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COVID-19 AND FOOD SUPPLY: FOOD SECURITY AND THE ROLE OF LAW

Executive Summary

The Covid-19 pandemic has placed the greatest of demands on the food supply of the United Kingdom. It raises issues which go beyond food being available and accessible, including the imperative of ensuring *food security*. There is now an opportunity to develop a regulatory framework more capable of delivering that security, both during immediate shocks and in the medium- and long-term. In the context of this inquiry, two aspects of maintaining a sustainable food supply are therefore addressed:

- the importance of holistic approaches, encompassing all facets of food security from farm-to-fork and beyond, including waste; and
- the extent to which the Agriculture Bill 2019-2021 contributes toward a regulatory framework capable of meeting this broader food security objective.¹

In particular, it will be suggested that:

- the Covid-19 pandemic would caution against an agrifood system which relies on global supply chains;
- the duty to report on food security under Clause 17 of the Bill would arguably benefit from significant enhancement of governance mechanisms, including a statutory independent body to provide advice and monitoring;
- the Covid-19 pandemic raises questions as to the degree to which a future model of financial assistance should move away from the core productive activity; and
- a key facet of food security is the legal obligation to prioritise food waste prevention, which ought to feature explicitly in the Bill's governance mechanisms and fair contractual dealing powers.

1. Food Security

A widely recognised definition of food security is that contained in the 2009 Declaration of the World Summit on Food Security, it existing:

...when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.²

¹ It has been argued cogently elsewhere that a statute with far broader ambit should be introduced: see, eg, T. Lang, *Feeding Britain: Our Food Problems and How to Fix them* (Penguin, 2020) (a new 'Food Resilience and Sustainability Act').

² A similar definition was adopted by DEFRA in the same year: 'ensuring the availability of, and access to, affordable, safe and nutritious food sufficient for an active lifestyle, for all, at all times' (DEFRA, *UK Food Security Assessment: Our Approach* (DEFRA, London, 2009) 6).

The same Declaration identifies ‘four pillars of food security’, namely ‘availability, access, utilization and stability’, adding that ‘[t]he nutritional dimension is integral to the concept’.

With specific reference to the United Kingdom, much attention has legitimately been directed to matters of access, with frequent focus on the challenges faced by those in poverty.³ However, a notable feature of the Covid-19 pandemic has been that, at least temporarily, availability became widely problematic, impacting even on those with adequate resources.⁴ This pressure on availability is not without recent precedent. The 2000 fuel crisis saw supermarket shelves emptied of essentials, with rationing imposed as just-in-time deliveries faltered and demand soared.⁵

Further, as already highlighted by the Declaration, the simple continuation of supply is itself insufficient to generate food security, not least because the food supplied must be nutritious. This aspect has for a considerable time been recognised in government circles, for example, in the Cabinet Office report *Food Matters: Towards a Strategy for the 21st Century*;⁶ and it has recently acquired enhanced prominence with advocacy that the agrifood system should deliver a ‘healthy reference diet’.⁷ In the specific context of the Covid-19 pandemic, the importance of maintaining a healthy diet has also been clearly articulated.⁸ Yet, while there is evidence of, for example, preference for fresh local produce, there are also strong indications that conditions will be generated that have the opposite effect: in particular, vulnerable groups may lose access to government programmes, while at the same time by reason of cost they may prioritise caloric intake over nutrient quality.⁹

2. Food Security and the Agriculture Bill 2019-2021

³ See, eg, *Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights* (London, 16 November 2018) (available at https://www.ohchr.org/Documents/Issues/Poverty/EOM_GB_16Nov2018.pdf).

⁴ BBC News, *Coronavirus: Supermarkets ask shoppers to be 'considerate' and stop stockpiling* (15 March 2020) (available at <https://www.bbc.co.uk/news/business-51883440>); and BBC News, *Coronavirus: 'We go hungry so we can feed our children'* (1 May 2020) (available at <https://www.bbc.co.uk/news/uk-politics-52455776>).

⁵ BBC News, *Countdown to crisis: Eight days that shook Britain* (14 September 2000) (available at <http://news.bbc.co.uk/1/hi/uk/924574.stm>); and P. Wintour and J. Wilson, *Britain grinds to a halt as Blair's pleas are ignored* (The Guardian, 14 September 2000) (available at <https://www.theguardian.com/uk/2000/sep/14/tonyblair.oil>).

⁶ Cabinet Office Strategy Unit, *Food Matters: Towards a Strategy for the 21st Century* (Cabinet Office, London, 2008).

⁷ See, eg, W. Willett *et al*, ‘Food in the Anthropocene: the EAT–Lancet Commission on Healthy Diets from Sustainable Food Systems’, (2019) 393(10170) *The Lancet* 447; and Royal Society of Arts: Food Farming and Countryside Commission, *Our Future in the Land* (Royal Society of Arts, London, 2019).

⁸ Food and Agriculture Organization (FAO), *Maintaining a healthy diet during the COVID-19 pandemic* (27 March 2020) (available at <http://www.fao.org/3/ca8380en/ca8380en.pdf>).

⁹ See, eg, D. Headey and M. Ruel, ‘The COVID-19 nutrition crisis: What to expect and how to protect’ (International Food Policy Research Institute, 23 April 2020) (available at <https://www.ifpri.org/blog/covid-19-nutrition-crisis-what-expect-and-how-protect>).

Against this background, the potential contribution of the Agriculture Bill 2019-2021 may be examined. As an initial consideration, it must be observed that the Bill retains a relatively narrow focus on the farming industry, notwithstanding calls since the commencement of the legislative process for it to be extended so as to embrace wider factors and, in particular, nutrition and health. By way of illustration, Sustain proposed an amendment to insert a public health purpose,¹⁰ which would fit well with the broader interpretation of food security as outlined above.

The Bill currently before Parliament does, however, contain three provisions which would seem to have direct impact on the delivery of either specific facets of food security or food security more generally (with the second and third mentioned having been added since the Agriculture Bill 2017-2019).

Firstly, under Clause 1(2) the Secretary of State may ‘give financial assistance for or in connection with either or both of the following purposes—

- (a) starting, or improving the productivity of, an agricultural, horticultural or forestry activity;
- (b) supporting ancillary activities carried on, or to be carried on, by or for a producer’.

And, in this context, ‘ancillary activities’ is to be interpreted as meaning ‘selling, marketing, preparing, packaging, processing or distributing products deriving from an agricultural, horticultural or forestry activity’; and ‘improving productivity’ extends to ‘(a) improving the quality of any products deriving from the activity, and (b) improving the efficiency of the activity in terms of the resources used in, or in connection with it’: Clause 1(5).

Secondly, the new Clause 1(4) requires that, ‘[i]n framing any financial assistance scheme, the Secretary of State must have regard to the need to encourage the production of food by producers in England and its production by them in an environmentally sustainable way’.

Thirdly, the new Clause 17 (Duty to report to Parliament on United Kingdom food security) imposes on the Secretary of State a requirement, at least once every five years, to ‘prepare and lay before Parliament a report containing an analysis of statistical data relating to food security in the United Kingdom’. Such data ‘may include (among other things) data about the following matters—

- (a) global food availability;
- (b) supply sources for food (including the range of supply sources and the availability to the public of food from domestic and other sources);
- (c) the resilience of the supply chain for food (including in response to disruptions in, or significant price increases for, the supply of energy);
- (d) household expenditure on food (including in comparison to expenditure on other items);

¹⁰ Written evidence submitted by Sustain (AB19) at Committee stage (available at <https://publications.parliament.uk/pa/cm5801/cmpublic/Agriculture/memo/AB19.htm>). See also M. Cardwell and F. Smith, ‘Charting a new course for the United Kingdom agri-food sector—*Health and Harmony: The Future for Food, Farming and the Environment in a Green Brexit*’, (2018) 89(3) *Political Quarterly* 497.

(e) food safety and consumer confidence in food’.

Accordingly, on the face of the Bill, there is now express recognition of food security as a fit subject for regulation and, moreover, in a way which is noticeably broader than the emphasis on productivity as found in the earlier Agriculture Bill 2017-2019. It may likewise be highlighted that Clause 17 looks beyond availability to include not just accessibility (by reference to household expenditure on food), but also food safety and consumer confidence. And the requirement that the Secretary of State must have regard to production in an environmentally sensitive way would seem capable of imposing obligations in respect of, *inter alia*, food waste.

That having been said, four further observations may be put forward. Firstly, although under Clause 1(4) the Secretary of State must have regard to the need to encourage production of food by producers in England (which gives more than a nod towards a ‘food sovereignty’ model under which England would move to higher levels of self-sufficiency), there is a lingering sense that the supply of food is still largely to be conceived in terms of keeping open global supply chains. For example, ‘global food availability’ is at the head of the list in Clause 17 for the purposes of food security data analysis;¹¹ and DEFRA has recently affirmed that ‘[t]he UK sources food from diverse stable countries and imports can make up for domestic supply shortages’.¹² What the Covid-19 pandemic (and the 2007-2008 food crisis before it) would caution is that, just as domestic supplies tighten, exporting countries have a tendency to impose export restrictions.¹³ Indeed, a WTO report found that, over the period 2007 to the end of March 2011, 31 per cent of a sample of 105 countries imposed some form of food export restriction;¹⁴ and by 22 April 2020 the WTO noted that the pandemic was the cause of 17 countries and separate customs territories adopting these same measures.¹⁵

Secondly, the duty to report on United Kingdom food security under Clause 17 would arguably benefit from significant enhancement of governance mechanisms so as to translate these reports into action.¹⁶ There is no express obligation to respond and no structure is revealed as to how any recommendations might be addressed. In addition, some form of statutory independent body to provide advice and monitoring could promote not just appropriate and timely implementation, but also a higher level of public trust. An existing model is provided by the Committee on Climate Change under the Climate Change Act 2008, whose advice the Secretary of State *must* take into account when setting carbon budgets: Section 9(1). And the need for such a body may be further illustrated by the fact that the Covid-19 pandemic has already seen the creation, on a non-statutory basis, of the Food Industry Resilience Forum. Not only could such a role be formalised and materially strengthened, but there should also be greater scope for proactive interventions based upon long term planning.¹⁷

¹¹ This list is not prescriptive, in that such data *may* include the specified matters.

¹² DEFRA *et al*, *Agriculture in the United Kingdom 2018* (2019) Chart 14.2.

¹³ See, eg, G. Marceau, ‘WTO and export restrictions’, (2016) 50(4) *Journal of World Trade* 563.

¹⁴ R. Sharma, *Food Export Restrictions: Review of the 2007-2010 Experience and Considerations for Disciplining Restrictive Measures* (FAO, Rome, 2011) (available at http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm_Working_Papers/EST-WP32.pdf) Table 1.

¹⁵ WTO, *Export Prohibitions and Restrictions: Information Note* (23 April 2020) Chart 1.

¹⁶ In addition, the duty to report ‘at least once every five years’ does not seem onerous.

Thirdly, the provision of financial assistance for the delivery of ‘public goods’ under Clause 1 of the Bill has clear and obvious benefits; and the proposed emphasis on the environment under the Environmental Land Management Scheme is likely to underpin the long-term environmental sustainability of agricultural production. However, food supply and food security do not as such feature in this context, with the exception of support for productivity and ancillary activities under Clause 1(2). Whether or not food security can be characterised as a ‘public good’ (which has proved the source of considerable controversy),¹⁸ the Covid-19 pandemic and its effects on the food supply chain raises questions as to the degree to which a future model of financial assistance should move away from the core productive activity. To provide just one illustration, notwithstanding early indications to the contrary,¹⁹ the Bill contains no provision for government financial participation in income insurance and income safety-net programmes, although they would appear well calculated to contribute towards addressing the current disruption within the sector, and also have the benefit of being potentially exempt under the WTO Agreement on Agriculture.²⁰ Indeed, in order to promote a robust food chain and food security generally, there may yet be scope to move towards a more multifunctional model of agriculture, which at its core produces food and fibre, while at the same time delivering a range of environmental and other ‘public goods’.²¹

Fourthly, production must meet the criterion set out in Clause 1(4) in respect of environmentally sustainability, which is apt to cover food waste. Food waste prevention is a crucial facet of food security. The paradoxical coexistence of abundance, waste, overconsumption and hunger has already been placed before this Committee and is a challenge with which food security must grapple in times of normality and in crisis.²² Others will be better qualified to offer evidence on the scale to which the Covid-19 pandemic has, or will, increase levels of food waste. For instance, this may be as a result of: food and drink destined for the hospitality sector going to waste as restaurants, pubs and hotels are required to close; the potential for increased levels of household food waste associated with a spike in consumer demand as consumers follow advice to prepare for possible periods of self-isolation; and pressures on the supply of farm labour potentially leading to food rotting unpicked in fields. That having been said, these potential effects of Covid-19 are part and parcel of the ways that food waste is built into the system through what many have referred to as systematic and normalised overproduction.²³

¹⁷ A not dissimilar body (which might be called the Food Advisory Group of Experts (FAGE) or Food and Health Liaison Group (FHLG)) is advocated by Professors Tim Lang, Erik Millstone and Terry Marsden in a letter to the Secretary of State for Environment and Chief Executive of Public Health England (1 April 2020):

<https://foodresearch.org.uk/download/15003/https://foodresearch.org.uk/download/15003/>.

¹⁸ See, eg, A. Burrell, ‘Evaluating policies for delivering agri-environmental public goods’, in Organisation for Economic Co-operation and Development (OECD), *Evaluation of Agri-environmental Policies: Selected Methodological Issues and Case Studies* (OECD, Paris, 2012) 49.

¹⁹ C. Stocks, ‘Farm subsidy system to be overhauled post-Brexit, says Eustice’ (Oxford Farming Conference, 4 January 2017) (available at <https://www.ofc.org.uk/blog/farm-subsidy-system-to-be-overhauled-post-brexit-says-eustice>).

²⁰ Agreement on Agriculture, Annex 2, Paragraph 7.

²¹ See, eg, OECD, *Multifunctionality: A Framework for Policy Analysis* (OECD, Paris, 2001).

²² House of Commons Environment, Food and Rural Affairs Committee, *Waste Management in England: Fourth Report of Session 2014-15*, HC 241.

- **The legal obligation to prioritise food waste prevention**

The Government's approach to food waste has been largely end-of-pipe,²⁴ the *Resources and Waste Strategy (Strategy)* having a particular focus on the *redistribution* rather than reduction of surplus food.²⁵ This seems at odds with its legal obligation to prioritise waste prevention, including to reduce the generation of food waste in primary production and apply the 'waste hierarchy'.²⁶ Reducing waste upstream through a reduction in surplus also feeds into many of the considerations relevant to food security, such as whether food, or particular types of food that are nutritionally limited or climatically damaging, *ought* to be produced, or produced in the quantities, places or ways that they are.

Further, the limitations of redistribution as a strategy were brought into stark relief by the Covid-19 pandemic. Despite the spike in demand for food from supermarkets, simply shifting surplus from hospitality/wholesale to retail has proved difficult given different pack sizes and labelling.²⁷ The additional risk with the Government and supermarkets giving money to food redistribution organisations in the wake of Covid-19²⁸ is the further institutionalisation of charitable food redistribution as a 'solution' both to structural and systematic problems of inequality and normalised overproduction.²⁹

Thus, food waste as a challenge must not be confined to waste law and policy, but integrated within regulatory frameworks on food security and agriculture. Food waste cannot be addressed by ignoring its agricultural origins and productive context.³⁰ There are, nonetheless, opportunities within the Bill to embed food waste prevention within the governance of food

²³ See, eg, C. Bradshaw, 'England's fresh approach to food waste: Problem frames in the *Resources and Waste Strategy*', (2020) 40 *Legal Studies* 1 (pre-print available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3499698).

²⁴ C. Bradshaw, 'Waste law and the value of food', (2018) 30 *Journal of Environmental Law* 311 (available online at <http://eprints.whiterose.ac.uk/126955/>).

²⁵ HM Government, *Our Waste, Our Resources: A Strategy for England* (2018).

²⁶ The waste hierarchy is a priority order at the top of which is waste prevention, followed by preparing for re-use, recycling, energy recovery and disposal: Directive 2008/98/EC of 19 November 2008 on waste [2008] OJ L312/3 (as amended in 2018), Articles 4 and 9.

²⁷ See, eg, A. Hancock and J. Eley, *UK food industry fears waste explosion as coronavirus strains supply chain* (The Financial Times, 31 March 2020) (available at <https://www.ft.com/content/7b6bb903-7688-4520-84f5-9845b0f6bd50>); and see generally L. Petetin, 'The COVID-19 Crisis: An opportunity to integrate food democracy into post pandemic food systems', (2020) *European Journal of Risk Regulation* (forthcoming).

²⁸ See, eg, the £3.25m Covid-19 Emergency Surplus Food Grant (available at <https://wrap.org.uk/content/resource-action-fund>); and The Grocer, *Coronavirus: Asda and Co-op donate millions to food bank charities* (21 March 2020) (available at <https://www.thegrocer.co.uk/asda/coronavirus-asda-and-co-op-donate-millions-to-food-bank-charities/603154.article>).

²⁹ J.I. Macdiarmid, T. Lang and A. Haines, 'Down with food waste', (2016) 352 *The BMJ* 1380.

³⁰ An indicator of some of the problems with Government's approach in this regard—which casts shadows over our management of the food supply chain in a time of crisis—is found in the leading diagram of the *Strategy's* food waste chapter. Quite remarkably, this diagram omits how food is grown or reared (and wasted) on farms: *Strategy*, 100.

security and the structure of the food supply chain, with a view to stitching together an otherwise fragmented patchwork of measures into an enhanced and holistic approach that builds resilience into the system post-Covid-19.

- **Embedding waste prevention within the governance of food security and the supply chain**

Clause 17 of the Bill, for example, might expressly include food waste in the list of data for the purposes of the report to Parliament. The Secretary of State might additionally be obliged to report on how measures to address food security comply with the legal obligation to prioritise waste prevention. This integrates aspects of agricultural and waste law, while firming up the legal obligation to prioritise waste prevention in the context of food.

Further, Clause 27 of the Bill provides powers to promote fair contractual dealing in the food supply chain and offers similar opportunities. Two points can be made about the operation of this proposed new regime.

Firstly, consideration should be given to the purpose, and enabling nature, of the fair dealing powers. As the Government acknowledges in the *Strategy*, the powers in the Bill extend to specifying a range of obligations and contractual terms which are presently associated with driving overproduction and food waste.³¹ However, the Bill contains a potentially limiting stipulation that the fair dealing powers are ‘exercisable for the purpose of promoting fair contractual dealing’: Clause 27(2). A possible amendment could allow the powers to be exercisable for purposes of promoting fair contractual dealing *and preventing food waste*. At the same time, given the Covid-19 context, consideration might be given to whether a *duty* on the Secretary of State to make these fair dealing regulations might be more appropriate than the current enabling powers.³² This is particularly so given that reports are emerging as to a rise in unfair trading practices in the wake of the pandemic.³³

Secondly, consideration ought to again be given to the wisdom of operating a new regime of fair contractual dealing separate from the existing Groceries Supply Code of Practice (the Code) enforced by the Groceries Code Adjudicator (GCA). As the Committee is already aware, the Code requires retailers deal with suppliers fairly, but it protects only the *direct* suppliers of the United Kingdom’s major supermarkets. Farmers tend to be indirect suppliers to major retailers and so most fall outside the Code. Importantly, the new powers will not be exercised in respect of any commercial arrangements within the GCA’s remit,³⁴ the practical effect of which is to insulate major retailers from a new regime which might meaningfully address food waste in the supply chain.

The Committee will recall its own justifiable criticism of this approach, seeing ‘no reason’ for ‘two separate processes and enforcement bodies’.³⁵ Indeed, the governance of food

³¹ *Strategy*, 105.

³² As suggested by Sustain (albeit not in response to Covid-19): https://www.sustainweb.org/resources/files/other_docs/FairDealingClauseAgricultureBillbriefing.pdf.

³³ G. Fortuna, ‘COVID-19 causing spike in unfair trade practices, farmers complain’ (30 April 2020) available at <https://www.euractiv.com/section/agriculture-food/news/covid-19-causing-spike-in-unfair-trade-practices-farmers-complain/>.

³⁴ Agriculture Bill 2019-21, Explanatory Notes [238].

waste—even without consideration of its role in food security—is increasingly crowded and fragmented, in contravention of the need for joined-up approaches. Multiple interventions (such as waste law, new powers under the Bill, the Courtauld Commitments and the Code) come with a variety of respective regulators or quasi-regulators (the Environment Agency, the new fair dealing regulator, WRAP and the GCA), with different responsible Government departments (DEFRA and BEIS). How these various regimes are to coexist is unclear. In the absence of holistic measures and approaches, it should be noted that a fragmented landscape, as Professor Christine Parker and Dr Hope Johnson remind us, creates opportunities for law and regulation ‘to be shaped by short-term political interests and not by social and ecological realities’.³⁶

³⁵ House of Commons and Environment, Food and Rural Affairs Committee *Scrutiny of the Agriculture Bill: Tenth Report of Session 2017-19*, HC 1591, 21.

³⁶ C. Parker and H. Johnson, ‘From food chains to food webs: Regulating capitalist production and consumption in the food system’, (2019) 15 *Annual Review of Law and Social Science* 205, at 211.