

Local Authorities Chief Executives
CC: Local Authority Lead Food Officers
Local Authority Lead Feed Officers

14 March 2016

Ref: FSS/ENF/16/012

Dear Chief Executive

Letter to LA Chief Executives: Delivery of Official Controls

Food Standards Scotland (FSS) and local authority environmental health representatives met last August to discuss areas of mutual concern and interest around the delivery of food law enforcement. Sustainable delivery of official controls against increasing budgetary pressures was a key consideration throughout the day. A number of delegates approached me during the event to suggest that it might be helpful to highlight the existing legal framework within which local authorities deliver official controls. We are of course conscious of the pressures on LAs and the balance between various statutory obligations, but clearly from our perspective as the Competent Authority for Scotland, we need to be in a position to provide assurance to the Food and Veterinary Office (FVO) of the EU Commission and the EU Commission itself with regards to the delivery of controls in Scotland. The purpose of this note therefore is to bring to your attention the FSS's proposals for a more structured escalation of performance issues with local authorities. You are of course free to bring this to the attention of your elected representatives.

FSS is keen to maintain strong partnership working with local authorities and the intention of this letter is to assist chief executives by setting out the general framework of statutory powers and obligations relating to official controls. It also explains how FSS proposes to handle any escalation of concerns it may have about delivery of these local authority services.

The bulk of food and feed regulation comes from Europe. This includes directly applicable legislation on member states, setting out obligations on the way in which official controls

are carried out¹. As you are probably aware, the vast majority of official food and feed controls are carried out by local authorities. The obligations under European Law that apply to delivery of official controls by local authorities include ensuring:

- a. The effectiveness and appropriateness of official controls
- b. That controls are applied at an appropriate risk-based frequency
- c. That they have a sufficient number of suitably qualified and experienced competent staff and adequate facilities and equipment to carry out their duties properly
- d. That staff are free from conflicts of interest
- e. That they have access to an adequate laboratory capacity and capability for testing

The European Commission has powers to apply significant financial sanctions to the UK where the delivery of official controls is found to be inappropriate or inadequate and these sanctions would apply proportionately to the Scottish Government. FSS is responsible for ensuring that appropriate and adequate arrangements are in place to meet EU obligations in Scotland. This role includes the production of statutory Codes of Practice approved by Ministers setting standards for the delivery of official controls by local authorities and the monitoring of service delivery through annual returns and audit of relevant local authority services^{2,3}.

Notwithstanding all of the above, we are not standing still. FSS, in partnership with Local Authority colleagues, is currently undertaking a major review of how Local Authority interventions are undertaken and set out in the Food Law Code of Practice. This review is aimed at further integration of inspection programmes, and a greater risk-based approach that gives greater recognition of sustained compliance and increased focus on non-compliant businesses. Linked to this review is the intention to introduce a Scottish National Database, which will serve to harmonise the existing IT platforms that Local Authorities currently use to report enforcement activity. We expect this to be a significant improvement on the current Local Authority Enforcement Monitoring system and will support LAs in making timely decisions on interventions. This project should significantly reduce the administrative burden placed on Local Authorities, by collecting the data directly from source and should also greatly improve the way this data is stored and analysed. A pilot exercise involving Local Authorities is proposed in the near future to take both of these projects forward.

As the Code of Practice is reviewed, an area of work that FSS is progressing in partnership with Local Authorities, FSS will ensure that there is a clear link between the specific European requirements and standards set. We will also be reviewing our local

¹ Regulation (EC) No 882/2004

² Food Law Code of Practice 2015: <http://www.foodstandards.gov.scot/sites/default/files/CoPFood-FSS-final.pdf>

³ Feed Law Enforcement Code of Practice (2015): <http://www.foodstandards.gov.scot/sites/default/files/Feed%20Law%20Code%20of%20Practice%20Scotland%202015.pdf>

authority audit programme to provide a more direct link to meeting these requirements. We will of course continue to work with local authorities to remedy any issues identified during audits but, where these issues cannot be resolved, the relevant food and feed legislation allows for FSS, following consultation with Ministers, to issue a *Direction* to a local authority requiring it to take specified steps to comply with a Code issued under this regulation.

FSS has not, to date, considered it necessary to pursue the use of Direction powers with any local authority on any matter of food controls delivery. However, given the continuing pressure on LA budgets, we will develop a set of procedures for the escalation of any concerns that could in due course lead FSS to consider a formal Direction. Directions are enforceable through Court of Session Orders and it is crucial that all practicable steps for informal resolution are taken before considering the use of formal powers. My preference is to ensure that issues be resolved at the lowest possible organisational level and only escalated where this has not been effective. I propose that the final stage of any such escalation, would involve formal communication from myself as chief executive of FSS, to a local authority chief executive and that this communication would include a summary of all preceding stages.

In addition to delivery of official food controls, environmental health colleagues were keen to explore the possibility of their potential future involvement in working with food businesses to improve nutritional outcomes for consumers. An important part of FSS's statutory remit is to improve the extent to which members of the public have healthy diets. Any additional contribution that local authorities can make in tackling the major challenges associated with diet related disease in Scotland would certainly be welcome. However, before embarking on additional work in the field of nutrition advice, I would ask that chief executives satisfy themselves that their environmental health services are in a position to do so without adverse impact on the delivery of statutory food controls (see Appendix 1).

As I mentioned earlier in this letter, I am keen to maintain strong partnership working with local authorities. With that in mind I hope that you find this letter helpful as a framework for setting resourcing priorities for delivery of food official controls and for effective management of communications, where performance concerns arise. I would also be happy to take any suggestions you may have on how FSS might further assist local authorities in improving performance management and reporting arrangements.

Yours sincerely



Geoff Ogle
Chief Executive,
Food Standards Scotland

Appendix 1: Extract from the Food Law Code of Practice (Scotland) 2015

2 General Obligations of Food Authorities under the Food Safety Act

Obligations on central and local government under European Law:

1. All Member States of the European Union have agreed a consistent framework of controls on safety, composition, labelling and description of food sold and traded in any Member State. This framework is designed to protect public health and the interests of consumers but also ensures that businesses can sell food produced in, or imported into, one Member State without requiring additional controls on food as it enters another Member State. Therefore the consistent application of controls by local authorities is essential in terms of the wellbeing of consumers, food businesses and the wider economy. This Code underpins the necessary confidence of consumers and food businesses that all food purchased or traded in Scotland is manufactured, described and handled to consistent standards, irrespective of its origin.
2. European Law sets out obligations that apply to all Member States in relation to the delivery of Official Food Controls. These obligations apply to delivery of Official Controls by local authorities and include ensuring:
 - a. The effectiveness and appropriateness of Official Controls.
 - b. That controls are applied at an appropriate risk-based frequency.
 - c. That they have a sufficient number of suitably qualified and experienced competent staff and adequate facilities and equipment to carry out their duties properly.
 - d. That staff are free from conflicts of interest.
 - e. That they have access to an adequate laboratory capacity and capability for testing.
3. The statutory requirements outlined in this part of the Code should be brought to the attention of local authority officials and or elected member bodies responsible for agreeing budgets or other service arrangements relevant to the delivery of Official Controls.
4. The Commission has powers to apply financial sanctions to the UK where, following infringement proceedings for a breach of EU law, the Court of Justice has found that delivery of Official Controls, are inappropriate or inadequate. Such financial sanctions may comprise of both a daily penalty (of up to circa €700,000 per day to induce the remedy of the breach) and a lump sum (based on assessment of the effects of the breach for which the minimum is currently €9,446,000). The Scottish Government would be required to pay a percentage of any UK fine if the infraction related to a devolved matter. Fines are extremely rare and the European Commission works hard with Member States to avoid financial penalties wherever possible. Through its Food and Veterinary Office (FVO), the European Commission audits the performance of every member state on their arrangements for implementing Community Law and agreement. The majority of these missions/audits will involve visits to food establishments

where a local authority is the enforcing authority. In such cases, Food Authorities should cooperate with any audits in their areas and should ensure that appropriate local authority officers are available to assist the FVO officials at the establishments selected for audit by the FVO.

5. In England, Wales, and Northern Ireland, the Food Standards Agency (FSA), and in Scotland, Food Standards Scotland (FSS) has statutory responsibilities including policy development in relation to food, advising Ministers on the arrangements necessary to meet EU requirements and on any additional national measures that are appropriate for the protection of public health or other consumer interests. Food Authorities are required under that legislation to have regard to this Code when discharging their duties. This means, in effect, that Food Authorities must follow and implement the provisions of this Code that apply to them, statutory duties include oversight of local authority arrangements for and delivery of Official Controls. This includes a programme of audit of the local authority arrangements to meet the requirements of this Code, production of audit reports and associated action plans, these are agreed by local authorities and then published online by the FSA and FSS.
6. If a Food Authority finds that complying with this Code might compromise public health or safety they should discuss the matter with the FSA/FSS at the earliest opportunity.
7. In Scotland Food Authorities have statutory duties to enforce legislation relating to food. Regulation 5 of the Food Hygiene (Scotland) Regulations 2006 sets out the division of enforcement responsibilities between Food Authorities and the FSS in respect of the Hygiene Regulations.
8. The purpose of enforcement is to ensure compliance with legislation relating to food in each Food Authority's area in the United Kingdom. Every Food Authority must therefore discharge its duty as effectively as possible, using means that are most appropriate to the circumstances.
9. The effective discharge of this duty relies on Authorised Officers being familiar with the law they are appointed to enforce, referring to the law itself as well as to this Code and other guidance, understanding what the law actually states and requires, and seeking guidance when either it, or they, are unclear.
10. FSA and/or FSS may, from time to time, issue Practice Guidance for Food Authorities. Food Authorities should take account of such guidance, as well as any appropriate guidance issued by the European Commission. Food Authorities must also have regard to the principles of the Enforcement Concordat⁹ and the Scottish Regulators Strategic Code of Practice.

11. Food Authorities should be aware that law relating to food is not necessarily made under the Act. Law that applies to food is also contained in and/or made under the Animal Health Act 1981, the European Communities Act 1972, the Consumer Protection Act 1987, the Consumer Protection from Unfair Trading Regulations 2008, the Weights and Measures Act 1985, the Medicines Act 1968 and directly under EU Regulations.
12. Food Authorities should be aware that Article 8(5) of Regulation (EC) No 852/2004 stipulates that Guides to Good Practice drawn up pursuant to Directive 93/43/EEC (known in the UK as “Industry Guides to Good Hygiene Practice”) shall continue to apply after the entry into force of that Regulation, provided that they are compatible with its objectives.
13. For the purposes of this Code the terms Enforcement Authority and Food Authority are interchangeable, subject to the specific enforcement responsibilities. In this Code, references to live bivalve molluscs also include live echinoderms, tunicates and marine gastropods, in line with Annex III, Section VII of Regulation (EC) No 853/2004, with the exception of the parts of this Code which deal with purification of live bivalve molluscs. Annex 10 of this Code concerns the enforcement of primary production activities. It applies to both food and feed hygiene and is therefore directed at both food and feed authorities. References to sections, sub-sections and annexes are to the relevant parts of this Code unless stated otherwise.
14. Food Authorities in England, Wales and Northern Ireland should refer to the Code relating to their respective areas of the UK and contact the respective offices of the FSA in those areas for further advice where necessary.