

# Free Trade Agreements, a new Farm Support System and Brexit: Which Direction does UK Farming go now?

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## Abstract

In November 2020 the UK adopted its first Agriculture Act since 1947 which sets out the vision for English and British agriculture now the UK is no longer a Member State of the EU. On 1 January the UK will regain its independent seat at the World Trade Organisation outside the EU and is currently negotiating seven free trade agreements. This brings a number of opportunities for British farming such as improving the rules governing the transport of live animals. It also brings many threats such as how the UK will defend its higher farm animal welfare standards or its animal health standards, two of which have already been ruled by the WTO as being non compliant.

All farm animal health and welfare legislation is devolved and so the responsibility of the devolved administrations and Parliaments. But it is the UK that is the member of the World Trade Organisation which polices the rules on imports, exports and subsidies of farm products; it is the UK that has to report on how the UK has complied with those rules. It is also the UK that negotiates free trade agreements with other countries, the majority of whom have farm standards that are lower than in the UK. Those British standards will be vulnerable to cheaper imports produced to lower standards that are illegal in the UK. This paper will explore the opportunities and threats to Britain's farm standards and examine where the power really lies in determining the direction of those standards as the UK leaves the European Union.

## Introduction

In November 2020 the UK Parliament agreed its

first Agriculture Act<sup>1</sup> since 1947 and from 1 January 2021 Great Britain's three devolved countries - England, Wales and Scotland - will be in charge of farm policies and farm subsidies outside of the EU's Common Agricultural Policy for the first time since 1973<sup>2</sup>. Northern Ireland, as a Member of the EU's Single Market and Customs Union under the European Union (Withdrawal Agreement) Act 2020<sup>3</sup> will continue to follow the EU's farm legislation but be able to set its own farm subsidy programme. On the same date the UK will resume its membership of the World Trade Organisation (WTO) as a non EU Member State, free to set its own trade policies. These two once in a generation changes are large enough on their own to set new strategies and laws on these areas but the UK's trade policy and its farm policy are inextricably linked, interdependent and conflicted. Decision making on these two areas is also interlinked and conflicted. One, trade policy, is a reserved power and so decided at a central Government level. Farm support policy has been a devolved power since 1999, confirmed in the Agriculture Act 2020. Policy on individual farm issues such as farming standards or consumer information is also devolved but needs to be juxtaposed with ensuring the free movement of food and farm products across the UK Single Market which is a reserved power. The future direction of British farming is dependent not just on the inter-

1 <https://www.legislation.gov.uk/ukpga/2020/21/contents/enacted>

2 Farm animal and health laws are devolved to England, Scotland and Wales; although the four devolved Governments have set their own farm subsidy programmes since 1999, these have been constrained by EU common rules on how much could be spent on animal welfare and environment programmes and how much on the Basic Payment Scheme

3 <https://services.parliament.uk/Bills/2019-21/europeanunionwithdrawalagreement.html>



action between trade policy and farm policy but also the interplay between devolved and central governments.

The UK Government has a clear manifesto commitment not to undermine its high animal welfare standards in trade agreements<sup>4</sup>. It has made clear its intentions to improve its animal welfare standards as set out in the Prime Ministers first speech<sup>5</sup>. It also has laid out its intentions to play a full role as a free trade nation once it regains its seat at the WTO independent of the EU<sup>6</sup>. The interplay of these two seemingly conflicting goals and the tussle between central and devolved governments to control the farm welfare agenda will determine how the UK's farm animal welfare policy will develop in the future. Will the UK decide to go to a free trade liberalisation

policy with the resultant impacts cheaper products produced at lower standards will have on its own farm standards? Or will it decide to pursue an agenda of increasing farm animal welfare standards and selling these products and this philosophy on a world stage? Tensions within Government between the Trade and Agriculture Ministries<sup>7</sup> and between the devolved and central Government<sup>8</sup> already show the fault lines in trying to answer this question.

This paper will assess the powers of the Agriculture Act, the retained specific farm animal welfare laws and the UK's trade policy to gain an insight into which road the UK will take on farm policy and assess the options it has under trade rules to support that position.

### **Agriculture Act 2020 - separating out the England and UK pieces**

4 <https://www.conservatives.com/our-plan> accessed 29.11.20

5 <https://www.gov.uk/government/speeches/boris-johnsons-first-speech-as-prime-minister-24-july-2019>

6 <https://www.gov.uk/government/speeches/chatham-house-speech-liz-truss-sets-out-vision-for-values-driven-free-trade>

7 <https://www.ft.com/content/a1bb84cf-be5d-486c-841f-fc6d84aa22b8> accessed 20.11.20

8 <https://www.heraldsotland.com/news/18774695-reckless---snp-attack-uk-race-bottom-food-standards/> accessed 20.11.20

The Agriculture Act<sup>1</sup> covers 52 Articles, 7 Schedules and perhaps more importantly gives 29 different powers to authorities to set out new delegated legislation in areas which range from the power to the devolved governments to set their own farm support systems to the power to change fertiliser standards. It took nearly three years to agree from the first consultation in February 2018 on the principles behind the legislation<sup>9</sup> to the final Royal Assent in November 2020. Agreement on the Act spanned two Governments, two Prime Ministers and three Defra Secretaries of State, and was determined to a certain extent by the lack of progress on agreeing how the UK was leaving the EU.

It generated some of the largest responses seen on a piece of any legislation let alone one on agriculture. Over 43,000 responses were submitted to the initial consultation in 2018<sup>10</sup> and a petition containing over one million signatures to protect British food standards was submitted to Defra as the Bill reached its finale in 2020<sup>11</sup>. Aside from being the first Agriculture Act in over 70 years, part of this public concern can be gauged from the importance the issue of animal welfare and agriculture had played in the Referendum debate during 2016 when there were promises that the UK would be able to manage its own legislative portfolio for the first time and ban totemic issues such as live exports of farm animals<sup>12</sup>.

The Agriculture Act 2020 fulfills two roles. It sets out a new framework to pay farmers subsidies once we have left the EU, to replace the outmoded Common Agricultural Policy<sup>13</sup>. Each of the four devolved Governments will have the right to set their own agricultural policy. Secondly the Agriculture Act sets out this policy in detail for England. By determining all subsidies

9 <https://www.gov.uk/government/consultations/the-future-for-food-farming-and-the-environment>

10 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/741461/future-farming-consult-sum-resp.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741461/future-farming-consult-sum-resp.pdf) accessed 29.11.20

11 <https://www.nfuonline.com/news/latest-news/nfu-food-standards-petition-hits-one-million-signatures/> accessed 20.1.20

12 <https://www.telegraph.co.uk/news/2016/08/29/brexit-is-chance-to-halt-shameful-live-animal-exports-say-protes/> accessed 20.11.20

13 [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en) accessed 29.11.20

(£2.45 billion annually until 2024<sup>14</sup>) shall be given for ten public good activities, including that to promote animal welfare<sup>15</sup>, it is clear that the English farm support system will be very different to anything that has gone before. The new payments regime will start in England in 2021 to come fully in effect by 2027<sup>16</sup>. The increase in payments for public goods will coincide with a decrease in the Basic Payments System (BPS) which will be around half of present levels by 2024<sup>17</sup>. The Governments in Wales<sup>18</sup>, Northern Ireland<sup>19</sup> and Scotland<sup>20</sup> are expected to set out their policies in Agriculture Acts in 2021 but are expected to adopt different policies in regards to the balance between BPS and public goods payments<sup>21</sup>. All have announced legislation<sup>22</sup> to ensure there is a degree of continuity of the existing payments for 2021 whilst the new systems are agreed.

Clearly this is a huge opportunity for animal welfare to divert farm payments away from BPS towards promoting animal welfare schemes. In the 47 years that the UK implemented the Common Agricultural Policy, only one country, Scotland, has adopted any programme to specifically promote animal welfare and this only ran from 2007 to 2013<sup>23</sup>. Whilst this was a successful programme<sup>24</sup>, the funds allocated to it could not compete compared to the annual spend of

14 <https://www.gov.uk/government/speeches/spending-review-2020-speech> accessed 25.11.20

15 Article 1(1) Agriculture Act 2020

16 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939602/agricultural-transition-plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939602/agricultural-transition-plan.pdf) accessed 30.11.20

17 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/939925/agricultural-transition-plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939925/agricultural-transition-plan.pdf) accessed 30.11.20

18 <https://business.senedd.wales/documents/s105187/Letter%20from%20the%20Minister%20for%20Environment%20Energy%20and%20Rural%20Affairs%20to%20the%20Chair%20of%20the%20Legislation%20.pdf>

19 <https://www.northernireland.gov.uk/node/47952>

20 <https://www.gov.scot/news/farming-and-food-production/>

21 <https://gov.wales/sites/default/files/consultations/2019-07/brexit-consultation-document.pdf> accessed 30.11.20

22 Eg <https://www.legislation.gov.uk/asp/2020/17/contents/enacted>

23 <https://www2.gov.scot/Topics/farmingrural/SRDP/PMC/PMCPapers/PMC20083> accessed 30.11.20

24 RSPCA.2007.Targeted help: improving farm animal welfare in Scotland under the Rural Development Programmes.

around £2.6 billion in farm support payments that the UK gave farmers based on the size of their farm under the BPS<sup>25</sup>. The England programme alone will allocate around half the £2.4 billion in payments to environment and animal welfare schemes by 2024, more in a year than has occurred in the past 47 years. Farmers have questioned what this massive change in direction will mean for their business<sup>26</sup>.

The Agriculture Act sets out the powers for the devolved Governments of Wales and Northern Ireland to set their own farm support policies<sup>27</sup> and specifically sets out the English support framework<sup>28</sup>. But it also gives power to the UK Government to ensure that any payments are in line with the UK's WTO obligations<sup>29</sup>.

How are these seemingly competing powers going to operate? The snappily titled World Trade Organisation Agreement on Agriculture (Domestic Support) Regulations 2020<sup>30</sup>, laid as a Statutory Instrument in November 2020 in the Houses of Parliament gives some clues. Although the system allows for coordination and communication between the four parts of the UK, ultimately it is the Defra Secretary of State who decides if a farm payment is compliant with our trade obligations or should be changed. Now we should examine the potential of the specific laws on farm animal welfare to change farm policy.

### EU legislation - what have we inherited?

The UK has nationalised all 18 of the EU's farm animal welfare acquis which includes four specific standards on the keeping of animals on farm, three specific bans on usage of growth promoters on animal health grounds and legislation on the transport and slaughter of farm animals. All of the farm animal welfare laws are devolved and have been agreed by the relevant

country's legislatures. The animal health laws are also ostensibly devolved and are under the jurisdiction of the three devolved Governments and their food standards agencies rather than central Government<sup>31</sup>.

However, it is not that simple as the impact of devolved legislation could have consequences on the other Governments. For instance England has the power to stop live animal exports in its legislation but this would have a big impact on the exports of Scottish calves or Welsh sheep - and subsequently the economic value of these sectors - as these exit from English ports. The UK also has the power in Free Trade Agreements to permit importation of substances prohibited in other jurisdictions such as hormone beef or chlorine washed chicken. As these products are free to circulate in the British market once imported, these render the country prohibitions in Scotland or Wales effectively redundant.

There are opportunities to shape future farm animal law. The UK Government has said it will improve its farm animal welfare legislation once it has finished the transition period and left the EU. For instance the UK Government has announced a consultation on stopping live exports and improving transport rules within England<sup>32</sup>. In addition the three devolved Governments could start to pass species specific legislation in areas that the EU has yet to agree such as beef and dairy cattle, sheep, turkeys or salmon. But all these laws have to meet the framework of the WTO's trade regime, so establishing what the WTO rules are and what they mean is crucial for future farm improvements.

### World Trade Organisation rules - what is possible and impossible

Agriculture has always been a difficult sector for the multilateral trading system which has treated agriculture differently from its inception in 1947. Although the General Agreement on Tariffs and Trade (GATT '47)<sup>33</sup> did not exclude agriculture, it did allow import restrictions where

25 [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/basic-payment\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/income-support/basic-payment_en) accessed 29.11.20

26 <https://www.fwi.co.uk/business/payments-schemes/bps/defra-unveils-roadmap-to-elm-scheme> accessed 30.11.20

27 Article 47 Agriculture Act 2020

28 Article 1(3) Agriculture Act 2020

29 Article 43 Agriculture Act 2020

30 <https://www.legislation.gov.uk/ukdsi/2020/9780348214987>

31 Northern Ireland will continue, as part of the EU's Single Market to follow the EU's rules on animal health

32 <https://consult.defra.gov.uk/animal-health-and-welfare/live-exports-and-improving-welfare-in-transport/> accessed 4/12/20

33 General Agreement on Tariffs and Trade 1947. [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

there were food surpluses or national schemes in place to regulate the marketing of products. The reform of the global agricultural trading system was only really initiated under the Uruguay Round negotiations in 1994 which set up the Agreement on Agriculture<sup>34</sup>. This agreed three methods to establish a fair and market oriented system for farm products, namely, to increase market access, reduce tariffs on imported products and reduce support for farming systems that have minimal or no trade distorting effects on production. Since 1994 there have been 109 disputes looked at by the WTO's Dispute Settlement Body (DSB) involving agricultural and food products<sup>35</sup> of which 84 have been taken under the Agreement on Agriculture<sup>36</sup>. This has given a broad framework to establish what is and is not possible under trade rules.

Trade in food and farm products must, like trade in any product, adhere to the relevant Agreements under the WTO, which for agriculture are the GATT '47<sup>1</sup>, the Sanitary and PhytoSanitary Agreement (SPS)<sup>37</sup>, the Technical Barriers to Trade Agreement (TBT)<sup>38</sup> and the Agreement on Agriculture (AoA)<sup>29</sup>. Disputes on trade measures tend to cite more than one Agreement and previous disputes have looked at the most relevant Agreement first to assess the measures. The nexus of Agreements to each other differs: if a measure is found to be non compliant to the SPS it is assumed to be non compliant to the GATT but this does not necessarily hold for the TBT and GATT. We will now examine measures that are possible under each Agreement.

Firstly animal health measures. The SPS allows a country to set its own level of protection on animal health provided that any measures are necessary, are not a disguised trade restriction or applied in an unjustifiably discriminatory manner. Trade bans are not permissible if the country has not undertaken a risk assessment of

the measures<sup>39</sup>, has introduced measures contrary to international regulations<sup>40</sup> and uses the precautionary principle if there is no scientific evidence to back it up<sup>41</sup>. Risk assessments need to be regularly updated<sup>42</sup>. Countries can adopt higher standards than the OIE global standards but need to show why this has been adopted in their risk assessment<sup>37</sup>. The SPS has not dealt with an agricultural animal welfare dispute as there are no international agricultural welfare standards<sup>43</sup> but has ruled on a number of agricultural animal health disputes, such as on beef hormones, where it found against the EU's ban as it was not based on a risk assessment or scientific information<sup>44</sup>. This dispute was only resolved after 20 years by the EU offering, and the USA accepting, increased import quotas for non hormone beef<sup>45</sup>. The UK, when it becomes a member of the WTO outside the EU on 1 January 2021, will not have the safeguard of this negotiated agreement and it is likely that the USA will reopen this issue knowing that the WTO DSB has already ruled it as illegal under trade rules. Another outstanding dispute concerns the EU ban on imported US chicken washed in agents such as chlorine. Again this is not based on a scientific risk assessment and the UK may also find this difficult to defend should a country such as the USA ask the DSB to rule on it.

The TBT covers labelling issues. There have been 56 disputes under the TBT, 19 concerning farm animals though only one, the EU seals ban, involved an animal welfare issue<sup>46</sup>. The panel disputes have confirmed that measures cannot be taken that are "more trade-restrictive than

34 Agreement on agriculture. 1994 [https://www.wto.org/english/docs\\_e/legal\\_e/14-ag\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm)

35 [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm?id=G15](https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm?id=G15) accessed 29/11/20

36 [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A1](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A1) accessed 29/11/20

37 Agreement on the Application of Sanitary and PhytoSanitary Measures. 1994 [https://www.wto.org/english/docs\\_e/legal\\_e/15sps\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm)

38 Agreement on Technical Barriers to Trade. 1994 [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm)

39 WT/DS291/R 2. 1998. EU Approval and marketing of Biotech products

40 WT/DS47/AB/R 2014 Russian Federation - Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union

41 WT/DS26/AB/R 1998 EU Measures affecting meat and meat products (hormones)

42 WT/DS447/R 2015 USA-Argentina Import of animals, Meat and other animal products from Argentina

43 The OIE farm standards which cover 14 areas are not linked to the SPS Agreement unlike the OIE disease and animal health standards

44 [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds26\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm) accessed 29.11.20

45 <https://www.consilium.europa.eu/en/press/press-releases/2019/07/15/imports-of-hormone-free-beef-eu-us-agreement-confirmed/#>

46 [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A22](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A22) accessed 29.11.20

necessary to fulfil a legitimate objective<sup>47</sup> and a risk assessment has to be done based on “available scientific and technical information”<sup>48</sup>. But recent panels have allowed measures to protect the life or health of any animal, including farmed ones<sup>49</sup> and permitted labelling or marketing terms different from internationally agreed standards<sup>50</sup>, as long as they are not a disguised trade restriction<sup>42</sup>. The US country of origin labelling on beef was found not compliant as it disadvantaged imported beef against US beef<sup>51</sup>. However the US's tuna dolphin labelling scheme was ruled as compliant with TBT rules as it introduced a calibrated method of assessing the risk of product which was determined not to constitute arbitrary or unjustifiable discrimination to other products<sup>52</sup>. So measures are allowed to protect human health<sup>53</sup>, give consumers information<sup>54</sup>, including on how a product is produced based on consumer preference<sup>47</sup>, but regulations must be even handed and cannot be an arbitrary or unjustified discrimination between countries where the same provisions prevail and cannot be a disguised restriction on trade<sup>55</sup>. The crucial issue concerning if labelling is permitted to show the difference to consumers in how an agricultural product is produced, based on a “like” product such as eggs, is unclear as panels have yet to rule specifically if the method of production in a product is permitted under TBT rules<sup>56</sup>.

There have been 493 disputes heard under the

47 DS/384/AB/R 2012 USA Cool Certain Country of Origin Labelling Requirements

48 WT/DS381/AB/R 2012. United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

49 WT/DS381/RW 2015 United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

50 WT/DS231/AB/R 2002. EU Trade description of sardines

51 [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm) accessed 29.11.20

52 [https://www.wto.org/english/tratop\\_e/dispu\\_e/381abr2\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/381abr2_e.pdf) accessed 29.11.20

53 WT/DS135/R 2000. EU Measures Affecting Asbestos and Asbestos-Containing Products

54 DS/384/AB/R 2012 USA Cool Certain Country of Origin Labelling Requirements

55 DS406/AB/R 2012. US Clove cigarettes.

56 WT/DS401/AB/R. 2014. EU Measures prohibiting the importation and marketing of seal products

GATT since 1994<sup>57</sup> and over 350 rulings which have given a framework on the compatibility of trade bans under the regime. We know that trade bans are allowed for animal welfare including to protect a country's morals<sup>58</sup> determined by how long the country have held that position<sup>59</sup>, that trade bans are allowed to ensure that animals are not killed inhumanely<sup>60</sup> and can apply extra jurisdictionally<sup>61</sup>. Trade bans could be allowed based on how a product is produced provided there is a calibrated risk based approach to determine the impact of how the product is produced<sup>62</sup>. Consumer preferences can be included in this test<sup>63</sup>. However a country may not be able to introduce a trade restrictive measure if it gives an unfair trade advantage to its own products or allows a different method of production in its own territory to the imported product<sup>58, 64</sup>. The EU successfully retained its seal products ban after the WTO challenge from Canada and Norway on the grounds that this was an important moral issue for the EU<sup>65</sup>. The EU showed this not through opinion polls, but by demonstrating the legislation and public concern on the issue was long standing. The WTO also agreed that as this was a moral issue the EU could ban a product from another country, even if they have different moral values. However it did not rule on if it could ban a product based on how it was produced.

Finally the Agreement on Agriculture (AoA), sets out the framework for how farm subsidy payments must operate and encourages less

57 [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm) accessed 29.11.20

58 WT/DS363/R 2006. China Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products.

59 WT/DS400/R 2012. EU Measures prohibiting the importation and marketing of seal products

60 WT/DS381/RW. 2015. United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

61 WT/DS58/AB/R A 1998 USA Import prohibition of certain shrimps and shrimp products

62 WT/DS381/AB/RW 2015. United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

63 WT/DS477/R. 2014 Indonesia - Importation of Horticultural Products, Animals and Animal Products

64 WT/DS332/AB/R 2006. Brazil Measures affecting imports of retreaded tyres

65 WT/DS400/AB/R 2014. EU Measures prohibiting the importation and marketing of seal products

trade distorting domestic support policies to assist farmers and the rural economy<sup>66</sup>. However there has only been one dispute panel ruling on farm subsidies under the Agreement on Agriculture<sup>67</sup> so it is difficult to know when subsidies are in line with the rules. Under the AoA framework a country can pay its farmers any payments that are non trade distorting and not linked to production. These would include payments for animal welfare. These are denoted as Green Box payments<sup>68</sup>. These subsidies are exempt from the country's obligations under the AoA to reduce their total farm support by 20% by 1998. Payments that are related to production such as paying a farmer to produce beef, are called Amber Box payments. A country is not permitted to pay farmers subsidies that exceeds 5% of their total production of that product or 5% of the country's total agricultural output<sup>69</sup>.

Overall the WTO rules particularly on farm subsidies, labelling and even import restrictions give a fair degree of flexibility for a country when building its farm legislation. The SPS regime, covering animal health issues, is the most prescriptive and gives the least amount of flexibility. So a country would be allowed to subsidise farmers as long as those payments were delinked from production, and could be able to stop imports as long as the measures were proportionate, non discriminatory or a disguised restriction on trade. It just needs a government that is brave and prioritises such measures to improve farm animal welfare.

We have covered two of the three different pillars of legislation determining farming and food policy: retained legislation from the EU and the subsidy system set up under the Agriculture Act 2020 and have shown there is a degree of flexibility in how these are at the trade level. We now turn to the final area, ensuring that there is free movement of food and goods within the UK whilst respecting the right of devolved Governments to set their own standards.

66 WTO Agreement on Agriculture. 1994. [https://www.wto.org/english/docs\\_e/legal\\_e/14-ag\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm)

67 WT/DS511/R 2017:China - domestic support for agricultural producers

68 WTO. 1994 Agreement on Agriculture Annex 2 6 (b)

69 WTO. 1994 Agreement on Agriculture Part IV Article 6 (4)

## The UK Single market - how to square the circle of devolution and free movement

The Joint Ministerial Committee (JMC)<sup>70</sup>, set up in 2001, has the task of resolving and clarifying issues between the four countries, including conflicts between devolved and non-devolved matters. It has the tricky balance to ensure there are UK harmonised rules whilst respecting the devolution settlements. Under the JMC, the four devolved Governments published the Common Framework on Animal Health and Welfare<sup>71</sup> in November 2020. This essentially acknowledges the power of devolved Governments to set farm animal welfare policies but then states that any European Union inherited legislation should be decided at a UK level. As most farm welfare legislation is inherited from the EU anyway, this suggests that the powers of the devolved Governments to set farm standards above the GB baseline are limited. If a devolved government wishes to set higher standards they must apply to the UK Government with their reasons and if there is no agreement this goes to arbitration at the Joint Ministerial Committee<sup>72</sup>. The JMC has its own dispute resolution process and publishes regular updates on disputes or progress on issues under dispute<sup>73</sup>.

The Common Framework has important implications for devolution as it appears to curtail the powers of devolved governments to set their own farm policies if they diverge from the UK baseline but also has ramifications on future farm policy in each of the three British countries. At present there is only one farm animal welfare law inherited from the EU where a country, in this case Northern Ireland, has diverged from the other laws set by the other three Governments. Northern Ireland set a maximum stocking density of 42 kg/m<sup>2</sup> for chicken farming<sup>74</sup>, in line

70 <https://gov.wales/joint-ministerial-committee>

71 <https://www.gov.uk/government/publications/animal-health-and-welfare-framework-2018/animal-health-and-welfare-framework>

72 <https://senedd.wales/Research%20Documents/The%20Joint%20Ministerial%20Council%20-%20Quick%20guide-09012012-229160/qg12-0002-English.pdf>

73 <https://www.gov.uk/government/publications/joint-ministerial-committee-eu-negotiations-community-3-september-2020>

74 <https://www.legislation.gov.uk/nidsr/2012/9780337986475/contents>

with the EU baseline in Directive 2007/434/EC<sup>75</sup>, whereas the other three Governments opted for a slightly higher standard of 39 kg/m<sup>2</sup><sup>76</sup>. The impact of this divergence has been minimal over the past ten years since it was implemented as the space differences are minimal, but it remains to be seen if the future approach limits countries from adopting higher farm animal welfare standards.

Adding to this complexity is the Internal Markets Bill<sup>77</sup>, the aim of which is to ensure there is one UK market for food and food standards and products produced in different methods or labelled different ways in any of the four UK countries cannot be prohibited from being imported or sold in any of the three other countries. This law is being decided in Westminster although it clearly has an impact on what each of the devolved governments can propose on food standards and food labelling. It also plays a crucial role in deciding the level of food standards.

The UK Government has assured the devolved Governments that the independent Food Standards Agencies in England and Scotland are in charge of our food import policy<sup>78</sup>. Yet it is the UK Government that is in charge of trade negotiations so could agree to import products produced to lower standards or methods illegal to undertake in the UK such as chlorine washed chicken or hormone injected beef. Oversight of any free trade negotiations has been widely criticised in Westminster as it is the Government rather than Parliament negotiates and ratifies any agreements<sup>79</sup>.

Once in the Great Britain market (Northern Ireland is within the EU Single Market and Customs Union so follows those rules) these products can clearly circulate within all three countries of Great Britain even if a country has a marketing ban of the product in its legislation. The Bill, ex-

pected to be adopted in December 2020, preserves the different rules on food standards and labelling but crucially introduces market access conditions which essentially mean that any country cannot refuse entry of a food product produced or marketed in the UK based on how it was produced or how it is labelled. These are very similar powers that the European Commission has to maintain the Single Market rules in the EU, powers demarcated in the Cassis de Dijon case in 1978<sup>80</sup>. However the Internal Market Bill goes further as the rules apply not just to products produced in Great Britain but to products imported from third countries. This has two important implications. Firstly it could dampen a country's enthusiasm to implement higher farm animal welfare standards as they will not be in a position to stop imports from another part of Great Britain. These imports could undermine their high farm standards, as there is a cost implication of production at a higher level which has been clearly shown for eggs<sup>81</sup>, chickens<sup>82</sup> and pigs<sup>83</sup>.

Secondly if the UK decided to allow imports of a product currently banned in the UK such as hormone implanted beef, as part of a Free Trade Agreement, this would not just have implications for England as the product would be able to circulate into Wales and Scotland, even if that country still had a ban on imports or marketing of hormone beef. All three countries (Northern Ireland follows Directive 2003/74 which contains the sales and production prohibition<sup>84</sup>) have banned the use and sale of hormone implanted beef<sup>85, 86</sup>. A similar situation arises for imports of chicken washed in anything other than water (the chlorine-chicken question) which again

75 <https://eur-lex.europa.eu/legal-content/EN/TX-?uri=CELEX:32007L0043>

76 Eg <https://www.legislation.gov.uk/ukxi/2007/2078/contents/made>

77 <https://www.legislation.gov.uk/ukdsi/2020/9780348214987>

78 <https://hansard.parliament.uk/Lords/2020-09-08/debates/5BADA7DC-AC31-4745-9BA6-11C87010ABCA/Trade-Bill> accessed 29.11.20

79 <https://publications.parliament.uk/pa/cm201719/cmselect/cmintrade/1043/1043.pdf>

80 ECJ 22 May 1978, nr. C-120/78, Cassis de Dijon, paragraph 8, subparagraph 2.

81 <https://library.wur.nl/WebQuery/wurpubs/fulltext/469616>

82 [https://www.avec-poultry.eu/wp-content/uploads/2018/05/Wageningen-report-2017-005-competitiveness-EU-poultry-meat-van\\_Horne\\_def....pdf](https://www.avec-poultry.eu/wp-content/uploads/2018/05/Wageningen-report-2017-005-competitiveness-EU-poultry-meat-van_Horne_def....pdf)

83 [https://projectblue.blob.core.windows.net/media/Default/Pork/Documents/CostofPigProduction2018\\_200302\\_WEB.pdf](https://projectblue.blob.core.windows.net/media/Default/Pork/Documents/CostofPigProduction2018_200302_WEB.pdf)

84 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003L0074>

85 <https://www.legislation.gov.uk/ukxi/2015/787/contents/made>

86 <https://www.legislation.gov.uk/wsi/2019/569/contents/made>



has been transposed into legislation<sup>87</sup> by the UK Government. Again there are implications on devolution and farm animal welfare. Whilst there are exceptions to these prohibitions these are limited to issues such as pest control and not animal welfare<sup>88</sup>. Ironically the EU has less stringent rules as it allows exemptions under Article 36 for reasons that include public morality and animal health and life<sup>89</sup>. Again the Secretary of State at Defra can change these exemptions not the devolved Governments.

The same applies to information given to consumers on the provenance of their food. Although there are common rules on labelling that allow the devolved countries to agree their own labelling rules<sup>90</sup>, the Internal Markets Bill's principle of mutual recognition would stop a devolved country from unilaterally labelling a product that is imported from another part of Great Britain (or indeed from a third country via a GB country). This has created unsurprisingly, tensions between the three devolved Governments<sup>91</sup>.

## Conclusion

2020 will be seen as a landmark year for British farming and agricultural standards. The Agriculture Act provides the template for the four UK countries to prioritise farm payments to whatever sector or issue they desire including the environment or animal welfare. Leaving the EU on 31 December also gives the three British countries the flexibility in determining what level of animal welfare standards they want to see in its farming industry - and the scope to financially incentivise this. Both have to pass the tests set by international trade rules, but these are more flexible particularly on measures to promote animal welfare than are commonly understood.

87 <https://www.legislation.gov.uk/ukxi/2019/1247/contents/made>

88 <https://eurelationslaw.com/blog/goods-in-the-uk-internal-market-a-closer-look-at-the-exceptionclauses>

89 [https://ec.europa.eu/romania/sites/romania/files/tratatul\\_de\\_la\\_roma.pdf](https://ec.europa.eu/romania/sites/romania/files/tratatul_de_la_roma.pdf)

90 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/925713/Nutrition\\_related\\_labelling\\_composition\\_and\\_standards\\_provisional\\_common\\_framework\\_web\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925713/Nutrition_related_labelling_composition_and_standards_provisional_common_framework_web_accessible.pdf)

91 <https://blogs.sussex.ac.uk/uktpo/files/2020/11/BP-49final.pdf>

More importantly any measures adopted by the devolved Governments also have to pass the tests set by the UK Government on allowing free internal circulation of food and agricultural produce within Great Britain. Any policies must also bear in mind what measures have been agreed in free trade agreements by the UK Government as these have the potential to undermine farm standards if they permit imports of produce that has been produced in ways illegal or below present farming standards. The future for British farm animals could be optimistic. England has already announced some radical ideas with their farm support payments. But ultimately the direction of travel in England, Scotland and Wales will heavily depend on the UK Government's trade policy and how much priority it gives to farm animal welfare and how closely it abides by its commitment not to lower farm welfare standards in any future trade agreements.