Dear Lewis

EU food, feed materials, sprouts and additives

Thank you for your letter of 20 November, setting out the Committee’s general questions on the notification process and the specific points raised in relation to the notifications on the following EU Exit fixing SIs that I sent to the Committee on 12 November:

- The Food and Feed Imports (Amendment) (EU Exit) Regulations 2018
- The Materials and Articles in Contact with Food (Amendment) (EU Exit) Regulations 2018
- The Sprouts and Seeds (EU Exit) Regulations 2018
- The Animal Feed (Amendment) (EU Exit) Regulations 2018
- The Food Additives, Flavourings, Enzymes and Extraction Solvents (Amendment) (EU Exit) Regulations 2018

I have addressed the Committee’s questions below, and I hope that this response provides helpful clarification.

General

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 was developed by officials from the Scottish Government and the Scottish Parliament. It outlines a process to enable the Scottish Parliament the opportunity to consider in advance of the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018. In most cases, the Scottish Government will not have had sight of a final SI when it notifies the Scottish Parliament. However, sharing of drafts and information amongst officials is ongoing. That is why the protocol requires the
Scottish Government to advise the Scottish Parliament when the final SI is laid. With respect to one of the key elements associated with these instruments namely ensuring that the transfer of functions from EU bodies to the UK is consistent with the devolution settlement, Food Standards Scotland reached an agreement with the Food Standards Agency that the content of the final versions of the SIs would respect devolution.

With respect to new schemes and processes and associated costs, linked to these instruments, the repatriation of functions currently done at an EU level needs to be assessed in both a Scottish and wider UK contexts and is forming part of discussion on working arrangements with the FSA, including the proposed UK framework for food and feed safety. Depending on the approaches taken, simply replicating EU processes may not be necessary or appropriate after exit from the EU. However, the main impacts are anticipated to be on FSS and Local Authorities rather than business stakeholders, given that the technical standards which businesses will need to comply with will remain the same. Unfortunately, due to continued general uncertainty about the extent to which current market practices might change, with respect to the new trading arrangements which might emerge as a result of a ‘no deal’ it is very difficult to quantify costs and assign a level of significance to the functional changes. However, FSS is currently carrying out a ‘no deal’ capability and capacity assessment designed to evaluate new burdens and responsibilities.

**The Food and Feed Imports (Amendment) (EU Exit) Regulations 2018**


- **It is not clear who these competent authorities are at the moment in the UK, or who they are proposed to be. We request further information on this point given the financial implications (for the authority and potentially for businesses).**

Competence in relation to food and feed enforcement are already matters which are subject to subsidiarity principles and are detailed in the Scottish statutory instruments which give effect to the union law. Where EU instruments refer to competent authorities these provisions will therefore remain unchanged, as no fix for EU exit purposes is necessary.

The designation of competent authorities for the purposes of the execution and enforcement of Commission Regulation (EC) No 669/2009 in Scotland is provided for in The Official Feed and Food Controls (Scotland) Regulations 2009. Feed and food authorities (i.e. Local Authorities) are currently designated as the relevant competent authorities in Scotland for the Designated Point of Entry (DPE) concerned, except in relation to certain transitional measures provided for in Article 19. However there are no DPEs in Scotland at present and given that the products in question covered by these rules relate to specific products originating from specified current ‘third countries’ and not EU member states it is anticipated, that there should be no material difference
in the extent of import checks at the point of Brexit. Equivalent domestic legislation is in place in England, Wales and Northern Ireland.

In future the UK will be able to depart from those conditions, if it considers appropriate, based on intelligence on the public health risks posed by certain products. However, the current intention is to maintain the existing import conditions post-Brexit. The notification states that “should the risk profile of certain products from EU countries change in future those products and countries, if listed, would be subject to the requirements outlined in this regulation”.

- It is unclear who would decide on the “risk profile” or how this might be communicated within the UK, or between the EU and the UK. We request clarifications on these points.

Other than a necessity to repatriate powers in relation to decision making on how changes are made to the legislation itself, essential core functions in relation to surveillance and risk assessment in a UK context will remain unchanged. FSA and FSS will continue to collect surveillance data arising from local authority enforcement activity; and already direct LAs to undertake intelligence led sampling activity which covers both home produced and imported products. In addition information gathered as a result of FSA and FSS food crime investigations (both bodies have dedicated food crime units), will also continue to be considered when determining future import risks and controls. The EU Regulation currently requires that certain data sources be considered by the Commission when making recommendations on EU import controls – these requirements will remain if these functions transfer to FSA and FSS to make recommendations to Ministers in the four UK countries. This includes data originating from RASFF, reports and information resulting from the activities of EU food and feed auditors, reports and information received from third countries, information exchanged between the UK and EU bodies/Member States, and the results of any scientific risk assessment. It is envisaged, that FSA will co-ordinate this activity at a UK level as is currently the case.

- In addition, some of the instruments covered by these regs. are “time bound” and it would be useful to know how these time restrictions would apply in the UK, or how they could be amended.

Some of the regulations are time bound which means that in effect their terms must be reconsidered, rolled forward or revoked entirely. The extent and application of both the 669/2009 requirements and the other specific rules referred to in this instrument will be for Ministers to determine and apply using domestic powers available through for example, the Food Safety Act 1990 and fixes to Regulation 882/2004 (as per the Official Feed and Food Controls (EU Exit Regulations 2018).

The Materials and Articles in Contact with Food (Amendment) (EU Exit) Regulations 2018

We note the notification states that these Regulations will include provisions for the future amendment of the retained EU Law and that the power of amendment will be exercisable by Scottish Ministers insofar as they are within devolved competence and exercisable in Scotland. This would appear to create a power to legislate
exercisable by Scottish Ministers, which would engage the category B criteria creating a power to legislate (i.e. sub delegation).

The power to amend retained EU law in future is transferred to Scottish Ministers’ in relation to Scotland where the European Commission currently make decisions at EU level. There is no provision to create new legislation making powers or sub-delegate such powers to any UK public body such as FSS which we understand to be the provision specified in Category B (i.e. for example transferring EU legislative powers to a UK public authority) The powers which are being transferred to the Scottish Ministers are considered to be tertiary powers within an EU context and within devolved competence and therefore consistent with the devolution settlement.

- We seek further clarification on the nature and scope of the proposed powers to legislate conferred on the Scottish Ministers and any limitations on those powers

The proposed SI replaces the role of the Commission by the appropriate authority, which is the Scottish Ministers in respect of Scotland. Taking account of advice from FSS, they will have the powers to prescribe specific measures such as

- the list of substances authorised for use in the manufacturing of materials and articles;
- list(s) of authorised substances incorporated in active or intelligent food contact materials and articles, or list(s) of active or intelligent materials and articles and, when necessary, special conditions of use for these substances and/or the materials and articles in which they are incorporated;
- setting specific limits on the migration of certain constituents or groups of constituents into or on to food, taking due account of other possible sources of exposure to those constituents;
- additional provisions of labelling for active and intelligent materials and articles.

The Sprouts and Seeds (EU Exit) Regulations 2018

The notification says, in relation to Commission Reg (EU) No. 210/2013 on the approval of establishments producing sprouts: “[the requirements in relation to the approval of establishments producing sprouts] will continue to apply in the UK after exit.” The body which approves the establishments is the “competent authority”.

- If the competent authority is currently FSS and will continue to be FSS, then no issue arises. However the notification does not say who the current competent authority is. Are you able to provide clarity on this point?

Competence for food business approvals is set out in the Food Hygiene (Scotland) Regulations 2006 (as amended) and with respect to sprouted seeds establishments this is the local food authority (the local authority). The requirements for the local
authority to approve such establishments will remain unchanged as a result of these fixes.

The Animal Feed (Amendment) (EU Exit) Regulations 2018

Regulation (EC) No 1831/2003 on additives for use in animal nutrition. The notification states that this EU Regulation will be amended so that the Scottish Ministers, “or the Secretary of State for the UK as a whole” may authorise new feed additives… and prescribe their conditions of use”. The amendments will give various regulation-making powers to the Scottish Ministers and Secretary of State. Instruments made by the Secretary of State will not normally come to the Scottish Parliament for scrutiny, whereas instruments made by the Scottish Ministers will.

- We therefore wish to know in which circumstances will these powers be exercised by the Scottish Ministers, and in which circumstances by the Secretary of State?

We consider that it may be appropriate for products marketed across the UK to be subject to a single authorisation and statutory decision making process for example to ensure uniform coming into force dates and avoid potential market distortion within the UK. However we consider that it may also be appropriate that legislation which propose to authorise products in Scotland which have been banned in the EU (for example) should be considered by this parliament. Work to determine exactly those areas which should be subject to UK wide or Scotland specific processes is ongoing and will indeed require careful scrutiny. This matter is subject to ongoing UK frameworks discussions. Any power for the Secretary for State to legislate in Scotland requires the consent of Scottish Ministers who will therefore in effect have a veto with respect to the exercise of those powers in Scotland.

Regulation (EC) No 183/2005 on requirements for feed hygiene. The notification states that “appropriate authorities (defined as the Scottish Ministers as regards Scotland) may provide for more detailed rules on the application of the requirements in the regulation, for example for the purposes of facilitating the application of the regulations for small businesses…”.

- We ask for more information on what else these more detailed rules may cover.

The areas to which current EU comitology procedures apply in relation to feed law will carry over in a UK context through the fixing instrument. For example Article 6 of 183/2005 sets out the Hazard analysis and critical control points (HACCP) system requirements for feed businesses which essentially mean that businesses must put in place, implement and maintain a permanent written procedure based on the HACCP principles (as outlined in the Article). That article envisages that it might be appropriate to adopt measures to facilitate its implementation, including for small businesses. Another example can be found at Article 5 which states that businesses shall comply with specific microbiological criteria and take measures or adopt procedures necessary to meet specific targets and that these criteria and targets
shall be defined by the Commission. The fixing instrument means that this will be determined by appropriate authorities in the UK in future.

Regulation (EC) No 378/2005 re Community Reference Laboratory concerning applications for authorisations of feed additives. This section of the notification concerning this regulation lacks detail. It says “it is proposed that a UK reference laboratory will undertake relevant functions on exit in the event of no deal”. There is no further specification.

- Which UK reference laboratory is referred to, is that an existing laboratory or will one be established? If that is not known, how will the laboratory be determined?

Requirements for national laboratories under feed and food law are set down in EC Regulation 882/2004. The current UK national reference laboratory for feed additives is the Laboratory of the Government Chemist (LGC) in Middlesex.

Regulation (EC) No 767/2009 on the placing on the market and use of feed. The notification states that the Scottish Ministers will be given power to make changes to the more detailed technical requirements. The notification itself states, under the categorisation heading, that: “significant additional resource requirements could be placed on UK food safety authorities, particularly in relation to the processing and authorisation of feed additives”.

- Given the points we’ve raised above regarding powers and rules are you able to provide further clarification on why you do not consider this merits the notification falling into Category B?

The impact on UK authorities at this point is unknown and will be subject to how the market reacts to the UK’s exit from the EU. The current process is administered entirely by EU institutions and in any given year there may be about 50 potential authorisations or de-authorisations under consideration. How many of these relate to products designed to tailor to UK specific purposes is unknown but is likely to be significantly less than the EU-wide figure, and likewise products which would require a Scotland-only authorisation may be minimal or non-existent. FSS was unable to identify any animal feed additive manufacturers based in Scotland during a consultation undertaken last year. On EU exit, even in the event of no deal it may be that we will continue to recognise products authorised by the EU which would result in very little additional scrutiny by food safety authorities in either Scotland or the UK. On balance therefore, and given both the highly technical nature of this subject area and the current Scottish manufacturing landscape, it is considered appropriate that the overall categorisation of this instrument, of which this element is a part, remains ‘A’.

“The EU Regulation will require that the Food Safety Authority keep a register of authorised additives (which is currently maintained by the Commission)” and handle applications to be on the register.

- We request further information regarding the current status of the UK register i.e. does one exist, or is it under active development?
The current EU register will become the UK register. It will be up to UK authorities to ensure that it remains up-to-date, in the event of no deal. The administration of this process is subject to ongoing framework discussions, but it is anticipated that existing liaison arrangements as set out in MoUs between organisations will be built upon to ensure efficient delivery of this and other functions that may require UK-wide delivery mechanisms.

The Food Additives, Flavourings, Enzymes and Extraction Solvents (Amendment) (EU Exit) Regulations 2018

We note the EU Exit Regulations would revoke a European Regulation which set up a programme for the European Food Safety Authority to re-evaluate approved food additives. However, no alternative provision is made in its place. The notification states that this is because the process will be redundant when the UK leaves the EU. The notification indicates that while the European Food Safety Authority re-evaluation work is nearing completion, Food Standards Scotland and the UK Food Standards Authority will keep up to date with future scientific developments in food safety matters.

- We request more clarity on how the FSS will have access to, and be cognisant of, the European Food Safety Authority re-evaluation work.

The Scottish Government’s preferred approach is to maintain close working relationships with the European Food Safety Authority, including learning about any emerging findings from the remaining re-evaluation work. FSS is working closely with the FSA, who share this aim, to explore how this can be achieved. In any case, EFSA publishes proposals for reviews, details of reviews and full reports and recommendations on their website. Therefore this information should continue to be publically available.


- Are you able to confirm whether the ongoing discussions between FSS and FSA on “the development of a UK-wide framework for food and feed safety and control of use of food additives, flavourings, enzymes and extraction solvents” will extend to food labelling?

As regards labelling requirements, Regulation (EC) No 1333/2008 only deals with rules on the labelling on food additives sold as such and rules on the labelling of specific colours. Additives sold as such will be included in the scope of the UK-wide discussions between FSA and FSS.

Otherwise, the use of food additives in food is covered by the general labelling rules as set out in the Food Information to Consumers Regulation (EU) No. 1169/2011.
These rules will be included in the scope of UK-wide framework discussions among Defra, FSA and FSS. Defra has policy responsibility for general food labelling at UK level and the fixes to Regulation (EU) 1169/2011 will be the subject of separate Notifications.

We note you have assigned the notification as category A by the SG. The notification also states that these EU Exit Regs will include provisions for the future amendment of the retained EU law and that the power of amendment will be exercisable by Scottish Ministers insofar as they are within devolved competence and exercisable in Scotland.

- We believe this would appear to create a power to legislate exercisable by Scottish Ministers, which would engage the category B criteria creating a power to legislate (i.e. sub-delegation). Are you able to provide a response to this view.

The power to amend retained EU law in future is transferred to Scottish Ministers’ in relation to Scotland where the European Commission currently make decisions at EU level. There is no provision to create new legislation making powers or sub-delegate such powers to any UK public body such as FSS which we understand to be the provision specified in Category B (i.e. for example transferring EU legislative powers to a UK public authority) The powers which are being transferred to the Scottish Ministers are considered to be tertiary powers within an EU context and within devolved competence and therefore consistent with the devolution settlement.

Co-ordinating activity for oversight of the control of the use of food Additives, flavourings, enzymes and extraction solvents, including risk assessment, is currently undertaken by the Commission, and this function will require to be repatriated in a UK context. Given the statutory role of FSS in food matters it is therefore considered that there is only one obvious policy option as to which body would provide an opinion to Scottish Ministers and the Scottish Parliament in these areas.

- We also request further information on what the nature and scope of these powers would be including what limits there would be on the powers? The Committee requests this information to inform its view on whether it is content that the ‘fix’ is made at Westminster, or whether it would be more appropriate that this is done by SSI or under joint procedure SI.

Examples of these powers include:

for modifying, suspending or revoking an authorisation for a smoke flavouring, Scottish Ministers must consider an opinion from FSS and prepare a draft of the decision to be taken. The decision must set out any necessary changes to the conditions of use and if necessary any restrictions attached to the authorisation.
If in the light of scientific progress or technical developments it is necessary to modify the labelling requirements for foods containing certain food colours, amendments to the list of requirements must be prescribed by Scottish Ministers.

The amendments in the UK SI would give Scottish Ministers greater control than at present over technical matters related to the authorisation and day to day oversight of food additives, and those powers would be limited to those areas that are presently subject to comitology provisions by the EU.

JOE FITZPATRICK