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Briefing Paper

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Proposed Draft Farm Welfare Bill – potential considerations

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1 Background

This briefing paper provides an overview of the proposed draft Farm Welfare Bill produced by NI Farm Groups.

As well as considering the main elements within the Bill, the briefing paper presents an overview of the use of farm gate pricing mechanisms across a number of jurisdictions.

It should be noted that the contents of this briefing paper do not constitute legal advice and they should not be used on this basis.

2 Introduction

The issue of farm incomes, farm produce prices and associated volatility has been a key challenge for the agricultural sector over recent years, whether it be in relation to the cost of inputs or the achievable price for finished produce.

A number of previous RaISe publications have explored these issues and their impact on farm businesses and wider farm families. The most recent blog article[1] considering these issues in May 2020, during the early stages of the COVID19 pandemic and associated lockdown in Northern Ireland, included the following observations:

> *The introduction of the UK lockdown on 23 March 2020 had a direct and almost immediate impact on the market and demand for many kinds of farm produce across the UK. The shutting down of the hospitality sector in all of its myriad forms in particular had a massive and immediate impact on prices for beef and lamb in particular. DAERA market data for 2019 and 2020 highlights the drop in prices for different classes of beef this year, and more particularly since week 13 which began on 23 March. The Ulster Farmers' Union has lodged their concerns around the price reductions for lamb and beef and have provided a practical assessment of their impacts on farm incomes. According to UFU analysis published on 10th April 2020, the recent falls in the price of beef and lamb would have equated to individual farmers seeing a loss of £76 on a 380kg U-3 grade steer carcass and a loss of £14.30 on a 22kg lamb carcass.*

Across all of the RaISe publications dealing with these issues, a number of common contextual issues are identified in relation to local agriculture as follows:

- Agriculture is more significant in Northern Ireland than any other part of the UK in terms of employment and economic contribution and as such anything that affects the sector, either negatively or positively, will have significant impacts;
- Direct payments are critical to the short term survival, never mind long term sustainability of many farms, particularly given the variation in farm incomes;
- The high level of LFA land within Northern Ireland, combined with the small average farm size, may present challenges for farm profitability; and
- The heavy reliance on cattle (dairy and beef) and sheep within Northern Ireland may make local agriculture particularly sensitive to any changes to policy affecting these sectors.

3 Content of the proposed draft Bill

The proposed draft Bill as presented to the Committee is titled as the Farm Welfare Bill (Northern Ireland), and has a stated aim of preventing damage to the welfare of

[1] COVID-19 and farming – A bitter harvest?, RaISe blog article, 5 May 2020

farming businesses in Northern Ireland by making provisions about the prices for farm produce.

In terms of specific content the proposed draft Bill is made up of six sections as follows:

- Section1 – Fair Farm Gate Prices Index;
- Section 2 – Fair Farm Gate Pricing Panel;
- Section 3 – Minimum Pricing;
- Section 4 – Anti-avoidance Provisions;
- Section 5 – Commencement and Transitional;
- Section 6 – Interpretation.

Table 1 below provides a brief overview of the specific content of the each of these six sections.

Table 1 : Overview of proposed draft Farm Welfare Bill

Section	Sub sections and associated provisions
1 Fair Farm Gate Prices Index	5 subsections • Subsection 1 – establishes DAERA responsibility for the compilation, maintenance and publication of an index to be known as the Fair Farm Gate Prices Index; • Subsection 2 – establishes requirement for Fair Farm Gate Prices Index to make separate provision for each class of produce commonly sold by farm businesses; • Subsection 3 – establishes that the Index will specify lowest prices for best quality produce, lowest quality produce consistent with wholesale market acceptability and compliance with food standards, and also enable setting of other prices based on objective quality indicators; • Subsection 4 – sets the terms by which prices must be set – taking account of the cost of production and an appropriate margin; • Subsection 5 – sets the terms by which the Index should determine production costs, identify the viability margin, index link the viability margin and specification of produce.
2 Fair Farm Gate Pricing Panel	8 subsections • Subsection1 – establishes that the Commissioner for Public Appointments is responsible for the appointment of the Fair Farm Gate Pricing Panel; • Subsection 2 – Sets the responsibilities and tasks for the Commissioner in terms of the Panel membership; • Subsection 3 – identifies who the Commissioner must consult before appointing members to the Panel; • Subsection 4 – establishes the power for the Commissioner to appoint one or more persons as observers to the work of the Panel; • Subsection 5 – establishes the requirement for the Panel to annually appoint independent experts to review and make recommendations around the Index; • Subsection 6 – sets the responsibility for the Panel to sets the first index, maintain it and publish a table of seasons in relation to produce; • Subsection 7 – sets the requirements/specification for individuals being considered as independent experts;

Section	Sub sections and associated provisions
	• Subsection 8 – sets the responsibilities that DAERA has for panel members including remuneration, expenses, secretariat support and access to departmental data.
3 – Minimum Pricing	6 Subsections • Subsection 1 – establishes that it is an offence to buy listed produce at a price below the listed price; • Subsection 2 – defines listed produce and listed price; • Subsection 3 – establishes that purchase price means the price after any discounts or deductions; • Subsection 4 – establishes that anyone committing an offence under subsection 1 is subject, on summary conviction, to a fine not exceeding £50,000; • Subsection 5 – establishes the responsibility on DAERA to appoint inspectors to consider disputes about the application of the Index to transactions; • Subsection 6 – sets a requirement on DAERA to consult the Fair Farm Gate Pricing Panel before appointing inspectors referenced in subsection 5.
4 – Anti-avoidance Provisions	6 Subsections • Subsection 1 – establishes that it is an offence to purchase produce intended for retail sale within Northern Ireland from a supplier who is not a farm business as defined in Section 6; • Subsection 2 – defines produce as equating to classes of produce deemed to be commonly sold by farming businesses in Northern Ireland; • Subsection 3 – establishes the grounds for defence in relation to persons charged with an offence under subsection 1 – more specifically details the provision of a Produce Non-Availability Report and sets a requirement to retain copies of such for 6 years from date of purchase; • Subsection 4 – further defines that it is a defence for persons charged with an offence under subsection 1 to show that the produce was out of season at the time of purchase; • Subsection 5 – establishes that a person who commits an offence under subsection 1 is liable, on summary conviction, to a fine not exceeding £50,000; • Subsection 6 – establishes the requirement for DAERA to appoint inspectors to carry out random inspection of Produce Non Availability Report records.
5 – Commencement and Transitional	3 subsections • Subsection1 – establishes the principle of provisions of the Bill/Act coming into force on such day or days as DAERA may by order appoint; • Subsection 2- establishes a 2 year window from the passing into law of the Act during which Section 1, subsection 4 applies with such modifications as the Panel thinks appropriate to ensure an orderly transition to the application of the Index; • Subsection 3 – establishes the principle that where the Panel apply Section 1, Subsection 4 with modifications, they must make provision for the gradual adjustment towards application without modification, at intervals of around 3 months;
6 – Interpretation	Defines the terminology utilised within the Bill/Act as follows: • 'the Department' – DAERA;

Section	Sub sections and associated provisions
	• 'farming business' – any commercial undertaking located in Northern Ireland producing agriculture or horticulture (or both) consisting of one acre or more of farmed land; • 'the Index' – the Fair Farm Gate Prices Index; • 'produce' – produce grown or produced on a farm in Northern Ireland; • 'relevant person' – any sole trader, partnership, co-operative group, public or private limited company who is a wholesale purchaser of produce commonly sold by farming businesses, bought with intention of onward processing, wholesale or retail sale, retail sale, for the purposes, does not include sale at local markets, farmers markets or other ad-hoc or non-permanent points of sale; • 'produce commonly sold by farming businesses' – any class of field crop, livestock product or other agricultural or horticultural produce which generates an estimated annual aggregate output from NI farms of one million pounds sterling or more; • 'the Panel' – the Fair Farm Gate Pricing Panel; • 'out of season' – falling outside the season for that category of produce being available in Northern Ireland, as specified by the Panel in accordance with Section 2, subsection 6(c).

4 Farm produce price provisions within other jurisdictions

As set out in table 2 below there are market price interventions of various types deployed within many OECD countries. The data in this table is sourced from the OECD's Agricultural Policy Monitoring and Evaluation 2020 report[2] and from a previous RaISe publication looking at models of farm support (NIAR224-16).

Table 2: Farm produce price provisions/interventions for various OECD members

Country	Farm produce price provisions/interventions
China	Minimum purchase prices for wheat and rice are set every year by the National Development and Reform Commission (NDRC) in consultation with the Ministry of Agriculture and Rural Affairs (MARA) and other government institutions. Their application is limited to major wheat and rice producing provinces. They differ by type of grain, are announced before sowing seasons, and only apply for a fixed period limited to several months after the harvest. The central government mandates the state-owned China Grain Reserves Corporation (Sinograin) and other state-owned companies to undertake intervention purchases in the case market prices fall below the respective minimum prices. The government-led temporary purchase and storage policy at pre-determined prices – mostly intended to stabilise market prices and to ensure adequate supplies – was discontinued in 2014-15 for cotton, soybeans, and rapeseed, and in 2016 for maize.
Australia	Mandatory dairy code of conduct came into force on 1 January 2020. The code applies to supply contracts drawn after that date and regulates business relationships between farmers and processors, including banning retrospective reduction of farm gate milk price. The code is under the authority of the Australian Competition and Consumer Commission (ACCC) and provides for a dispute resolution process.

[2] Agricultural Policy Monitoring and Evaluation 2020, OECD

Country	Farm produce price provisions/interventions
Argentina	Argentina provides negative support to its agricultural sector mainly due to export taxes that depress domestic producer prices. The Special Tobacco Fund (Fondo Especial del Tabaco FET) provides a supplementary payment to market prices as part of a broader policy arrangement. Created in 1972, the FET (Decree Law 19.800) provides this additional revenue to tobacco producers located in the northern provinces of Jujuy, Salta, Misiones, Tucuman, Corrientes, Chaco and Catamarca. These provinces are dominated by small producers with economic and social difficulties. The fund is financed by a tax of 7% on tobacco retail consumption prices (excluding IVA) and the interests and other revenue generated by the fund, and is directly managed by the Ministry of Agriculture, Livestock and Fisheries.
Brazil	Reflecting its position as a competitive exporter, Brazil provides relatively low levels of support and protection to agriculture. The basic element of price support policy consists of regionally set minimum guaranteed prices, which cover a broad range of crops and a few livestock products like cow and goat milk, and honey. To secure these minimum guaranteed prices, the government implements several price support mechanisms on the domestic market, including direct government purchases (AGF programme); premiums to commercial buyers who pay minimum prices to producers; and public and private options contracts backed by a private risk premium option.
Canada	Canada has significantly reduced its agricultural support since the late 1980s. Producer support as a share of gross farm receipts (%PSE) was halved between 1986-88 and 2000-02, in large part because market price support (MPS) to the grains industry was discontinued in 1995. Canada's agricultural support policies differentiate between the supply-managed sectors, which are protected by high custom tariffs and are oriented towards the domestic market, and other commodity sectors, which operate within an open market environment and are export oriented. A supply management system provides market price support to the dairy, poultry and eggs sectors through tariffs and production quotas that are tradable only within provinces, combined with a system of domestic price-setting according to production costs.
EU	Support to agriculture in the European Union has declined gradually since the 1990s. Support to producers as a share of gross farm receipts (%PSE) has stabilised at around 19% since 2010. Although support in the form of price distortions has been reduced substantially, trade protection measures (including import and export licensing, Tariff Rate Quotas (TRQs) and special safeguards) remain in effect for a number of sectors. The EU can also utilise market-support measures in circumstances such as extreme weather. The EU has also intervened due to trade disruptions e.g. Russian Import Ban on EU products. In such instances available options include taking products into public intervention (national intervention agencies withdraw surplus produce from the market) or the use of private storage aid (to stabilise markets) .
USA	The level of support provided to agricultural producers in the United States has been consistently below the OECD average. Producer support (PSE) was 11% of gross farm receipts in 2017-19. On average, prices received by farmers in 2017-19 were 4% higher than those observed in world markets, largely as a result of market price support (MPS) for milk, sugar, and to a lesser extent sheep meat. These commodities are protected by border measures (including tariff rate quotas). Producer prices of other commodities are mostly aligned with border prices. The primary crop commodity programmes under the 2018 Farm Bill include programmes that make payments to producers with historical base acres of programme crops (wheat, feed grains, rice, oilseeds, peanuts, pulses and seed cotton) when prices fall below statutory minimums or when crop revenue is low relative to recent levels.
South Korea	Korea's level of support to agricultural producers gradually decreased during the last two decades due to continued efforts towards market-oriented reforms, but in spite of these reductions, support levels remain well above the OECD average and potentially most distorting forms of support predominate.

Country	Farm produce price provisions/interventions
	The most important direct payment programme is the rice income compensation scheme introduced in 2005. The scheme consists of fixed and variable payments. While the fixed payment is a decoupled income support, the variable payment is determined according to the difference between a target price and each year's harvest-period price. If the harvest-period price is lower than the target price, farmers receive 85% of the difference, after deduction of the fixed payment. The target price is adjusted every five years reflecting the five-year price change.
New Zealand	Since the reform of its agricultural policies in the mid-1980s, production and trade distorting policies have almost disappeared in New Zealand, and the level of support to agricultural producers has been the lowest among OECD countries. Most of the (very low) support to producers is provided through market price support (MPS), one of the potentially most distorting forms of support and arising from SPS-related import restrictions (Figure 20.1). This creates some Single Commodity Transfers (SCT) for poultry meat and eggs.

It is clear from the data presented in table 2 that market price interventions are employed across a range of OECD countries and for a range of products. Whilst the levels of intervention vary considerably this does establish that there are precedents for either setting minimum prices for farm produce or for acting when prices fall below a particular threshold.

It does need to be said however that the OECD analysis of the data reveals the following trend across its member countries;

> *The way support is delivered to producers has also evolved. In particular, the development in support to agriculture in the OECD area is characterised by the long-term decline of support based on commodity output (including market price support and output payments). OECD work has identified this form of support as having the strongest potential to distort agricultural production and trade…*[3]

Furthermore the recommendations contained within the report include the following as they relate to market price interventions:

- Dismantle, in a gradual but consistent process, all policies identified as particularly detrimental to market efficiency and the sector's environmental performance. The priority reform should be the sectors where high support is provided via the most distorting measures. Such reforms would reduce intra-sectoral distortions and allow markets to function better, while simultaneously reducing environmental pressures that derive from incentives to intensify production in unsustainable ways;
- Phase out distorting budgetary support. This would liberate funds for more targeted policies, as well as for investments to make agriculture more productive, environmentally sustainable and resilient. Such funds could be allocated to wider societal priorities including climate adaptation and mitigation;
- Improve the efficiency of support to individual producers by targeting well-defined, quantifiable outcomes of public interest. Payments for non-commodity outputs (such

[3] ibid

as the landscape) are means to create markets for public goods, while providing agricultural producers with additional income opportunities;

- Integrate farm households into social security systems to reduce the need for spending on agriculture-specific income support. Governments should improve their understanding of the financial situation of farm households and target any market failures that lead to persistent low incomes within the agriculture sector.

In summary, whilst direct market price interventions undoubtedly exist, the OECD is of the opinion that there should be a move away from such mechanisms across their member countries.

5. General issues for consideration in relation to the proposed Farm Welfare Bill

This section of the paper considers some general issues as they could relate to the adoption of the proposals within the draft Farm Welfare Bill.

5.1 Is the Bill compliant with the UK Competition Act 1998?

The UK Competition Act 1998[4] has provisions designed to prohibit practices which lead to agreement, business practice or conduct which has, or could have, a damaging effect on competition in the United Kingdom.

Part 1, Chapter 1, Section 2 of the Act specifically identifies what activity is prohibited. Subsection 2 specifically lists the following as prohibited unless exempted:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The idea of a fixed market price for farm produce could potentially fall foul of the prohibition identified in paragraph (a), although this would need to be confirmed by a qualified legal professional.

As previously stated the Competition Act includes provisions for the use of exemptions that could theoretically overturn the prohibitions. In particular, Part I, Chapter I, Exemptions, Section 9 of the Act highlights the following:

[4] Competition Act 1998

An agreement is exempt from the Chapter I prohibition if it

(a) contributes to—

(i) improving production or distribution, or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit;

(b) does not—

(i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

(ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Once again however there is a need for professional legal advice to definitively determine whether any such exemption could be secured for a Farm Welfare Bill which included minimum pricing requirements.

5.2 A lack of costings data

The proposed draft Bill proposes the creation and maintenance of a Fair Farm Gate Prices index and there are a number of identified components as follows which would undoubtedly accrue costs. These include, but may not be limited, to the following:

- Appointment of a Fair Farm Gate Pricing Panel to oversee the appointment of independent experts and maintenance of the Index – made up of 8 to 12 members;
- Appointment of one or more persons as observers of the Panel;
- Appointment and retention of ‘independent experts’ by the panel to both create and review the Index;
- Potential annual procurement exercise to appoint independent experts;
- Creation of a Farm Gate Prices Index that makes separate provision for each class of produce commonly sold by farming businesses;
- Publication of the index;
- Creation of a Produce Non-Availability Report administrative system;
- Appointment of inspectors to consider disputes about the application of the Index transactions;
- Appointment of inspectors to carry out random inspection of Produce Non-Availability Report records.

The Bill explicitly references DAERA as being responsible for paying appropriate remuneration and expenses to members of the panel and independent experts as well as providing appropriate secretariat and other facilities.

None of these provisions however appear to be costed based on the information included within and accompanying the proposed draft Bill. In addition, the proposed draft Bill appears to suggest that DAERA will bear all of these costs, as there is no reference to any other body or source of funding such as a producer levy.

Additionally, and as referenced in section 5.1 of this paper, some of the outworking of the proposed draft Bill could potentially lead to legal process, but the proposed draft Bill does not explicitly state whether DAERA would be liable for meeting the costs of such action, although by inference it could appear to have. Similarly, there is no indication as to whether funds generated by the proposed draft Bill in the form of fines could be utilised by DAERA for the operation of the Index and its supporting elements.

Finally, there seems to be no assessment of the potential costs emerging from the proposed draft Bill for retailers and consumers. If such work has been completed by the proposed draft Bill proposers, it would be interesting to see if it actively considered the potential impacts on low-income households in particular.

5.3 State aid considerations

Article 10 within the Ireland/Northern Ireland Protocol[5] sets out the provisions relating to state aid, and is further supplemented by Annex 5 in general terms, and Annex 6 with specific regards to the issue of agricultural support.

In basic terms, as a result of Article 10, EU state aid requirements will continue to apply in Northern Ireland as they relate to EU laws identified in Annex 5 of the Protocol – it should be noted that these requirements apply to goods but not services. These requirements apply to trade between Northern Ireland and the EU.

Agricultural support is exempt from the application of EU state aid rules as set out in Annex 5 but the level in terms of maximum ceiling of support for agricultural production and trade will be subject to approval by the UK-EU Joint Committee.

The mechanics of this process are set out in Annex 6 of the Protocol and include the fact that the UK-EU Joint Committee is responsible for determining the initial maximum exempted overall annual level of agricultural support and the initial minimum percentage referred to in Article 10(2).

On the 17th December 2020, the UK-EU Joint Committee published their decision[6] on agricultural subsidies. In summary, this decision means that annual agricultural subsidies within Northern Ireland up to the value of £382,200,000 are not subject to EU state aid rules. The Joint Committee decision also includes provisions for the UK to increase this maximum exempted overall annual level of support, up to an additional

[5] New Protocol on Ireland/Northern Ireland and Political Declaration as presented at the October European Council, 17 October 2019

[6] Decision of the Withdrawal Agreement Joint Committee on agricultural subsidies, HM Government, 17 December 2020

amount of approximately £25 million in a given year by the part of the amount of the maximum exempted overall annual level of support that has not been spent in the preceding calendar year.

The reason this issue is significant, relates to the point made in section 4.1 of this paper, namely that the proposed draft Farm Welfare Bill is not costed. The proposed provisions of the proposed draft Farm Welfare Bill could potentially be classified as state aid. In such circumstances, the costs associated with the Bill could theoretically impact on the amount of agricultural subsidy, free from EU state aid constraints, that DAERA has to spend within a year. An accurate assessment of the potential risk here is however impossible without detailed bill costings. This observation is also made within the context of the UK government committing £315 million of spending specifically for Northern Ireland agriculture in 2021-22[7].

5.4 Treasury spending rules: implications

HM Treasury operates a series of principles for the allocation of funding across the UK as part of their statement of funding policy for the devolved administrations. The most recent statement of funding policy published in November 2020[8] includes principle 10 as follows:

> *where decisions taken by any of the devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the UK government or, alternatively, decisions of UK government departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust for such extra costs (e.g. if the Barnett formula doesn't apply), the body whose decision leads to the additional cost will meet that cost.*

The potential significance of principle 10 relates to the fact that it could theoretically lead to the Northern Ireland Executive having to bear costs across the UK resulting from the adoption of a particular policy or piece of legislation within Northern Ireland. For example, and within this context, there is a need to establish if the adoption of the proposed draft Farm Welfare Bill would have financial implications for departments or agencies in the rest of the UK.

5.5 1998 Northern Ireland Act implications

Article 26(4) within Part III of Northern Ireland Act 1998[9] as it relates to international obligations makes it clear that:

[7] Spending Review 2020, HM Treasury, November 2020, page 38
[8] Statement of funding policy: Funding the Scottish Government, Welsh Government and Northern Ireland Executive, HM Treasury, November 2020
[9] Northern Ireland Act 1998

If any subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department contains a provision which the Secretary of State considers- .

(a) would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order; or.

(b) would have an adverse effect on the operation of the single market in goods and services within the United Kingdom, .

the Secretary of State may by order revoke the legislation

In light of Article 26(4b), there may be a need to establish if the potential introduction of the proposed draft Farm Welfare Bill within Northern Ireland could have an adverse impact on the operation of the single market in goods and services within the UK. If this was found to be the case the Secretary of State could potentially revoke any emerging Bill or Act.

5.6 Implications for new agricultural policy and associated support

At the time of writing, there remains a lack of detail on the overall agricultural policy, and specific programmes, that DAERA will operate in Northern Ireland beyond 2021. In November 2020 Minister Poots[10] did however outline a number of broad issues that he hoped to address as follows:

- Farmers should be properly rewarded for delivering environmental outcomes and achieve a return on the environmental assets present on their farms;
- Explore the role for a basic, area-based resilience payment, that provides a safety net, but which does not blunt the incentive to become more productive and deliver better environmental outcomes;
- Fund coupled payments targeting, for example, suckler cow and breeding ewe producers. It is important to stress that this would not be a return to the old coupled payments of the past;
- Coupled support for protein crops – initially as a pilot;
- A new approach to agri-environment measures that is focused on delivering outcomes and delivering a lasting legacy;
- Look at capping more closely as part of the longer term approach to support.

Leaving budgetary questions aside, it remains unclear if the proposed draft Farm Welfare Bill is designed to supplement or replace provisions such as a potential area based resilience payment. This is a significant question given DAERA's need to finalise the form of agricultural policy beyond 2021 and an associated budget. In effect, there is

[10] Northern Ireland Assembly, Official Report (Hansard),Tuesday 17 November 2020Volume 133, No 2, page 34

a need to determine if the proposed draft Farm Welfare Bill would complement or run counter to DAERA's policy direction and objectives beyond 2021.

5.7 What has informed the development of the proposed draft Bill?

Ordinarily, an Executive or Private Member's Bill that comes before the Assembly has been subject to public consultation and stakeholder engagement. The documentation outlining this process and any associated findings normally accompanies the Bill at the point of introduction to the Assembly. There does not appear to be any such documentation to accompany the proposed draft Farm Welfare Bill, and as such, it would be useful to determine the level of stakeholder engagement and consultation that has led to the development of the proposed draft Bill to this point in time.

5.8 Application of the Fair Farm Gate Prices Index given price volatility

As has been established in other RaISe publications referenced in Section 2 of this paper, price volatility has been a key challenge facing farmers over the last decade across a wide range of products. Trying to run a viable, never mind profitable business within this context has been a key struggle for many local farmers.

The idea of a minimum pricing model for produce that takes account of the cost of production plus an appropriate margin would undoubtedly be an attractive proposal for many farmers regardless of any associated challenges around delivery. There are however genuine questions to ask around how such a system operates within volatile market conditions as follows:

- How responsive could the proposed Fair Farm Gate Prices Index be to high levels of market volatility given its requirement for approval by the Fair Farm Gate Pricing Panel? How often could the panel realistically meet and how would costs be controlled?
- If the lowest price for a particular product in season, as set by the Index, is higher than the world market price, is there a risk that wholesalers and larger retailers will simply avoid buying or selling some of these products in their local stores? Could there therefore be a theoretical risk that local farmers would therefore be unable to sell their product?

5.9 The Farm Welfare Bill vs provisions within the UK Agriculture Act 2020

Section 29 of the UK Agriculture Act 2020[11], which extends and applies to Northern Ireland, gives the DEFRA Minister powers to make regulations to introduce obligations that promote fair contractual relationships between primary producers, Producer Organisations, associations of Producer Organisations, produce aggregators and the business purchasers of their products.

[11] Agriculture Act 2020

This is a potentially significant provision as it has been designed to promote fair contractual dealing by business purchasers of agricultural products from qualifying sellers – qualifying sellers are defined, amongst other things, as any '*person carrying on an agricultural activity for the production of products of that kind or otherwise in connection with their production'.*

Subsection (6) sets out examples of the kinds of obligations that may be imposed on business purchasers such as the use of a written contract (6a) and inclusion or otherwise of terms in the contract dealing with a particular matter (6b). Subsection (7) provides examples of the types of terms that could be regulated through the contractual obligations imposed under subsection (6)(b) and (7c) makes specific reference to *pricing mechanisms (including mechanisms for adjustments, premiums and deductions)*.

In November 2020, DEFRA published their outline plans for The Path to Sustainable Farming, covering the period between 2021 and 2024. The document includes the following intention as it relates to supply chain and food policies:

> *…use powers in the Agriculture Act 2020 to address market failures that have led to farmers having a weaker position in the supply chain. We have consulted on mandatory dairy contracts and will act to ensure that trading practices are fair for farmers in all sectors*[12]*.*

Given DEFRA's stated intention to use the powers within the UK Agriculture Act 2020 to address market failure, it would be useful to determine if the use of these powers will extend to Northern Ireland and if so for what sectors and associated produce.

There may also be merit in considering if such powers are extended to Northern Ireland whether these could potentially address some of the aspirations set out within the proposed Farm Welfare Bill.

5.10 Long-term viability of agricultural businesses– is the Bill the vehicle to achieve this?

As mentioned previously one of the stated purposes of the proposed draft Bill, as set out in Section 1, subsection 5(b) is to secure the long-term viability of farming businesses in Northern Ireland. Whilst this is a legitimate aspiration, there is potentially merit in exploring the implications of this approach in light of emerging agricultural policy and a post Common Agricultural Policy context. As set out in section 2 of this paper, which is based on data from the OECD's Agricultural Policy Monitoring and Evaluation 2020 report[13], whilst market price interventions are utilised across many jurisdictions, the OECD makes the following observation:

[12] The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024, DEFRA, November 2020
[13] Agricultural Policy Monitoring and Evaluation 2020, OECD

> *The way support is delivered to producers has also evolved. In particular, the development in support to agriculture in the OECD area is characterised by the long-term decline of support based on commodity output (including market price support and output payments). OECD work has identified this form of support as having the strongest potential to distort agricultural production and trade…*

Additionally, within their 2020 report the OECD makes a number of recommendations around agricultural policy development going forward including the following:

- Integrate farm households into social security systems to reduce the need for spending on agriculture-specific income support. Governments should improve their understanding of the financial situation of farm households and target any market failures that lead to persistent low incomes within the agriculture sector;
- Phase out distorting budgetary support. This would liberate funds for more targeted policies, as well as for investments to make agriculture more productive, environmentally sustainable and resilient. Such funds could be allocated to wider societal priorities including climate adaptation and mitigation;
- Dismantle, in a gradual but consistent process, all policies identified as particularly detrimental to market efficiency and the sector's environmental performance. The priority reform should be the sectors where high support is provided via the most distorting measures. Such reforms would reduce intra-sectoral distortions and allow markets to function better, while simultaneously reducing environmental pressures that derive from incentives to intensify production in unsustainable ways.

In light of this information, and building on the points made in sections 5.6 and 5.9, there may be value in considering how the proposed draft Farm Welfare Bill sits against emerging policy trends in Northern Ireland, the UK and wider.

6 Specific issues within the proposed draft Farm Welfare Bill

This section of the paper actively considers more specific issues around the content of the proposed draft Bill.

6.1 Defining and implementing 'best-quality' and 'lowest quality' in terms of produce

Section 1, subsection 3 of the proposed draft Bill makes reference *to 'specifying a lowest price to be paid for best-quality produce'* and a lowest price for produce of the '*lowest quality'*. How *'best quality'* is to be determined and who would have responsibility for this determination is not explicitly set out in the proposed draft Bill.

Is this purely a responsibility for the Index to determine, or is this determination left to the purchaser of the produce? Subsection 3(c) of Section 1 within the proposed draft Bill seems to support the hypothesis that this may be a responsibility of the Index, as it makes reference to the Index being able to *'specify other prices by reference to* *objectively ascertainable quality indicators falling between the best and lowest qualities'*.

Furthermore, subsection 3 within Section 4 of the proposed draft Bill indicates that DAERA would have a responsibility to appoint inspectors to consider disputes about the application of the Index to transactions, and makes specific reference to the same inspectors playing a role in disputes about the quality of particular produce.

Clarity is needed here, as the potential implications for DAERA arising from playing a role in either the definition of quality or the consideration of disputes around the same could be significant in terms of resources. It would seem inevitable that dispute resolution or definition of produce quality could potentially lead to legal action on the part of some producers, particularly if there was a significant difference in the minimum price paid for high quality and lowest quality produce. The costs to DAERA through operating a dispute resolution system could be considerable, even before considering the potential costs associated with legal action.

Whilst the proposed draft Bill makes no reference to it, in addition to the need for DAERA inspectors to be involved in dispute resolution around quality, there would seem to be a logic for a wider inspection role, to ensure that quality standards are maintained to a standard to justify minimum pricing. This could, potentially once again, bring associated costs for DAERA, unless this activity could be incorporated into existing on farm inspection activity.

6.2 The means of setting a cost of production/minimum price

Subsection 5 of Section 1 within the proposed draft Bill sets out the process by which the Fair Farm Gates Prices Index will determine both the cost of production and application of an additional appropriate margin to secure the long-term viability of farming businesses in Northern Ireland.

It would be useful to further clarify a number of the elements in this process as follows. Firstly, subsection 5(a) makes reference to using the most efficient 10% of farming businesses in Northern Ireland as a benchmark, but whilst mention is made of 'having regard to any subsidies and grants', there is no explanation as to whether this means that subsidies and grants are to be accounted for or discounted in the efficiency assessment.

Secondly, subsection 5(b) makes reference to specifying prices which represent the mean cost of production. It would be useful to clarify if this mean cost of production is derived from the aforementioned most efficient 10% of farm businesses or whether it represents the mean costs of production for all farm businesses.

Finally, subsection 5(b) also refers to securing the long-term viability of farm businesses by specifying prices that represent the cost of production plus the smallest margin, referred to as the viability margin. It would be useful to explore with the proposed draft Bill proposers what they believe would represent a fair viability margin. In addition it would also be helpful to establish once again whether viability margin would be added to the average production costs of all farms in Northern Ireland or the 10% most efficient. This is a potentially crucial question, as basing the cost of production on the most efficient farm businesses could incentivise all farm businesses to become more efficient, whilst conversely using an average cost of production for all farm businesses could actually have the opposite effect and embed inefficiency.

6.3 The Fair Farm Gate Pricing Panel

Section 2 of the proposed draft Bill sets out the process by which the Fair Farm Gate Pricing Panel would be set up, the composition of its membership and its responsibilities.

There are a number of potential questions relating to the operation of the panel as follows:

- Who will the panel ultimately be accountable to in the course of it's work?
- Will the panel and its work be subject to Assembly scrutiny?
- Is the maintenance of the Index a responsibility of DAERA, the Panel or both?
- Does the annual appointment of independent experts by the Panel constitute an annual procurement process?
- There appears to be no requirement for the Panel to produce an annual report outlining its work – would this be a useful addition in the interests of transparency and to enable effective scrutiny?
- There appears to be no mechanism for a review of both the work of the panel and the effectiveness of the proposed draft Bill in general after a given period of time. Could the Bill be amended to include such provisions as these are now commonly adopted in legislation as a matter of course?
- Are recommendations that the Panel make to DAERA regarding the Index and its operation binding or advisory in nature?

6.4 Defining seasonal produce

A key responsibility of the Farm Gate Pricing Panel, as set out in Section 2, subsection 6(c) of the proposed draft Bill, is the publication of a table showing the seasons during which each category of produce commonly sold by farming businesses is available for purchase in Northern Ireland. Whilst this work is to be informed by the independent experts appointed by the Panel there are nonetheless a number of questions around this process such as whether seasonality is likely to apply to some produce more than others?

Furthermore, what are the potential implications created by the adoption of extensive and wide ranging seasonal definitions? Subsection 5 within Section 4 of the proposed

Bill suggests that it shall be a defence for a person charged with an offence under subsection 4(1) to show that produce purchased was out of season at the time of the purchase. This is a significant point, as it seems to confirm that it is an offence to purchase produce in season, for retail sale in Northern Ireland, from anyone other than a farming business in Northern Ireland. In light of this, there could be implications from the creation of a long or year wide season for a product, as it could effectively mean that these could only be bought from a local farm business. This could present issues in relation to UK competition law and the operation of the UK single market as it would effectively create a monopoly on supply.

Conversely, if seasonal periods were too short, there could be a legal means for retailers to get around the provisions in the proposed draft Bill, by mainly selling items in local stores which were out of season. This would enable retailers to source the product from either outside Northern Ireland, or at a lower price within Northern Ireland, so long as they completed a valid Produce Non-Availability Report.

6.5 Offences within the proposed draft Bill and associated penalties

The proposed draft Bill appears to include two explicit offences as follows:

- A relevant person buying listed produce from a farming business for a purchase price below the listed price;
- A relevant person purchasing produce intended for retail sale within Northern Ireland from a supplier who is not a farming business.

A person committing either of these offences is liable on summary conviction to a fine not exceeding £50,000.

Whilst not identified as an offence within the proposed draft Bill, as set out previously in Section 6.4 of this paper, it does appear to be an offence to purchase produce in season, for retail sale in Northern Ireland from anyone other than a farming business in Northern Ireland. It would be useful to confirm with the proposed draft Bill proposers if this is an intended offence.

With regards to the fine levels associated with the two explicitly stated offences, it would be useful to determine how the draft Bill proposers reached the decision to utilise a fine up to £50,000 upon summary conviction. Under the provisions of The Criminal Justice (Northern Ireland) Order 1994[14], there is a limit on the level of fine that can be imposed upon summary conviction. The highest figure possible on the standard scale, a level 5 fine, equates to £5,000.

It is theoretically possible for a fine to exceed this £5,000 maximum in Northern Ireland but it would need to be defined why this would need to be the case. By way of example where this can happen, the Planning Act (Northern Ireland) 2011[15] includes offences

[14] The Criminal Justice (Northern Ireland) Order 1994
[15] Planning Act (Northern Ireland) 2011

relating to contravention of hazardous substances control, and a person guilty of an offence on summary conviction is liable for a fine up to £100,000.

Leaving the issue of fine levels aside, it would be useful to establish if the draft Bill proposers have considered additional options relating to offences such as:

- Inclusion of conviction on indictment;
- Differentiating between individuals and companies;
- Including provisions for second and further convictions;
- Including provision for custodial sentence in addition to or instead of fine on summary conviction.