Food Standards Scotland (FSS) analysis of UK Government (UKG) White Paper: UK Internal Market

Summary

FSS challenges the rationale behind several of the proposals in the White Paper and the extension of the internal market scope away from the scope and principles agreed by the JMC (EN) with respect to frameworks principally for the following reasons;

- The majority of the intended principles are already accounted for either within proposed UK frameworks or existing MOUs with other UK administrations;
- The proposals on the internal market, mutual recognition and associated non-discrimination are not in line with internationally accepted principles and are unduly biased towards consideration of business cost;
- The arguments for legislative under-pinning and the establishment of new UK impact assessment body are not substantiated with respect to our policy area;
- The proposals do not properly accord the devolution settlement, or normal conventions of subsidiarity as to where responsibility for decisions on quantitative restrictions should lie; and,
- The potential for future deviation from existing harmonised law, in this area, is demonstrably greater from the UKG Northern Ireland policy proposals than anything contemplated by any regulatory bodies operating in our policy sphere

Finally, the proposals in this paper should be of concern because they simply do not strike the right balance between the cost and non-cost benefits of Governments' "interference" in the market. Non cost benefits, which would be in the consumer interest, appear time and again to be subservient to the business cost implications.

1. Introduction

1.1 Food Standards Scotland (FSS) is a Non-ministerial Office of the Scottish Administration accountable directly to the Scottish Parliament. With respect to internal governance it is accountable to an independent Board.

1.2 FSS's purpose is defined in the Food (Scotland) Act 2015.

The 2015 Act gives FSS three objectives:

- to protect the public from risks to health which may arise in connection with the consumption of food;
- to improve the extent to which members of the public have diets which are conducive to good health; and
- to protect the other interests of consumers in relation to food.

1.3 In setting out our purpose, the Act provides FSS with the legitimacy to carry out activities to help achieve these objectives, and in doing so, to protect consumers and help them to have better health.

1.4 FSS's vision is "***to create a food and drink environment in Scotland that benefits, protects and is trusted by consumers".***[1]

1.5 It is in this context that FSS is responding to this consultation, but there is a key point worth making here because it underpins much of our response. Government interventions in the "internal market" are not new and in fact are fundamental to how

[1] https://www.foodstandards.gov.scot/about-us

Government makes improvements it desires in critical areas such as public health. Cost alone cannot and should not be the principle determinant of whether “interference” in the market is reasonable or not.

2. Rationale and scope of the proposals

2.1 At paragraph 25, the White Paper sets out three “overarching policy objectives”

a) to continue to secure economic opportunities across the UK;
b) to continue competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business; and
c) to continue to provide for the general welfare, prosperity, and economic security of all our citizens.

2.2 These are further supported by aims and design rules in paragraphs 26 and 27.

2.3 However, in delivering these objectives the White Paper:

- addresses the ‘repatriation’ of powers from the EU Single Market at the end of the transition and seeks consistency of approach, but does not respect devolution for these powers within the UK;

- proposes unfettered market access between the UK’s constituent nations to improve economic growth, recognising the economic impacts of COVID 19, but makes “cost” the primary driver of change; and

- suggests legislative underpinning for the principles of mutual recognition and non-discrimination without recognising sufficiently where competence and accountability sits within the current devolution settlement.

2.4 In terms of the policy objectives per se (para 25(a)-(c)), there is little to disagree with in terms of wanting an effective UK internal market. FSS’ primary concern though is related to “how” these outcomes are intended to be delivered. This analysis therefore looks at the practical implications of delivery of these proposals.

3. Repatriation of EU law

3.1 In 2018, the UKG identified 24 policy areas, including all of those that fall into the remit of FSS, which UKG considered should be subject to more detailed arrangement in order to manage regulatory divergence post EU exit.

3.2 Since then all devolved administrations have devoted time and resources to the development of UK wide Frameworks and at no point has legislative underpinning in order to secure mutually agreed outcomes been identified by either relevant UK departments or FSS with respect to our framework discussions. Indeed, reports required under Schedule 3 of the European Union (Withdrawal) Act on progress towards implementing arrangements intended to replace UKG powers to restrict devolved competence, stated as recently as May 2020 that

“As a result of the continuing joint progress and collaboration on common frameworks, the UK Government has not sought to bring forward any section 12 regulations to date[2].”

[2] The European Union (Withdrawal) Act and Common Frameworks 26 December 2019 to 25 March 2020, p.7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886372/TheEuropeanUnion-Withdrawal-ActAndCommonFrameworks.pdf

3.3 The repatriated powers have, therefore, been the subject of extensive discussions between FSS and the relevant departments and organisations in the rest of the UK for some time. Good progress has been made and draft frameworks with FSA and DHSC are at an advanced stage. Ministers across the UK have already indicated that they are content with the progress made so far.

3.4 Each of these Frameworks has carefully respected the key UK framework principles of ensuring the functioning of the internal market, whilst respecting devolved competence to protect consumers in each of the administrations. This task was not easy and involved much deliberation to ensure key objectives were observed and importantly it was clear which 'devolved competencies' were in scope.

3.5 **We can, therefore, see no need for the White Paper proposals, covering our policy area, with respect to this objective when the necessary arrangements are already in place**.

3.6 We are also concerned that the scope of proposals contained within the White Paper could stretch beyond returning EU powers – even if that is not the intention - and that the nature and emphasis on how the principles are proposed to be applied do not, in our view, properly and appropriately accord with the devolution settlement.

3.7 Of particular concern is the emphasis placed on 'unfettered' market access. This principle appears to stretch wider than normal 'tariff barriers' where such language would normally be applied, to non- tariff aspects (such as the well-established 'over-riding consumer interest' test) where the concept of 'unfettered' access by definition is wholly inappropriate.

3.8 Overall, the proposals suggest an overwhelming concentration on 'de-regulatory' reduction of business costs, with little or no, recognition given to the societal and economic value of risk-based targeted regulation in protecting food safety, other consumer protections and also business reputation. We do not think the interests of consumers can be defined by monetary cost alone, not least because Governments have always made interventions in the market where they have been deemed to be in the interests of consumers for example on public health grounds and proportionate to policy objectives.

3.9 With respect to scope, it is also clear that the White Paper's market proposal stretches further than future modification of retained EU law and appears to concern itself with also inhibiting devolved matters, currently the subject of subsidiarity and not governed by the EU. It also appears there may be a proposal to involve matters of food standards, for foods placed solely on the market in Scotland on the basis that there may be indirect impact on other parts of the UK.

> *'It is important to recognise that most potential barriers to internal trade can come from differences in regulation which do not take the form of primary legislation. To preserve the UK Internal Market as an integrated trading space, the Internal Market system will cover wider regulatory powers, such as secondary legislation and regulation made, not just by governments, but also by other regulators concerned with regulating professionals and service providers. This should be in scope where it could significantly impact the UK Internal Market as a whole.'*[3]

3.10 These matters were carefully and, in our view, correctly excluded from the UK Frameworks scope, so there is no justification for their inclusion here. As is described in more detail later, consideration of knock on impacts for the whole of the UK are already considered in Scottish impact assessments. However, more importantly, so long as these impacts are proportionate and non-discriminatory, they are correctly considered and decided upon by the devolved administration. **This is fully in line with established recognised international trade law**. The proposal in the White Paper to upset this generally accepted practice is therefore, unnecessary and does not accord with the devolution settlement, or the best interests of consumers.

3.11 These proposals in the White Paper consultation therefore seriously undermine the hard work which has been undertaken in reaching agreement to these UK Frameworks, placing their final agreement in some doubt.

[33] Para 101 White Paper

4. Dealing with the economic aspects of COVID 19

4.1 Whilst there no doubt that the effects of the pandemic will have significant impacts on the UK economy, the pandemic has demonstrated the importance of timeous, targeted market intervention to protect public health. The consequence of not doing so has catastrophic impacts on public health and the economy. The lesson should therefore not be about promoting 'unfettered' market access, but about the pre-eminence of the application of risk-based targeted public health intervention over market considerations.

4.2 It is for these reasons that matters of public health are accepted as fundamental exemptions from the general prohibition of applying quantitative restrictions on trade (including appropriate exemptions from mutual recognition of goods). Such exemptions exist in the current applicable relevant TFEU articles, the principles of WTO GATT and also most internal and external market agreements on trade. This includes the Swiss, Australian and ANZAC models referenced in the White Paper[4].

4.3 We therefore believe the arguments are too nuanced – and certainly counter to consumer interest - that no acknowledgement or recognition of this feature is highlighted in the paper. Instead the paper chooses to draw on only the potential costs to the internal market of differential rules in this area. To be clear FSS would never advocate un-necessary regulatory divergence, but neither would we shy away from it if it were necessary to protect adequately Scottish consumers, and it was a proportionate and non-discriminatory policy choice. These issues are developed in more detail in the section on mutual recognition and non-discrimination below.

5. Legal underpinning for the UK internal market

5.1 The White Paper asserts the need for legal underpinning of the internal market, particularly to enshrine the principles of mutual recognition and non-discrimination as described in the paper and to ensure consistency of approach.

5.2 With respect to general legal under-pinning to ensure consistency for our policy areas, this was widely discussed as part of our UK Frameworks with FSA and DHSC and considered un-necessary. The key reasons for this were that existing approaches to risk analysis were already legally consistent and with respect to FSS and FSA enshrined in the statutory basis for the organisations themselves. Other aspects of the Frameworks' principles were already the subject on detailed concordats and MOU's, which are to be updated to reflect EU Exit.

5.3 Most importantly it should be noted that existing working arrangements have not caused any difficulties, levels of trust are high and legal underpinning is considered un-necessary. Any centralised imposition of legal underpinning would appear to be unnecessary in the absence of any evidence to the contrary.

5.4 With respect to legal underpinning for the principles of mutual recognition and non- discrimination these are already well established in international trade law (WTO GATT rules) and are currently underpinned by articles 34-36 in TFEU. If needed at all, which seems questionable, since it has not been required for the almost 300 years as the White Paper reminds us[5], the UK internal market existed **before** our integration into the EU single market. In our view, the most obvious solution would be to have either simply retained with the necessary modifications the current EU law (something which might also have underpinned mutual recognition in the trade deal with the EU reducing non-tariff barriers here) or rely on the equivalent WTO rules which the UK has already signed up to. In other words, there is already sufficient international legal underpinning to make such legislation unnecessary.

5.5 **There is, therefore, a potential risk that the accepted international principles of appropriate exemption from mutual recognition may not be well aligned with future UKG policy objectives required to secure future trade deals**. The consequence of that risk materialising is that any trade deal negotiated by the UKG with a change to standards is subsequently

[4] Cf Annex B pages 97-99,
[5] Cf para 58-64 of the White Paper

imposed across the whole of the UK against devolved administration wishes and most importantly against wider consumer interests

5.6 On standards specifically, paragraphs 31-44 focus on *"Maintenance of High Standards*" which we welcome as that accords with consumer expectations, but overall the paper does not strike the right balance between cost and protection of consumers. High standards often have a financial cost and that can be deemed justifiable in public health terms even if businesses are against such proposals. Not everything can or should be justified on monetary cost grounds alone.

6. Impact on FSS Competence

6.1 With respect to the scope of the proposals relating to our policy area, we note that there are a number of references to food standards, including within specific case studies that are discussed in more detail later. However, to set this in overall context we make the following key points.

6.2 Firstly, the vast majority of food law is currently fully harmonised across the UK and, from an FSS perspective, any drivers to add to the very limited differential rules applying in Scotland will be subject to the key statutory and non-statutory under-pinning values and commitments of the organisation. That is they will be:

- Based on risk analysis consistent with international standards;
- Targeted to support consumers interests, but in a way which is proportionate to policy objectives in line with our better regulation commitments and non- discriminatory; and
- Appraised in terms of the cost and overall value of the policy objective in accordance with recognised international laws and conventions for such public policy.

6.3 A practical demonstration of our commitment to these principles is fully outlined in the example below in our advice on considerations of flour fortification to reduce neural tube birth defects.

6.4 Secondly, whilst matters of trade are generally reserved to the UK Government, our area of food and feed standards is fully devolved. This is no accident, since it aligns fully with the intended purpose of devolving all public health consideration to the Scottish Administration. It is also in line with the international convention that over-riding matters of public health should ultimately be determined by those with responsibility for such matters and not be shackled by the requirement for mutual recognition and related prohibition of quantitative restriction rules contained in international trade law. If these proposals in the White Paper do proceed, the status of Scotland's food regulator as the primary policy maker in Scotland would be significantly eroded in those areas where the White Paper proposes restrictions on Scottish Ministers and the relevant competence which has been conferred on FSS. In these areas recommendations or advice from FSS would not be determined by Scottish Ministers, but by UKG or whichever Whitehall department it had conferred competence on a UK basis (FSA/Defra/DHSc or the new body) and accountability would be to Westminster, not the Scottish Parliament

6.5 Currently, Scottish consumers' interests in relation to food are a primary focus for FSS. But such a change in the balance of competence would put Scottish consumers' interests in a significantly worse position than before FSS was established in 2015, significantly undermining the devolved nature of food regulation in Scotland. Whilst FSA acted across the UK before FSS was established, it did so in a landscape where competence was fully devolved to the Scottish Parliament through Scottish Ministers. Going forward even that would no longer be the case

6.6 The effect of these proposals would mean that Scottish consumer interests in relation to food would not be a primary focus as they are for FSS. Hence the way the arguments are presented in the White Paper leads to the conclusion that the purpose of this proposal is not really about collectively supporting the internal market but whether - by design or not - it has the effect of removing the devolved decision making process and returning it to centralised UKG control. The first explanation should be of concern to Scottish consumers, given that a large amount of consumer protection and agri-food legislation (eg food safety and standards, animal and plant health, SPS official controls, environmental standards) is, as a matter of legal fact, devolved. The second

explanation should also be of concern to Scottish consumers, since it would fundamentally undermine the appropriate determination of these matter locally and the accountability of the Scottish Parliament for them.

6.7 As already mentioned the reason for the establishment of FSS (and also the FSA in the rest of the UK) as arms-length and independent from Ministers was to ensure transparency in food regulation for the benefit of consumers. It was also to ensure that food standards policy decisions should not be overly influenced and constrained by bias towards industry promotion and over concern of monetary costs of regulatory intervention. Lessons from the past, such as the BSE scandal and previous major food borne disease outbreaks clearly demonstrate the danger in that approach, not only to consumers, but ultimately to the food industry through lowering standards and loss of reputation and market. It is important that as time passes those lessons are not forgotten or conveniently ignored to the detriment of consumers and industry. Again, leaving decisions to a body that doesn't have appropriate expertise and where cost is the predominant focus, risks replicating expensive historical mistakes.

6.8 Also, we note that the intention is not to include reserved matters within the proposed scope of these internal market considerations. This seems anomalous in the context of this paper where, clearly, reserved decisions could also have a wider impact on the UK market as much as any devolved administration decision. If legislation is deemed necessary for the regulation of the UK single market then for completeness it ought to include both devolved and reserved matters otherwise UKG reserved decisions have no oversight via this new body and every devolved decision does.

6.9 These proposals, therefore, cannot be supported by FSS as they cut across its statutory purpose and are not in the interests of Scottish consumers. The proposals within the White Paper would provide

- a UK Government veto on our regulatory policy objectives in Scotland, and/or
- constrain devolved competence and therefore FSS's statutory remit; and/or
- make FSS accountable to a new UK body, whose purpose appears to be to consider simply the monetary cost to business of policy intervention, whist ignoring wider societal economic costs and values including consumer protection interests, as part of that assessment of impact.

7. Key underpinning Principles of Mutual Recognition

7.1 A key underpinning feature of the White Paper is the proposed establishment of market access legislation, linked to principles of mutual recognition and non-discrimination.

7.2 As this analysis has already briefly alluded to, these high level principles and objective are already well established in various internal markets between nations or regions of individual countries or as part of rules between trading blocks and wider single market agreements. Importantly they are also well established in international trading law such as WTO GATT, which given the UK is fully committed to, would apply in the absence of any specific UK internal market law. The widely accepted purpose of these rules is to set, as a default, that goods traded between separate legislatures should normally be mutually recognised by these legislatures and that 'quantitative restrictions' (prohibitions) should not be applied.

7.3 **However, importantly and fundamentally these internationally established principles of establishing free market access, also fully respect the need for exemption from this default position to support wider public policy of protecting the over-riding interests of the public**. Case law determining what these over-riding public interest tests are has developed over time, but **public health and wider consumer protection imperatives,** were for obvious reasons, one of the first considerations

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agreed[6]. Within Europe these have mainly developed from the landmark *Cassis de Dijon*[7] case as is also outlined in the example of the Swiss internal market model in the White Paper[8].

7.4 Given that these, fundamental exemption principles, fully align with our key strategic objectives of putting the consumer first, unsurprisingly these are of utmost concern to our organisation. The almost complete lack of recognition or apparent understanding of these principles in the White Paper is therefore of some considerable concern to us because it is clearly not in the consumer interest.

7.5 We have therefore outlined the EU rules and principles[9], as they currently apply in the UK in more detailed below and provided examples to outline how these have properly been applied within the UK in our policy area.

- There is a general prohibition of the application of quantitative restriction on goods by the receiving country or region underpinning the principle of mutual recognition.
- There are specified exemptions from that rule to allow public interest policy (such as protection of public health) to be applied by the receiving country.
- Any market restrictions should be proportionate and necessary to meet the public policy objectives. Issues of proportionality are determined by application of impact assessment designed to assess the necessity of the restriction and carry out a cost benefit analysis. The cost element typically includes evaluation of the total monetary costs not just the business cost of compliance.
- Any restrictions should be applied in a non-discriminatory way in particular avoiding preferential treatment to the 'home' market.
- **Importantly the decision on the application of any necessary restrictions (under principles of subsidiarity) ultimately rests with the jurisdiction applying the restriction as does the responsibility for demonstrating it has been applied in a proportionate and non-discriminatory way in the event of challenge.**

7.6 Instead of stating that these principles will be applied by the UKG and Devolved Administrations respectively, the White Paper effectively re-invents these principles in a way that the UKG alone ultimately determines these matters when in fact it is for the region or country applying the restriction to determine and the other party or affected individual to challenge it. FSS accepts the principle of mutual recognition, but not the proposed basis on how the exemptions are determined from it. Issues should be determined on a case by case basis in accordance with recognised existing international law not through a pre-determined list of exemptions which our policy areas might or might not be on. The issue is then about proportionality and subsidiarity which these proposals seriously undermine to the detriment of consumers.

7.7 **Example 1: Fortification of Flour with folic acid to improve neural tube defect affected pregnancies.** The scientific advisory committee on nutrition has for some considerable time advocated this policy, demonstrating a significant improvement in health outcomes for those affected. In the absence of UKG action FSS was asked to provide advice to Scottish Ministers of application of the policy in Scotland. Whilst the policy was clearly within Scottish Ministers devolved competence. FSS carried out a full impact assessment (which assessed the costs for all UK businesses not just those in Scotland) and concluded that due to the nature of the market all UK flour would require fortification to achieve the necessary public health improvement. However, to require the necessary differentiation of product lines only supplying Scotland, should the rest of the UK not apply the same policy, would be dis-proportionate. Therefore, FSS recommended that a separate Scottish solution should not be followed, in preference

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[6] Article 168 TFEU and Article 114 TFEU. The Court of Justice of the European Union has ruled on numerous occasions on how the EU can pursue public health objectives through the integration of the internal market, evoking Article 114 as the legal basis. https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf

[7] Case 120/78 Cassis de Dijon ECJ [1979]

[8] [8] Annex B pages 97-99

[9] Articles 34-36 TFEU

to a whole UK approach. Scottish Ministers accepted that recommendation did not act unilaterally and wrote to the UKG proposing a UK-wide approach which is now being considered.

7.8 **Example 2 The prohibition of the sale of raw drinking milk in Scotland**. Evidence demonstrating that the consumption of raw drinking milk was resulting in significant serious illness and deaths in Scotland, through inherent food-borne pathogens was established many years ago. A policy introducing a ban on the marketing for human consumption of raw drinking milk, was introduced by the UKG many years ago and has been continued to be supported (post devolution) by Scottish Ministers. The prohibition is supported by the recommendations of the independent UK Advisory Committee on the Microbiological Safety of Food (ACMSF), responsible for providing expert scientific advice on food safety to all four UK Governments.

7.9 However, the controls currently applied in England, Wales and Northern Ireland, where sales of raw drinking milk and cream are legal, are less restrictive than those applied in Scotland, meaning that different rules apply across the UK. Nonetheless the restrictions in Scotland apply irrespective of where the raw milk originated (Scottish producers and any other producers from any other geographical location) must comply meaning they have been applied in a non-discriminatory way which does not favour home producers.

7.10 Both of these examples fully respect the internationally accepted principles of the application of market restrictions and demonstrate that the current rules in this area are providing the correct balance between facilitating market access and protecting consumers' interests. **There is a question therefore as to why the White Paper feels it is necessary to re-invent these well-established rules and principles for the UK internal market.**

7.11 In support of the proposal to re-invent these well-established rules, the White Paper makes the following assertion and assumption: .

> *'The Government will seek to introduce new legislation that will commit, to all citizens and businesses, free access to the economic activity across the UK. This will ensure continued market access across the UK, delivered through the principles of mutual recognition and non-discrimination. Without such a legislative underpinning, unnecessary regulatory barriers could emerge between the different parts of the UK'*[10]*.*

7.12 As outlined above, in our policy area there is no evidence to support this assertion. A combination of the well-established liaison arrangements, supplemented by UK frameworks and underpinned by existing international law on market access would provide adequate protection for UK businesses and citizens of the constituent nations. Importantly decisions on the application of restrictions need to be taken on a case by case basis and accountability rests with the legislature applying the restriction.

7.13 The White Paper commits that:

> *' …, the UK will continue to operate as a coherent Internal Market.* ***A Market Access Commitment will guarantee UK companies can trade unhindered in every part of the United Kingdom –*** *ensuring the continued prosperity and wellbeing of people and businesses across all four nations. At the same time, we will maintain our high standards for consumers and workers'…'This will give business certainty.* ***If a baker sells bread in both Glasgow and Carlisle, they will not need to create different packaging because they are selling between Scotland and England'*** and also;
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> *'Mutual recognition and Non-discrimination. The fundamental aim of mutual recognition systems is to ensure that compliance with regulation in any one territory is recognised as compliance in the other(s). For example, if a good produced in Scotland, and adhering to the Scottish labelling regulations, can be placed on the Scottish market, it can also be placed on the English and Welsh markets without the additional need to comply with English or Welsh requirements.'*[11]

[10] Cf para 28

[11] Cf para 49

7.14 The reference to ‘trading unhindered’ and the equivalent ‘unfettered access’ in the Northern Ireland protocol **without any qualification** signposts a new direction of travel and clearly is at odds with the international convention of the application of quantitative restrictions to protect consumers interests. The baker’s example[12], and general labelling examples given in the White Paper, illustrate this by providing guarantees in the area of food standards. This is clearly an area where, in principle, there might be a genuine application of differential restrictions across the UK, where it is proportionate and appropriate to do so to meet public health imperatives.

7.15 For example, to support wider dietary health policy it is normal practice to require high sugar, high fat foods to display food labelling identifying the amounts of these ingredients on the label. If, in future, one administration determined that such information was no longer required on products placed on its market, but another determined this was still required to meet public health objectives, this would be a clear example of where differential labelling might be required for each country. This would entirely be in line with the overriding public interest (public health test) and where ‘unfettered’ mutual recognition and market access would not be appropriate.

8. Key underpinning Principles on non-discrimination

8.1 This appears to be another area where the White Paper is determined to re-define the principles from those well established in trade law. As described above with respect to trade in goods this is simply about not applying more favourable treatment to home goods compared to goods introduced from another country or territory. These proposals appear to have two different interpretations.

> *‘The non-discrimination principle will be a requirement not to discriminate between individuals or businesses based on residence or origin within the UK. Direct discrimination is where an individual or business is treated differently and unfavourably by another administration, in an explicit manner, compared with local operators when operating in another part of the UK, expressly on the grounds of residence or geographical origin[13].’*

8.2 This first definition is broadly equivalent to that already existing for trade in goods and presents no problems. However, the White Paper introduces a new concept of explicit indirect discrimination.

> *‘The Government holds that it should also protect against instances where an economic operator is not directly discriminated against but is nevertheless treated in a substantially unfavourable way by another administration compared with local operators when operating in another part of the UK, and where for example, this is not justifiable on the grounds of a clearly stated policy objective.’*
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> *‘This obligation on administrations and regulators not to discriminate in a way that affects trade will provide an additional safeguard for the UK Internal Market in areas where mutual recognition is excluded. For example, if Wales specified that milk cannot be transported more than a certain distance which meant that in effect most milk from England, Scotland and Northern Ireland could not be sold in Wales, this could be viewed as a case of indirect discrimination. This kind of discrimination should be prohibited as it has equivalent effect to direct discrimination.*
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> *It will be necessary to decide whether indirect discrimination in this context should be prohibited at the outset in legislation as a justiciable right for business[14]’.*

8.3 The caveat above about justification on the grounds of a clearly stated policy objective is helpful, although it is unclear if it is intended to be applied in our policy area or indeed which policy areas generally. Our view is that, for our policy area, as is

[12] Cf Foreward
[13] Cf para 134
[14] Cf paras 135-137

currently the case, determination of indirect non-discrimination should be considered on a case by case basis and considered a justiciable right.

8.4 There may be an implication here (and elsewhere in the White Paper) that the reference to non-discrimination might be intended to be applied to other areas, such as equivalence of general standards to trade and mutual recognition of qualifications[15].

8.5 With respect to such considerations in our policy area, there are already well established mechanisms for agreeing issues of equivalence and consistency via joint risk analysis processes and MOUs. In future this is intended to be supplemented with respect to any proposed deviation from the currently generally harmonised law via the processes outlined in the respective relevant proposed UK food and feed frameworks. There is in our view therefore no need for a separate mechanism for determining these matters in our policy area.

8.6 The areas covered by the UK Frameworks agreement articulated in the White Paper are set out below. These are generally agreed. To be clear, FSS would wish to continue to commit to this work as originally proposed, but it is clear to us that there is now the possibility of major inconsistencies between the commitments given in the JMC (EN) principles agreed in October 2017 and the positions now being proposed in White Paper and also in the Northern Ireland protocol, particularly with respect to principles of devolved decision making and accountability.

8.7 We agree with the purpose and principles of Frameworks set out in paragraphs 88-90 of the White Paper, but the arguments of their limitations as set out in paragraph 21 are not arguments that support legislation as the answer, nor are they arguments to undermine current devolved competence. The purpose of the Frameworks is to work on a four countries basis. There is the implicit understanding that they would consider wider impacts on the functioning of the internal market, while acknowledging policy divergence – indeed an assessment of other legitimate factors beyond the immediate policy issue under consideration will, and should be, a key part of any four country policy analysis. In fact, if the principles of devolution are to be applied appropriately, then these proposals – as the Frameworks do – should recognise the possibility of divergence within the UK. As for the risk of regulatory difference in one sector affecting other sectors, that risk exists now and is not a new risk. For example, the impacts on environmental regulation on packaging could increase costs on the food sector which are ultimately passed on to consumers, but that is no different to that possibility happening now. Leaving the EU doesn't introduce this as a new risk because it has always existed. As for replication of "…*the wider EU ecosystem of institutions*[16]*…"* there are structural answers to this issue or indeed answers through "institutions" such as the JMC.

9. Other specific references to FSS policy areas

9.1 The White Paper also states:

> *'The UK also has some of the most robust standards on food, with world-leading food, health and animal welfare standards. We will not lower our standards nor put the UK's biosecurity at risk as we negotiate new trade deals. The Government remains committed to promoting robust food standards nationally and internationally, to protect consumer interests, and ensure that consumers can have confidence in the food they buy. We will continue to protect human, animal and plant life and health, and the environment and continue to cooperate with stakeholders across all four parts of the UK via bodies such as the Trade and Agriculture Commission.'*
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> *'We remain firmly committed to upholding our standards outside the EU and the European Union (Withdrawal) Act 2018 will transfer existing EU food safety provisions, including existing import requirements, into the statute book. These import standards include a ban on using artificial growth hormones in domestic and imported products and set out that no products, other than potable water, are approved to decontaminate poultry carcasses. Any changes to existing food safety legislation would require new legislation to be brought before the UK Parliament and the devolved legislatures.'*

[15] , other than simply to its usual meaning concerning regulation of goods placed on a market from another country or territory,
[16] Cf para 21

'The Food Standards Agency and Food Standards Scotland will continue to ensure that all food imports comply with the UK's high safety standards and that consumers are protected from unsafe food. Alongside this the UK will repatriate the functions of audit and inspections that are currently carried out by the European Commission to ensure that trading partners continue to meet our import conditions for food and feed safety, animal and plant health and animal welfare'[17].

9.2 From a consumer perspective these commitments are welcome. FSS welcomes the unqualified and unequivocal commitment to high standards but of course the judgement on whether they have been maintained can be reached only once we know the content of future trade agreements.

9.3 However, there is a tension within the White Paper between its stated economic objectives – where cost appears to be the over-riding concern –and what that means in terms of standards. As already stated high standards may mean a higher cost, but inevitably there is a correlation between the two: "you get what you pay for". Overall, there is very little recognition in the White Paper of the possibility or need to apply appropriate different interventions based on risk to maintain standards should the evidence show that this is appropriate and proportionate. Instead the language focusses on concepts such as unfettered access for goods, implying that any divergence must be counter-productive to the market.

9.4 Given the objectives of the paper, inevitably the focus is almost entirely on the cost to business of intervention rather than evaluating the non-cost benefits and values which ensue to society as a whole. Such an approach would almost certainly eventually lead to a reduction in standards linked to a race to the bottom. The higher costs of higher standards may of course provide longer term benefits such as improved consumer confidence, greater assurance over safety and standards, enhanced public health protection etc. However, the White Paper instead presents costs of divergent regulation being passed on to consumers as only negative. Using another example, applying the principles in this White Paper would mean the sugar levy should never have been introduced because it increased costs for consumers despite the health benefits of reducing sugar content and had costs for business because of the time-limited requirement around reformulation.

9.5 The case studies tend to focus on the aggregate costs of differential policy across a number of areas. For example, aggregated costs to food manufacturers of meeting food safety, animal health and environmental standards are outlined. The implication here is that even if all of these measures were considered proportionate impacts individually, they should still not be applied if the overall aggregated cost burden was large, even when the individual measures themselves contained non cost benefits.

9.6 The other inference from the labelling example is that it would be acceptable for businesses to meet labelling requirements of particular export markets and willingly accept the cost, but a differential labelling within the UK which benefits consumers (for example on public health grounds) is unacceptable because it creates a cost.

9.7 Another case study in the White Paper[18] is provided outlining the potential impacts of differential application of front of pack labelling. This is a curious choice for an example since all UK administrations have already committed to a collaborative approach to this issue which recognises it will be essential to work together to build on the success of the current UK scheme, as reflected in an initial joint four nation evidence gathering consultation that has just been issued. This joint approach is well known across all stakeholders. The use of this as a case study could therefore be best described as "alarmist" as there has been no application of different approaches to FOP. What the example doesn't highlight, although it is currently a possible consequence, is that differential labelling could occur at the end of the transition because of the Northern Ireland protocol commitments on unfettered access.

[17] Cf para 34-36
[18] Cf page 76

10. Governance, independent advice and monitoring

Impact Assessments

> *'Assessing the likely costs and benefits of policymaking is standard practice, with the UK Government and devolved administrations each implementing some approach to 'Better Regulation', in part through formalised impact assessments. But no administration currently explicitly considers the impact of their regulatory decisions on other parts of the United Kingdom on an individual or collective basis, including whether their proposals may be discriminatory'*[19].

10.1 This statement on Impact Assessment does not accurately reflect how it applies to our policy area in Scotland. Potential affects out-with Scotland are fully and routinely recognised as part of a determination of acceptability and proportionality of applying market restrictions and issues of discrimination. Indeed, as the White Paper recognises, the rest of the UK is a major market for Scotland so it would be perverse to not assess and understand the impacts of Scottish decisions across the UK. The example on folic acid clearly exemplifies this. It is true that a different approach to "better regulation" is applied in Scotland where a qualitative assessment is also applied and is fully supported by the CBI in Scotland, but that isn't an argument to support these proposals.

> *'It is the Government's position that independent expert advice should be available on the potential impact of a proposal on the Internal Market, including to legislatures, rather than being isolated to individual administrations. As well as shaping the policy-making process and encouraging stakeholder input from across the UK, these assessments will contribute to a stronger evidence base both within and between administrations. Such assessments will cover not only local and community effects, but also cumulative and cross-UK supply chain implications'*[20].

10.2 The rationale and the logic is unclear as it implies that the use of independent expert advice is absent from policy development and proposes far reaching changes to our statutory powers. To illustrate the potential impact: if the FSS Board made a policy decision on health grounds, but which had cost implications for industry, regardless of the fact that an Business Impact Assessment had been done, the policy decision would need to go to the new body for consideration. In other words, despite the Board's decision, despite Scottish Ministerial acceptance of any recommendation, we would end up with effectively a "backdoor" centralisation of the formulation of any proposal that might impact the market with presumably this new body having a veto of any proposal if it concluded it was contrary to the stated objectives of the White Paper proposals.

Example 3 Allergen Information for Consumers on Pre-Packed for Direct Sale (PPDS) Foods[21]

10.3 Both FSS and FSA, working closely with Defra, developed proposals to improve allergen information for consumers on foods sold prepacked for direct sale (PPDS), following the tragic death of a teenager who died after eating a baguette containing undeclared sesame seeds. Four options were considered as part of a joint UK-wide consultation: (i) promote best practice; (ii) mandate the use of "ask the staff" labels; (iii) mandate the name of the food and 14 allergens listed in the FIC Regulations; (iv) mandate the name of the food and full ingredient listing on labels of all PPDS foods. Both the FSS and FSA Boards agreed to option 4 which is in the best interests of consumers, which was recommended to Ministers in each of the four administrations, but the cheapest option for industry would have been option 1. Consumer preference was overwhelmingly for option 4. In considering all the arguments, costs and practical compliance challenges for business, and consumer preferences, both Boards reached the same conclusion which demonstrates how a UK wide approach can be achieved. But if FSS had gone for option 4, and only for illustrative purposes, the FSA Board had chosen option 3, under the proposals in the White Paper, and despite the FSS Board agreement to option 4 as being in the best interests of Scottish consumers and Minister's acceptance of it, this proposal would be subject to a decision by the new UK body. And presumably, it is quite possible the new body would not have accepted either conclusion because option 1 was aimed at raising consumer confidence without regulatory intervention. In other words, according

[19] Cf para 157
[20] Cf para 158
[21] https://www.foodstandards.gov.scot/downloads/Allergen_Information_for_Consumers_on_Pre-Packed_for_Direct_Sale_%28PPDS%29_Foods.pdf

to the proposals in this paper, cost impacts on business would predominant the decisions rather than the best interests of consumers and protection of public health

10.4 Equally, consultation processes are in part designed to obtain independent and expert views. It also seems to follow that the conclusion UKG has drawn is that other administrations are somehow incapable of assessing the impact on an internal market which is again inaccurate. The respective competent authorities in Scotland should have the responsibility for carrying out impact assessment because:

(i) we have the competence;
(ii) we fully understand the policy landscape;
(iii) there is the capability to seek and gather independent expert advice;
(iv) we are responsible for its implementation and should therefore have the accountability and.
(v) this approach is also fully in line with the international concepts of subsidiarity of decision making in such matters.

10.5 For example, within the currently applicable EU model, matters which are the subject of subsidiarity, where member states are the responsible regulating authority, means that individual member state authorities, such as FSS, make these determinations not the EU. FSS therefore challenges the principle that this function is required to be carried out by a UK wide body and certainly not one whose focus would appear to be simply quantitative costs rather than proper, balanced multi-objective qualitative assessments.

> *'Independent advice should be available to support the gathering of necessary evidence and analysis, as well as reviewing its comprehensiveness when requested. Expert economic and scientific advice, based on a growing evidence base on the Internal Market, as well as analytical capability will help all four administrations through the process of accounting for the need to manage the Internal Market. Such advice will be vital in ensuring that different regulatory approaches can be accommodated across the UK whilst ensuring protection of the Internal Market and the free flow of goods across the nations.[22]'*

10.6 Expert independent scientific advice, including social science and economic evaluations is already provided by FSS to Ministers in Scotland in our policy area. As aforementioned that advice already fully considers the benefits of different regulatory approaches. In addition, the proposed single UK risk analysis forum within the UK Food and Feed Framework will adequately deal with other legitimate factors such as economic factors as well as safety risk assessment in matters materially affecting products traded across the UK internal market. FSS therefore challenges the assertion that new advice is required in our area.

10.7 The proposals on governance and oversight has the practical effect that differential consumer protection measures proposed to be introduced in Scotland would be considered (whatever their merits) by the UK Government agency with over-sight of these arrangements which completely undermines our current structures of accountability, including to the Scottish Parliament.

11. The effects of the Northern Ireland Protocol

11.1 FSS notes and accepts the importance of establishing where possible and appropriate a level playing field across the whole of the UK, but it should fully respect the existing devolutionary landscape as a minimum. From a consumer perspective it is the combination of the application of the NI Protocol and the possibility of increasing divergence from EU law that potentially creates more costs for businesses in Scotland as they have to adapt to differences for each market.

11.2 This point can be illustrated from the text of the paper itself that highlights that under the Northern Ireland Protocol goods from Northern Ireland will have unfettered access to the rest of the UK. This effectively means that the UK market will need to be sufficiently flexible to accommodate two food labelling systems anyway with consumers, enforcers and businesses simply having to accept this. There is therefore a general incompatibility with the stated overall purpose of these proposals (i.e. guaranteeing a

[22] Cf para 159

level playing field (LPF) and mutual recognition). The practical implication of these proposals is that consumers would not be presented with a level playing field across the UK and businesses would still have the costs of compliance with EU law if they want to trade in NI,. In other words, the LPF can only apply to GB and the consequence of these proposals means EU changes would find their way into GB, while changes we wanted to make in Scotland which were shown to be in the consumer interest could be at risk of being over-turned by this new UK body.

Regulatory Food Standards at the end of the transition period.

11.3. The protocol obliges NI. to align and keep pace with EU law for a minimum of 4 years at the end of the transition. The UKG have committed to provide unfettered access to these goods into the rest of GB and to recognise these EU. standards.

11.4 These policy obligations, coupled with the ability of GB authorities to deviate from EU. law, at the end of the transition, provides the probability of a two tier system of regulation developing across the UK to the potential detriment of consumers and businesses. This undermines a key object of UK frameworks and presents opportunities for an un-level playing field, particularly with respects to specified regulated products where EU pre-market approved products, could circulate across the whole of the UK without undergoing UK approval. These issues appear to be in direct contradiction to the principle objectives of these internal market proposals.

12. Conclusions

13.1 From the perspective of its statutory underpinning and current practice and based on the foregoing analysis, FSS challenges the rationale behind several of the proposals in the White Paper and the extension of the internal market scope away from the scope and principles agreed by the JMC (EN) with respect to frameworks principally for the following reasons;

- The majority of the intended principles are already accounted for either within proposed UK frameworks or existing MOUs with other UK administrations;
- The proposals on the internal market, mutual recognition and associated non-discrimination are not in line with internationally accepted principles and are unduly biased towards consideration of business cost;
- The arguments for legislative under-pinning and the establishment of new UK impact assessment body are not substantiated with respect to our policy area;
- The proposals do not properly accord the devolution settlement, or normal conventions of subsidiarity as to where responsibility for decisions on quantitative restrictions should lie;
- The potential for future deviation from existing harmonised law, in this area, is demonstrably greater from the UKG Northern Ireland policy proposals than anything contemplated by any regulatory bodies operating in our policy sphere.

13.2 Finally, the proposals in this paper are of concern because they simply do not strike the right balance between the cost and non-cost benefits of Government “interference” in the market. Non cost benefits, which would be in the consumer interest including supporting public health, appear time and again to be subservient to the business cost implications.

Consultation Questions

1. Do you agree that the government should seek to mitigate against both ‘direct’ and ‘indirect’ discrimination in areas which affect the provision of goods and services?

No for the reasons given in the body of the narrative above.

2. What areas do you think should be covered by non-discrimination but not mutual recognition?

There isn’t an answer to this question because these terms are wholly inter-dependent in international trade law in so far as these terms are commonly applied for traded goods. Issues of acceptance of equivalence of standards applied for

non-traded goods on individual markets are an entirely separate issue, but also cannot be applied in a discriminatory way for no good reason. Interpretation of compliance with these matters is ultimately for the courts not the legislatures.

3. What would be the most effective way of implementing the two functions outlined above? Should particular aspects be delivered through existing vehicles or through bespoke arrangements?

In our policy area there are well established existing vehicles and mechanisms which are currently being revised. There is no need for the burden of additional new bespoke arrangements, since the current arrangements are already bespoke.

4. How should the Government best ensure that these functions are carried out independently, ensure the smooth functioning of the Internal Market and are fully representative of the interests of businesses and consumers across the whole of the UK?

Fully independent arrangements are already in place via the constitutional basis and statutory remits of Food Standards Scotland and the Food Standards Agency

12 August 2020