8th October 2018

Dear Lewis

THE GENERAL FOOD LAW (EU EXIT) REGULATIONS 2018
THE GENERAL FOODSTUFFS HYGIENE (EU EXIT) REGULATIONS 2018
THE SPECIFIC FOODSTUFFS HYGIENE (EU EXIT) REGULATIONS 2018
THE CONTAMINANTS IN FOOD (EU EXIT) REGULATIONS 2018
THE QUICK FROZEN FOOD (EU EXIT) REGULATIONS 2018

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach the notifications which set out the details of the above SIs which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in these SIs. This is the first in a series of such notifications which deal with EU food law that I will be sending to the Health and Sport Committee over the coming weeks.

The policy rationale for the proposed changes that the above SIs will make is to ensure the continuation of important consumer protection elements of the current EU food and feed regulatory regime. This includes those aspects that establish the general principles of food Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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law and associated responsibilities on food and feed businesses, general food hygiene requirements and the specific hygiene rules that apply to products of animal origin, and technical standards related to contaminants in food and quick-frozen foodstuffs. This will maintain the high standards of food and feed safety and hygiene that we currently benefit from as an EU Member State, and I am pleased to note the assurances provided by the UK Government that these changes will not result in any material changes to existing levels of public and animal health protection with respect to domestic and imported food and feed.

In preparing the UK statute book for a No-Deal scenario the changes remove those sections of EU food law that provide the legal basis for the European Food Safety Authority (EFSA) and the EU’s Rapid Alert System for Food and Feed (RASFF) and associated crisis and emergency management arrangements. The nature of the UK’s future relationship to EU agencies and bodies such as EFSA is subject to ongoing UK-EU negotiations, and the Scottish Government has made clear its position that we would wish to continue to benefit from participation in such agencies. However, in the event of a No-Deal it would not be possible to ensure a legal basis for the continued access to these functions and the instrument therefore reflects the reality of that situation.

The Food Standards Agency (FSA) is the lead UK department for these SIs which are due to be laid in the UK Parliament between 31 October and 5 November 2018. The FSA were advised of the Scottish Parliament scrutiny requirements and officials in Food Standards Scotland (FSS) sought a deferral of the proposed laying dates to allow the full 28 days scrutiny period, given the coincidence of the Westminster laying date and Scottish Parliament recess from 6 – 21 October. However, FSA asked that if at all possible we accommodate the UK scheduled laying dates on the basis that an agreement in principle has been reached that these instruments will fully respect the devolution settlement and the functions and powers of Scottish Ministers and the Scottish Parliament in these devolved policy areas.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you in due course.

Joe FitzPatrick

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area
THE GENERAL FOOD LAW (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

These Regulations make amendments to, what will become, retained direct EU law relating to the safety of food and animal feed for the whole of the United Kingdom. They amend Regulation (EC) No. 178/2002 laying down the general principles of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (‘General Food Law Regulation’). The General Food Law Regulation is the cornerstone of EU food law and establishes its basic principles, including general obligations in relation to food trade, overarching food and feed safety and traceability requirements, and associated responsibilities on food and feed businesses. These Regulations also amend Commission Implementing Regulation (EU) No. 931/2011 on the traceability requirements set by Regulation (EC) No. 178/2002 for food of animal origin. These Regulations also revoke Commission Regulation (EU) No. 16/2011 laying down implementing measures for the Rapid alert system for food and feed.

These Regulations also make amendments to related subordinate legislation in England.

Summary of the proposals and how these correct deficiencies

These Regulations make the necessary amendments to the above EU Regulations to ensure they continue to function effectively following the UK’s exit from the EU. This includes, for example, replacing EU references and terminology that will not be appropriate when the UK is no longer an EU Member State.

The Regulations also remove those provisions of the General Food Law Regulation that provide the legal basis for establishing the European Food Safety Authority (EFSA), the Rapid Alert System for Food and Feed (RASFF) system, and associated administrative arrangements between EU Member States for crisis and emergency management in the event that food or feed constitutes a serious risk to public health.

The Regulations also amend the General Food Law Regulation to provide Ministers in each of the four UK countries with enabling powers to make subordinate legislation for the purpose of applying traceability requirements to specific sectors.
An explanation of why the change is considered necessary

The proposed changes are necessary to ensure the high level of food and feed safety and consumer protection provided by the above EU Regulations continues to apply in the UK once this legislation become retained direct EU law.

Removal of those provisions of EU food law establishing EFSA, the RASFF system and associated crisis management procedures are necessary as these will no longer be applicable to the UK under a No-Deal scenario, which is the basis upon which the text is drafted. The nature of the UK’s future relationship to EU agencies and bodies such as EFSA is subject to ongoing UK-EU negotiations, and the Scottish Government has made clear its position that we would wish to continue to benefit from participation in such agencies. However in the event of a no deal it would not be possible to ensure a legal basis for the continued access to these functions and the instrument therefore reflects the reality of that situation.

The provision of enabling powers related to traceability requirements for specific sectors is required to replace existing delegated powers exercised by the Commission at EU level.

The relevant repatriated powers respect the devolution settlement providing an appropriate power for Scottish Ministers and the Scottish Parliament to make certain amendments currently held by the EU institutions.

Scottish Government categorisation of significance of proposals

Category A – on the basis that this instrument makes the required amendments to the above EU Regulations which are technical in nature and uncontroversial.

Impact on devolved areas

Food and feed safety is a fully devolved area. The proposed amendments to retained direct EU law relating to the safety of food and animal feed will therefore affect Scotland. The instrument as drafted respect and protect the Scottish Ministers powers to make subordinate legislation instead of the EU institutions in those areas specified in these Regulations (i.e. modifications on the rules concerning traceability of foods).

Summary of stakeholder engagement/consultation

The Food Standards Agency carried out a UK-wide consultation on its proposed approach to retained EU law for food and feed safety and hygiene during September and October 2018. Food Standards Scotland has highlighted this consultation to stakeholders in Scotland.

A note of other impact assessments, (if available)
The Food Standards Agency has not carried out an impact assessment in relation to these Regulations as they are aimed at preserving the effect of the current regulatory regime.

**Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation**

The Scottish Ministers believe that the changes proposed in these Regulations are necessary so far as falling within devolved competence to secure continuation of an effective food and feed safety regulatory regime, and to provide continuity for business on day one of Brexit. In the current circumstances where there is existing harmonised EU law in this area and the need to prepare for a No-Deal exit from the EU, the Scottish Ministers consider that it is appropriate therefore for the fixing legislation be made on a UK-wide basis by the UK Government. This is on the basis that there is an appropriate transfer of powers to the Scottish Ministers and Scottish Parliament in the Regulations.

**Intended laying date (if known) of instruments likely to arise**

The current proposed laying date is 31 October 2018.

**If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?**

We advised FSA of the parliamentary handling requirements and sought a deferred Westminster laying date as a consequence. However, they have asked that we try to meet the UK laying dates, on the basis of the general agreement that has been reached on the content of these instruments, that these changes are considered non-contentious and that there are significant pressures on the overall Parliamentary Westminster schedule which mitigates against rescheduling.

**Information about any time dependency associated with the proposal**

None.

**Any significant financial implications?**

These Regulations are not expected to have any financial implications for stakeholders in Scotland.
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

THE GENERAL FOODSTUFFS HYGIENE (EU EXIT) REGULATIONS
THE SPECIFIC FOODSTUFFS (HYGIENE) (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

The above Regulations make amendments to, what will become, retained direct EU law relating to food hygiene requirements for food business operators. They contain requirements including: the registration and approval of food businesses; the required approach to food safety management; the structural requirements for food businesses in the UK and intra-community trade requirements in relation to the marking and certification of products of animal origin.

Summary of the proposals and how these correct deficiencies

These Regulations make the necessary amendments to the above EU Regulations to ensure they continue to function effectively following the UK’s exit from the EU. Regulation (EC) No. 852/2004 on the hygiene of foodstuffs – sets out general requirements applicable to all food business operators and establishments, as well as requirements for the production of industry guides. The above EU exit regulations will retain and maintain those general requirements and standards in a UK context.

Regulation (EC) No. 853/2004 laying down specific hygiene rules for food of animal origin – sets out specific requirements, in addition to those set out in Regulation (EC) 852/2004, for those food business operators placing products of animal origin on the market. These include the requirement that such establishments be approved; the requirements for identification marking (currently an oval ‘EC’ mark); and requirements for the approval of substances other than potable water which may be used for decontamination of products of animal origin (for example the potential use of chlorine washes for poultry). The above EU exit regulations will ensure the continued applicability of the various provisions and provides for arrangements to ensure the necessary transfer of functions and powers from the EU institutions to the appropriate bodies in the UK.

Regulation (EU) 636/2014 on a model certificate for the trade of unskinned large wild game – this regulation concerns intra community requirements which will not be applicable on exit and will therefore be revoked.

Whilst we have not seen final draft instruments confirming the arrangements for repatriation of powers currently exercised by EU institutions, other drafts in relation to food law we have been sighted on respect the devolution settlement and reflect devolved competence for these specific areas. We have been assured, in writing, by the Food Standards Agency (FSA) that the final drafting on powers to amend
annexes in respect of retained EU law etc. will follow the same format outlined in the fixing instrument for general food law, which provides that legal competence is conferred on ‘appropriate Ministers’ – which is defined as the Scottish Ministers in respect of Scotland.

**An explanation of why the change is considered necessary**

The change modifies the above regulations by limiting their scope to the UK, and therefore providing appropriate Ministers (rather than the Commission/EU Council/Parliament) with domestic powers to amend specific elements of the legislation. Likewise where certain executive functions are carried out by the Commission these are intended to be repatriated by transfer to FSA and FSS as appropriate.

**Scottish Government categorisation of significance of proposals**

This instrument has been categorised as Category A. Whilst the subject matter of these regulations contains potentially contentious issues (the poultry chlorine wash issue mentioned above has been raised in the media as a potential point of dispute in trade negotiations), this instrument covers general and specific technical requirements in relation to obligations with which food business operators must comply currently, tailored to a UK context on EU exit. The instrument does not change the current rules here and will provide Scottish Ministers with the ability to determine any future changes for Scotland. On that basis we consider that these changes are principally involved in ensuring continuity of law and the transfer of functions provisions are consistent with the devolution settlement.

**Impact on devolved areas**

The subject matter is a fully devolved area. The proposed amendments relate to retained direct EU law relating to food hygiene will therefore affect Scotland. It is intended that the instrument will respect and protect the Scottish Ministers powers to make subordinate legislation instead of the EU institutions in those areas specified in these Regulations. The change in terms of powers and competence highlights that additional capacity may be required in Scotland and the rest of the UK to provide to support the repatriation of powers in this area to UK authorities.

**Summary of stakeholder engagement/consultation**

The FSA carried out a consultation on its food and feed proposals during September and October 2018. FSS has highlighted this consultation to stakeholders in Scotland.

**A note of other impact assessments, (if available)**

N/A
Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

The Scottish Ministers believe that the changes proposed in these Regulations are necessary so far as falling within devolved competence to secure continuation of an effective food hygiene regulatory regime, and to provide continuity for business on day one of Brexit. In the current circumstances where there is existing harmonised EU law in this area and the need to prepare for a No-Deal exit from the EU, the Scottish Ministers consider that it is appropriate therefore for the fixing legislation be made on a UK-wide basis by the UK Government. This is on the basis that there is an appropriate transfer of powers to the Scottish Ministers and Scottish Parliament in the Regulations.

Whilst the early drafts received did not properly reflect devolved competence, we expect to see a draft instrument imminently that will bring these hygiene instruments into alignment with other instruments seen to date from FSA. The more recent drafts in related areas reflect the powers that Scottish Ministers would expect to have in relation to a devolved subject area ie parity between the Scottish Ministers and the Secretary of State.

Intended laying date (if known) of instruments likely to arise

1 November 2018

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?

We advised FSA of the parliamentary handling requirements and sought a deferred Westminster laying date as a consequence. However, they asked that we try to meet the UK laying dates, on the basis of the general agreement that has been reached on the content of these instruments, that these changes are considered non-contentious and that there are significant pressures on the overall Parliamentary Westminster schedule which mitigates against rescheduling.

Information about any time dependency associated with the proposal

N/A

Any significant financial implications?

These Regulations are not expected to have any financial implications for stakeholders in Scotland.
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area
CONTAMINANTS IN FOOD (AMENDMENT) (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

These Regulations make amendments to, what will become, retained direct EU law which sets down food safety limits for certain contaminants in food, as well as sampling and analysis requirements.

Summary of the proposals and how these correct deficiencies

These Regulations make the necessary amendments to the above EU Regulations to ensure they continue to function effectively following the UK’s exit from the EU.

Council Regulation (EEC) No. 315/93 provides for limits to be set for chemical contaminants in food. The proposed amendment replaces the EU function of setting any revised limits with domestic powers.

Minor technical amendments are made to the following regulations in order to reflect the scope of the retained EU law applies to the UK:

Commission Regulation (EC) No. 401/2006 laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs;

Commission Regulation (EC) No. 1881/2006 setting maximum levels for certain contaminants in foodstuffs

Commission Regulation (EC) No. 1882/2006 laying down methods of sampling and analysis for the official control of the levels of nitrates in certain foodstuffs

Commission Regulation (EC) No. 333/2007 laying down the methods of sampling and analysis for the control of the levels of trace elements and processing contaminants in foodstuffs

Commission Regulation (EC) No. 124/2009 setting maximum levels for the presence of coccidiostats or histomonostats in food resulting from the unavoidable carry-over of those substances in non-target feed

Commission Regulation (EU) 2017/644 laying down methods of sampling and analysis for the control of levels of dioxins, dioxin-like PCBs and non-dioxin-like PCBs in certain foodstuffs and repealing Regulation (EU) No. 589/2014
An explanation of why the change is considered necessary

The change modifies the above regulations to make technical changes to apply the provisions in the context of their application to the UK in the circumstances of a no deal with the EU. As a consequence they also provide Ministers with domestic powers to amend specific elements of the legislation, particularly in relation to the setting of maximum permitted levels of contaminants in foodstuffs. The relevant repatriated powers respect the devolution settlement providing an appropriate mechanism for Scottish Ministers and the Scottish Parliament to make certain amendments currently within the scope of the EU institutions.

Scottish Government categorisation of significance of proposals

This instrument has been classed as Category A on the basis that it makes the required amendments to the above EU Regulations which are technical in nature and uncontentious.

Impact on devolved areas

Contaminants in food, as a food safety matter, is a fully devolved area. The proposed amendments to retained direct EU law relating to contaminants in food will therefore affect Scotland. The instrument as drafted respects and protects the Scottish Ministers powers to make subordinate legislation instead of the EU institutions in those areas specified in these Regulations. The change in terms of powers and competence means that additional capacity in Scotland and the rest of the UK may be required to provide support the repatriation of powers in this area to UK authorities.

Summary of stakeholder engagement/consultation

The Food Standards Agency carried out a consultation on its food and feed proposals during September and October 2018. Food Standards Scotland highlighted this consultation to stakeholders in Scotland

A note of other impact assessments, (if available)

N/A

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

The Scottish Ministers believe that the changes proposed in these Regulations are necessary so far as falling within devolved competence to secure continuation of a food safety regulatory regime, and to provide continuity for business on day one of Brexit. In the current circumstances where there is existing harmonised EU law in this area and the need to prepare for a No-Deal exit from the EU, the Scottish Ministers consider that it is appropriate therefore for the fixing legislation be made on a UK-wide basis by the UK Government. This is on the basis that there is an appropriate transfer of powers to the Scottish Ministers and Scottish Parliament in
the Regulations.

**Intended laying date (if known) of instruments likely to arise**

5 November 2018

**If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?**

We advised FSA of these parliamentary handling requirements and sought a deferred Westminster laying date as a consequence. However, they have asked that we try to meet the UK laying dates, on the basis of the general agreement that has been reached on the content of these instruments, that these changes are considered non-contentious and that there are significant pressures on the overall Parliamentary Westminster schedule which mitigates against rescheduling.

**Information about any time dependency associated with the proposal**

N/A

**Any significant financial implications?**

N/A
NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s) (if known) or a title describing the policy area

THE QUICK-FROZEN FOODSTUFFS (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

These Regulations make amendments to, what will become, retained direct EU law relating to quick-frozen foodstuffs.

Council Directive 89/108/EEC covers the approximation of the laws of the EU Member States relating to quick-frozen foodstuffs for human consumption. This was introduced to more closely align the laws of EU Member States on foods which have been subjected to a rapid freezing process and facilitate trade within the EU.

The Directive defines quick-frozen foodstuffs as foodstuffs:

- which have undergone a suitable freezing process known as ‘quick-freezing’ whereby the zone of maximum crystallization is crossed as rapidly as possible, depending on the type of product, and the resulting temperature of the product (after thermal stabilization) is continuously maintained at a level of -18 °C or lower at all points, and

- which are marketed in such a way as to indicate that they possess this characteristic.

Linked to this Directive is Regulation (EC) No 37/2005 on the monitoring of temperatures in the means of transport, warehousing and storage of quick-frozen foodstuffs intended for human consumption. This directly applicable Regulation requires suitable recording instruments to be fitted to means of transport, warehouses and storage areas to enable the frequent monitoring of the air temperature to which quick frozen foodstuffs are subjected.

Food businesses must date and store temperature records for at least one year or a longer period according to the nature and shelf life of the quick-frozen foodstuffs. There are derogations from this requirement for open retail cabinets and products in local distribution where the temperature can be measured by at least one easily visible thermometer.

Summary of the proposals and how these correct deficiencies

Most of the draft Regulations relate to corrections to England only domestic legislation. The equivalent necessary changes to Scottish domestic legislation will be done in due course by Scottish Statutory Instrument.
The correction to Regulation (EC) No 37/2005 extends across the UK and deletes the line after Article 5 “This Regulation shall be binding in its entirety and directly applicable in all Member States.”.

An explanation of why the change is considered necessary

The change modifies Regulation (EC) No 37/2005 by making the technical change necessary to remove the reference to Member State and make the provisions work within the context of the UK after EU exit.

Scottish Government categorisation of significance of proposals

[See above step (6) on page 8 – choose category A or B and explain why]

This instrument has been classed as Category A on the basis that it makes the required amendments to the above EU Regulations which are technical in nature and uncontentious.

Impact on devolved areas

The subject matter is a fully devolved area. The proposed amendments to retained direct EU Law relating to temperature monitoring requirements for quick-frozen food will therefore affect Scotland. However, the correction does not alter the current requirements on businesses in Scotland and maintains the same requirements across the UK. The Regulation does not contain any provisions linked to repatriation of decision making powers from the EU to the UK.

Summary of stakeholder engagement/consultation

The Food Standards Agency carried out a consultation on its food and feed proposals during September and October 2018. Food Standards Scotland highlighted this consultation to stakeholders in Scotland.

A note of other impact assessments, (if available)

N/A

Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

The Scottish Ministers believe that the changes proposed in these Regulations are necessary so far as falling within devolved competence to secure continuation of a temperature monitoring regime for quick-frozen foodstuffs, food safety regulatory regime, and to provide continuity for business on day one of Brexit. In the current circumstances where there is existing harmonised EU law in this area and the need to prepare for a No-Deal exit from the EU, the Scottish Ministers consider that it is appropriate therefore for the fixing legislation be made on a UK-wide basis by the UK Government.
Consumers will not be affected by this change as quick-frozen foodstuffs will remain covered by the same definition and subject to temperature monitoring as at present.

The proposal does not change the temperature monitoring requirements on food businesses in Scotland and maintains the same standards as in the other 27 EU countries.

There are no matters associated with transfer of decision making powers linked to this instrument.

**Intended laying date (if known) of instruments likely to arise**

5 November 2018

**If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister’s proposal to consent, why not?**

We advised FSA of these parliamentary handling requirements and sought a deferred Westminster laying date as a consequence. However, they have asked that we try to meet the UK laying dates, on the basis of the general agreement that has been reached on the content of these instruments, that these changes are considered non-contentious and that there are significant pressures on the overall Parliamentary Westminster schedule which mitigates against rescheduling.

**Information about any time dependency associated with the proposal**

N/A

**Any significant financial implications?**

None anticipated