

COMMON AGRICULTURAL POLICY

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Moving goalposts...

One year in seven we know what we're doing!

Latest uncertainty with the new Commission

- restructure to avoid “silo mentalities, clusters and portfolio frontiers” (Juncker)
- Phil Hogan, new Agriculture & Rural Development Commissioner
- Tasked to review EFAs over next 12 months and consider simplification
- Mid-Term Review in 2017/18

Interpretation of Regulations

In English statutes or regulations, there is no preamble. Meaning has to be determined from the operative words.

In the EU, the purpose and scope of the regulation is set out in “Recitals”. Operative words are merely to implement purpose.

A different attitude is therefore necessary in order to understand what Regulations are intended to mean. Need to take a purposive view, not a literal one.

Language: all EU regulations are published in all EU languages. There are differences in the use of English – the words may not mean what they look as though they mean!

Active farmer

Art.9 Reg.1307/2013 – does not mean what it implies.

Those “who operate airports, railway services, waterworks, real estate services, permanent sport and recreational grounds” are on the face of it disqualified.

Airports – CAA licensed for public use. Military and unlicensed not included.

Railways – licensed operators, infrastructure owners, rolling stock companies PLUS any other business (including charities) operating a timetabled railway service on standard or narrow gauge track (including heritage railways).

Waterworks – 27 utility companies putting water into public supply. Not therefore private water supplies.

Real estate services – property developers and estate agencies. More detail still to come on where the boundaries lie.

Permanent sports and recreational grounds – All the following conditions apply:

- dedicated and kept throughout the year for sporting or recreational purposes, e.g. golf course, football ground, cricket pitch, manège. Agricultural use does not save it (agriculture not the primary use); and
- grounds include permanent structures, e.g. changing rooms, showers/toilets, spectator facilities; and
- grounds or facilities not just for personal use.

Redemption is possible if any one of the following conditions applies:

- (a) annual payments for SPS or BPS (including the greening and/or young farmer payment) are at least 5% of the total non-agricultural receipts activities in the most recent financial year;
- (b) total agricultural receipts are at least 15% of total receipts in the most recent fiscal year;
- (c) that its principal business or company objects include an agricultural activity (more guidance is awaited on exactly how this will be applied).

Qualification under the active farmer rules will be required annually and evidence will need to be provided to RPA in support before midnight on 15th May. Detailed information is still awaited.

Greening conditions

Officially the greening conditions are payments intended to encourage “agricultural management practices beneficial for the climate and for the environment” (**Chapter 3 of Regulation 1307/2013**). By **art.43**, farmers entitled to payment under the BPS “shall observe” the conditions, hence receipt of BPS is conditional upon them.

Those farming registered organic land are taken by definition to comply with greening (**art.43(11)**) in respect of that organic land. Those who have a mixture of organic and non-organic land will need to assess their liability for greening by reference to the area of non-organic land.

Penalties for breach will initially be limited to loss of the 30% greening element. However, that will rise in 2017 to 120% of that element (i.e. 36% of the overall claim) and from 2018 to 125% (37.5%).

Permanent grassland

The ratio of permanent grassland to total agricultural area, taken at the national level, must not fall by more than 5% compared with the 2015 ratio. RPA does not believe this is likely to come into play.

Arable land

In contrast to permanent grassland, both the crop diversification and EFA conditions relate to arable land i.e. “land cultivated for crop production or areas available for crop production but lying fallow, including areas set aside..., irrespective of whether or not that land is under greenhouses or under fixed or mobile cover” (**art.4(1)(f) of Regulation 1307/2013**)

Crop diversification

The requirements are governed by the area of arable land at a farmer’s disposal.

- Those with fewer than 10ha have no diversification obligation;
- Those with between 10ha and 30ha must grow at least two crops, the larger of which may not cover more than 75% of the arable area;
- Those with more than 30ha must grow three crops, the largest of which may not cover more than 75% and the smallest of which must cover at least 5% of the arable area.

(art.44(1) of Regulation 1307/2013)

There are exemptions: **art.44(3)**:

- (a) more than 75% of the arable land used (a) for the production of grasses or other herbaceous forage, (b) fallow land, or (c) a combination of the two, unless the arable area not covered by these uses exceeds 30ha;
- (b) more than 75% of the eligible agricultural area is (a) permanent grassland, (b) used for grasses or other herbaceous forage, (c) used to cultivate crops under water for a significant part of the year or for a significant part of the crop cycle, or (d) any combination of the three, unless the arable area not covered by these exceeds 30 hectares;
- (c) more than 50% of the areas of arable land declared this year were not declared last year and where all arable land is under a different crop compared to that of last year.

“Crop” is defined by **art.44(4)** as:

- (a) a culture of any of the different genera defined in the botanical classification of crops;
- (b) a culture of any of the species in the case of *Brassicaceae*, *Solanaceae*, and *Cucurbitaceae*;
- (c) land lying fallow;
- (d) grasses or other herbaceous forage.

Winter and spring varieties of the same crop are to be treated as two crops. Which is which is determined by reference to either the National List or the Processors and Growers Research Organisation's Recommended List or, for crops not on either list, see the EC Common Catalogue at: ec.europa.eu/food/plant/propagation/catalogues/database/public/index.cfm

The latest information from DEFRA is in its October guidance and will be updated at www.gov.uk/cap-reform from time to time.

Period for assessment of crop diversification will be 1st May to 30th June in the year of claim (the "cropping period"), during which 5% of claimants will be inspected. Where a crop is harvested before the end of June, the presence of stubble will be acceptable evidence of compliance and DEFRA is actively examining with the Commission other possibilities to accept evidence should the crops not be present at the time of inspection.

Ecological focus areas

EFA's apply where more than 15ha within a holding is "arable land". From 1st January 2015, at least 5% of that arable land must be within the definition of EFA.

From the list of available options, DEFRA has chosen to use:

- Fallow land;
- Buffer strips;
- Catch- and cover crops;
- Nitrogen-fixing crops; and
- Hedges.

Fallow land 1m² provides 1m² towards EFA. The minimum area admissible will be 0.01ha (100m²) with a minimum width of 2m.

Buffer strips 1m length provides 9m² towards EFA, whatever the width. Need to be adjacent to a watercourse or parallel to and up a slope from it. No set distance from watercourse but must be capable of managing run-off.

Minimum width 1m; maximum 10m, measured in each case from the top of the bank. Strips used towards satisfaction of cross compliance may also be used for EFA.

Catch crops or green cover 1m² provides 0.3m² towards EFA. Catch crops period: 31st August to 1st October; cover crops 1st October to following 15th January. In each case those periods will begin within the year of claim, i.e. crops sown in 2015 will relate to the EFA obligations for the 2015 claim.

Nitrogen fixing crops 1m² provides 0.7m² towards EFA. The minimum admissible area is 0.01ha (100m²). There are no specific cultivation requirements and this may, as with fallow land, be taken as part satisfaction of the crop diversification requirement at the rate of 1m² satisfies 1m².

Hedges will be calculated as 1m length provides 10m² towards EFA (1km = 1ha). Minimum length 20m. May include gaps not exceeding 20m. No minimum or maximum height. They will need to be “next to” arable land.

- If a hedge is separated from arable land only by a feature qualifying for BPS (e.g. ditch less than 2m wide) it will qualify for EFA.
- Hedges separating a farmer’s land from non-arable may be counted in full provided the farmer is responsible for both sides. If he is responsible for the arable side only, he may counted it at half rate (1m = 5m²); if for the non-arable side, it is ineligible.
- Hedges separating a farmer’s land from non-agricultural land (e.g. a road or woodland) are eligible provided the farmer is responsible for both sides of the hedge.
- Hedges separating a farmer’s arable land from someone else’s land may be counted at half rate (1m = 5m²).

Hedgerow maintenance

Under revised cross compliance rules, it was set to become a requirement that hedges would need to remain uncut until the beginning of September. DEFRA has announced in its October update that it is seeking a derogation allowing cutting “in prescribed circumstances” during August.

Solar panels

Land under solar panels will from 2015 not be eligible for matching against entitlements, even if it is used for agricultural activity.

Double funding

This is an issue for some claimants who have obligations under agri-environment or woodland grant scheme agreements.

Those affected by double funding payment reductions are being contacted by Natural England and given three options:

- Continue with the agreement and accept the reduced payments;
- Amend the agreement to add in further options or add land covered by existing options; or
- Withdraw from the agreement with effect from 31st December 2014 without penalty.

Claimants who choose to withdraw will be paid pro rata to the end of the year. Those who fail to respond to Natural England by **15th November 2014** will be assumed to accept the reduced payments and will continue to be liable to comply with the agreement on that basis.

Artificiality

There is a solid principle in all EU matters called abus de droit (abuse of rights). All EU schemes contain provisions that “no advantage” is to be granted in favour of those who “artificially create” circumstances of compliance with conditions to qualify for support or, as the case may be, avoid penalties. The DEFRA guidance has a number of comments to that effect.

Any restructuring exercises, for example, will be vulnerable unless there are justifiable commercial reasons for them outwith simply improving one’s position under a support scheme.

If you want to know how not to do it, read the European Court of Justice’s decision in the case of *Slancheva sila EOOD v Izpalnitelen director na Darzhaven fond ‘Zemedelie’ Razplashtatelna agentsia* (2013) Case C-434/12.

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