

## EU EXIT – 8 MONTHS ON

### 1. Purpose

#### 1.1. To update the Board on

- FSS operations post-EU exit;
- key issues and challenges which have arisen post EU exit; and
- key developments during the 8 months since the UK left the European Union.

1.2. While the paper touches on the UK Government's Command Paper on the Northern Ireland Protocol (NIP), published in July 2021, negotiations between the UK and the Commission are ongoing and it is too early to indicate what consequences will emerge for FSS. However, on 6<sup>th</sup> September the UK and the EU announced an indefinite extension of grace periods under the Protocol to allow negotiations to continue.

#### 1.3. The Board is asked to:

- Discuss the contents of this note, identifying any areas of concern or where further information is requested;
- Note the update; and
- Agree that FSS should continue to publicly support the need for a specific Sanitary and Phytosanitary (SPS) agreement.

### 2. Strategic Aims

2.1. The cross-cutting nature of the work on EU exit means there is a link to almost all of FSS' strategic outcomes:

- Food is Safe and Authentic (work to ensure access to information networks on food and feed fraud and food incidents, risk analysis and regulatory assurance)
- Responsible Food Businesses are enabled to thrive (work to support Scotland's export businesses and to ensure post-EU exit changes in legislation are communicated)
- Consumers are empowered to make positive choices about food (work on food labelling, EU alignment, import assurance, and Frameworks)
- FSS is trusted and influential (legislative changes, work to ensure FSS positions are represented in trade negotiations, FSS continues to speak with authority in relation to regulatory assurance and risk analysis)

### 3. Background

3.1. On 31<sup>st</sup> December 2020, the UK's agreed transition period ended and the country left the European Union on terms negotiated by the current Westminster

government. FSS' EU exit programme had, by that point, delivered a wide range of organisational and operational changes to the work of FSS and the organisation had recruited a number of new staff to fill roles identified as part of the planning process for EU exit. Shortly afterwards, on 26<sup>th</sup> January 2021, the Programme Board agreed that the EU exit programme should be wound down, with delivery of any remaining EU exit objectives forming part of the business-as-usual activities of branches across FSS.

- 3.2. To maintain oversight of any cross-cutting EU exit issues which might emerge following the closing down of the programme, the Executive Leadership Team (ELT) agreed to the continuation of the EU exit Steering Group (EUSG), which now has a monitoring and advisory role – to identify and advise on EU exit issues, reporting to ELT on a quarterly basis and escalating issues which require strategic intervention.

## 4. Discussion

- 4.1. The following provides updates on the status of the previously identified EU exit programme workstreams, including identification of any outstanding actions, assessment of business-as-usual operations, and an outline of emerging issues which are being considered by the EUSG:

### Legislation

- 4.2. Legislation to ensure the retention of EU law at the end of the transition period was completed in line with deadlines. Scottish Statutory Instruments (SSIs) were laid and Scottish Parliamentary consent was obtained for GB Statutory Instruments (SIs) in time to ensure the deadline of 31 December 2020 was met. A Scottish consultation on proposed changes to mutual recognition provisions for food compositional standards was signed off in late August 2021.
- 4.3. It was anticipated that further legislation would be required in the months following EU exit, and in early 2021 SSIs were laid (or consent was given for GB SIs) which dealt with:
  - Removal of the recognition of natural mineral waters directly imported into Scotland from EU/EEA countries. (SSI)
  - Food Information Technical Amendments (from September 2022, food businesses or their importers must be established in the UK for food labelling purposes. In addition, UK or non-UK rather than EU or non-EU terminology will also be needed if giving origin information. (GB SI with corresponding SSIs to provide transitional periods).
  - Amendment of Art. 53 of General Food Law to ensure that emergency measures that may be applied where a serious risk to health is identified can be applied to all goods entering into GB, including those coming via NI.
  - Postponing the date before new compositional standards for infant formula containing protein hydrolysates apply to enable completion of

- scientific assessment work. (GB SI with corresponding SSI to retain the current requirements in Scotland until 2022.)
- A GB SI covering technical amendments to nutrition legislation, including updates to the substances which may be added to food.
- 4.4. We expect further legislative adjustments may be required should the UK Government's renegotiation of the Northern Ireland Protocol result in substantive changes to that agreement.

### Trade Negotiations

#### *UK-EU Trade and Cooperation Agreement (TCA)*

- 4.5. The TCA was agreed on 30 December 2020 and thereafter provisionally applied until formal ratification in May 2021. It sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes. It is underpinned by provisions ensuring a level playing field and respect for fundamental rights.
- 4.6. The chapter on sanitary and phytosanitary (SPS) measures (encompassing food safety, animal and plant health controls and border checks) is the key part of the TCA impacting FSS policy areas, and to a lesser extent the chapters on technical barriers to trade (TBT) (applicable to food labelling and standards) and level playing field.
- 4.7. As the Board will be aware, the lack of any UK-EU agreement during negotiation of the TCA on SPS regulatory alignment or equivalence has resulted in the introduction of significant non-tariff barriers impacting GB-EU trade, including the application of full SPS border checks on Scottish/GB exports to the EU, prohibitions and restriction on trade in certain goods of (such as seed potatoes, chilled meats and live molluscs from class B water) and additional export health certification and paperwork requirements.
- 4.8. The Board may wish to note that the Scottish Government has continually emphasised the importance of agreeing regulatory alignment to EU SPS rules within the UK-EU TCA, or as a side agreement, similar to the EU-Swiss Veterinary Agreement, which would significantly reduce, if not completely eliminate, these trade barriers. Of significance to FSS is the potential risk on food safety because of the rising costs for exporting businesses. Non-tariff barriers are an added cost that many businesses have not experienced and while short cuts are unlikely to be taken for exports, the continuing pressure on cost may well lead to businesses being prepared to take more risks to keep costs down.
- 4.9. To be clear there is no evidence that is a risk at this point, but apart from putting up prices (which will also impact on consumers) the alternative is to reduce

production costs. Alongside the fact that all Scottish businesses are aligned with EU standards, an SPS agreement would relieve pressure on businesses and may also ameliorate the cost to consumers. The Board are asked to agree that FSS should continue to advocate for an SPS agreement.

- 4.10. The TCA establishes an extensive governance structure, overseen by a joint Partnership Council held at Ministerial level. The current UK co-chair is Lord Frost, Minister of State at the Cabinet Office. The EU co-chair is Maroš Šefčovič, Vice-President of the European Commission. A number of specialised joint trade committees sit below the Partnership Council, including the Trade Specialised Committee on SPS.
- 4.11. Scottish Government is continuing to engage with the UK Government on how the devolved administrations will be involved in TCA governance arrangements and specialised committee structures, and FSS is actively involved in preparations for the first meeting of the SPS Trade Specialised Committee meeting for our interests, due to be held at the end of September 2021.

### EU Alignment

- 4.12. Scottish Ministers' stated policy is that Scotland remains aligned with the EU in order to protect the high standards and access to markets Scotland has enjoyed during the UK's membership, and to protect Scotland's ability to re-join the EU as an independent member state should it choose to do so, while recognising that alignment may not always be possible or desirable.
- 4.13. FSS is continuing to engage with the Scottish Government to consider the implications of this EU alignment policy on FSS's policy areas and intersect with four-country working models, including the UK food safety risk analysis process, recognising the need to balance our role as an independent, science and evidence based public body, at arm's length from Ministers.
- 4.14. FSS has also been working closely with the Scottish Government to trial new IT platforms to monitor changes to EU law, and have developed specific in-house tracking tools to identify changes to EU food and feed law to support FSS policy teams.

### World Trade Organisation Obligations

- 4.15. Since 1 January 2021, following the end of the EU exit transition period, the UK has been a fully independent member of the World Trade Organisation (WTO). As such, the UK is now solely responsible for its engagement with the WTO, including notifying any regulatory changes that have a significant impact on trade, and responding to any specific trade concerns that may be raised against the UK.
- 4.16. Devolved administrations, including FSS, are subject to the same obligations and are required to notify the WTO of relevant regulations in devolved areas. Any requirement that significantly affects whether and how a product can be placed on the market in Scotland might require a notification. Notifiable measures might

include, for example, rules about changes to food labelling requirements or health checks for products of animal origin.

4.17. An FSS WTO coordination and contact point has been established to ensure we are well placed to meet these new responsibilities. Strong links have been established with the UK 's national notification and enquiry points for WTO SPS and TBT matters (hosted by Defra and DIT respectively) and Scottish Government WTO leads, and FSS is fully involved in cross-government discussions on UK preparations for meetings of the WTO SPS and TBT Committees. Guidance for FSS policy and risk managers on WTO SPS and TBT notifications has also been developed.

### UK Frameworks

4.18. FSS remains involved in discussions around the three frameworks for which we lead in Scotland (Food and Feed Safety and Hygiene [FFSH], Food Labelling, Composition and Standards [FLCS] and Nutritional Labelling and Compositional Standards [NLCS]). Two of the three frameworks (NLCS and FFSH) had completed parliamentary scrutiny in the Scottish Parliament during the last parliamentary term and all are provisionally operational. The Board will recall that the intention was to have all three frameworks signed off by the end of the transition period.

4.19. However, progress on all three Frameworks (and the framework programme as a whole) was disrupted in the latter half of 2020 –This followed a number of unilateral policy decisions by UK Government resulting in a failure to agree how cross-cutting issues, including the effects of the Internal Market Act 2020 and the Northern Ireland Protocol as well as wider liaison on international relations might be reflected in their text.

4.20. The Dunlop Review into UK Government Union Capability and the UK's Draft Inter-Governmental Relations proposals were also published during the period in which the Frameworks were being developed. Each contains proposals for Ministerial engagement and dispute resolution which, if adopted, would require to be reflected in the Framework texts.

4.21. The resultant legislative landscape is therefore messy and challenging to navigate. This has already created difficulties in preparing guidance for enforcement officials. Recent draft guidance prepared by BEIS on Internal Market Act compliance was subject to a robust comments process involving Whitehall and devolved administrations and a final version is due to be published imminently.

4.22. FSS continues to engage with UK Government across its portfolio areas in line with the provisional frameworks as agreed to date having established good relationships with lead officials in FSA, Defra and DHSC and leads across the UK as a whole.

### Northern Ireland Protocol

4.23. The UKG recently published their command paper outlining proposals to alter the operation of the NIP. While this was not previously a FSS work-stream, we have

been asked to be involved in both FSA and Scottish Government projects considering impacts of the protocol and this is drawing on FSS resource.

4.24. The protocol has significant bearing on a number of existing work-streams, in particular import and export controls, UK frameworks and the associated risk analysis work. Full consideration of both negative impacts and 'potential' negotiating opportunities associated with the protocol is therefore a **high priority and urgently required**.

4.25. FSS is working with FSA to understand how the UK's proposals for revision of the NIP would work in practice, if agreed. In particular, how the dual regulatory regime envisaged in the Command Paper will be able to work in practice is a current priority. An initial outline of areas of interest for FSS is included as an annex to this paper.

4.26. As negotiations are ongoing, we are unable to offer further detailed analysis at this stage.

### Import and Export Controls

4.27. The UKG decision to not seek extension to the transition period, coupled with delays associated with COVID and the UKG aspiration for an 'at best' minimum free trade deal resulted in significant challenges and additional burdens with respect to official controls associated with imports and exports. The UKG's recently announced intention to renegotiate the NIP has resulted in continuing uncertainty, with a number of preparatory works (including the UKG legislation necessary to establish West-facing Border Control Posts [BCPs] in GB) being suspended pending that negotiation.

#### *Import Controls*

4.28. The most recent plans in place for staged changes to SPS controls on imports from the EU include:

- 1 October 2021 - Pre-notification of Products of Animal Origin (POAO), certain animal by-products (ABP), and High Risk Food Not of Animal Origin (HRFNAO).
- January 2022 - Physical checks for POAO, certain ABP, and HRFNAO required. These checks will take place at BCPs.
- March 2022 - checks at BCPs on live animals.

4.29. The intention is for these controls to be implemented for goods moving from the EU-GB as scheduled, however the UKG has indicated that the period from 1<sup>st</sup> October to end December will also act as an information gathering/educative period allowing common errors in documentation to be identified by the DEFRA managed, "central hub" and corrected in time for implementation of physical checks and stops in January.

4.30. DEFRA continues to indicate that most BCP infrastructure will be compliant in time for the January deadlines, however the question of competent authority



resource, mainly veterinary, remains a major challenge in terms of BCP approval – and questions remain about the time remaining to deliver this ambitious work programme.

4.31. However, in relation to movements of goods between GB-NI, all of these arrangements are now in doubt as a result of the UK Government's decision to announce its intention to renegotiate the NIP.

4.32. Meanwhile, a project to deliver a single risk-based imports regime from 2022 is underway. This would put in place controls and border checks for imports of animal and animal product from both EU and RoW countries. A Defra led Animal and Animal Product Imports 2022 Project Board was established, with representation from all GB administrations and Food Standards bodies, to put to Ministers a recommendation for implementing a single risk-based imports regime that provides the basis for an enduring import controls for all imports of animals and animal products to GB. The project also aims to provide a checks regime that is transparent to a degree, meeting the requirements of the WTO. The Board will recall that FSS Import Project recommended that FSS agreed to the single risk-based import regime, whilst noting the potential WTO challenge.

#### *Export Controls*

4.33. Since 1 January 2021, food and drink businesses in Scotland have been required to apply for an Export Health Certificate (EHC) to export products of animal origin, including fish, fishery products, LBM's including live exports of crustacea, to the EU and Northern Ireland. Export Health Certificate requirements for POAO and certain ABP are due to come into force on 1<sup>st</sup> October 2021.

4.34. Defra has developed an Exports Roles and Responsibilities document setting out their expectations of FSS and Local Authorities (LAs) in Scotland to support export trade. Scottish Government Legal Department (SGLD) has recently confirmed that FBO inspections against third country requirements are official controls. Local authority lawyers may have a different view but consideration needs to be given to potential future resource requirements, particularly if the UK diverges from EU requirements.

4.35. To complement the EHC provision usually undertaken by LAs and the private sector, through use of private vets in Scotland, FSS and the Scottish Government developed a supplementary EHC approach specifically for fishery trade at three logistics hubs in central Scotland.

4.36. FSS stepped forward in September 2020 to undertake the work in setting up the hub processes and recruit the necessary staffing certifying resource capacity, to reduce the burden on LAs. This approach was developed to support the food and drink industry with anticipated scale of demand for salmon and seafood EHCs, and relieve some of the certification pressure on LAs.

4.37. The weeks following the end of the transition period were undoubtedly very difficult for exporters and FSS. The agreement of the TCA with literally hours to go before the UK's formal departure from the European Union generated significant

challenges, with border infrastructure and exporters ill-prepared for the implementation of new export checks. Lack of familiarity with the required paperwork resulted in businesses failing to accurately complete the documentation, creating delays in the system which resulted in lost revenue and export loads being rejected at the border or their intended destination. However, Scottish salmon sales in Q1 have been reported to be at record levels and so the industry appeared to have recovered quickly.

4.38. FSS was quickly able to demonstrate the value that the Hub model delivered for businesses showing that, where paperwork was completed accurately by export businesses, the relevant certification processes were undertaken within reasonable timescales and export loads were not rejected during their onward journey. By mid-August FSS had issued over 8000 EHCs with only a very small number of issues identified at BCPs.

4.39. There have been few technical issues emerging as barriers to export but two notable issues are impacting the export of shellfish. As a Third Country, the UK is no longer permitted to export live bivalve molluscs (LBMs) without undertaking appropriate treatment and testing to ensure they are fit for human consumption. As a Member State, it was previously possible for UK businesses to export Class B LBMs using a registration document, with the receiving food business in the EU taking responsibility for attesting/verifying their safety prior to placing on the market. Due to a lack approved treatment facilities, this change has been problematic for the industry, particularly in England and Wales, where a high proportion of shellfish is Class B status.

4.40. In Scotland, this is not a significant issue as the majority of shellfish is harvested from Class A areas, however the requirement to verify food safety prior to export has presented a barrier to the export of gastropods (snails), tunicates (sea squirts and similar) and echinoderms (sea urchins), due to the lack of methods which are capable of measuring biotoxin levels in these species. Like LBMs, these species are now required to comply with safety standards prior to export, and cannot be attested for export health certification without evidence that testing has taken place. As the majority of gastropods, tunicates and echinoderms are exported, and responsibility for this testing previously fell to the receiving business in Europe, there was no imperative for the industry or enforcement authorities to develop the analytical methods required to verify compliance with biotoxin limits. Therefore the lack of a suitably validated method prevented them from being certified. FSS worked with Scottish Government to develop an interim solution for enabling these species to be exported, and this is now being implemented on a UK wide basis by DEFRA.

### *Staffing*

4.41. The main issue that has had a material impact on our operations is the lack of certifying capacity. Even after 8 months FSS does not have sufficient permanent staff to carry out the process. We have had to rely on a variety of contractors and agency staff to fill gaps. FSS continues to conduct recruitment campaigns for Certifying Officers and has attracted sufficient candidates. However, as the Scottish Government recruitment process now extends to 9 months in most cases it is unlikely we will be fully staffed until early 2022.



4.42. There has also been increased competition for veterinarians who are the main body of certifying officers and plant based Official Veterinarians (OV's). Several private sector certification bodies have commenced active recruitment campaigns in Scotland and we have lost a number of OVs from meat plants during the last 9 months. This has resulted in a critical shortage of OVs in central belt meat plants. The primary source of meat OVs since the insourcing of the role in 2019 has been to recruit from Eville & Jones who are the sole supplier to the FSA. They have recently received additional funding from FSA and have increased OV salaries significantly. This means that FSS is no longer competitive on salary as E & J are offering salaries which exceed the top of the Scottish Government pay scale. Several successful candidates have withdrawn as Scottish Government offer only the minimum of the scale and have been too slow to offer candidates a higher starting salary. We are considering the application of a pay supplement as a counter measure depending on the success of the current campaigns for COs and OVs.

4.43. The veterinary availability situation is likely to deteriorate further as the impact of changes to the Civil Service Nationality Rules take effect. To date, we have attracted staff with settled status but as that cohort diminishes it will become increasingly difficult to recruit EU nationals. Additional barriers including visas and alien certificates will inevitably reduce the number of candidates and extend the recruitment timescales for those willing to overcome the barriers.

4.44. Recruitment of Meat Hygiene Inspectors is also more of a challenge as a result of changes to immigration rules. FSS is now barred from recruiting EU nationals without settled status as MHIs. We are able to recruit vets as MHIs but this is a limited pool. In response we have increased our in-house trainee MHI programmes and anticipate that by the end of 2022 this will be the main source of MHIs in FSS.

### Risk Analysis

4.45. FSS has re-structured its policy and science functions to accommodate the new UK Risk Analysis process which was developed with FSA to deliver the food and feed safety functions that are undertaken by the European Commission and the European Food Safety Authority (EFSA) for EU countries. The UK Risk Analysis model is designed to provide a four country approach for developing risk management recommendations for the UK Government and devolved administrations in Wales, Northern Ireland, and Scotland. The process is now fully operational; with defined procedures in place for undertaking risk assessment and formulating evidence-based advice and opinions on proposed changes to legislative standards and advice, and the authorisation of regulated products such as new types of flavourings, enzymes or additives in food and feed. Issues requiring risk analysis are managed through dedicated IT platforms which are shared by FSS and FSA to provide joint access and enable both parties to identify priorities and assess resource requirements. All risk analysis matters are reviewed internally by FSS through its Policy and Risk Management Forum, which ensures that Scottish interests are noted and that any potential for divergence (either between the UK and Europe or Scotland and the rest of the UK) is managed appropriately.

4.46. The Risk Analysis process is resource intensive. The administrative and legislative procedures involved require significant policy expertise, coordination and administrative support. Also whilst FSS largely relies on FSA's expanded team of around 65 risk assessors and UK scientific advisory committees for risk assessment work, our own scientists have been actively involved in the process, contributing data, and supporting the development of assessments and validation of technical dossiers submitted for regulated products approval. In light of the growing list of technical issues that are emerging through trade talks, and new requirements for import and export functions, it will be important to keep our policy and science capacity and capability under review as the risk analysis process gathers pace. Officials are also developing procedures for prioritising issues based on their importance to Scotland which will help FSS to manage workload and resources in this area.

4.47. Over twelve hundred Regulated Products applications have now been submitted. Of these just over 400 are progressing, the majority of which relate to CBD products. The others have failed at the earliest stages of the process or did not upload a dossier. A first tranche of "pipeline" applications (applications which have already been submitted to the EU prior to the end of 2020 and where a EFSA opinion has already been published) are making their way quickly through the process.

## International Assurance

### *Imports Assurance*

4.48. Products of Animal Origin: Work with the UK Office for SPS Trade Assurance (UKOSPSTA) continues with fortnightly Operations Group. Fourteen subgroups are being established to develop processes and where possible, appropriate subject leads will attend. Others will be shared with Scottish Government and FSA. Currently UKOSPSTA is handling 17 live Market Access Requests (food and live animals) and this work is expected to increase over time, although Defra is currently unable to quantify this.

4.49. Products Not of Animal Origin: Work to develop a system of imports assurance for nPOAO (including High Risk) is underway, with colleagues in FSA.

### *Exports Assurance*

4.50. Full/partial questionnaires received for completion prior to consideration for inward missions, including a benchmarking questionnaire with the Korean competent authorities on food safety management systems and incident response. A mission to the UK from US Food and Drug Administration is expected before end June 2022.

4.51. Relisting of two plants for export to China, as a result of Covid outbreaks, is ongoing. Currently, there does not appear to be any sign of UK requests (and a number of other countries) being actioned by the Chinese authorities.

## Food Crime and Incidents

4.52. The SFCIU continues to work with key partners to raise awareness of food crime and food incident matters of interest to the Unit, in particular most recently with the port authorities (mainly Police Scotland and Border Force) at Cairnryan. This is working well with a number of recent disclosures being made with regards to a variety of matters. Engagement also continues with industry bodies in an effort to understand the risk and vulnerabilities currently associated to the supply chains and matters attributed to EU Exit.

4.53. Access to the Food Fraud Administrative Assistance and Cooperation (FF AAC) system has not been available to SFCIU for many months now and we no longer have membership to the Food Fraud Network (FFN). However, dialogue with relevant EU agencies continues as a result of previous relationships developed with these agencies, which can be highlighted by the recent dissemination of intelligence to SFCIU relating to information regarding the mis-representation of parma ham being sold by a Scottish business.

4.54. Intelligence sharing with EU member states and other Countries continues with processes already in place for this purpose via Europol and/or Interpol. In effect, SFCIU is still able to liaise and share intelligence with EU members states and further afield relating to food crime. There continues to be concern that EU Exit has presented an opportunity for food crime to occur or be exacerbated by the challenging environment faced across supply chains. SFCIU continue to gather intelligence on potential food crime, undertake analysis on key areas of risk and identify emerging risks as part of detecting and preventing criminality in the supply chain.

4.55. The incidents team have seen an increase of 20% in the number of incidents reported this financial year (FY) compared to 20/21 FY and 12% compared to the previous year.

4.56. Communication with other countries has been delivered through INFOSAN following loss of access to RASFF. The UK is still being notified of incidents from other countries via the Commission and INFOSAN, however, there has been some delays. We continue to engage with FSA and INFOSAN to continually improve the incident notification process and so far it has worked well. A new INFOSAN community website has been created which will further enhance our ability to receive and send out communication to other countries relating to incidents.

#### Local Authority capacity

4.57. Local Authorities have been involved in the delivery of export health certification for fishery products at local level and in provision of Attestation documents to provide assurance that exporting businesses are subject to the required official control food law intervention activity. These have been provided to our FSS Certifying Officers at the Hubs and also to private OV's providing a commercial service direct to businesses exporting POAO. In addition supporting attestation documents have been required by some countries in the EU for exports of product that are not POAO e.g. confectionary products.

4.58. The increased demand for EH services in this area is not uniform, with certain LA's e.g. Highland, Aberdeenshire and Argyll and Bute seeing the greatest volume of requests. In general the LA's have managed to cope with this added workload, however this has been largely met through the relaxation of other programmed inspections across food businesses due to Covid-19. The real impact on overall resource required to deliver the Food Law Code of Practice will only become apparent when Local Authorities re-start their intervention programmes in full. FSS will be monitoring LAs closely during this time.

## 5. Identification of risks and issues

5.1. The Board will note that a number of risks have been identified throughout this paper, including:

- Resourcing – across the board, the volume of work occasioned by EU exit has transpired to be greater than anticipated, with additional complexities introduced by the NIP and other UKG decisions compounding this problem.
- Recruitment has also become an issue, putting our ability to manage these extra resource pressures at risk.
- Our colleagues in Local Authorities are under similar pressure, bringing into question the viability of the level of enforcement checks required in the post-EU exit landscape.
- The complex legal landscape and ongoing uncertainty over the practical application of the Internal Market Act risks making the enforcement of official controls more challenging.
- While intelligence sharing continues, the lack of border checks on imports into GB creates an opportunity for increased food crime.
- The imposition of import checks in October 2021 and January 2022 creates further potential for disruption to UK food supply (exacerbated by pandemic and EU exit related labour shortages).
- Incentive for businesses to cut costs or take shortcuts which make mistakes or active criminality more likely.
- Food price inflation as a consequence of many of these issues.

5.2. Ultimately therefore, consumers in Scotland face an increased risk of food crime and fraud, less choice when buying food (particularly for consumers vulnerable to food insecurity), and the overall system of food regulation faces significant resourcing challenges to its continued effective operation.

5.3. As set out above, teams across FSS are taking a range of actions to mitigate these risks, but many of the levers to resolve issues sit elsewhere. Where possible to do so, we will continue to proactively address these issues as they arise.

## 6. Equality Impact Assessment and Fairer Scotland Duty

6.1. No EQIA or Fairer Scotland Duty issues arise in relation to this update paper – EQIA and Fairer Scotland issues may arise in relation to specific elements of the work which is ongoing following EU exit, however this will be taken forward as part of business as usual in the relevant policy or operational areas.

## 7. Conclusion

7.1. There are a number of work streams from the EU exit programme which are now part of FSS' day to day business – these include considerations around future legislative change, the risk analysis process, and international assurance. Other areas are still in a state of flux and changes to the operating landscape, many of which are outside FSS' direct control, will continue to influence our ability to carry out our functions effectively.

7.2. More importantly, a number of areas of work are facing resourcing challenges – whether as a result of a shortage of skilled staff who can undertake key roles in Operations, ongoing uncertainty over the nature of the role FSS is being asked to undertake, or as a consequence of larger-than-anticipated work volumes moving through our new processes. We have therefore identified the need to review the EU exit business case against the landscape we currently find ourselves operating in to test some of the assumptions which underpinned that request for additional funding. This work will be complementary to existing work to review the import/export function and the workforce review.

7.3. The Board are therefore asked to:

- Discuss the contents of this note, identifying any areas of concern or where further information is requested;
- Note the update; and
- Agree that FSS should continue to publicly support the need for a specific Sanitary and Phytosanitary (SPS) agreement.

**David Johnston**  
**Head of Strategic Engagement**  
**September 2021**

Annex

Initial FSS analysis of the UK Government Command Paper, July 2021.

<p><b>General points made in the paper:</b> UKG wants no border anywhere, and a light touch assurance, self notification system to ID NI only goods. This would be underpinned by greater reciprocity in data/enforcement info sharing.</p>
<p><i>39. First, they (EU) need to look at ways of removing the burdens on trade in goods within the UK while managing the real risks to the EU Single Market. We need to find a way of ensuring that full customs and SPS processes are applied only to goods destined for the EU. (See paras 47-57 below.)</i></p>
<p><i>40. Second, we need to look at how to ensure that businesses and consumers in Northern Ireland can continue to have normal access to goods from the rest of the UK on which they have long relied. Applying the same principle of differentiation, the regulatory environment in Northern Ireland should tolerate different rules, allowing goods made to UK rules and regulated by UK authorities to circulate freely in Northern Ireland as long as they remain in Northern Ireland. (See paras 58-65 below.)</i></p> <p><b>FSS: Dual regulatory regime envisaged</b> for NI. This would require statutory amendment in NI.</p>
<p><i>41. Thirdly, we should look to normalise the governance basis of the Protocol so that the relationship between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice. The existing arrangements are highly unusual and have not proven conducive to solving the issues that have arisen. We should return to a normal Treaty framework, similar to other international agreements including our Trade and Cooperation Agreement, in which governance and disputes are managed collectively and ultimately through international arbitration. As part of this, we also need to find ways of ensuring that institutions representing Northern Ireland can be more deeply involved in shaping and bringing into force legislation which binds Northern Ireland. (See paras 66-72 below.)</i></p> <p><b>FSS: Dual regulatory regime envisaged.</b> EU law can apply, so can UK law, but no EU only oversight of the application of EU law? To check international nature of DRM in TCA. UKG also looking to influence EU law (as it applies in NI) so therefore looking for a seat at the law making table. Unlikely without some deeper commitment on SPS.</p>
<p><i>43. We are also ready to look at exceptional arrangements for deep, reciprocal sharing of data on trade, close cooperation with authorities across the EU and in Ireland, inspection processes.... We also stand ready to bring in new legislation to deter anyone in Northern Ireland looking to export to Ireland goods which do not meet EU standards or to evade these enforcement processes.</i></p>



**FSS: Potential for new data sharing agreements between UK and EU?** New legislation making an offence to export products not meeting EU standards. Interesting concept here – if you have no authorisation for the legal standards you are being asked to enforce, how to determine an offence. Unless reported at the other end. Currently export standards are ‘enforced’ by simple refusal to sign an EHC. Separately there is a wider need to look at export specific regulation to separate out domestic requirements from those required specifically for export.

*44. Finally, these new arrangements should of course continue to ensure, as now, that there are no infrastructure or checks at the international border between Ireland and Northern Ireland.*

FSS: Where does this leave the ability to enforce on a territorial basis.

*47. The Protocol is clear that Northern Ireland is fully part of the United Kingdom’s customs territory. But this principle does not apply in practice due to the burdens of paperwork facing all trade moving from GB to Northern Ireland.... Now, with the increasing evidence of the extremely limited risks to the Single Market in practice, there is an opportunity to build on the “at risk” concept already in the Protocol to genuinely differentiate trade based on its destination.*

*48. One possible alternative would be arrangements under which it would be the primary responsibility of any UK trader moving goods to Northern Ireland to declare whether the final destination of those goods was Northern Ireland or Ireland. Full customs formalities would be required for goods going to Ireland and the UK would undertake to enforce them. Other goods would not require customs processes. Assurance for these arrangements would be provided by the requirement for all such traders to register in a light-touch scheme: in so doing, they would be agreeing to complete transparency of their supply chains to enforcement authorities, and to openness of their shipments to controls or checks on a risk-based and intelligence led basis.*

**FSS: Self declaration process. Does this imply labelling of product?** Backed up by assurance process dependent on open supply chain info from businesses. This is already a requirement for food businesses under 178/2002. Ref to light touch registration scheme. A light touch UK trader scheme – for all UK traders sending to NI, irrespective of final destination?

**SPS measures {in addition to those outlined above}**

*50. For agri-food, this model would operate through the same internal UK trade scheme proposed for customs. The full SPS requirements of EU law would be applied for goods going to Ireland and the UK would undertake to enforce them. **There would also still be the means to apply risk-based and intelligence-led controls on consignments as they move into Northern Ireland. But there would be no need for certificates and checks for individual items that are only ever intended to be consumed in Northern Ireland.***

FSS: Aspirational. How to provide assurance based on more than trust? Also no certs for products intended for NI consumption. How about goods sent to NI that may be processed for onward sale and whose final destination is not known by the seller?

*52. Additional confidence in these arrangements could if necessary be provided by an appropriately designed SPS agreement covering these movements on the lines already proposed by the UK, setting out where UK and EU SPS legislation provided for the same high standards, and providing a means to identify areas of significant difference where the level of risk-based controls might need to be higher.*

FSS: Wholly down to EU/UK to agree on SPS rules – what is “significant” in terms of difference that would trigger additional inspection?

**Enforcement**

*55. In all these areas effective monitoring and enforcement is crucial. Though the risks to the EU would be extremely low in practice given that trade from Northern Ireland to Ireland is less than 0.5% of all imports into the EU, all these arrangements need to be underpinned by strong reciprocal data-sharing arrangements, building on the access to information in IT systems already provided by the UK, and other law enforcement cooperation, to provide assurance that all necessary requirements are being met. **On SPS goods, there would need to be particularly strong oversight and visibility of supply chains; appropriate labelling requirements so that goods could only be sold in the UK; and increased market surveillance to monitor compliance, with penalties for non-compliant traders.***

FSS: Labelling of UK goods – all UK goods? Or just goods intended for NI? What sort of offences? For all traders non compliant with export requirements or only those relating to NI?

**Unfettered access**

*57. The UK and EU agreed in December not to require export declarations for goods moving to Great Britain from Northern Ireland other than in certain very limited circumstances (for example CITES endangered species movements). This was on the basis that other data sources, such as shipping manifests, could provide equivalent information. Following work with carriers and others however, it is clear that this model is not operable without putting in place burdensome new requirements to collect further information. We suggest that a new settlement should definitively eliminate these requirements except in the narrow cases of specifically controlled goods. This involves no risk to the EU since any goods moving to the rest of the UK will either be consumed there or be subject to further processes if later re-exported.*

FSS: not food specific but possible WTO risk viz EU goods to GB via NI.

ii. Circulation of goods within Northern Ireland

58. Under the Protocol, Northern Ireland aligns with all relevant EU rules relating to the placing on the market of manufactured goods. This requires products to meet EU rules if they are to be placed on the market in Northern Ireland, but goods approved to these rules by UK bodies are marked for sale only in Northern Ireland and Great Britain. The current arrangements have already caused difficulties for businesses trying to put goods from Great Britain onto the market. These will be exacerbated further once the UK moves fully onto the new UKCA product safety regime, leading to significant risks that many businesses in Great Britain simply give up trying to produce goods for the Northern Ireland market. The current system nevertheless enshrines the principle that there can be parallel arrangements for different goods in Northern Ireland, underpinned by risk-assessed regulatory checks performed by market surveillance authorities to limit the sale of goods beyond Northern Ireland.

59. We suggest that the right way forward would be to extend this principle **to provide for a full dual regulatory regime in Northern Ireland. Goods, whether manufactured or SPS goods, should be able to circulate within Northern Ireland if they meet either UK or EU rules, as determined by UK or EU regulators, and should be labelled accordingly.** Of course, goods destined or produced for the EU Single Market would need to meet EU rules in full. Goods exported from Great Britain via Northern Ireland to Ireland or beyond would, under the arrangements set out above, need to meet full normal EU customs processes.

62. Arrangements of this nature involve risk to both sides: that goods made to UK rules move onto the EU market, and that goods made to EU rules move to the market in Great Britain. For our part we believe that risk is manageable and acceptable, given existing strong market surveillance. For the EU's part we are ready to agree stronger arrangements for enforcement, including clearer rules for product labelling, extensive reciprocal data-sharing arrangements with the EU and Ireland, enhanced forums for cooperating on market surveillance and calibrating it to specific levels of risk, and awareness work with traders. Once again we are also ready to put in place legislation to provide for penalties for UK traders seeking to place non-compliant goods on the EU market.

iii. Governance

66. As we have set out above, the institutional arrangements of the Protocol have not proven conducive to finding shared solutions. Nor have they provided a sense of common ownership, instead placing problems too quickly into an adversarial setting. We should aim at putting in place new institutional arrangements making the UK and EU into a partnership of equals, both with a strong and direct interest in operating the Protocol effectively.

67. The most unusual feature of the current Protocol is Articles 12(4) to 12(7), which give the institutions of the EU, up to and including the Court of Justice, the right to enforce major elements of the Protocol's provisions. It is highly unusual in international affairs for one party to a treaty to subject itself to the jurisdiction of the institutions of the other, all the more so when the arrangements concerned are designed to mediate the sui generis relationship between the EU and its Member States. The UK refused to accept this in the negotiations on the Trade and Cooperation Agreement, and only agreed to it in the Protocol because of the very specific circumstances of that negotiation.

<b>Consultation and legislative processes</b>
<i>71. We should also take the opportunity to ensure that in any areas where EU law is applied or replicated in Northern Ireland under a rebalanced settlement, there are more robust arrangements to ensure that, as rules are developed, they take account of their implications for Northern Ireland – and provide a stronger role for those in Northern Ireland to whom they apply (including the Northern Ireland Assembly and Executive, and wider Northern Ireland civic society and business).</i>
<i>72. Of course, for as long as some legislation affecting Northern Ireland continues to be made outside the United Kingdom, the consent mechanism will need to continue to apply.</i>
<i>77. To provide space for these discussions, the Government believes it is vital to provide certainty and stability for businesses in Northern Ireland in the short term. <b>Accordingly, we believe we and the EU should agree a ‘standstill’ on existing arrangements,</b> including the operation of grace periods in force, and a freeze on existing legal actions and processes, to ensure there is room to negotiate without further cliff edges, and to provide a genuine signal of good intent to find ways forward.</i>