation to England only.

2.3 This instrument also makes minor changes to other domestic and retained EU legislation that applies in relation to England. These changes are made as a consequence of ending the BPS in England.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Joint Committee on Statutory Instruments***

3.1 None.

## 4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England only.

## 5. European Convention on Human Rights

5.1 The Minister of State for Food, Farming and Fisheries, Mark Spencer MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Agriculture (Delinked Payments and Consequential Provisions) (England) Regulations 2023 are compatible with the Convention rights."

## 6. Legislative Context

6.1 On EU exit day, the Direct Payments to Farmers (Legislative Continuity) Act 2020 incorporated EU legislation governing the 2020 Common Agricultural Policy Direct Payment schemes into UK law. The Direct Payments to Farmers (England) (Amendment) Regulations 2020 (S.I. 2020/1513) allow these schemes to continue, in England, beyond 2020.

6.2 Section 12 of the Agriculture Act 2020 gives the Secretary of State the power to make delinked payments in place of Direct Payments under BPS. This instrument introduces delinked payments in 2024. It sets the eligibility requirements for these payments and sets out how the payments will be calculated.

6.3 This instrument also revokes, in relation to England, the legislation governing BPS on 1 January 2024. There is a savings provision for the purposes of dealing with any outstanding matters relating to claims under BPS for the 2023 claim year or earlier claim years.

6.4 This instrument also makes minor changes to other pieces of domestic and retained EU legislation as far as that legislation applies in relation to England only. These changes are made as a consequence of revoking the legislation governing BPS in England.

## 7. Policy background

***What is being done and why?***

7.1 Direct Payments have been the main income-support schemes for farmers under the Common Agricultural Policy. The EU legislation governing the 2020 Common Agricultural Policy Direct Payment schemes was incorporated into UK law when the UK left the EU.

7.2 Direct Payments in England are currently made through the BPS. BPS payments are largely based on the amount of land a farmer has. For this instrument, and this explanatory memorandum, the term "Basic Payment Scheme" or "BPS" also includes the young farmer payment, which is a top-up payment for young farmers. That term also includes the greening payment which was made to BPS applicants until the end of the 2020 claim year.

7.3 In 2018 the Government announced how, as part of its wider agricultural reforms, it intended to simplify and phase out Direct Payments in England over an agricultural transition period (2021 to 2027). This included setting out the Government's intention to end BPS, and introduce delinked payments, in England. Delinked payments are a simpler type of payment. It announced these plans in its "Health and Harmony: the future for food, farming and the environment in a Green Brexit - policy statement": https://www.gov.uk/government/publications/the-future-for-food-farming-and-the-environment-policy-statement-2018/health-and-harmony-the-future-for-food-farming-and-the-environment-in-a-green-brexit-policy-statement.

7.4 Unlike BPS, delinked payments will not be based on the amount of land someone has. Instead, they will be based on the BPS payments made in a reference period. There will be no requirement for the recipient to continue to have land. The Government considers that introducing delinked payments best meets the widespread desire for simplification expressed by respondents to its 2018 consultation (see section 10.1 of this explanatory memorandum).

7.5 This instrument introduces delinked payments in 2024. By 2024, we will be over halfway through the agricultural transition period, during which Direct Payments in England are being phased out. The Government considers that this means that the rules and administration currently associated with BPS would be disproportionate. The Government's intention to introduce delinked payments in 2024 was announced in November 2020 in "The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024" (the "Agricultural Transition Plan"):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954283/agricultural-transition-plan.pdf.

7.6 Delinked payments will be made each year until the end of the agricultural transition period.

7.7 This instrument sets the rules that a person needs to meet to receive delinked payments. They must have claimed and been eligible for BPS in the 2023 claim year, except for some inheritance cases.

7.8 To receive delinked payments, a person must also have a reference amount. A reference amount is used to calculate delinked payments. The reference amount is the average BPS payments made to the person in relation to the reference period, which is the three-year period covered by the BPS 2020 to 2022 claim years. The reference amount will be adjusted if some or all of that amount has been transferred to or from another person (see sections 7.9 and 7.10 of this explanatory memorandum). This means that, where some reference amount has been transferred to a person, this will be added to their reference amount. If some or all of a person's (the "transferor's") reference amount has previously been transferred to another person, that amount will be deducted from the transferor's reference amount.

7.9 During a transfer period, a person can ask the Secretary of State to transfer some or all of their reference amount to one or more other person. This instrument sets out some conditions which must be met by the person making the transfer request. Defra intends for the transfer period to be open for around twelve weeks from February 2024 to May 2024. The dates of the transfer period will be included in updated guidance which the Rural Payments Agency ("RPA") plans to publish by the end of 2023 (see section 11.1 of this explanatory memorandum). To receive delinked payments, the person receiving the reference amount must meet the eligibility rules described in section 7.7 of this explanatory memorandum. Defra is allowing reference amounts to be transferred to provide flexibility for farmers. Defra considers this will particularly help businesses which have changed their structure since the start of the reference period. For example, if two or more businesses have merged, the original businesses may wish to transfer reference amount to the current business.

7.10 If someone has inherited eligible land in England after 15 May 2020, they can ask for reference amount to be transferred to them from the person who died. 15 May 2020 was the application deadline for the BPS 2020 claim year (the first year of the reference period). These transfer requests can be made at any time during the agricultural transition period.

7.11 This instrument also sets out how delinked payments will be calculated. For each year, the payments will be calculated as the value of the person's reference amount. The Government intends to then reduce that amount by applying percentage reductions each year (2024 to 2027) to phase the payments out. The reduction percentages will be set in future secondary legislation, which will give Parliament an opportunity to debate the reductions nearer the time the payments will be made.

7.12 If any part of the reference amount was used to calculate a payment under the Lump Sum Exit Scheme, it will not also be taken into account when calculating a delinked payment. This is to avoid double funding between the Lump Sum Exit Scheme and delinked payments. The Lump Sum Exit Scheme was introduced by the Agriculture (Lump Sum Payment) (England) Regulations 2022 (S.I. 2022/390).

7.13 This instrument sets out when the delinked payments will be made each year. Delinked payments must usually be made within 13 months of the start of the year to which the payment relates. The Government intends to make the payments in two instalments each year to help recipients with their cashflow. This instrument allows the Secretary of State to recover any overpayments of delinked payments, with interest, and sets the rules for this recovery.

7.14 This instrument sets out how a person can appeal against a decision made by the Secretary of State under this instrument. It sets a 60-day time limit, following notification of the relevant decision, for a person to appeal. The appeals process in this instrument is similar to the process used under BPS and some of Defra's other schemes. The Direct Payments to Farmers (Reconsideration and Appeal) (Modification) (England) Regulations 2023, laid in Parliament on 7 November 2023, introduces a 60-day time limit for appeals against BPS decisions.

7.15 An application is not required to receive delinked payments. This is because the RPA will already have the data needed to check eligibility for delinked payments and calculate the payments. This means there will be less bureaucracy than BPS. Eligible persons can choose to opt-out of the payment at any time.

7.16 As delinked payments are in place of payments under the BPS, this instrument ends BPS in England and revokes the law relating to BPS in England on 1 January 2024, including the associated cross compliance provisions in relation to BPS. Ending BPS therefore also means ending cross compliance in relation to that scheme. Under cross compliance, applicants under BPS and land-based rural development schemes have to meet standards for the environment, public, animal and plant health and animal welfare. Cross compliance was ended in relation to rural development schemes by the Agriculture (Removal of Cross-Compliance and Miscellaneous Revocations and Amendments, etc.) (England) Regulations 2023 (S.I. 2023/816).

7.17 Once cross compliance ends, laws will continue to protect the environment, public, animal and plant health and animal welfare. Compliance will be monitored and regulated in a fair, consistent and proportionate way. However, the cross compliance rules for hedgerows are not fully covered by existing UK law. A consultation on protections for hedgerows closed in September 2023: https://consult.defra.gov.uk/legal-standards/consultation-on-protecting-hedgerows/. The Government will announce its response to this consultation once it has considered the responses. For other rules within cross compliance which are not in existing UK law, protections will be in place through more generalised and outcome-focussed rules in existing regulation, guidance such as the Code of Practice for Plant Protection Products, or standards within the Sustainable Farming Incentive. There will be no link between these standards and the receipt of delinked payments.

7.18 This instrument changes S.I. 2022/390 to make a minor change to how payment reductions are calculated under the Lump Sum Exit Scheme. Currently, payment reductions are applied if the applicant has not surrendered enough BPS payment entitlements to the RPA. The change made by this instrument takes account of the fact that BPS payment entitlements in England will not exist from 1 January 2024, once the law relating to BPS in England has been revoked. The change makes sure that, in relation to lump sum payments calculated on or after 1 January 2024, the applicant will not be disadvantaged as a result of BPS payment entitlements no longer existing.

7.19 This instrument also makes minor consequential changes to other legislation, as it applies in England, relating to schemes that used to be part of the Common Agricultural Policy. These changes remove or amend cross-references to Direct Payments or to the legislation governing Direct Payments.

## 8. European Union Withdrawal and Future Relationship

8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union. This is because we only have the flexibility to make the changes in this instrument as a result of leaving the EU.

## 9. Consolidation

9.1 Defra does not intend to consolidate the relevant legislation at this time.

## 10. Consultation outcome

10.1 Defra carried out a consultation on "The future for food, farming and the environment" from February to May 2018, which led to over 40,000 responses. This asked for views, amongst other things, on whether we should delink Direct Payments from land during the agricultural transition period. Although delinking of Direct Payments was less popular amongst respondents than keeping the existing BPS in England, there was a strong desire from respondents to simplify the conditions attached to Direct Payments. The Government considered that introducing delinked payments would best meet respondents' wish to simplify Direct Payments.

10.2 This 2018 consultation also asked for views on the method of reductions to be applied to Direct Payments as they are phased out. Taking account of the responses to that consultation, since 2021 the Government has been applying reductions to Direct Payments under the Basic Payment Scheme through a method known as progressive reductions. This means higher reductions have been applied to amounts in higher payment bands. The Government intends to apply progressive reductions to delinked payments each year and to set these reductions in future secondary legislation (see section 7.11 of this explanatory memorandum).

10.3 The full summary of responses to the 2018 consultation can be found here: https://www.gov.uk/government/consultations/the-future-for-food-farming-and-the-environment.

10.4 Defra carried out a consultation on "Direct Payments to farmers: Lump sum exit scheme and delinked payments in England" from May 2021 to August 2021. 654 responses to the consultation were received from farmers, farming organisations and other interested parties.

10.5 The 2021 consultation asked for views on Defra's proposed approach to delinked payments. This included seeking views on the reference period to be used to determine eligibility for, and calculate the value of, delinked payments. There was a broad range of views on the reference period. Most respondents thought the reference period should cover multiple years, so that any year-to-year changes would be evened out. The Government took these views into account when setting the reference period as the average of the BPS 2020 to 2022 claim years.

10.6 A range of other comments were made about delinked payments. This included comments highlighting the need for strong legal standards, including environmental

standards, to be in place for those who continue to farm. Many respondents wanted extra eligibility conditions for delinked payments, such as to exclude organisations that don't farm the land.

10.7 The full summary of responses and the Government response to the 2021 consultation can be found here:

https://www.gov.uk/government/consultations/direct-payments-to-farmers-lump-sum-exit-scheme-and-delinked-payments

10.6 Defra subsequently had further discussions with industry stakeholders on how the rules for delinked payments would cater for business changes. The approach to transferring reference amounts took account of stakeholders' requests for Defra to provide flexibility for farmers. The transfer period which Defra intends to set will be around twelve weeks, which takes account of views from industry stakeholders.

## 11. Guidance

11.1 The RPA provided information to farmers in February 2022 explaining the key rules for delinked payments. This guidance was updated with more detailed information in May 2023. This guidance can be found here: https://www.gov.uk/guidance/delinked-payments-replacing-the-basic-payment-scheme. The RPA plans to update this guidance by the end of 2023 to give more detail about the process for receiving delinked payments.

11.2 The RPA also plans to send statements to farmers by the end of 2023 showing their reference amount which will be used to calculate delinked payments.

## 12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because it is not a regulatory provision. This instrument relates to the giving of grants or other financial assistance by or on behalf of a public authority.

## 13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision to take no action to assist small businesses is that no disproportionate impacts are expected to affect small and micro businesses.

## 14. Monitoring & review

14.1 The Government has announced its intention to phase out delinked payments by the end of 2027. However, Defra and its agencies will monitor and review the impact of this instrument as part of its standard policy-making procedures.

## 15. Contact

15.1 Claire Williams at Defra, Telephone: 0208 0262927 or email: claire.williams@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Deborah Wells, Deputy Director for Policy Design in the Farming and Countryside Programme at Defra, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Mark Spencer MP, the Minister of State for Food, Farming and Fisheries at Defra, can confirm that this Explanatory Memorandum meets the required standard.

# Annex

## Statements under the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020

## Part 1A

### Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

| Statement | Where the requirement sits | To whom it applies | What it requires |
|---|---|---|---|
| Sifting | Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7 | Ministers of the Crown exercising sections 8(1) or 23(1) to make a Negative SI | Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees |
| Appropriate-ness | Sub-paragraph (2) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2 | A statement that the SI does no more than is appropriate. |
| Good Reasons | Sub-paragraph (3) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2 | Explain the good reasons for making the instrument and that what is being done is a reasonable course of action. |
| Equalities | Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2 | Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.<br><br>State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010. |
| Explanations | Sub-paragraph (6) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1) or 23(1) or jointly exercising powers in Schedule 2<br>In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs | Explain the instrument, identify the relevant law before IP completion day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law. |
| Criminal offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1) or | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |

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| | | 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence | |
| Sub-delegation | Paragraph 30, Schedule 7 | Ministers of the Crown exercising section 8 or part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument. | State why it is appropriate to create such a sub-delegated power. |
| Urgency | Paragraph 34, Schedule 7 | Ministers of the Crown using the urgent procedure in paragraphs 5 or 19, Schedule 7. | Statement of the reasons for the Minister's opinion that the SI is urgent. |
| Scrutiny statement where amending regulations under 2(2) ECA 1972 | Paragraph 14, Schedule 8 | Anybody making an SI after IP completion day under powers conferred before the start of the 2017-19 session of Parliament which modifies subordinate legislation made under s. 2(2) ECA | Statement setting out:<br>a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament,<br>b) containing information about the relevant authority's response to—<br>(i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and<br>(ii) any other representations made to the relevant authority about the published draft instrument, and,<br>c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid. |
| Explanations where amending regulations under 2(2) ECA 1972 | Paragraph 15, Schedule 8 | Anybody making an SI after IP completion day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA | Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before IP completion day, and explaining the instrument's effect on retained EU law. |

# Part 1B

## Table of Statements under the 2020 Act

This table sets out the statements that may be required under the 2020 Act.

| Statement | Where the requirement sits | To whom it applies | What it requires |
|---|---|---|---|
| Sifting | Paragraph 8 Schedule 5 | Ministers of the Crown exercising section 31 to make a Negative SI | Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees |

# Part 2

## Statements required under the European Union (Withdrawal) 2018 Act or the European Union (Future Relationship) Act 2020

**16. Explanations where amending or revoking regulations etc. made under section 2(2) of the European Communities Act 1972**

16.1 The Minister of State for Food, Farming and Fisheries, Mark Spencer MP, has made the following statement regarding regulations made under the European Communities Act 1972:

"In my opinion there are good reasons for the Agriculture (Delinked Payments and Consequential Provisions) (England) Regulations 2023 to amend or revoke the following regulations in relation to the BPS in England:

- the Common Agricultural Policy Basic Payment and Support Schemes (England) Regulations 2014 (S.I. 2014/3259)
- the Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014 (S.I. 2014/3263)
- the Common Agricultural Policy (Amendment) Regulations 2015 (S.I. 2015/1325)
- the Common Agricultural Policy (Amendment) (No. 2) Regulations 2015 (S.I. 2015/1997)
- the Common Agricultural Policy Basic Payment and Support Schemes (England) (Amendment) Regulations 2017 (S.I. 2017/1198)
- the Common Agricultural Policy (Basic Payment and Support Schemes) (England) (Amendment) Regulations 2018 (S.I. 2018/1026)
- the Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) (Coronavirus) (Amendment) (England) Regulations 2020 (S.I. 2020/477).

16.2 This is because the revocation of these regulations is consequential on the introduction of delinked payments in place of the BPS in England, using powers in the Agriculture Act 2020. BPS in England will end at the end of 2023. The regulations listed in section 16.1 of this explanatory memorandum relate to the operation of the BPS. These regulations will not be needed in relation to BPS in England after 2023, apart from their effect as saved in relation to previous claim years.

16.3 The effect of the revocations of, or amendments to, the regulations listed in section 16.1 of this explanatory memorandum is that, after the end of 2023, they will no longer apply for the purposes of BPS in England. There is a savings provision for the purposes of dealing with any outstanding matters relating to claims under BPS for the 2023 claim year or earlier claim years."