Dear Minister

EU food, animal feed and health, GM and novel foods

Thank you for your letter of 30 October providing the Committee with notification of the following statutory instruments:

- The Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations 2018
- The Genetically Modified Food and Feed (Amendment etc.) (EU Exit) Regulations 2018
- The Official Controls for Feed, Food and Animal Health (Amendment) (EU Exit) Regulations 2018
- The Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2018
- The Novel Food (Amendment) (EU Exit) Regulations 2018

In advance of the Committee considering these the Committee would find it helpful to have a response to the questions set out in the Annex to this letter. Given the short timescales we are working to we request the response by 12 noon Wednesday 14 November.

Yours sincerely
ANNEX

General

In our on-going exchange with you regarding the first tranche of EU notifications related to food we have explored the potential repatriation of the European Food Safety Authority to the Food Standards Agency and Food Standards Scotland. This has raised issues regarding the functions that would be carried out by the FSS, the relationship between the FSS and FSA and whether there will need to be changes to the legislation establishing the FSS as a result. Any further clarification on these points would be much appreciated.

We also note that some of these SI notifications explicitly state that these regulations are not expected to have any financial implications for stakeholders in Scotland. Are you able to provide further information on how this view has been arrived at given there are likely to be resource implications in terms of setting up a UK-wide framework for food and feed safety and hygiene?

The Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations 2018

- The notification mentions in the section “why the change is necessary” that the SI will mirror “in part” the provisions and competences set out in the Food and Environment Protection Act 1985 (the 1985 Act). Please can you provide further information on what aspects of the 1985 act are to be mirrored under this instrument. We note for example, the 1985 Act allows Scottish Ministers to make emergency orders where there are or may be circumstances which are likely to create a hazard to human health through human consumption of food and where that food has come from an area of land in the UK or an area of sea within British fishery limits or both to designate that area and containing emergency prohibitions. Such orders are made under a procedure where the Order comes into force when made but ceases to have effect after 28 days unless the Parliament approves the Order by resolution. The Committee wishes to established if this is to be mirrored as it would make it clear what powers Scottish Ministers will have and what scrutiny role the Parliament will have.

- The section “impact on devolved areas” notes that an obligation to introduce controls in the current EU regulation is being maintained through “existing UK statute” Please can you provide clarity on what that statute is.

- The Notification states that—
“arrangements for co-operation between experts drawn from member states are removed from this instrument as this is an inoperability for the fixing purposes in the event of a no deal. Matters of international liaison on nuclear co-operation are reserved to the UK Government and are being led by the Department for Business, Energy & Industrial Strategy”.

Please can you provide detail on how this network of experts would be replicated, or accessed under a no-deal situation. The Notification further states that “the UK’s future relationship with European institutions and systems remains subject to ongoing UK/EU negotiations”.

- Under the protocol governing the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers’ consent to the exercise by UK Ministers of powers under the European Union (Withdrawal) Act it sets out how notifications will be categorised. One of the characteristics of notifications falling into category B will have is—

  “Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be”.

The Notification states that—

  “Whilst there are no powers to make changes to the legislation in this instrument, the Regulations place an obligation on designating authorities (as defined in FEPA 1985) to put in place emergency orders specifying the maximum permitted levels of potentially contaminated food or feed that could be placed on the market”.

Are you able to provide further information on what these emergency orders could look like, and who the “designating authorities” would be? This will assist with the Committee determining whether it considers there is enough material change to warrant this being a Category B rather than Category A Notification.

**The Genetically Modified Food and Feed (Amendment etc.) (EU Exit) Regulations 2018.**

- The Notification states—

  “The 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 where the UK is no longer an EU Member State.”

The notification does not set out exactly what the deficiencies are and what wording they will be replaced with. Are you able to provide this information?

- As we’ve raised with the Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations we question whether this SI could potentially be considered as a Category B as functions could be transferred to FSS, Scottish Minister or the FSA. It would be helpful to receive you views on this.
The Official Controls for Feed, Food and Animal Health (Amendment) (EU Exit) Regulations 2018

- This is a large and complicated area of policy and any further information you can provide to ensure the notification is as clear and comprehensive as possible will assist us with our scrutiny.

- The Notification acknowledges that the SI will correct deficiencies in relation to audit functions on the delivery of controls. The auditing body is not specified in the SI and no information is provided on the proposed body in the notification. Please can you provide us with further information on what is intended with the auditing body and function.

- Whilst you have identified this as a category A instrument, we question whether this should be category B. The characteristics listed in the protocol for category B include “replacement, abolition or modification of certain EU functions that have significant implications e.g. reporting, monitoring, compliance and enforcement.” It could be argued the replacement of an audit function, especially where there is no indication of where that will fall, falls within this characteristic. It would be helpful to receive your view on this point.

- The Notification states—

> “This includes the provision of new enabling powers to allow the appropriate authority to make subordinate legislation, i.e. to prescribe additional tasks and responsibilities of NRLs.”

Are you able to provide further information on what this means?

- As with the Genetically Modified Food and Feed (Amendment etc.) (EU Exit) Regulations 2018 the notification does not set out exactly what the deficiencies are and what wording they will be replaced with. Are you able to provide this information?

The Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2018

- In the “why change is necessary” section the notification mentions that competence for enforcement of the regulations being amended by the SI are already ascribed in domestic statute which will not be affected by the changes made by the SI. Are you able to confirm what domestic statute is being referred to?

- The notification states that—

> “whilst there are powers to make any future amendments to import conditions within this fixing SI, the nature of any changes are subject to the international liaison arrangements which will be required in the event of a nuclear incident”.

Are you able to provide further information on what “future amendments” might look like? Also what the “international liaison arrangements which will be required” might look like, and whether any Scottish organisations would be involved in their development?
• The Notification further states that—

“the specific subject matter currently has limited material effect at Scottish ports due to the nature of current supply routes from the affected countries”.

Has any analysis taken place on how supply routes might change after the exit of the UK from the EU?

• The Notification makes clear that some non-legislative functions currently exercised by the EU institutions will transfer to Food Standards Scotland e.g. advice on food safety risks and monitoring such risks. Are you able to provide further information on these functions?

• With regards to the instrument being given Category A designation are you able to provide further information on the assertion in the notification that—

“it is therefore considered that 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”.

The Novel Food (Amendment) (EU Exit) Regulations 2018

• In the “why change is necessary” section the notification mentions that—

“the change modifies the above [EU] Regulations by limiting their scope to the UK, and include a limited transfer of functions, for example, by replacing ‘European Commission’ with a form of wording to enable each of the four administrations in the UK to provide for minor amendments in limited parts of the legislation in future”.

It is further stated that—

“where certain administrative functions are carried out by the Commission or EFSA, these are intended to be repatriated by transfer to FSA and [Food Standards Scotland] FSS as appropriate”.

Are you able to provide further information on the kind of amendments to legislation which might be anticipated? Also what kind of repatriated functions are to be fulfilled by FSS, and how “appropriate” is to be defined.

• The notification states that—

“main purpose of the instrument is to ensure continuity of law in this area with no significant policy divergence. With respect to transfer of powers from the EU institutions, it is anticipated that this will be limited here and will be consistent with the devolution settlement”.

Are you able to provide further information on what “no significant policy divergence” means, as it suggests that there may be some?

• The notification further states that—

“there are no proposals to sub delegate new powers to legislate to public bodies in this instrument”.

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Previous notifications have made specific reference when non-legislative functions are to be transferred, but this notification makes no such reference, instead setting out that there are no proposals in relation to legislation. Are there any such proposals for transfer of non-legislative functions?

- As the instrument does appear to involve a possibility of policy divergence and the possibility of amendments to legislation, this raises the questions of whether this notification should fall into Category B. Are you able to respond to this point?

- The notification states that the—

  “change in terms of powers and competence highlights that additional capacity may be required in Scotland and the rest of the UK to support the repatriation of powers in this area to UK authorities”.

However the notification further states that—

  “these Regulations are not expected to have any financial implications for stakeholders in Scotland”.

These two statements appear mutually incompatible. If there is additional capacity required, this would seem to have financial implications. Are you able to respond to this point?