

Commons and Pillar 1 Support post–2013

1 Introduction

1.1 This paper is submitted to the National Common Land Stakeholder Group's ('the Group') meeting on 23 May 2011, as a basis for discussion about the future of Common Agricultural Policy (CAP) Pillar 1 support (*i.e.* direct agricultural subsidies to farmers) in relation to common land, and particularly actively grazed upland commons, in England. If your organisation is unable to attend the meeting on 23 May, you may wish to ask another member to represent your organisation's views, or to let us have written comments in advance of the meeting.

1.2 The paper explains, by way of background, the management of common land, the administration of the current Pillar 1 subsidies (the Single Payment Scheme — SPS) on common land, and looks at future options for the administration of such payments under a reformed Pillar 1 from 2014 onwards. The paper notes that the administration of the current scheme is heavily circumscribed by the relevant European regulations, and explores what flexibilities would need to be sought under a new scheme to deliver desired outcomes.

1.3 We hope to be able to provide members with data on current take-up of SPS on common land in advance of the meeting on 23 May.

2 Background

2.1 Commons are land, generally open and unenclosed, which is owned by one person, but over which another person ('a commoner') is entitled to exercise rights of common (such as grazing animals or cutting bracken for livestock bedding), and these rights are generally exercisable in common with others. On most commons, the extent of the common land, and the rights over it, are recorded in registers kept by the 'commons registration authority' (*i.e.* county councils and unitary authorities).

2.2 Commons are highly variable in their character, appearance, ownership, biodiversity, traditions, rights and management. So while about 3% of England is common land (around 400,000 ha, and a further 175,000 ha in Wales), of which about three-fifths is designated as sites of special scientific interest, and around four-fifths is located within National Parks and Areas of Outstanding Natural Beauty, even neighbouring commons may have very different characteristics.

2.3 Commons are an essential part of the economy of hill farming in some of our least prosperous regions, enabling many upland farms to remain viable: about 37% of agricultural land above the Moorland Line is common land. But commons also provide benefits to millions of people through open space for recreation, so enhancing their quality of life. They provide a wide range of habitats for our native species, protecting them from the pressures of the twenty-first century. They are a quintessential component of the English landscape (think of the New Forest or the Lakeland fells, Wimbledon Common or Harrogate Stray). Undisturbed for generations, they host some of our finest prehistoric archaeological sites. And they are key to the social cohesiveness of many, often remote, communities — whether because of the annual drift to gather livestock, or because everyone's home faces onto the village green.

2.4 There is no default management mechanism for commons. Where commons remain in agricultural use, each commoner is generally entitled to exercise his rights to graze stock over the whole of the common. But in practice, on many upland commons, a commoner's stock will keep to a particular part of the common (typically known as a 'heft'), and hefting patterns can be inculcated in traditional breeds of sheep and cattle by diligent shepherding. Commoners may confer with each other on the overall management of the common (e.g. as regards disease control, or gathering animals for inspection, marking or sale) through commoners' associations, which are generally unincorporated, voluntary bodies, often with a constitution and appointed officers. However, a commoners' association has no powers to manage the common other than through consensual decision making, and even here, the landowner's agreement will be needed to anything affecting the land itself (such as burning or drainage).

2.5 A few commons are managed by statutory bodies established under local Acts of Parliament (e.g. the New Forest, Ashdown Forest, the Dartmoor commons). There are powers in the Commons Act 2006 to establish commons councils for the same purpose (as yet, these powers have not been exercised, but Defra hopes to establish a first commons council during 2011–12). Many, mainly lowland, commons are subject to schemes of regulation under the Commons Act 1899 which vest management in the control of the local authority.

2.6 Common owners have the same rights as other landowners, but must not interfere with the exercise of commoners' rights. They may themselves graze the common only if there is surplus capacity after the commoners' requirements have been met.

3 Single Payment Scheme and common land

3.1 Pillar 1 support is provided through the SPS. Entitlements were established in relation to common land (as other land) in 2005.

3.2 SPS entitlements on common land are established in relation to the commoner's share of the total grazing rights. It is immaterial whether those rights are actually exercised (*i.e.* whether the commoner places stock on the common), but the claimant must be a person who contributes to keeping the common in good agricultural and environmental condition (GAEC). The commoner is allocated a notional area of the common proportionate to the commoner's share of the total grazing rights. In effect, the common will be divided up (for SPS purposes only) into a number of notional parcels, each assigned to a right holder. It is immaterial whether an entitlement to SPS is in fact established in connection with a particular right and its associated notional parcel: that notional parcel is still reserved to that particular right.

3.3 If particular commoners do not establish entitlements in connection with their rights, the entitlements associated with those rights are not parceled out to other claimants on the common, but are recycled within the 'region' in which the common is located: this means that the smaller the proportion of right holders establishing entitlements in relation to a common, the smaller the pot of SPS money available for the common. Put another way, a common with a large number of right holders but only a small number of active commoners will attract only a small proportion of the potential available SPS — notwithstanding that those few active commoners may well assume management responsibility for the whole common.

3.4 Each entitlement is activated by the commoner on an annual basis, in order to give rise to a claim. The SPS does not require claimants to be active commoners. So, on commons as elsewhere, a claimant need not place stock on the common in order to activate an entitlement. A claimant must however, contribute to the delivery of GAEC — but it is unlikely that any claimant will be penalised if the common is maintained in GAEC, regardless of that claimant's individual contribution.

3.5 Common owners may establish entitlements in relation to the common only if there is a notional surplus grazing capacity, taking into account the total grazing requirements of all the commoners as measured against a standard benchmark.

3.6 A commoners' association is generally unable to establish entitlements on behalf of member commoners, because the association does not have the use of the rights. However, following a relaxation of the SPS rules earlier this year, a commoners' association may claim in respect of particular rights of common. The association will have to demonstrate that it is acting as the farmer in terms of keeping the land in GAEC. This change will be explained at the meeting on 23 May.

4 Options for future Pillar 1 support

4.1 This paper explores two options for future delivery of Pillar 1 payments. Other options, or variations of the options presented here, may be practicable, and the Group is invited to engage in discussion of these at its meeting.

4.2 The form of future Pillar 1 support is currently under negotiation among Member States and the European Commission. In due course, the Commission will make regulations which will set out the basis on which such support can be delivered by, and the discretion afforded to, Member States.

4.3 It is worth noting that the English (and Welsh) character and structure of commoning is not widely shared elsewhere in Europe: commons are widespread in Europe, but we believe that most continental commoning systems are endowed with stronger management systems, typically comprising control of the common vested in a powerful management body (such as a mayor or co-operative). The English system of divided ownership and rights is understood to be unusual.

4.4 While it is likely that the Commission's regulations will make specific provision for the administration of Pillar 1 support in relation to common land, it is less likely that such provision would spontaneously take account of the unusual management characteristics of English commons. Indeed, it may be said that the absence of such provision is a significant drawback in relation to the delivery of existing SPS support on commons. However, if Defra is able to identify a favoured approach to delivery on commons from 2014, it may be possible to help shape emerging regulations to take account of those requirements. Nevertheless, while we wish to encourage a debate with stakeholders about the form of delivery of Pillar 1 support after 2013, it is important to bear in mind that, as now, the flexibility to promote a particular approach may be absent or heavily constrained.

4.5 During the consultation process, the Farming Regulation Task Force, chaired by Richard Macdonald, received evidence on commons in relation to the SPS and cross-compliance and will be looking at this as part of their work on reducing bureaucratic burdens on farmers and food processors.

Continue with existing methodology

4.6 The advantages and disadvantages of the present SPS on commons are well understood, and may be summarised as follows:

SPS and common land	
Advantages	Disadvantages
<ul style="list-style-type: none">• relatively straightforward and objective to administer, as entitlements are established against registered rights• avoids invidious decisions about whether commoners are (or were) actively engaged in management of common• ensures small numbers of commoners cannot claim SPS for whole of common where many rights go unclaimed and common as a whole is not effectively managed	<ul style="list-style-type: none">• no mechanism to distribute payments proportionate to management of common• commoners can claim only in proportion to share of total rights — regardless of contribution to active commoning/delivery of GAEC• unclaimed rights attract no SPS, so commons with many inactive commoners attract less SPS (irrespective of management input by active commoners)• not straightforward to enforce GAEC requirements against individual claimants• large commons with few but active commoners may attract disproportionate individual SPS payments in relation to obligations to deliver GAEC

Q. Does the Group agree that the existing SPS methodology for commons is unsatisfactory, and that Defra should consider alternatives?

Payments through commoners' associations

4.7 An alternative approach is that any Pillar 1 payment should be made to the commoners' association, which should itself be responsible for distribution of the payment received among its members, provided only that payments were made to active commoners.

4.8 This approach would enable commoners to apply jointly for Pillar 1 payments, and to apply those payments holistically to management of the common, and Defra (*i.e.* including the Rural Payments Agency) would resile from decisions about who gets what. It might be expected that a common would be eligible for Pillar 1 payments in proportion to the area of the common (depending, of course, on the structure of Pillar 1 support post-2013). But the approach also poses questions about the extent to which Defra would retain responsibility and oversight of the distribution of funds downstream: *e.g.* what if a commoner claimed to be arbitrarily excluded from involvement in the commoners' association (and receipt of any payment)? Would commoners' associations need to be incorporated, and from whom would Defra recover in the event of a breach of cross-compliance?

4.9 Even if this approach were to be preferred, Defra would need considerably more discretion to proceed in this way than is available under the SPS. For example (in relation to the current SPS):

- commoners' associations are not themselves entitled to the use of rights of common, or of the land (*c.f.* some continental management structures, where the managing body itself controls the rights, which are allocated by it to individuals for their use);
- commoners' associations are generally unincorporated voluntary bodies, and lack an assured legal status (there is considerable uncertainty about the extent to which such bodies can enter into agreements and be held liable for any breaches);
- commoners' associations are not necessarily inclusive of all those who exercise rights over the common, nor of those who hold (but do not exercise) rights;
- a commoner exercising rights may claim under the SPS but not participate in an Environmental Stewardship agreement, and *vice versa*;
- common owners may be entitled to part of the grazing of a common, but are unlikely to be engaged in the commoners' association;
- a commoners' association has no mandatory powers of management over the common (but can act only by consensus): so its power to deliver (for example) GAEC is dependent on co-operation, and can be weakened by dissent; but
- no individual commoner is necessarily identifiable as responsible for breaches of GAEC (depending on the nature of the breach), because the common is managed and grazed by a number of claimants;
- commons councils may be established for some commons, but will not be established for the majority (and therefore do not provide a solution for commons generally).

4.10 These difficulties suggest that Defra would need considerable latitude under post-2013 Pillar 1 support to deliver this approach, and raise the question of how such flexibility might best be achieved. For example, in order to implement this approach in relation to the current SPS, Defra would have needed powers to:

- treat with commoners' associations in relation to common land, notwithstanding that the association does not itself have the use of the rights or the land;
- hold a commoners' association responsible to deliver GAEC on a common (rather than individual commoners);
- require information from a commoners' association about individual beneficiaries (to enable recovery action against individuals as well as the association);
- resist claims from individual commoners (in relation to the common) where an entitlement is established by the commoners' association;
- suspend payments where a dispute exists in relation to the common which remains unresolved.

Q. Does the Group agree that Defra should strive to deliver Pillar 1 support on commons after 2013 through commoners' associations? If so, does it agree with this assessment of the difficulties of such an approach (paragraph 4.9, and of the powers which Defra would require (paragraph 4.10)?

Alternative approaches

Q. Are there alternative approaches to delivery of Pillar 1 support which Defra should consider?

Commons and Access Implementation Team
27 April 2011

Notes on CAP reform

The European Commission, in its [Commission Communication on the CAP towards 2020](#), published in November last year, outlined possible policy orientations and options for the future of the CAP. Section 6.1 of the communication explored how funding instruments could be adapted better to meet the three main objectives of the future CAP: viable food production, sustainable management of natural resources and climate action, and balanced territorial development:

“The future of direct payments to be granted to active farmers could be based on the following principles, taking up the concept proposed by the European Parliament:

- **Basic income** support through the granting of a basic decoupled direct payment, providing a uniform level of obligatory support to all farmers in a Member State (or in a region) based on transferable entitlements that need to be activated by matching them with eligible agricultural land, plus fulfilment of cross-compliance requirements. Introducing an **upper ceiling** for direct payments received by large individual farms ("capping") should be considered to improve the distribution of payments between farmers. Disproportionate effects on large farms with high employment numbers could be mitigated by taking into account salaried labour intensity.
- Enhancement of environmental performance of the CAP through a mandatory “**greening**” component of direct payments by supporting environmental measures applicable across the whole of the EU territory. Priority should be given to actions addressing both climate and environment policy goals. These could take the form of simple, generalised, non-contractual and annual environmental actions that go beyond cross-compliance and are linked to agriculture (e.g. permanent pasture, green cover, crop rotation and ecological set-aside). In addition, the possibility of including the requirements of current NATURA 2000 areas and enhancing certain elements of GAEC standards should be analysed.
- Promotion of the sustainable development of agriculture in areas with **specific natural constraints** by providing an additional income support to farmers in such areas in the form of an area-based payment as a complement to the support given under the 2nd pillar.
- In order to take account of specific problems in certain regions where particular types of farming are considered particularly important for economic and/or social reasons, voluntary **coupled** support, may continue to be granted, within clearly defined limits (with support based on fixed areas, yields or number of heads).
- A simple and specific support scheme for **small farmers** should replace the current regime in order to enhance the competitiveness and the contribution to the vitality of rural areas and to cut the red tape.
- Simplification of **cross compliance** rules by providing farmers and administrations with a simpler and more comprehensive set of rules without watering down the concept of cross compliance itself. The inclusion of the Water Framework Directive within the scope of cross compliance will be considered once the Directive has been implemented and the operational obligations for farmers have been identified.

These changes in the design of direct payments should go hand in hand with a better definition and targeting of support to **active farmers** only, responding to the criticism of the European Court of Auditors.”

Defra’s response to the Commission’s paper is published in the [UK response to the Commission communication and consultation](#).