ANNEX A

SINGLE MARKET RULES - HOW DO THEY ENGAGE FSS POLICY OBJECTIVES?

Background - How Single / Internal Markets Principles Operate in Practice

1. The following background text draws from a recent discussion document produced on this subject by Professor Michael Dougan of the Liverpool Law School.

   Internal markets are not merely about "trade". They are also about fundamental policy choices concerning how to structure your economy and society; as well as basic constitutional questions about the institutions, processes and values that underpin your public and democratic realm.

   Any internal market between two or more territories, (for example the internal UK devolved countries or the individual member states of the EU), each of which is capable of enacting its own laws, needs to address two main issues.

   a) how to define and address "barriers to trade" between the constituent territories. In particular, how far will this idea of a "barrier to trade" cover what is undoubtedly the main problem in cross-border commerce: the existence of simple variations in how different territories regulate the sale of goods or provision of services, so that goods lawfully sold or services lawfully provided in Territory X cannot be lawfully sold or provided in Territory Y, without having to comply all over again with the different regulatory standards that Territory Y applies to its own goods and services.

   b) how to define and address "distortions of competition". Different regulatory standards impose different compliance costs upon economic actors: more safety checks in one territory mean greater costs and higher prices than in territories with lower standards. Some people see those variable compliance costs as an artificial distortion of merit-based competition between private undertakings that needs to be eliminated. Others believe that variable compliance costs encourage undertakings to select the optimal jurisdiction for their regulatory needs, in turn creating a valuable competitive pressure between legislatures to meet the real needs of the market. Of course, for many others that is simply a

polite way of saying that private undertakings can in engage in "social dumping" by picking the territory that has the most permissive standards, and forcing other countries into a damaging deregulatory cycle.

2. So, we have two main issues that an internal market needs to address: defining which "barriers to trade" and which "distortions of competition" are to be considered a problem that needs to be solved. In turn, we then have two highly stylised models for addressing those twin issues.

a) mutual recognition. Any good which is lawfully sold or service which is lawfully provided in Territory X, should be allowed to be lawfully sold / provided also in Territories Y and Z as well, without having to comply with any further standards or checks or requirements in the host country. That solves the problem of barriers to trade, and does so in a relatively straightforward way. But it leaves intact distortions of competition, actively encourages the process of regulatory competition between different territories, and places significant limits on the ability of any given country effectively to enforce its own social policy choices.

b) harmonisation. Here, a central regulatory body is capable of adopting a single regulatory standard that must be complied with by all the territorial jurisdictions within the internal market. That obviously solves the problem of barriers to trade: there are no more differences between national laws. But it also eliminates any distortions of or opportunities for competition that would otherwise arise from the existence of regulatory variations across territories. And it is difficult to reconcile with the idea of regional autonomy or local policy preferences.

How do Single Market Rules Currently Impact on Our Policy Area?

3. The issue of harmonised rules (a level playing field**)** to underpin the EU treaty obligations on the single market EU market is already a fundamental element of regulation of food and animal feeding stuffs, with the relevant single market treaty obligations cross-referenced in the pre-amble to the majority of the specific Community rules in this area.

In particular Regulation (EC) 178/2002 on general food law, which sets the overall principle of the pursuit of a high level of protection of human life and health, also references the aim of achieving free movement of food and feed within the Community as a principal objective.

4. In addition, given that much of food regulation specifically relates to market intervention, such as imposition of conditions, restriction or prohibition of goods being placed on the market, the concepts of harmonisation, or where appropriate mutual recognition, are clearly important considerations. Moreover much of the evolved case law which helps to interpret the current EU single market rules, such as the general prohibition of quantitative restrictions (market distortions) and the appropriate exemptions from such prohibitions are based on food law cases. The most quoted landmark case being the *Cassis de Dijon* 1979 case. Its relevance is summarised in Annex C.

5. This case precipitated the introduction of the concept of overriding reasons of public interest (ORPI's), as justifications for diverging from these underpinning single market principles. These ORPIs have continued to evolve and subsequently have become a feature of subsidiarity and proportionality 'flexibilities' from the general harmonisation of EU law, since this Court of Justice ruling.

6. It is considered that this overriding public interest principle is something which should be a key feature of both the UK negotiations with the EU and also our ongoing discussions with the UKG, over potential UK common frameworks, post Brexit.

7. One of the key ORPIs is the principle of the right for individual countries to impose proportionate market restrictions on imported goods (which might differ from the rules applying in the exporting country) where there is an over-riding public health reason for doing so. This is an established principle in both EU law and in W.T.O rules. It also underpins some of the existing permitted national rules available in EU law, such as the ability to prohibit the sale of raw drinking milk and the ability to introduce mandatory fortification of foods with vitamins and minerals. Two key examples which the Board members will be familiar with.

8. It appears to us that the concept of a completely harmonised set of rules in our policy area, being promoted by some within the UK Government, purported to be essential for the function of the UK internal market, seems to be ignoring both the established ORPI and mutual recognition principles and also does not accord with

the need to respect the devolution settlement as agreed at the JMC(EN) (See Annex A).

9. With respect to food law, **subsidiarity and proportionality** concepts are already in play at EU level, for our policy area, and it will be important that FSS continue to promote these values and principles should the UK Government fail to recognise this, or consider them subservient to perceived essential single market functionality.

10. There have been arguments presented that full harmonisation of, for example, all technical standards, will be essential to underpin any future trade deal with the EU and / or to meet industry pressure for a level playing field within the UK. However, in practice, most existing trade deals are based on a mix of harmonised rules and mutual recognition clauses recognising national differences.

11. The key point is that every "internal market" is a product of its own unique circumstances and conditions – whether it is the internal market which operates within a single sovereign federal state (such as the USA, Canada or Australia); or the internal market which is created between sovereign states through international treaties in a regional project of economic integration (as with the EU of course, but also in South America or South East Asia).

12. The following examples illustrate how mutual recognition arrangements work in the existing trade deal between the EU and Canada (CETA), including respect for 'intra-national' differences.

- Article 2.12 of the CETA sets the expectation that goods imported from the EU to Canada (and vice versa) and lawfully sold or offered for sale in an EU Member State or constituent territory of Canada may also be sold or offered for sale throughout the territory of EU or Canada.

- The Joint interpretive instrument for the CETA (Section 2) mentions that Canada's and each EU Member State's right to regulate is unaffected in areas which include the protection and promotion of public health, safety, and consumer protection.

- One of the annexes to the CETA agreement shows where the various Canadian Provinces reserve the right the adopt or maintain measures in areas such as betting and gaming, alcoholic drinks, fishing activities. The entry for

Quebec mentions 'the Food Products Act' and the right to limit market access through permits.

13. The above examples help illustrate that every internal market is defined by how a number of variables interact: the substantive balance between regulatory autonomy, greater trade and social interests; together with the potential and the limits created / imposed by its underpinning institutional framework. And of course, the relative weight of those variables will inevitably vary from sector to sector: internal markets are not end-states or final destinations: they are ongoing processes which need to be constantly directed and managed. And the UK will be no different.

14. There appears to be industry pressure, in some quarters, for a fully harmonised integrated UK approach post Brexit. However there are clear examples, where parts of the Scottish food industry have previously sought proportionate differential rules to apply in Scotland, when they have been unhappy about the proportionality of the 'overall food law' regime. Examples include flexibilities negotiated for Scottish industry with respect freezing requirements for farmed salmon (see below) and the flexibilities sought from the shellfish harvesting sector to allow placing of wild scallops on the local market to obtain derogation from applying many of the existing EU hygiene rules.

15. In general, food law has continued to become more harmonised at an EU level, with greater application of single market principles, irrespective of the original principle of potential divergence for public health reasons which are now enshrined within the single market treaty rules. The main reasons for this were described in the principles of general food law outlined above.

16. The Board previously agreed that a top priority with respect to food standards and safety, is to protect at least equivalence (or direct alignment) to EU standards and regulations. This will ensure the high level of public health protection and general consumer protection on product standards currently afforded by the EU law and underpinning the EU single market.

17. Notwithstanding the adoption of these general principles, enshrined in EU law, regulatory equivalence will not always be essential and divergence in certain areas may be desirable. We need to fully recognise and utilise the over-riding principle of public health protection and also the principles of proportionality and

subsidiarity which already exists in the EU law and defend this position where necessary.

18. One of the key issues in protecting the principle of potential divergence and a key reason for the existing devolution settlement is recognition that supranational rules, based on generic risk assessment, are sometimes ineffective or disproportionate and that sometimes local solutions are needed to best address public health challenges.

19. One example demonstrating the need for proportionality related to EU rules that required the freezing of **all** salmon intended to consumed raw or lightly cooked, to deal with the problem of a specific parasitic worm. We undertook local risk assessment which demonstrated this problem did not occur in Scottish farmed salmon and therefore this freezing step, which added cost and reduced product value was unnecessary for these products.

20. This local risk assessment helped inform a wider European Food Safety Authority (EFSA) risk assessment, which provided the necessary evidence to influence and underpin a new Commission proposal to introduce more risk based proportionate controls, including a freezing exemption for farmed fish where there was evidence of negligible risk. The success in negotiation of this exemption was a positive outcome for Scotland. It illustrates the importance of being able to undertake local risk assessments and adopt local risk management decisions, when national or supranational risk assessment are not sensitive enough and where risk management decisions might not reflect local needs.

21. In contrast to the previous example, we consider that the current restrictions applied on the sale of raw drinking milk in England are insufficient to protect public health (this is supported by recent related outbreaks of E. coli O157). We have more stringent controls in Scotland, and these different rules are supported by scientific risk assessment and permitted in national measures in line with current EU subsidiarity from the generally harmonised food hygiene EU law. They align well with the principle of the public interest test, mentioned above, where the possibility of divergence from fully harmonised single market rules is foreseen.

22. This example also helps to demonstrate the pre-existing capacity, for member states and their constituent nations, to develop more robust public health controls where they believe this is proportionate and supported by risk assessment. The capacity to maintain this type of flexibility post Brexit will be important and we

need to ensure that it is not lost in furtherance of arguments associated with matters considered essential for the functioning of the UK internal market or the need to secure new trade agreements at all costs.

23. The examples given above with respect to food law help demonstrate that there is no inconsistency in generally supporting the principles of harmonised rules where appropriate, but still providing the necessary flexibility (linked to principles of subsidiarity, proportionality and mutual recognition for different rules and solutions to apply to meet the needs of the citizens and businesses of Scotland.