Food (Scotland) Bill

Scotch Whisky Association

The Scotch Whisky Association (SWA) is the trade body representing over 90% of the Scotch Whisky industry, including distillers, bottlers, blenders and brokers.

Scotch Whisky plays a significant role in the Food and Drink sector representing 85% of Scottish food and drink exports. Scotch Whisky is generally considered to be a responsible and compliant industry with regard to food safety. In addition, responsible alcohol consumption is an aim of both the Scottish Government and the Scotch Whisky industry and we work collaboratively in a number of areas to help tackle alcohol misuse.

The functions of Food Standards Scotland (FSS) as detailed within this bill are directly relevant to our industry as a producer of Scotch Whisky and a Scottish food manufacturer. The Scotch Whisky Association is therefore delighted to have the opportunity to submit comments on the Food (Scotland) Bill to the Health and Sport Committee.

Part 1 – Food Standards Scotland

The Scotch Whisky industry is concerned with the objectives of the bill as set out in Part 1 Section 2(1).

In particular, the industry notes that objective (c) which is to protect the other interests of consumers in relation to food is defined in Part 4 Section 54 as (a) the labelling, marking, presentation or advertisement of food and (b) the descriptions which may be applied to food.

It is important to note that the Scotch Whisky Regulations (2009) set out in law the definition for the production, marking and labelling of Scotch Whisky. These regulations are used by the Scotch Whisky Association to combat Scotch Whisky fraud on a global basis and every company producing Scotch Whisky, which can only be made in Scotland, must adhere to these regulations.

The SWA would therefore welcome a commitment to include within the regulations, that will accompany the Food (Scotland) Bill, recognition that the Scotch Whisky Regulations (2009) provide the definition of Scotch Whisky, or acknowledgement that where regulations already exist relating to the marking, labelling or advertising of a food product that these regulations should take precedence over the general requirement in the Food (Scotland) Bill. The industry would not welcome changes, or new provisions that would conflict with the Scotch Whisky Regulations (2009). Such a move would cause confusion and could dilute the enforcement of the regulations which could, in turn, weaken our position when combatting producers of fraudulent products around the world. This work is essential to maintain the integrity and quality of our product and help to increase exports of our product.
In addition, it is important to note that all labelling of food products must adhere to the EU *acquis*, i.e. Regulation 1169 / 2011, among others. The European framework provides harmonised information for all EU consumers and facilitates the free movement of goods. While there are also some national rules among the EU’s 28 Member States (only in non-harmonised areas), where they exist they create barriers to free movement, complicate trade and add costs to business. We hope the new Bill will not seek to introduce additional labelling requirements.

With regard to advertising, there is currently an effective regulatory system in place composed of a mixture of self-regulation (non-broadcast) and co-regulation (broadcast) enforced by the Advertising Standards Agency. It is unclear how this objective of FSS would interact with the current regulatory system for advertising in the UK. Consideration should be given with regard to the message given out with Scotland to export markets and differences introduced between north and south of the border, which many businesses view as one market. We therefore ask that the FSS should be required to consult on any proposed changes to the labelling, marking and advertising of food with affected industries.

Part 1 Section 15 details the general powers of Food Standards Scotland stating that: *the FSS may do anything which it considers necessary or expedient for the purposes of or in connection with its functions.*

Tax decisions taken at home are often cited by Governments around the world as an excuse for higher taxes and/or discriminatory trade barriers. We believe that domestic decisions surrounding labelling and advertising could have similar implications, which would negatively affect the economy.

The SWA asks for the requirement for FSS to consider the wider implications of any decisions to be included within the Bill, particularly with regard to the possible effect on exports. Any actions taken by the FSS should seek to help grow the food and drink industry on an international scale which is consistent with the benefit of the Bill, as detailed within the Policy Memorandum, to *support the growth of the Scottish food and drink industry by providing a strong international reputation for safe, quality food.*

The only comment the SWA would like to make regarding the administrative and governance arrangements for FSS as covered by sections 4, 5 and 6 is to suggest that a Memorandum of Understanding with the FSA in London should be considered to ensure that the flow of information between the two organisations and advice continues.

Part 1 Sections 18- 21 detail the power of those accessing information under this Bill. The Scotch Whisky industry is happy to comply with regulators accessing information relating to the production of Scotch Whisky. However, we hope that an understanding of the unique production process of Scotch Whisky will be taken into consideration when requests are made and that adequate timescales will be adopted for the provision of such information to ensure that production is not interrupted. For example, it is important to note
malt distilleries are batch processes whereby certain aspects of production occur within certain timescales and not continually or on demand.

Part 1 Section 21 makes it an offence for an authorised person carrying out an observation to disclose or use information gathered which relates to a trade secret outwith the course of their duties. According to the explanatory notes, this relates to giving a trade secret gathered during an observation to a rival business. Although we welcome this inclusion, we note that it does not prohibit FSS from using its own powers under Section 30 to publish or disclose information.

Section 30 sets out protection surrounding the Publication and disclosure of advice and information and we seek further clarification regarding the level of this protection and how it is to be applied.

The SWA understands that this section does not authorise publication or disclosure of material which, according to Part 1 Section 30 (3) (a) and (b), is prohibited by an enactment, or would constitute or be punishable as a contempt of court or (5) if the disclosure of the material concerned is outweighed by any considerations of confidentiality attaching to it.

We believe that ‘consideration of confidentiality’ relates to commercially sensitive information. Clarification that this is indeed the case would be welcomed. Only three ingredients can be used to make Scotch Whisky – water, grains and yeast and the way in which it is made is set out in the Scotch Whisky Regulations (2009). Despite this, many methods are used to acquire differences in taste, strengths and features of the vast range of Scotch Whiskies are individual to each brand. Each of these methods could be viewed as commercially sensitive. In addition, companies would not be willing, for example, to provide cereal tonnages and spirit yields as this would provide competitors with production volumes.

In order to avoid any doubt during further consideration of this Bill and its accompanying regulations, the SWA requests that a detailed list of areas that would be considered as confidential or commercially sensitive by the FSS should be provided within the regulations. The SWA would be keen to have sight of these regulations in draft.

Given that it is impossible to reverse a decision once information has been published particularly in today’s electronic age, we seek assurances that consideration of confidentiality should be adopted as the starting position prior to any publication. That way, information could be published if deemed appropriate, rather than automatically published unless confidentiality was deemed an issue. In addition, further detail as to the manner in which information could be published, the notification of such publications and the level of detail published would also be welcomed.
Part 2 Food and feeding stuffs

The SWA is content that Section 32 15A (a) states that food information has the same meaning as Regulation (EU) No.1169/2011 of the European Parliament and notes that this section gives power to Scottish Ministers to give effect to requirements in EU law on food information.

Part 2 32 15A (b) states that food information law is defined as any enactment relating to food information as the Scottish Ministers may by regulations specify. The SWA is keen to see the detail of the regulations which will provide additional information to this area. We also highlight, again, the need for any such regulations to adhere to, or complement, current legislation affecting Scotch Whisky.

The Scotch Whisky industry welcomes Section 32 15B which creates a new power to issue a notice to detain food which contravenes food information law. This is defined within the Explanatory Notes as where the description of the label does not match the content.

Currently, officers have powers to detain or seize and remove food which is deemed unsafe but no such powers for food which is safe but doesn't meet food information requirements. We welcome that this Section will strengthen against mislabelling which will provide additional help to protect our product.

Presently, the existing FSA takes responsibility for products deemed to be unsafe to humans.

HMRC takes on responsibility where suspicious products pose a risk to tax revenues and Trading Standards step in for cases of inappropriate labelling within their own areas.

There remains a regulatory gap however for food fraud where goods are labelled to look like something that they are not (for example a spirit that says it is ‘Scotch Whisky’ on the label but is in fact a mixture of whiskies from other countries). Such goods may carry a genuine duty stamp and may pose no risk to health and may be labelled appropriately but they may be misleading consumers and undermining the reputation of Scotch and indeed individual brands of spirit. We believe that the inclusion of the new food information law will help begin to bridge this gap.

Section 32 15C creates a duty to report non-compliance with food information law. It places a new duty on Food Business Operators to inform FSS where food information law is, or has been, contravened. The SWA welcomes this inclusion which will provide additional protection to the consumer covering quality, provenance, authenticity, composition and labelling. It will also assist in cases whereby fraudulent whisky, which is falsely labelled as having been made in Scotland, is on the market. We hope that the FSS will work actively
with the licensed trade to share information and intelligence. We would also seek assurances that 15C would only come into force when the goods are placed on the market and are available for sale to the consumer. Prior to this in the supply chain, companies may wish to remove the product for aesthetic reasons or other non-compliances with internal standards and we would not wish any requirement for these to be formally reported.

In addition, in Europe, we have an on-going issue of concern with the importation of bulk spirits labelled as “whisky”. Although the goods may comply with the laws of their home countries, they do not meet the EU whisky definition. We hope that this Bill will assist with preventing such products being allowed to circulate in Scotland.

**Section 34 Animal feed stuffs**

Section 34 allows Scottish Ministers to make regulations in relation to animal feed stuffs. The SWA acknowledges that this is a fall-back power only and it is included in the Bill to guard against any unforeseen circumstances in which the other existing animal feeding stuff regulations based on European requirements are insufficient for Scotland’s needs. Some by-products of the Scotch Whisky production process are provided to the animal feeds market. We therefore ask for the Scotch Whisky industry to be fully consulted should any additions or further regulations surrounding this issue be considered.

**Part 3 Administrative sanctions**

Part 3 sets out provisions for non-compliance with food safety and standards. As mentioned earlier, in food safety terms, Scotch Whisky is generally considered to be a responsible and compliant industry. Over the years, we have developed good relationships with the regulatory bodies that monitor compliance relating to food safety and production.

**Fixed Penalty Notices**

The SWA is keen to see the regulations relating to Section 51 which will provide the list of activities to be covered by fixed penalty notices and compliance notices and Section 59 (2) and (3) which will highlight orders under affirmative procedure and those covered by negative procedures.

We note that Part 3 Section 39 states that a fixed penalty notice can be withdrawn. Further information surrounding the circumstances leading to this withdrawal would be welcomed.

We note that an appeals process for fixed penalty notices has been omitted from this Bill which leaves businesses with no means to question a fixed penalty notice. Section 47 provides details of appeals against a compliance notice however no such process has been included for fixed penalty notices. The SWA would welcome an appeal process for fixed penalty notices to be included within the Bill.
In terms of the application of fixed penalty notices, the amount applied should be proportionate and consistent. In addition, the penalty system is to ensure compliance and penalise non-compliance of the law, not to generate income which is why we welcome that money raised from fixed penalty notices are paid over to Scottish Ministers rather than enforcement authorities.

Part 3, Section 49 states that *before making any regulations under this Part, the Scottish Ministers must – (b) consult such persons as appear to them to be representative of interests likely to be substantially affected by the regulations.* The SWA would welcome consultation with regard to the drafting of regulations that may affect the Scotch Whisky industry.

**Costs**

The Association notes that the budget for FSS is expected to increase by 50%. We appreciate that there will be no financial implications for business in terms of charges related to this increase. However, we understand that secondary legislation will be required for regulating Animal Feed Stuffs as well as the Food Hygiene information scheme and that the costs associated with this will be covered when consulted on.

**Conclusion**

In conclusion the SWA would like to underline the need for Food Standards Scotland to continue to work alongside UK, EU and international decision making bodies. Continued effective communication with the FSA London and with Europe is critical to ensure effective national food regulations and compliance.

We are also keen to be involved with the consultation of the draft regulations in areas that will affect our industry. The Scotch Whisky Association would be happy to provide additional information or oral evidence if required.

*Scotch Whisky Association*

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