EXPLANATORY MEMORANDUM TO

THE COMMON AGRICULTURAL POLICY (AMENDMENT) (NO. 2) REGULATIONS 2015

2015 No. 1997

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 Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends two of the three statutory instruments ('the 2014 Regulations'[1]) that make provision for the implementation, administration and enforcement of the Common Agricultural Policy (CAP), including rural development schemes, for the 2014–20 CAP term. It also amends the Rural Development Enforcement (England) Regulations 2007[2] ('the 2007 Regulations') which apply to rural development agreements entered into during the 2007-2013 CAP term. In common with all Member States, the UK has some discretion over certain aspects of implementation of the CAP and the 2014 Regulations set out how these are exercised in England and in some respects for the UK for the current CAP term. The 2014 Regulations provide for domestic implementation of new CAP schemes with effect from 2015; this instrument supplements and modifies the 2014 Regulations to reflect early experience of implementation of the CAP schemes with regard to the discretions available to Member States and to correct errors in the original regulations.

3. Matters of special interest to Parliament

3.1 In its consideration of the 2014 regulations, the Joint Committee on Statutory Instruments reported[3] that regulations 21(1)(b) and 28 of the Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014 erroneously referred to an offence under regulation 25(4) of those regulations. Regulation 12 of this instrument removes those erroneous cross-references.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The 2014–20 round of the CAP is governed by a number of EU regulations, the main Council and Parliament Regulations are: 1305/2013 (on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)), 1306/2013 (on

[1] These regulations are listed in para.4.1.
[2] SI 2007/75.
[3] *Statutory Instruments Joint Committee — Twentieth Report*, s.3.

the financing, management and monitoring of the common agricultural policy), 1307/2013 (establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy) and 1308/2013 (establishing a common organisation of the markets in agricultural products). While these EU regulations are directly applicable, they afford some discretion to Member States to adapt the arrangements for implementation to their own particular circumstances. The 2014 Regulations set out some of the most important discretions exercised in relation to England. The 2014 Regulations comprise: the Common Agricultural Policy Basic Payment and Support Schemes (England) Regulations 2014[4] ('the BPS Regulations'), the Common Agricultural Policy (Control and Enforcement, Cross-Compliance, Scrutiny of Transactions and Appeals) Regulations 2014[5] ('the Cross-cutting Regulations'), and the Common Agricultural Policy (Competent Authority and Coordinating Body) Regulations 2014[6]. The last instrument is not amended by this instrument, but this instrument does also amend the 2007 Regulations, which confer enforcement powers in relation to the previous rural development programme. That programme is the basis of many agreements which remain in force. These and other discretions are explained in guidance to farmers.

4.2 An ambulatory reference applies to the EU regulations added to Schedule 1 to the Cross-cutting Regulations by the Schedule to this instrument. The EU regulations set out in Schedule 1 to the Cross-cutting Regulations were included to provide for purposes of powers of entry and to allow for appeals from decisions made under them. Technical amendments to these EU regulations are often made for market management purposes and it would be impractical to amend Schedule 1 to capture each amendment. For the same reason, the EU regulations added by the Schedule to this instrument are the subject of ambulatory references. The Department does not expect this to have any consequence other than that of ensuring that rights of appeal and powers of entry and inspection are kept up to date.

4.3 Certain provisions of this instrument amend or refer to the 2007 Regulations. The 2007 Regulations were revoked by SI 2014/3263 with a saving for their application to any existing commitment[7]. There are many existing agreements with farmers and others to which the 2007 Regulations apply, and this instrument makes a small number of amendments to the 2007 Regulations (as saved) to ensure that breaches of Regulation 65/2011, which applies to those commitments, can be enforced under the 2007 Regulations.

5. Extent and Territorial Application

5.1 The majority of this instrument extends to England and Wales. Regulations 11 and 12 extend to the United Kingdom.

5.2 The majority of this instrument applies to England. Regulations 11 and 12 apply to the United Kingdom.

[4] SI 2014/3259.
[5] SI 2014/3263.
[6] SI 2014/3260.
[7] See r.35(1) and Sch.5, and the saving contained in r.35(4).

6. European Convention on Human Rights

6.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The BPS Regulations are amended in Part 2 of this instrument as follows.

7.2 Regulation 3 addresses certain domestic discretions regarding whether an applicant is an "active farmer" and thus eligible to receive payments under the BPS. From 2015, only active farmers can receive CAP direct payments. All farmers in England who do not operate waterworks, railway services, airports, real estate services, or permanent sport and recreational grounds are considered active farmers. These activities are known collectively as the 'negative list'. Farmers who do operate activities on the negative list will be ineligible for direct payments unless they meet one of the three "readmission criteria" (or unless they received €5,000 or less in direct payments in the previous year). The first readmission criterion is set in the EU regulations: a farmer will be readmitted if the farmer's annual amount of direct payments was at least 5% of the total receipts that the farmer obtained from non-agricultural activities. The EU regulations also require that a farmer whose agricultural activities are not insignificant should be considered an active farmer, but allow Member States to decide how to implement this second readmission criterion. Ministers have decided that the scope of agricultural activities of a farmer with at least 36 eligible hectares, the median size of a farm holding in England, cannot be considered to be insignificant, so such farmers will be readmitted. Thirdly, the EU regulations require that a person or group of persons whose principal business or company objects consist of exercising an agricultural activity should be regarded as an active farmer. Ministers have decided that this requirement is best met by considering whether the receipts from agricultural activities of the farmer's business were at least 40% of total receipts in the most recent fiscal year for which such evidence is available. These second and third criteria were decided too late to be included in the BPS Regulations, but were set out in guidance to farmers applying under the BPS 2015[8]. This amendment therefore confirms practice already adopted for the 2015 BPS scheme year.

7.3 Regulation 4(1) adds oilseed radish to the list of crop types which farmers may use in order to meet the new "greening" requirements of the CAP to satisfy the Ecological Focus Area catch or cover crop option. This reflects the recent development of oilseed radish as a new catch or cover crop which should be designated for this purpose. Regulation 4(2) extends the list of crop types that farmers may use to meet the Ecological Focus Area nitrogen fixing crop option in Part 2 of the Schedule to the BPS Regulations to bring it in line with the list of crop types notified to the European Commission for this purpose.

7.4 The Cross-cutting Regulations are amended in Part 3 of this instrument as follows.

7.5 Regulations 6 to 11 amends various definitions and references to the relevant instruments and EU regulations. Regulation 12 corrects erroneous cross-references in the original instrument. Regulation 13 and the Schedule reflect the results of a review

[8] The handbook is available on gov.uk.

of Schedule 1 to the Cross-cutting Regulations 2014 in order to take account of legislative changes at EU level since the Cross-cutting Regulations came into force, and more generally ensure it includes all EU regulations related to the Single Common Organisation of the Market for which enforcement powers or appeal provisions are required in practice, but is also restricted to such EU regulations. As a result, 44 EU regulations have been removed from Schedule 1 and 18 added.

7.6 In relation to cross compliance, a number of aspects of Part 3 of, and Schedule 2 to, the Cross-cutting Regulations 2014 require updating. Cross compliance is a set of rules describing good farming and environmental practice, required by the EU, which claimants must meet to qualify for their farm payments. A European Commission audit has clarified requirements on minimum parcel sizes to which land based conditions should apply. Other changes were found to be necessary during 2015 to clarify the requirements of, or correct issues found in, Schedule 2 to the Cross-cutting Regulations, including a reference to legislation which has become outdated. The outcomes of the changes are:

- Regulation 14(3) and (4) refers to the new Nitrate Pollution Prevention Regulations 2015[9] and also updates relevant references to parts of those regulations.
- In addition, regulation 14(4)(a) removes the exemption of land parcels of 2 ha or less from the requirement to comply with rules protecting watercourses from fertilisers and pesticides in line with European Commission audit findings regarding minimum parcel sizes to which land based conditions should apply, and
- Regulation 14(4)(b) limits the requirement to keep a map of the holding detailing surface waters, springs and wells to those beneficiaries that spread organic manure, which was the intention of the original provision, and provides a definition of "organic manure".
- Regulation 14(5)(a) and (b) simplifies the requirement for a beneficiary of direct payments to keep green cover and not apply fertilisers or pesticides beside hedgerows even where these form part of the boundary of, or are within the curtilage of, a dwelling.
- Regulation 14(1) and (5)(d) applies so that not only fruit and nut trees in orchards, hop gardens and vineyards but also other trees directly involved in production of those crops; *i.e.* trees acting as windbreaks to orchards, hop gardens and vineyards, are to be exempted from the cutting ban period that would otherwise prevent this activity from 1st March to 31st August in each year.
- Regulation 14(5)(e) amends (for the purposes of paragraph 5 of Part 2 of the Schedule to the Cross-cutting regulations generally) the definition of a "tree" to include the height at which measurements are to be taken, which brings the interpretation of the term into line with the Forestry Act 1967[10]. It also defines a "windbreak" for the purposes of the preceding amendment.

7.7 The 2007 Regulations are amended in Part 4 as follows.

[9] SI 2015/668.
[10] See s.9.

7.8 Regulation 15 of this instrument amends regulation 8(1)(c) of the 2007 Regulations so that breaching Commission Regulation 65/2011 on control procedures and cross-compliance[11] is a breach that may lead to a beneficiary having rural development payments withheld or recovered.

Consolidation

7.9 This instrument is the second instrument amending the 2014 Regulations[12], and the third amending the 2007 Regulations[13]. We expect that further amendments may be made to one or more of the 2014 Regulations in most years between 2016 and 2020 to reflect changes to scheme rules which emerge from experience in implementation and revisions to the EU regulations (such as the current round of revisions to the EU implementing and delegated acts). We will review the case for consolidation in the light of any further amendments made in 2016, together with the expected timetable for consolidating Defra's secondary legislation online under the Defralex project. While the 2007 Regulations have now been amended several times, we have no plans for consolidation in view of their status as revoked with savings, and their declining relevance as existing agreements (to which the 2007 Regulations apply) expire.

8. Consultation outcome

8.1 No general public consultation has taken place regarding the proposed, largely technical, amendments. Proposals for the active farmer readmission tests were discussed with a stakeholder group, the Direct Payments Consultative Group (DPCG) organised by Defra and the Rural Payments Agency (RPA) to assess technical issues relating to the delivery of the CAP in England, on a number of occasions before implementation in early 2015[14]. This group includes a wide range of industry and environmental non-governmental organisation participants. The inclusion of oilseed radish as a catch or cover crop was supported by the DPCG. No consultations were undertaken on the rural development amendments in regulations 6 to 10 as these correct the Cross-cutting Regulations to ensure that rural development schemes are delivered as required by the EU regulations.

9. Guidance

9.1 The RPA and other delivery bodies issue extensive guidance on the CAP schemes. This is updated annually to take into account any legislative changes and is the primary source of information relied on by most claimants[15].

9.2 Updated guidance will be issued to farmers in early 2016. This includes revised guidance setting out the cross compliance rules for farmers, which will be published by 1 January 2016. Guidance for the BPS 2016 will be published in February 2016, containing consolidated guidance.

---

[11] EU 65/2011.
[12] SI 2015/1325 amended the Cross-cutting Regulations and the BPS Regulations.
[13] See SI 2010/2078 and SI 2012/666, art.8 and Sch.2.
[14] The DPCG considered the readmission criteria most recently 16 October, 13 November and 18 December 2014. Members welcomed the introduction of a hectarage criterion and thought this would eliminate difficulties and uncertainty.
[15] The 2015 BPS guidance and the 2016 Greening guidance can be found on gov.uk.

10. Impact

10.1 An evidence paper on the impact of the reformed CAP on farmers and other rural businesses (some of which are charities or voluntary bodies, such as the county Wildlife Trusts) was published as part of the Government's consultation in 2013.

10.2 No formal impact assessment has been done in relation to this instrument, as the impacts from the reformed CAP primarily arise from the policy itself, rather than the minor discretions exercised via this instrument and the instruments amended.

10.3 The impact on the public sector is negligible.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses: these regulations apply to the vast majority of farms in England, because these farms claim CAP payments, and most such farms are small businesses with few or no employees.

11.2 To minimise the impact of the requirements on small businesses (those employing up to 50 people), an option was taken in the BPS Regulations that excludes farms from the "active farmer" test when their direct payment receipts have not exceeded a certain level, and this level has been set as high as is permitted (€5,000)[16]. Regulation 3 of this instrument appoints a readmission threshold for the active farmer test of 36 ha of eligible land, which is below the mean UK average farm size of 54 hectares[17] and will secure the readmission of as many small farming businesses as is consistent with the intention of the European legislation.

12. Monitoring & review

12.1 The amendments to the 2014 Regulations will be subject to the review provisions contained in those instruments. This means they will be formally reviewed within five years of 1 January 2015.

12.2 The 2007 Regulations were revoked by the Cross-cutting Regulations 2014, except in relation to any application, commitment or rural development payment to which they apply. The amendments in regulation 15 of this instrument will therefore cease to have effect once those commitments expire.

13. Contact

13.1 Robin Fransella at the Department for Environment, Food and Rural Affairs, telephone: 0207 238 6348 or email: robin.fransella@defra.gsi.gov.uk can answer any queries regarding this instrument before 31 December, and Hugh Craddock, telephone 0208 026 3254 or email: hugh.craddock@defra.gsi.gov.uk after that date.

[16] R.10 of the BPS Regulations.
[17] Annexe 8 of EU 1307/2013.