

PREPARATIONS FOR LEAVING THE EUROPEAN UNION

1 Purpose

1.1 This paper links to all six of FSS's Strategic Outcomes.

1.2 The Board is asked to:

- **note** progress on preparations for the UK's exit from the EU, including:
 - legislative 'fixes' to ensure a functioning statute book in the event of a no-deal exit;
 - development of proposals for longer-term UK-wide frameworks in line with the Joint Ministerial Committee (European Negotiations) principles;
 - cross-government contingency planning for no-deal exit;
- **agree** that the Executive continues to work collaboratively with Food Standards Agency (FSA) on future arrangements for risk analysis in the UK, including on capacity for risk assessment;
- **agree** that the proposed Advisory Forum for Food and Feed (AFFF), would provide Food Standards Scotland (FSS), alongside FSA, with a formal mechanism for considering risk management interventions to support any future UK-wide framework on food and feed safety and hygiene;
- Subject to agreeing FSS participation in the AFFF, **agree** that the Chair writes to the Minister for Public Health, Wellbeing and Sport indicating he considers this mechanism an appropriate means of supporting the proposed UK framework on feed and food safety;
- **note** that the Executive will bring a further paper to the Board to review and consider the AFFF in the context of FSS's wider governance;
- **note** that the UK's exit from the EU will have longer term consequences for FSS in terms of repatriated functions and responsibilities that will have resource implications for the organisation.

2 Background

2.1 The Board has considered a number of papers related to FSS's preparation for the UK's exit from the European Union¹. At the time of writing this paper, the nature of the UK's exit remains unclear, so the current planning assumption is that FSS has to ensure certain preparations are in place for a no-deal exit at the end of March 2019.

¹ <https://www.foodstandards.gov.scot/about-us/our-remit/brexit>

2.2 FSS's position on leaving the EU is, in line with the Board's previous determination, that, whatever legislation is introduced as a consequence of the UK's exit from the EU, this should not result in any reduction in the level of protection afforded to consumers in Scotland, and that FSS, with its current remit and powers, is best placed to ensure the continued protection of public health, improvement in diet and protection of the other interests of consumers in Scotland in relation to food.

3 Preparing for Exit – Progress Update

3.1 Legislation

3.1.1 If a deal is reached between the UK and EU, the UK Government's expectation is that there will be a transitional period, during which EU food and feed law will continue to apply until the end of that period. Should no such agreement be reached and the UK leaves at the end of March with no deal, then it is imperative that there is a functioning body of food and feed law in place to ensure that consumers continue to be protected, and that food businesses and enforcement bodies have adequate information about the regulatory requirements. Most food and feed law is currently harmonised at EU level, with domestic regulations in place to make provision for the execution and enforcement of this EU law, and to provide sanctions and penalties for non-compliance.

3.1.2 As the food and feed law are fully devolved areas, FSS carries out a number of functions on Ministers' behalf, including working with legal advisers to prepare relevant legislation. The Scottish Government's view remains that staying in the EU is the best option for Scotland and the whole of the UK and continues to make the case for this. In the present circumstances, the SG's preferred option is to back another referendum which includes the choice to remain in the EU. Notwithstanding that position, the SG recognises, the need to make contingency plans and is undertaking extensive preparations, including with partners such as FSS, to mitigate the impact of a no deal scenario should it become a reality.

3.1.3 As part of that process, FSS has been working closely with colleagues in Scotland and with other government departments across the UK on the legislative fixes needed to ensure that the repatriated body of relevant directly applicable EU law that exists on exit day transfers effectively onto the domestic statute book, using powers under the European Union (Withdrawal) Act 2018, and to ensure that our domestic Scottish Statutory Instruments (SSIs) are amended with the necessary fixes to ensure their continued operability on exit.

3.2 UK Statutory Instruments (UK SIs)

3.2.1 Across our policy areas, we have been working with three different UK Government (UKG) Departments² to ensure that current EU food and feed law is effectively repatriated onto the UK statute book in time for a no-deal exit at the end of March. Following agreement between the devolved administrations and the UKG, these 'fixing SIs' for the directly applicable EU law are being made on a UK basis, so

² Food Standards Agency (FSA) on food and feed safety and hygiene; the Department of Health and Social Care (DHSC) on nutrition health claims, composition and labelling; and the Department of Environment, Food and Rural Affairs (Defra) on food composition, standards and labelling

a protocol is in place between the Scottish Government (SG) and Scottish Parliament where the SG provides notification to the lead committee in the Parliament that allows MSPs to scrutinise the purpose, intent and approach to the fixing SIs. FSS has prepared material for approximately 20 UK fixing SIs that the Minister for Public Health and Sport has notified to the Health and Sport Committee. All of the SIs on food and feed safety and hygiene have now been laid at Westminster, as has the one 'jumbo' SI on nutrition health claims, composition and labelling. Those led by Defra in the UKG, on food composition, standards and labelling are due to be laid later this month.

3.3 Scottish Statutory Instruments (SSIs)

3.3.1 We have consulted stakeholders on technical fixes to the domestic law that provides for the execution and enforcement of directly applicable EU law, and for the domestic law that transposes EU Directives – of which there are relatively few in our policy area. One affirmative instrument has already been laid in the Scottish Parliament and three further negative instruments are due to be signed by the Minister and laid in Parliament this week.

3.4 Development of UK-wide Frameworks

3.4.1 Over the past year, FSS has invested considerable time and resources into working with colleagues in UKG, Wales and Northern Ireland in developing proposals for frameworks that could apply across the UK in future, in accordance with the principles and agreement between the UKG and devolved administrations for these. In our remit, there are three separate policy areas where the UK Government considered legislative frameworks may be required in future – food and feed safety and hygiene (FSA lead at UKG level), nutrition health claims, labelling and composition (DHSC lead in UKG) and food compositional standards and labelling (Defra lead in UKG).

3.4.2 The Scottish Government has made clear that common approaches across the UK in some areas may be necessary or desirable in future, but that these must be agreed, not imposed. Whenever they are agreed, frameworks must be based upon the principles agreed by the four UK administrations at Joint Ministerial Committee (EU Negotiations) (JMC (EN)) in October 2017³, that is, in a way which respects the devolution settlements and the democratic accountability of the devolved legislatures.

3.4.3 The UK Government published an update report on 13 November, outlining the progress being made and refers to the work in the areas of food and feed safety and hygiene, and nutrition health claims, labelling and composition⁴. The report states that on the basis of the significant joint progress made on future frameworks, and the continued collaboration to ensure the statute book is ready for exit day, the UK Government has concluded that it does not need to bring forward any regulations made under section 12 of the EU Withdrawal Act at this juncture. On this basis the Scottish and Welsh Governments continue to commit to not diverging in ways that

³ <https://www.gov.scot/publications/joint-ministerial-committee-communique-october-2017/>

⁴ <https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-report>

would cut across future frameworks, where it has been agreed they are necessary or where discussions continue. The Scottish Government remains opposed to the use section 12 regulations, which would temporarily freeze devolved competence, and prevent devolved administrations from regulating in areas that are devolved.

3.4.4 The work with FSA on food and feed safety and hygiene framework is the furthest developed, and Ministers across the UK have been advised of the progress and asked to indicate if they are content with the general direction of travel. Whilst very resource intensive, this has been a highly collaborative and constructive endeavour. It is anticipated that reviewing the existing Memorandum of Understanding (MoU) between FSS and FSA will be an important part of setting out our future working arrangements in relation to areas that are impacted by the UK leaving the EU.

3.4.5 On nutrition health claims, composition and labelling, we have made good progress, and have now started discussions with our counterparts across the UK on a MoU to support working arrangements in future.

3.4.6 On food compositional standards and labelling, whilst the four countries have had a number of useful meetings to progress how we will work together in future on these areas, the focus thus far has been on agreeing the Statutory Instrument (SI) work.

3.4.7 All the outline framework proposals developed so far remain subject to the clarification of the UK's future economic partnership with the EU, the resolution of the position of Northern Ireland, and are without prejudice to Ministerial decisions.

4 Future Arrangements for Risk Analysis in the UK – Food and Feed Safety and Hygiene

4.1 In the context of FSS's work, risk analysis is defined by the World Health Organisation as 'a risk-based approach to the identification and management of public health hazards in food'⁵. Risk analysis involves different stages:

- to identify issues that might pose a threat to food safety – risk identification
- to assess the scale of that threat – risk assessment
- to inform others about that threat – risk communication
- to decide what, if any, action should be taken – risk management

4.2 Under the current system of largely harmonised EU food and feed law, a considerable amount of risk analysis is undertaken by the European institutions, including the European Food Safety Authority (EFSA) (risk assessment) and the European Commission (EC) (risk management), with involvement of the Member States throughout the process, e.g. through EC Standing Committees.

4.3 As part of the fixing SIs, in the event of a no-deal outcome, the food safety bodies in the UK – FSS and FSA – will become responsible for a number of

⁵ <http://www.who.int/foodsafety/risk-analysis/en/>

functions currently undertaken by EFSA and the European Commission, including risk assessment and development of risk management recommendations, with Health Ministers across the UK having responsibility for legislative risk management decisions that are currently taken within Europe by the Commission based Standing Committee opinions. Whilst the future economic partnership between the EU and UK has still to be negotiated, it is expected that the repatriation of responsibility for food and feed safety and hygiene risk analysis will result in an increased workload for the food safety bodies within the UK, and greater scrutiny of the evidence and governance procedures used in decision making.

4.4 It is necessary to put arrangements in place in the UK to support these repatriated functions, and we have been working with the FSA, to develop the infrastructure that will be needed in future to support the proposed UK-wide framework on food and feed safety and hygiene. FSS has existing, but limited, expertise and capacity on scientific risk assessment which, in future, may need to include more focus on matters that were previously undertaken through the European institutions. FSA has been funded by UKG to develop increased capacity on scientific risk assessment to ensure it has the necessary staff resource, skills and expertise to support evidence-based risk management in potential new areas of responsibility such as the authorisation of regulated products and import controls, in addition to its existing incident management and policy functions. As is presently the case through the MoU between our two organisations, FSA envisages that FSS will have access to this capacity, both on matters that are UK-wide, as well as the ability to commission risk assessments on Scottish issues. In addition, FSA is reviewing the structure and roles of the four Scientific Advisory Committees that provide advice across the UK on food and feed safety. Again, FSS has access to these Committees through the MoU, but the protocols will need to be reviewed in light of the additional functions proposed for these Committees in future.

4.5 It is the Executive's view that this is the most appropriate and cost-effective approach for risk assessment in relation to functions being repatriated from the EU, and FSS and FSA officials have been working to develop protocols and practical arrangements to ensure that our respective interests are taken into account.

5 An Advisory Forum on Food and Feed (AFFF)

5.1 On risk management, FSA has developed an Advisory Forum on Food and Feed (AFFF) to provide a mechanism for opining on proposed risk management interventions in future to cover England, Wales and NI. The proposals that FSS and FSA have been developing jointly for the proposed UK-wide food and feed safety and hygiene framework, envisages that the AFFF would be part of the risk management recommendation mechanism of that framework, where AFFF would provide a view on whether the evidence supports a single UK-wide risk management approach, or if different options for different parts of the UK would be more appropriate.

5.2 Assuming FSS were to participate in the AFFF it would consider recommendations from risk managers within FSA and FSS, and the evidence underpinning these recommendations, and would assist both organisations in delivering our respective core objectives of public health protection and consumer

interests in relation to food and feed, insofar as these relate to safety. If the AFFF is agreed as an appropriate mechanism to operate across the UK, then it is proposed that its core membership would be made up of officials from FSA (across the three countries) and FSS, with other Departments, in the UKG and in the devolved administrations, being invited to attend as observers, so they are able to follow discussions and identify areas of related interest.

5.3 The FSA Board has agreed to constitute the AFFF as an advisory committee of the FSA under relevant provisions of the Food Standards Act 1999 to cover Wales, NI and England. If the Board agrees that the AFFF is an appropriate mechanism to support consideration of risk management interventions for Scotland in future, then FSS could similarly do so under equivalent provisions of the Food (Scotland) Act 2015. The AFFF would then be jointly constituted to give advice to both FSA and FSS to help our organisations fulfil our core objectives, including advice to Ministers on new legislative proposals, as set out in the 1999 and 2015 Acts in the new context of functions repatriated to all parts of the UK from the EU.

5.4 If the Board agrees that this approach is appropriate for FSS, then it is proposed that the Executive brings a further paper to the Board to review the AFFF in FSS's wider governance arrangements. The paper would outline in more detail the proposed role that the respective FSS and FSA boards in risk management decision making processes of the AFFF. It is also suggested that, if the Board is agreeable, the Chair should write to the Minister for Public Health, Wellbeing and Sport to advise that the Board considers this mechanism appropriate as a means of supporting the proposed framework on food and feed safety and hygiene, arrangements for which will be subject to views and agreement of Ministers in due course, in line with agreed position on UK frameworks agreed through the Joint Ministerial Committee (European Negotiations).

6 No Deal Contingency Planning

6.1 FSS is currently working closely with colleagues across SG, the UKG and with counterparts in Wales and Northern Ireland to prepare for, and as far as possible, mitigate the impacts of, the UK leaving the EU without a deal at the end of March. As well as the work on legislative fixes described above, FSS has been working closely with the Scottish Government resilience network, where the FSS Chief Executive has a coordinating leadership role on issues concerning the food supply.

6.2 We are providing support to SG and to local authorities on planning for changes at the border that could affect the food supply both in terms of food and feed imports and exports, and putting in place additional resilience to deal with any increase in food incidents or food crime. This means not only having greater resilience within the Scottish Food Crime and Incidents Unit, but also seeking to ensure that there is resilience within the teams across FSS that support the management of incidents, including scientific support, policy and legislation and enforcement delivery. We have also contributed to SG's communications to the public and to businesses about Brexit preparedness, as well as making information available through our website.

7 Impact on FSS Resources

7.1 It will be apparent from the activity described above that the work to prepare for leaving the EU reaches widely across FSS, and has inevitably had an impact on other priorities. We have benefited this year from additional funding from the SG for Brexit (£0.85m) which has allowed us to bring in additional resource to help support our preparedness, and has prevented further diversion of effort and resources from other areas of work. It will also be evident from this paper that leaving the EU will have longer term impacts on FSS's functions and operations, though the exact nature and extent of these will not become clearer until there is clarity about both the nature of UK's exit from the EU and the future relationship between the UK and EU.

7.2 We have worked hard to develop proposals for UK-wide frameworks which, subject to the views of Ministers, are intended to set out longer term working arrangements and whilst we already work closely with counterparts across the UK, the repatriation of functions from the EU will create new responsibilities that will require resources to support them. There is a paper scheduled for discussion at this Board meeting that will address the financial and resource implications in more detail.

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