

Consultation Response

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To: Big Policy; Combinable Crops Committee

Cc: Combinable Crops Monitors

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This is our response to the UK Government's consultation to develop Fair Dealings policy for combinable crops. This will be the first of several consultations. Government are taking an iterative approach to developing Fair Dealings policy, engaging with a range of organisations to better understand commodity supply chains to avoid negative unintended consequences of legislation.

Quite a few early questions are aimed at individual agricultural businesses. Asking what enterprises they have, what stage they typically agree a contract, and other specific questions that are not applicable to us as a representative organisation. We have started the response at question 13.

Contractual Relationships in the Combinable Crops Sector

NFU Scotland (NFUS) is the leading agricultural organisation in Scotland. Representing more than 9,000 farmers, growers, and crofters, our members provide and support thousands of jobs and deliver significant economic, social and environmental benefits across Scotland.

Agriculture is the lynchpin of rural Scotland and is an important part of Scotland's booming food and drink industry. Scottish agriculture generates a gross output of £3.3 billion annually. The farming and crofting sector is committed to sustainable food production, enhancing biodiversity and helping to tackle climate change.

13. To what extent do you agree or disagree that bargaining power between producers and buyers of combinable crops (merchants) is reasonably balanced?

Please provide reasons and, if possible, examples to support your answer.

Strongly Disagree.

When we surveyed our members, 47% of respondents strongly disagreed and 37% disagreed with this statement. No respondents strongly agreed.

We have been told that farmers have little bargaining power. That contracts are offered on a take it or leave it basis. This results from having relatively few merchants compared to a large number of farm businesses. This concentrates power within the supply chain, leading to some unfair practices. This is separate from price-setting. For a globally traded commodity, where supply and demand sets the price, periods of low prices are inevitable. But this power imbalance can mean that supply and demand economics do not always operate effectively. A policy intervention is required to address potential market failures caused by this imbalance of power.

14. To what extent do you agree or disagree that current contractual practices in the combinable crops supply chain are fair and transparent?

Please provide reasons and, if possible, examples to support your answer.

Strongly Disagree.

When we surveyed our members 35% of respondents strongly disagreed and 39% disagreed with this statement.

It is felt by many of our members that contracts are biased in favour of buyers. That it is too easy for them to reject loads or change contract terms, and it is too difficult to dispute deductions. The malting barley supply chain was singled out as being particularly unfair.

The requirement to buy inputs from a buyer to secure a contract is viewed by many of our members as unfair. Our members report that contract terms are opaque and difficult to understand. They are not written in plain English, and are not well explained.

15. Do you believe that government intervention is required to regulate contracts in this sector?

Please provide reasons and, if possible, examples to support your answer.

When surveyed, 40% of respondents thought the government should intervene to regulate contracts, compared to who 33% thought they should not.

This surprisingly large figure (33%) reflects some anti-government and anti-politics sentiment. The overwhelming response from members is that there is unfairness, and this market failure requires some sort of intervention. While many respondents didn't trust government to do this properly the majority did think legislation was necessary because of the relative power that supply chain businesses have over farming businesses.

Representative organisations like AIC, MAGB, and SWA cite competition law requirements as preventing them from discussing unfair contracts and practices with farmer representative organisations like NFU Scotland. This market failure within the combinable crops supply chain therefore requires an intervention by government to address unfair practices through policy.

There are many individual agricultural businesses growing crops and relatively few supply chain organisations buying them. And this number continues to decline with consolidation of supply chain businesses. This inevitably leads to a power imbalance within the supply chain. The relatively weak position of individual farm businesses within supply chains can lead to unfair practices, despite good intentions of supply chain organisations. Within combinable crops supply chains, unfair practices can stem from the end processor of the product with their supplier, which then ripples down the supply chain, going on to affect merchants and then farmers.

NFU Scotland welcomes fair dealings policy, and would like to see legislated fairness extend across supply chains. Malting barley growers particularly want government intervention to extend across the supply chain, beyond merchants to maltsters and distillers. Power is ultimately held by distillers and there is no equivalent of the Grocery Code Adjudicator to hold them to account.

16. What type of sale agreement do you have when selling crops? (select all that apply)

When surveyed, the vast majority of respondents had a written contract.

17. As a business that sells combinable crops, what type of contract have you used over the past 5 years?

When surveyed, a wide range of contracts were used by our members.

18. "As a business that sells or purchases combinable crops, the terms and conditions agreed in my contract, whether written and signed or not, are specific and unambiguous." To what extent do you agree or disagree with this statement?

Please give reasons for your answer (Required)

When we surveyed our members 45% of respondents agreed and 25% neither agreed nor disagreed with this statement.

There are a range of contract types available. Our members report that some are clearer than others. In some cases contract terms are opaque. Legislation is needed to provide consistency and improve clarity across the board.

19. "To ensure a legal baseline across the whole sector, all sale agreements between producers and purchasers should be covered by a written contract." To what extent do you agree or disagree with this statement?

Please give reasons for your answer (Required)

When we surveyed our members 49% of respondents agreed and 17% strongly agreed with this statement.

Most members agreed that written contracts should be in place, and reported they have options to take different types of contracts.

20. "I feel empowered to negotiate the terms and conditions in the contract (e.g. payments terms, delivery conditions) to best suit my business needs." To what extent do you agree or disagree with this statement?

Please give reasons for your answer (Required)

When we surveyed our members, 40% of respondents disagreed and 15% strongly disagreed with this statement.

Our members reported that power sits with the purchaser, and that as individual suppliers they have very little negotiating power. Even combinable crop co-operatives report that they do not have the economies of scale to fairly negotiate terms and conditions with large multinational maltsters and distillers. They report a 'take it or leave it' approach from buyers. Our members tell us that terms can be unilaterally changed by the buyer later in the season anyway.

Increasingly, contracts include requirements for carbon audits or 'regenerative' practices. Growers can choose to sign these contracts or not, but the terms cannot be negotiated.

21. "I feel empowered to choose the type of contract (e.g. forward contract, pool contract etc.) to best suit my business needs." To what extent do you agree or disagree with this statement?

Please give reasons for your answer (Required)

When we surveyed our members 57% of respondents agreed and 23% neither agreed nor disagreed with this statement.

Our members have a range of contract types. They can choose the type of contract but not the wording within it. The terms are always set by the buyer, often influenced by the end user.

22. If you sell combinable crops, does your contract include a requirement for merchants to provide reasonable notice regarding when grain will be collected?

When we surveyed our members, 36% of respondents agreed and 13% disagreed with this statement.

We were told this can be quite variable, and that the buyer ultimately decides when grain will be collected. Which means the clause isn't always adhered to. Malting barley collection was singled out as being less reasonable than for other combinable crops. We received no comments on other combinable crop types (feed barley, oilseeds, etc.).

23. If you sell combinable crops, does your contract provide for compensation or additional payments if grain collection occurs outside the agreed movement dates?

When we surveyed our members, 69% of respondents disagreed with this statement.

Malting barley was singled out as not compensating for later movement dates.

24. As a business that sells combinable crops, at what stage do you typically agree a contract for your produce (i.e., fix the price and quantity with a buyer)? (Select all that apply)

When surveyed a wide range of agreements were in place, and that these were roughly similarly across categories.

25. As a business that sells combinable crops, at what stage do you typically expect to sell (exchange /deliver) your produce? (Select all that apply).

When surveyed a wide range of agreements were in place. Many respondents selected more than one stage.

We heard of example from our members of term dates being shortened in 2025.

26. When selling crops, do you feel you have sufficient opportunity to negotiate the price offered by buyers?

No

When we surveyed our members, 71% responded "no" and 20% responded "sometimes".

We were told that the price is offered on a take it or leave it basis. With no negotiation. But there are contract options available on how that price is set (futures, spot market, etc.).

27. When buyers offer a price for crops, do they provide clear information on how that price relates to market benchmarks (e.g., futures prices, spot prices, demand)?

Often

When we surveyed our members, 41% responded “often” and 34% responded “sometimes”.

The relationship of price within market benchmarks is clear. Some respondents queried why malting barley prices were tied to wheat futures, but the mechanism to determine price itself is very clear. Supply and demand influences price, and market benchmarks and premiums are important tools for clear price setting. We do not think this should be legislated for.

28. When selling crops, is the process used to determine the final quality specifications (e.g. moisture, protein content etc.) satisfactory?

When we surveyed our members, 42% responded “yes” and 42% responded “no”.

Within respondents’ survey comments, and through in-person engagement, there is a strength of feeling that this process is not satisfactory. That there is too much variability with test results for the same samples, and there is no way of disputing this. There is a feeling rejections are used to manipulate supply when demand is low. Again, the malting barley sector was singled out.

We have also heard that some merchants will accept malting barley that is out of specification as a ‘loss leader’, reporting that it is within specification, to attract new grower suppliers, encouraging them to end their relationship with their existing merchant. This practice gives growers the impression that the process used to determine final quality specifications is unsatisfactory, leading to cynicism and resentment.

29. When selling crops, which are collected by the buyer, do you feel you have sufficient opportunity to ensure the cleanliness of the inside of the trailer?

Yes

When we surveyed our members, 87% responded “yes”.

30. When selling crops, have you experienced unfair practices during the negotiation stage, before a contract is agreed (for example, last-minute changes to terms or pressure to accept unfavourable conditions)?

No

When we surveyed our members, 47% responded “no” and 42% responded “yes”.

We were told that terms are changed *after* the contract is agreed. That premiums are changed with no discussion, and that the buyer has all the power and control.

31. Are there any clauses which should be mandatory within any contract?

When we surveyed our members, 33% responded “yes” and 18% responded “no”.

We were told that quantity commitments, rather than indicative tonnages that give buyer the freedom to decide how much volume they wish to purchase, should be mandatory. However, flexibility should be built in to change tonnages, provided *both parties* agree to a change for mutual benefit. The cost of any third party brought in to arbitrate a change of tonnage should be at the expense of the party who wants to change the agreement. Buyers must not be able to unilaterally cancel orders. Term and payment dates should be mandatory and adhered to. The mediation clause should be mandatory and strengthened to reflect the increased risks farmers have in growing the crop.

32. Are there any clauses which should be prohibited within any contract?

When we surveyed our members, 53% responded “yes” and 10% responded “no”.

We were told that growers should not have to purchase inputs like seed, fertiliser, or chemicals, and that this requirement should be prohibited. There was a strength of feeling on this issue. With many comments about this from our members.

33. If you have had a dispute relating to a contract, how was it resolved? (select all that apply)

When we surveyed our members, 65% responded “Informal discussion” and 18% responded they were not able to resolve through any of the above methods. None went through court proceedings.

There was a strength of feeling about disputes relating to contracts in survey comments and in-person. We were told that disputes are very difficult to do, due to power buyers hold within the supply chain. Farmers are very reluctant and afraid to go to court or arbitration because of the likely cost and strength of the buyer’s legal representation.

34. To what extent do you agree or disagree that the current mechanisms for resolving disputes are fair, affordable, and impartial?

When we surveyed our members, 0% strongly agreed, 13% strongly disagreed, 30% disagreed, and 55% neither agreed nor disagreed.

Again there was a strength of feeling in the respondents' comments. Fear of being de-listed, as well as examples of buyers withholding future contracts after a dispute was raised, were reported. It was also reported that there are a range of merchants taking different approaches, with less fear in some combinable crop supply chains, and that there was a need to raise the baseline standard of behaviour and practice.

35. Should regulations require all contracts to include a clear dispute resolution procedure?

When we surveyed our members, 87% responded "yes".

We had feedback that most contracts refer to English law and courts, and that all Scottish contracts should be governed by Scots law.

36. To what extent do you agree that timely and detailed data about each delivery is available (such as weight, quality, price, deductions, etc.).

When we surveyed our members, 38% responded strongly agreed and 35% agreed. No respondents strongly disagreed.

We were told that some merchants have good online systems and that rejections are communicated very quickly. But there is variability between merchants. Overall, respondents felt this aspect was working well overall in Scotland. With no need for industry-wide initiatives like digital grain passports.

37. Should contracts for the purchase of combinable crops include a requirement for buyers to provide key data where a seller meets contractual requirements (e.g. moisture etc.) to the seller within a specified timeframe?

When we surveyed our members, 95% responded "yes".

38. Should contracts for the purchase of combinable crops include a requirement for buyers to provide key data where the seller does not meet contractual requirements (i.e. for deductions or rejections) to the seller within a specified timeframe?

When we surveyed our members, 98% responded "yes".

They would like a report with detailed test results when there has been a rejection. They want this to improve transparency in the likely reduction in value of the product and the likely additional cost in re-directing the consignment.

39. If yes, what data should this include and what timeframe would be reasonable?

When we surveyed our members, 70% responded “immediate”.

Most of our members thought these data requirements should relate to the contract. Rather than a list of standard requirements for all combinable crops. The data must be available to improve the transparency of any price deductions or premiums.

40. Regulations are often applied uniformly across all UK nations. Is there any reason why a different approach should be taken for the combinable crops sector?

No.

41. If new legislative requirements were to be introduced, are you aware of any positive or negative impacts to business that could arise?

When we surveyed our members, 46% of respondents were “unsure”, and “yes” and “no” responses fairly evenly split.

While legislation is needed to improve fairness, flexibility should be built into any requirements. Particularly for specification requirements that can be challenged by difficult growing conditions some seasons. It is essential that consensus and fairness for both parties is built into any flexibility mechanisms. Development of this legislation should proceed cautiously, listening to and understanding different parts of the supply chain, taking time to get it right.

42. Are you aware of any positive or negative impacts on consumers which could arise from the introduction of regulations in this sector?

When we surveyed our members, 62% responded “no”.

We were told that transparency and a better ability to negotiate fairer terms would have a positive effect on consumers. There were some concerns that legislation could incur unreasonable costs for businesses or create negative unintended consequences. Care should be taken when developing policy to mitigate against this.

43. If new regulations were to be introduced, how much time do you estimate would be required to implement business changes necessary to comply with them?

When we surveyed our members, 35% responded “13-24 months” and 27% responded “under 12 months”.

If there was a legislative requirement for specification testing to be standardised (including standard operating procedures and equipment) then this could require significant investment, and a reasonable lead-in time.

44. Are there any additional issues, concerns, or experiences related to business relationships in the combinable crops supply chain that you feel have not been addressed in this consultation?

Fear is a major factor that has been raised throughout our member engagement on this issue. Fear of being de-listed, fear of future poor contract prices, and a general fear of the consequences of raising their head above the parapet.

There was a strength of feeling about disputes relating to contracts in survey comments and in-person. We were told that disputes are very difficult to do, due to the power buyers hold within the supply chain. Farmers are very reluctant and afraid to go to court or arbitration because of the likely cost and strength of the buyer's legal representation.

Other issues that were raised were:

- The misuse of force majeure by buyers to change terms.
- Unreasonably short notice periods for contract changes.
- The common practice of partial contract fulfilment.

There is also a strong sense of unfairness from our members about the purchase of imported grain by end markets, particularly from countries with different pesticide authorisations than the UK.

We want to remain engaged with Defra as this process continues. While our response will likely reflect NFU England's response, we want to highlight that we are an entirely separate organisation, and would really appreciate ongoing discussions with Defra as this policy is being developed.