October 2018

Dear Lewis,

EU FOODSTUFFS AND HYGIENE – EU EXIT REGULATIONS

Thank you for your letter of 18 October 2018. I wish to apologise for missing your requested response date to allow the Committee to consider this further information during its deliberations today. I understand that the Committee decided today that it was not in a position to consider my recommendation and requires more time to do so. Given our commitment to try, wherever possible, to meet the tight timescale for these UK instruments to ensure a functioning statute book should there be no deal between the EU and UK by 29 March 2019, I would be grateful if the Committee might be able to consider the information attached herein at its meeting next week? I make this request in order to accommodate, if possible, the scheduled laying dates for these instruments the first of which is scheduled for 31 October.

To assist the Committee in its consideration of the notifications to consent to UK Statutory Instruments, following advice from Food Standards Scotland I have replied to your questions as follows:

General

1. The proposed Regulations do not introduce any new policy provisions. The existing EU provisions covered by the instruments are already fully harmonised and directly applicable in all member states. The UK SIs are intended to ensure continuity of this EU law at the point of EU Exit. They remove redundant EU technical references and make the retained legislation workable in a UK context, for
example by replacing references to EU institutions where necessary, to apply corresponding UK arrangements. This includes limited transfer of functions by replacing ‘European Commission’ with a form of wording to enable each of the four administrations in the UK to provide for minor amendments to limited parts of retained legislation on food and feed safety in future.

2. In some limited areas, e.g. food contaminants controls, there are proposals to transfer non-legislative functions, currently exercised by EU institutions to Food Standards Scotland. The functions in question are well aligned to the specific functions, ascribed to Food Standards Scotland in the Food Scotland Act 2015, e.g. advice on food safety risks and monitoring such risks within the food supply chain. It was therefore considered there was only one obvious policy option as to which body would provide an opinion to Scottish Ministers and the Scottish Parliament in these areas.

28 day scrutiny period

3. The Cabinet Secretary received a formal request from the UK Government to agree to a series of UK Statutory Instruments regarding food and feed safety, food standards and nutrition related matters on 28 September. Food Standards Scotland was informally advised by the Food Standards Agency (FSA), shortly before this formal consent request, that these particular instruments had been scheduled for early laying, within the challenging overall programme of UK Instruments that need to be through Westminster by the end of March 2019. Food Standards Scotland expressed concern over the limited time available for their consideration from a Scottish perspective, given that they had not received drafts of all the instruments themselves. Given the probability that this would result in less than the desired 28 days for Scottish Parliamentary scrutiny of the instrument, they requested the UK laying date be deferred to allow this to occur. FSA apologised for the tight deadline, but advised that any rescheduling would be extremely difficult given the overall tight deadline to ensure a functioning statute book for EU Exit next year. They asked that given the degree of policy agreement that had already been reached on the instruments at official level and their commitment to ensure that the limited transfer of functions elements would fully respect the devolution settlement, that the existing Westminster schedule be accommodated.

4. On balance, we agreed with the need to get the SIs laid according to their schedule and Food Standards Scotland then worked as quickly as possible to produce the notifications to the Scottish Parliament based on the information and draft Statutory Instruments available to them. Unfortunately on this occasion we have only been able to afford 8 days for Scottish Parliamentary scrutiny. Further drafts were received late on 19 October but these are still not final drafts. Food Standards Scotland and Scottish Government Legal Directorate are working hard with the FSA to agree the final text.
Annex B - The General Food Law (EU Exit) Regulations 2018

5. The Food Standards Agency and Food Standards Scotland are currently discussing the development of a UK-wide framework for food and feed safety and hygiene, with a view to agreeing new working arrangements and enhanced capacity and capability required to bolster the existing UK and Scottish capacity for incident handling and risk assessment, currently carried out by EU governance arrangements and systems. Where new arrangements require legislative underpinning, such as transfer of functions, the legislation will be subject to the protocol which has been established to ensure that Parliamentary scrutiny of the instrument and consent is given as required.

6. The UK’s future relationship with European Institutions and systems remains subject to ongoing UK/EU negotiations. Both FSA and FSS are seeking to maintain a good relationship with the European Food Safety Authority (EFSA), though the details of how this will be achieved are not expected to be clear until the negotiations are finalised.

7. In the event of a no deal, it is unclear what the cooperation arrangements will be. However we have been pressing the UK Government to ensure that appropriate information sharing continues, even in the event of a no deal in order to best protect consumers’ interests and Scotland’s reputation in an international context.

8. The proposed legislation maintains the basis of the existing EU legislative provisions which are designed to ensure a high level of public health protection is maintained, and that food businesses in Scotland and the rest of the UK are already operating within. With this in mind, it is therefore important that the necessary functioning statute covering these policy areas is in place before exit day.

9. With regard to Regulation (EU) No 16/2011. This lays down detailed implementing measures for the Rapid Alert System for Food and Feed (RASFF) system. As the UK will no longer participate in this EU system in the event of a no-deal scenario these more detailed rules will become redundant.

10. Category A was chosen on the basis that the main purpose of the instruments is to ensure continuity of law with no significant policy divergence. With respect to transfer of powers from the EU institutions, it is anticipated this will be very limited here and will be consistent with the devolution settlement. In particular, the proposed areas of transfer are considered to fall entirely within areas of devolved competence, as currently delineated within the Scotland Act and the transfer will provide that Scottish Ministers assume those functions of amending the EU law, in so far as those amendments are to be applied within Scotland. There are no proposals to sub delegate new powers to legislate to public bodies in these instruments, no new fees being provided for, or new financial implications for businesses or the creation of new fines or penalties.
11. As mentioned above the new powers for Ministers to make subordinate legislation with respect to applying traceability requirements are consistent with the devolution settlement and the existing powers of Scottish Ministers to make subordinate legislation for the purposes of ensuring food safety and specifying rules on hygiene contained in the Food Safety Act 1990.

12. The Food Standards Agency carried out a full public consultation across the UK from 4 September until 14 October on the proposed approach to retained EU law for food and feed safety and hygiene. The consultation received 47 responses of which 81% supported or did not disagree with the proposed approach being outlined, with 17% of replies containing mixed comments. The main concerns raised related to the communication of change and ensuring sufficient lead in time is given. One respondent raised concerns about the timeframe for delivering the legislation needed for day one readiness.

Annex C - The General Foodstuffs Hygiene (EU Exit) Regulations 2018

The Specific Foodstuffs Hygiene (EU Exit) Regulations 2018

13. The EU regulations amended by these fixes cover the food chain in its entirety. They set down the responsibilities of food business operators in relation to the hygienic production of food from primary production (such as farming and fishing) through to retail and require such businesses be, depending on their operations, either registered or approved by the competent authority.

14. The regulations set down in law the requirement for all food businesses, except primary producers, to put in place a food safety management system based on ‘Hazard Analysis and Critical Control Point’ (HACCP) principles as well as infrastructure requirements. There are also provisions for the production of guides to good hygiene practice. The regulations also specify additional requirements for establishments placing products of animal origin on the market and the requirement that such establishments carry an identification number as well as, in the case of fresh meat, a health mark which is applied by an official veterinarian of the competent authority. The regulations require that only potable or clean water be used as a decontaminant for meat, unless other substances are approved for such use by the Commission.

15. The Regulations also establish micro-criteria which must either be applied to ensure the safety of the final product (food safety criteria) or to monitor hygiene during processing in establishments (process hygiene criteria).

16. In addition, these regulations set down specific tasks required of competent authorities in relation to approved establishments producing products of animal origin. This includes specific tasks required of official veterinarians in slaughterhouses, as well as requirements for the classification and monitoring of bivalve shellfish production areas. The regulations also provide for the production of
stakeholders in Scotland but has not directly engaged with stakeholders on the UK Government’s approach. Initial findings from this consultation are given with Annex B

23. Food Standards Scotland issued a specific consultation related to the required replacement provisions for health marking of products of animal origin. This is required since the term EU will no longer be permitted on the health mark applied to UK products once the UK leaves the EU. The proposals were generally supported by stakeholders although concerns were raised by industry about the need for early clarification of the new mark to facilitate modification of existing labelling. FSS also took the opportunity to test stakeholders’ views about the potential ability to provide additional information delineating Scottish establishments at some point after EU exit and there was some support for that idea.

Annex D - The Contaminants in Food (Amendment) (EU Exit) Regulations 2018

24. The regulations make the necessary fixes to ensure that the regulations laying down rules regulating the presence of certain contaminants in food such as PCBs and dioxins will work effectively after EU exit. In particular they modify as necessary the procedures to be applied in future to modify the tolerances for specific contaminants already established at EU level. This includes limits for the same contaminants in different foods, analytical detection limits and sampling and analysis methods to be used.

25. The key feature of the fixing instrument is to replace the current role for these modifications from the Commission to Ministers in the UK countries in so far as they apply in those countries. The fix also provides that the Food Standards Agency in England, Wales and Northern Ireland, and Food Standards Scotland in Scotland, should be consulted by Ministers to provide advice before new technical standards are established and to carry out related functions such as monitoring levels of certain contaminants in certain foods.

26. It is considered that a Category A notification is appropriate given that the necessary transfer of functions is consistent with the devolution settlement. Scottish Ministers already have powers to make regulations prohibiting or regulating the presence in food of any specified substance, of any specified class and generally for regulating the composition of foods under Section 16 of the Food Safety Act 1990. Whilst there are proposals to transfer limited non-legislative functions currently exercised by EU institutions to Food Standards Scotland, the functions in question are well aligned to the specific functions ascribed to Food Standards Scotland in the Food Scotland Act 2015, e.g. advice on food safety risks and monitoring such risks within the food supply chain. It is therefore considered there was only one obvious policy option as to which body would provide an opinion to Scottish Ministers and the Scottish Parliament in these areas, resulting in a Category A rather than Category B notification in accordance with the guidance in the protocol on obtaining approval of the Scottish Parliament.
lists of countries and establishments from which products of animal origin can be imported into the EU.

17. The EU regulations also contain provision for the Commission to amend the regulations through “comitology procedures”, which in effect allows for changes to micro criteria and provides for more detailed implementing rules where considered appropriate, as well as allowing for changes to certain import conditions. These powers are repatriated to appropriate authorities in a UK context in the fixing SI, which for Scotland will be Scottish Ministers.

18. Competence for enforcing these regulations in Scotland is set out in the Food Hygiene (Scotland) Regulations 2006 (as amended) and is unchanged as a consequence of the UK fixing SIs.

19. Category A was chosen on the basis that the main purpose of the instruments is to ensure continuity of law with no significant policy divergence. With respect to transfer of powers from the EU institutions, it is anticipated this will be very limited here and will be consistent with the devolution settlement. In particular, the proposed areas of transfer are considered to fall entirely within areas of devolved competence, as currently delineated within the Scotland Act and the transfer will provide that Scottish Ministers assume those functions of amending the EU law, in so far as those amendments are to be applied within Scotland. There are no proposals to sub delegate new powers to legislate to public bodies in these instruments, no new fees being provided for, or new financial implications for businesses or the creation of new fines or penalties.

20. There is existing capacity in microbiological risk assessment in both Food Standards Scotland and the Food Standards Agency. In addition the UK Advisory Committee on the Microbiological Safety of Foods provides general advice on microbiological standards. It is possible that additional risk assessment capacity might be required to support any modifications of the current EU microbiological levels. However, this is not expected to be a frequent or imminent requirement post EU Exit and is expected to be accommodated as part of the current UK frameworks discussions. There is increased capacity being developed within the Food Standards Agency, funded by UKG to address additional capacity needs across the whole of this policy area and FSA has been clear that Scotland will have access to that additional capacity.

21. Food Standards Scotland has a programme of work planning for EU Exit and is currently evaluating issues of future capability and capacity as part of that programme. The capacity requirements are being evaluated in line with that additional capacity being provided to FSA and are also the subject of consideration within the UK food and feed framework which is being developed.

22. A consultation was carried out on a UK basis between the 4 September and 14 October 2018. Food Standards Scotland highlighted the UK consultation to its
27. A consultation was carried out on a UK basis between the 4 September and 14 October 2018. Food Standards Scotland highlighted the UK consultation to its stakeholders in Scotland but has not directly engaged with them on the UK Government's approach. Initial findings from this consultation are given with Annex B.

I hope this response is helpful.

Yours sincerely,

JOE FITZPATRICK