

Business



Shifting landscape: The term 'active farmer' has now been replaced in the CAP reform documentation by the term 'genuine farmer' which will set alarm bells ringing for some land lessors

Clarity on entitlements needs to be top priority for landowners signing leases

Future EU farm payment schemes may well change the definition of an 'active' or 'genuine' farmer — this could have big implications for entitlements income clauses in land leases

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As is usual at this time of year there is a cohort of landowners who are about to sign up to a lease of land and entitlements.

However, this year is different in that landowners have no idea of what the future holds in regard to the fate of their entitlements.

Recent headlines about so-called 'armchair farmers' are not helping matters and, in fact, are adding to the stress levels of many intending lessors that I have spoken to recently.

The impending replacement of the Basic Payment Scheme (BPS) with a new scheme to be known as the Basic Income Support for Sustainability (BISS) has many landowners who intended to lease land and entitlements in 2021 in a bit of a quandary.

The question is, should one sign up now or hold off for

another year?

The answer is far from simple as the rules for the replacement BPS are not yet decided so it is impossible to predict if holding off will make any difference.

As well as considering the possible consequences of committing now, you will also need to consider the loss of the tax-free income you would have earned in 2021 and factor that into your calculations.

In this article I will address the issues that could conspire to rendering you ineligible to retain your entitlements, or the likelihood of the leased entitlements yielding a lower return.

I will also address how the terms of a lease may afford you some measure of protection if you are no longer permitted to hold entitlements.

Leasing entitlements

The first uncertainty that needs to be highlighted is whether it will be possible to retain ownership of entitlements where the entitlements are not actively farmed by the owner.

This is a hot topic and

restrictions on entitlements will be staunchly resisted by the so-called 'armchair farmer' fraternity.

While the screw is slowly tightening on the leasing of entitlements, it is hard to envisage an outright abolition of entitlement leasing in all circumstances.

An important point to note about the proposed BPS replacement scheme is that the day of receiving the entire payment value of the entitlements back in the form of rent is probably at an end as the expectation is that the farmer will incur a greater compliance cost as a result of Greening being replaced by an Eco-scheme.

'Genuine farmers'

When the Single Farm Payment Scheme morphed

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into the Basic Payment Scheme in 2015, many landowners' bacon was saved by virtue of them qualifying as 'active farmers'.

This meant that they retained ownership of their entitlements which they could then lease out with the land. An active farmer was somebody who declared a hectare or more on their basic payment application in the reference year of 2013.

The term 'active farmer' has now been replaced in the discussion documentation with the term 'genuine farmer' which leads one to believe that the bar for satisfying the definition of a farmer will be raised substantially.

What form this will take is difficult to predict, but for those affected the word 'genuine' sets alarm bells ringing.

Reference year

While there is no certainty that a reference year will be central to the extent of one's entitlement to benefit under the new scheme, we are unlikely to see a total departure from this concept which has been applied in all previous schemes going back as far as Area Aid.

Accordingly, it is likely that there will be a reference year that will determine a payment value of entitlements and whether a farmer qualifies as a 'genuine farmer'.

Those intending lessors

who are worried about entering into a lease now will fear that 2021 will be the reference year; they may also wonder if there will be a reference year at all.

One would need a crystal ball to make a call on that one and I am fresh out of crystal balls.

My advice is that if you are proceeding with a lease, you should ensure that the terms contained in the lease afford you some measure of protection in the event that you have to forfeit your entitlements.

Framing the lease

If you intend to lease out your land and entitlements in 2021 you need to discuss the likelihood of possible changes in entitlement rules during the term of the lease with your prospective tenant.

The landowner will want to ensure that, in the event of a loss of entitlements, at least a fair proportion of any future payments that the land will generate will accrue back to the landowner in the form of an increased rent.

The time to get some form of provisional agreement on this matter with the tenant is when the lease is being negotiated not when the problem arises. The matter needs to be documented in the lease.

This can be achieved by the inclusion of a clause that addresses the issue by way of a suitable format of words.

Sharing the payment

Until recently, most leases of land and entitlements required that the entire payment value of the entitlements was paid over to the landowner.

However, I have encountered a number of leases in recent weeks where the land rent included a proportion (typically 70pc) of the current entitlement payment value.

In other words, the rent will continue for the duration of the lease and will be unaffected by any changes to the entitlements.

Such leases are predicated on the entitlements transferring to the tenant in the event of a rule change resulting in the landowner having to forfeit his/her entitlements.

It is important that you speak to your tax advisor before entering into such arrangements as there may be Capital Gains Tax or Capital Acquisitions Tax consequences down the line if the entitlements have to change hands.

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