17 December 2018

Dear Gillian

EU EXIT LEGISLATION - PROTOCOL WITH SCOTTISH PARLIAMENT
POLICY AREA: ANIMAL HEALTH

The Import and Trade of Animals and Animal Products (Amendment etc.) (EU Exit) Regulations 2018

Thank you for your letter of 13 December regarding the notification of proposed changes to the above regulations.

Answers to the Committee’s questions are set out in the attached annex. I hope that this additional information clarifies the points raised, but I would, of course, be happy to provide any additional information the Committee requires.

MAIRI GOUGEON
EU EXIT LEGISLATION - PROTOCOL WITH SCOTTISH PARLIAMENT
POLICY AREA: ANIMAL HEALTH

The Import and Trade of Animals and Animal Products (Amendment etc.) (EU Exit) Regulations 2018

The notification indicates, in the list at the foot of page 1, a number of changes the proposed SI will make. For example, it indicates that a new definition of “third country” is to be inserted, and that the references to “various certificates” are substituted. Further information about what the effect of the new definition of “third country” would be helpful? What certificates are these? The notification should go on to explain what the effects of the changes, listed by bullet points, are.

As set out in the notifications, the amendments to be made by the proposed SI are technical in nature and do not change existing policy. The proposed SI to which this and other notifications relate will only apply in the event of a no deal UK exit from the EU to ensure that the applicable EU rules continue to operate effectively in domestic law as retained EU law. Should the UK leave the EU on 29 March 2019 with no deal in place, these are intended to be short term requirements. Following the Scottish Government’s “Stability and Simplicity” consultation earlier this year, my officials are continuing to consider what changes may be appropriate over the medium to long term.

The proposed SI remains in draft form and continues to be subject to development and checking by DEFRA as it moves towards being finalised; and Scottish Government officials continue to engage with DEFRA officials as that process continues. Should the Scottish Parliament agree to the Scottish Government’s proposal to consent to the proposed SI the Scottish Government will of course write to the Scottish Parliament once we have had sight of the final SI to indicate whether the final SI is consistent with the agreement given by the Scottish Parliament.

• References to “Community legislation” amended to alternatives as appropriate (e.g. “EU derived domestic legislation”).

References to “Community legislation” in the directly applicable EU instruments becoming retained EU law will be replaced by the proposed SI with alternatives including “EU derived-domestic legislation”. Such changes are technical changes to ensure that such references continue to be operable in the event of a ‘no deal’ UK Exit from the EU on 29 March 2019, reflecting the fact the UK will no longer be subject to EU law.

The term “EU-derived domestic legislation” refers to legislation originally made under the European Communities Act 1972. Similarly, other references to “Community legislation” would be changed to national legislation.

As noted above, the proposed SI remains in draft form and continues to be subject to development and checking by DEFRA as it moves towards being finalised. Scottish
Government officials continue to engage with DEFRA officials as that process continues, with a view to ensuring that appropriate approaches to drafting solutions to fix technical deficiencies are taken.

- **References to “member State” amended to “the appropriate authority”**.

Where the directly applicable EU instruments currently provide for functions to be exercisable by a “member State”, amendments are made so that those functions are instead exercisable by the “appropriate authority”.

As detailed in the notification “appropriate authority” means, in relation to Scotland, the Scottish Ministers or the Secretary of State with the consent of the Scottish Ministers (with similar provisions for the other devolved administrations). Such amendment is made to ensure that the provision continues to be operable in a UK domestic context when the EU instruments, amended by the proposed SI, become retained EU law in the UK in the event of a ‘no deal’ UK Exit from the EU on 29 March 2019.

- **New definition of “third country” added to make clear that it means any country other than an EU member State or the UK, including the Channel Islands and the Isle of Man.**

A number of the directly applicable EU instruments amended by the proposed SI make provision as matters stand for treatment of imports into the European Union from ‘third countries’, with ‘third country’ in an EU context referring to a country other than a member State.

A new definition of “third country” (which means any country other than a member State, the United Kingdom, the Channel Islands or the Isle of Man) is required because when the UK ceases to be a member State of the EU and the directly applicable EU instruments become retained EU law in the UK domestic context, there will be three categories of country: the United Kingdom, the Channel Islands or the Isle of Man; the remaining member States; and, finally, all other countries (i.e. “third countries”).

That is done so that, in relation to the UK, the law continues to operate as it does now: insofar as the EU instruments currently make provision in relation to imports into the UK (as a member State currently) from countries other than member States, the provision will continue to apply to imports into the UK (not as a member State post UK exit from the EU) from countries other than member States.

**References to various certificates referenced in existing EU legislation are, where appropriate, substituted for “relevant certificates as published by the appropriate authority”**.

There are a large number of certificates for import into the EU, or in some cases for intracommunity trade, of animals and animal products. For example, the veterinary certificate for processed meat products is laid down in Commission Decision 2007/777/EC.
The broad purpose and effect of the proposed amendments is that where provision is made for certificates to be published or laid down 'at an EU level' - e.g. in an EU instrument or by the Commission under an EU instrument – provision is instead made for that certificate to be published or laid down by the appropriate authority in a UK domestic context.

It is expected that the existing/current model health certificates will continue to be capable of being used for the purposes of imports into the UK of animals or animal products instead of any equivalent model health certificate published by an appropriate authority. In essence, the existing certificates can be used as any new certificates issued by the appropriate authority, which in relation to Scotland is either the Scottish Ministers or the Secretary of State with the consent of the Scottish Ministers (on which see further explanation below).

• Reference to “Community reference laboratory” is amended to “national reference laboratory”.

One of the directly applicable EU instruments to be amended by the proposed SI is Commission Regulation (EC) No 798/2008 which lays down a list of third countries, territories, zones or compartments from which poultry and poultry products may be imported into and transit through the Community and the veterinary certification requirements.

The instrument makes reference to the performance of functions by the Community reference laboratory for avian influenza and Newcastle disease. This is to be replaced with reference to a laboratory approved by the appropriate authority as a national reference laboratory. At present there are two reference laboratories in the UK, Weybridge and Pirbright, which are both located in England and approved by the Secretary of State.

• References to the “TRACES” system (the EU’s Trade Control and Expert System, tool for all sanitary requirements on intra-EU trade and importation of animals, semen and embryo, food, feed and plants) replaced where appropriate with references to “the United Kingdom’s system for import control notifications” (this is the UK’s replacement system for TRACES currently under development by the Animal & Plant Health Agency).

Currently, goods are notified to the UK using the EU's Trade Control and Expert System (TRACES). The replacement system for import control notifications is currently under development, from recent discussions with DEFRA we are aware this system is being tested from January 2019 ahead of the exit date.

• Making provision for the legislative functions currently exercisable at an EU level to be exercised domestically by the “appropriate authority” (in relation for example to movement of pet animals, where the appropriate authority will have power by regulations to make provision in relation, for example, to species specific requirements for marking or describing pet animals and species specific preventive health measures for diseases or infections.
I would ask the committee to note the answer below on legislative functions.

**How has it been decided when a legislative or administrative function is for Scottish Ministers, and when it is for the Secretary of State with the consent of Scottish Ministers? Can further details of these legislative functions be given?**

Animal health is a devolved matter and throughout the instrument the principle applied is that all functions will be exercised by the Scottish Ministers except in areas where divergence is extremely unlikely and there are clear advantages to a unified UK approach, such as to facilitate international trade.

Where the proposed SI will amend directly applicable EU instruments becoming retained EU law to make provision in relation to exercise of functions – whether legislative functions or administrative functions – it does so by providing for those functions to be exercisable by the “appropriate authority”.

As noted above, the “appropriate authority” means, in relation to Scotland, either

- the Scottish Ministers;

or

- the Secretary of State with the consent of the Scottish Ministers,

with similar provisions for the other devolved administrations.

In any particular case it will be a matter for the Scottish Ministers to decide whether to exercise a function (whether an administrative function or a legislative function) themselves in relation to Scotland or to consent to the Secretary of State exercising the function in relation to Scotland.

**How will the legislative functions be exercised? Would the powers be exercisable by regulations, and, if so, what Parliamentary scrutiny procedure would apply?**

In terms of amendments in the proposed SI making provision for exercise of legislative functions, the proposed SI will, as indicated in the notification, make amendments to Regulation (EU) No 576/2013 of the European Parliament and of the Council on the non-commercial movement of pet animals. Amendments are made giving the “appropriate authority” (on which see above) the power to make certain provision by regulations.

In relation to Scotland the appropriate authority may either be the Scottish Ministers (making regulations by SSI to be laid in the Scottish Parliament) or the Secretary of State (making regulations by SI to be laid in the UK Parliament) with the consent of the Scottish Ministers.

Scrutiny procedures for further regulations made in exercise of regulation making powers for which the proposed SI makes provision are still to be determined by the UK Government and the Scottish Government.
In the cases where this proposed instrument will confer legislative powers on the Secretary of State with consent of Scottish Ministers, do these concern devolved matters? How will the Scottish Parliament scrutinise the decision? Has it been considered whether joint procedure at Westminster and Holyrood could apply?

As mentioned above, animal health is a devolved matter. With respect to the Scottish Parliament scrutiny, at the moment, where Scottish Ministers consent via s57(1) of the Scotland Act 1998 to UK regulations implementing EU obligations, we inform the relevant Parliamentary Committee in writing. Scrutiny of further regulations made by the Secretary of State (with the consent of the Scottish Ministers) under provisions amended by EU Exit SIs or SSIs is a matter for the Cabinet Secretary for Government Business and Constitutional Relations to determine, in consultation with the Parliamentary authorities.

Scottish Government
December 2018