

2 October 2020

Lewis Macdonald
Convenor Health & Sport Committee
The Scottish Parliament
Edinburgh
EH99 1SP

Dear Lewis

THE UK INTERNAL MARKET BILL

I write as Chair of Food Standards Scotland (FSS), a Non-ministerial Office of the Scottish Administration accountable directly to the Scottish Parliament and hence this letter to you as Convenor of the Committee we believe to have most relevance to the issues engaged by the UK Internal Market Bill (the Bill).

The attached paper provides our analysis of the potential impact specifically in relation to Scottish consumers that the Bill could have on our ability to discharge our statutory remit to protect Scottish consumers' interests in relation to food. As you will be aware, our remit reflects the need to ensure that government policy formation, regulation and enforcement in this area is clearly separate from those responsible for food industry growth and promotion. As a general point, it appears to us that the Bill blurs that distinction which has been in place since the formation of the Food Standards Agency following the BSE crisis.

Throughout the preparations for Brexit, FSS has recognised the need for clarity in the way in which the UK Internal Market would operate in the future. FSS has, with respect to its statutory responsibilities, been actively engaged with the Scottish Government, the UK Government and other bodies in the development of the UK Frameworks. We were also privy to discussions that recognised generally accepted market principles including GATT and WTO Agreements to which the UK Government is a party. Indeed, the UK Government confirmed only this month, in its report on [Common Frameworks](#) that the powers it had to restrict devolved competence under section 12 of the European Union (Withdrawal) Act 2018 had not been used precisely because "significant progress is being made across policy areas to establish common frameworks in collaboration with the devolved administrations". At no stage did any party express a need for, or provide evidence in support of a statutory framework to regulate the UK Internal Market in this way going forward.

Accordingly, FSS provided [a response](#) to the UK Government's consultation on their statute-based Internal Market Proposals. There has been no official response to the consultation and so it is difficult to identify what consideration the UK Government has given to our response. It is therefore disappointing that the Bill should be introduced purporting to benefit consumers; without having provided **any** evidence to demonstrate the ways in which bodies such as FSS (and indeed Food Standards Agency and other bodies in the rest of the UK) are currently *unable* to protect consumers interests in relation to food.

I am copying this letter to the leaders of Scottish Parliamentary Parties: Nicola Sturgeon First Minister; Ruth Davidson, Richard Leonard; Willie Rennie, Patrick Harvie, and Bruce Crawford, Convenor of Finance and Constitution Committee and Geoff Ogle, FSS CEO.

Yours sincerely



Ross Finnie
Chair
Food Standards Scotland

Paper on the Implications of the UK Internal Market Bill as it relates to FSS's statutory remit to protect Scottish Consumers.

Introduction

1. 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.*

2. In general terms the workings of the current internal market make provision to allow governments to impose conditions (such as labelling requirements, composition requirements or price mechanisms) on Food Business Operators in order to meet a public health objective provided the proposal meets an overriding public interest test. The Bill makes no equivalent provision and indeed makes clear that business cost is the primary driver with no consideration of either public health costs or non-financial consumer interests and protection.

3. The following summarises the ways in which the Bill intersects with FSS's objectives mainly through the setting of what are termed in the Bill the 'Market Access Principles'. Comprising: mutual recognition; and non-discrimination.

The Bill's provisions by reference to FSS functions

(i) To protect the public from risks to health which may arise in connection with the consumption of food.

4. The Bill has provided some concessions from the White Paper in relation to food safety as well as appearing to 'save' certain, limited domestic provisions as they apply now in Scotland. However, the conditionality attached to the concession for food safety, and the interaction with the Market Access Principles, as well as the lack of clarity as to functions and accountability, means that the full extent of the concession is unclear.

5. The risks to consumer health associated with the consumption of food are not managed simply by setting and enforcing safety limits, or authorizing treatments or additives. They are underpinned by a range of assurance mechanisms which includes the requirement for businesses to be registered or approved and to have documented food safety management and traceability systems. It is unclear therefore how the proposed exemption in relation to the 'mutual recognition principle' intersects with the promotion and prosecution of food safety legislation in Scotland.

6. Whilst the Bill appears to save existing unique, domestic provisions such as the ban on the sale of raw milk in Scotland (from wherever it has been supplied), future provisions introduced on public health grounds are not protected. Mutual recognition as it is more broadly understood and as it applies now, does not interfere with the right of any part of the UK to make regulations on public health grounds as regards, for example, labelling or composition

requirements. The application of mutual recognition as provided in the Bill however, effectively obviates the policy purpose and intent of the administration introducing the regulations. This is because by allowing goods which have been approved for sale in another part of the UK, but which do not meet the additional public health requirements of the other administration, to be granted mutual recognition and sold freely clearly undermines the intended public health purpose and intent.

7. Current arrangements include provisions for exceptions to be made to the principle of mutual recognition providing the administration seeking the exception meets the test of overriding public interest; commonly referred to as “objective justification”. The Bill makes no such equivalent provision. If, therefore, only current (and very limited) controls in Scotland remain protected but future controls do not – and we note that retained EU law is not protected under these provisions -then that potentially restricts FSS’s ability to engage meaningfully with businesses in Scotland on what a proportionate and effective future regulatory regime should look like.

8. There are two further points of relevance here: (i) the Bill includes the potential to encroach on matters always considered to have been outside of EU competence. This of course means the Bill not only deals with powers repatriated from the EU, but it also encroaches on issues that were outside of EU scope because of the principle of subsidiarity; (ii) from an international perspective, for Scottish exports, qualitative assurance will be more difficult to provide to other countries if the lowest standard predominates across the UK.

Subsidiarity

9. Matters of subsidiarity have been completely overlooked in the Bill, in so far as the Bill’s reach goes far beyond matters previously prescribed at EU level. There are numerous examples in EU food law where national measures are intended to apply, areas that were carved out of scope of UK Frameworks precisely because there was no EU Exit driver for bringing them within scope. The Bill makes no such distinction. While the EU internal market, comprising of 27 wholly independent Member States, operates within a subsidiarity model it is considered that the UK, following well established conventions, is incapable of following a similar path.

10. More generally, if one administration within the UK pushes a strong deregulatory agenda, then businesses elsewhere are likely to want to be afforded the same concessions, and may lobby Ministers under the terms of the Bill to achieve that. FSS was established to protect the interests of Scottish consumers and may need to be innovative if legal accountability for decisions affecting the regulations on food sold here, is in part shifted to the UK Government with advice on the merits of food safety being provided by the CMA. Inevitably this will dilute our accountability to the Scottish Parliament because our decisions could simply be over-ridden by what happens in another UK administration.

Assurance on Exports

11. Similarly it will make it very difficult to describe not only to businesses but to trading partners too what the regulatory landscape is in the UK. This Bill draws a parallel with Schrödinger's cat - suggesting that national law can both apply and not apply simultaneously

in virtually identical circumstances and where compliance and non-compliance are relative rather than absolute terms. The Bill adds a layer of complexity to regulation and accountabilities that may result in poor or unclear positions emerging (“which law applies to me?”) and making enforcement to a standard particularly difficult to navigate for already stretched officers across the UK because they will need to understand the law in four administrations to understand whether a product is compliant i.e. a product could be non-compliant with a Scottish standard, but be compliant with a lower standard from elsewhere. What is worse from a consumer perspective (see below) is that transparency for consumers through labelling that would enable them to make choices between variable standards in the same product are effectively made redundant by this Bill because even labelling requirements are within scope. *UK frameworks in any case would minimise potential divergence in output, but the law in each UK country should reflect that output in a simple and straightforward way.*

(ii) To improve the extent to which members of the public have diets which are conducive to good health

12. The provisions in this Bill significantly dis-incentivise our ability to bring forward any measures that would restrict food businesses ability to market unhealthy food in any way. The mutual recognition principle targets (see Clause 3(2)) any relevant requirement which concerns (amongst other things):

- (a) characteristics of the goods themselves (such as their nature, composition, age, quality or performance);*
- (b) any matter connected with the presentation of the goods (such as the name or description applied to them or their packaging, labelling, lot marking or date-stamping);*
- (f) documentation or information that must be produced or recorded, kept, accompany the goods or be submitted to an authority;*
- (g) anything not falling within paragraphs (a) to (f) which must (or must not) be done to, or in relation to, the goods before they are allowed to be sold.*

13. Anything not covered by this principle may however be caught by the ‘non-discrimination principle’ which at Clause 6(3) would apply to:

- (a) the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold);*
- (b) the transportation, storage, handling or display of goods;*
- (d) the conduct or regulation of businesses that engage in the sale of certain goods or types of goods.*

14. The cumulative effect of these principles would mean, that unless the qualifying bars are met as potentially arbitrated by the Secretary of State, rather than FSS or Scottish Ministers, any legislation brought forward in Scotland concerning (for example):

- Food information for consumers (which could include reference to methods of production for the food concerned);

- mandatory fortification of food (e.g. folic acid)
- nutrition labelling (e.g. ‘traffic light’ labels)
- restrictions on in store promotions of unhealthy food (e.g. restricting ‘buy one get one free’ promotions for sugary foods, or point of sale restrictions);

would have ‘no effect’ other than in relation to ‘local’ goods and businesses.

15. The reference in the Explanatory Memorandum to allowing “people *and businesses to trade as they do now, without additional barriers based on which nation they are in*”, and the equivalent ‘unfettered access’ in the Northern Ireland protocol without any qualification, signposts a new direction of travel; it is also clearly at odds with the international convention of the application of quantitative restrictions to protect consumers interests. 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.

(iii) To protect the other interests of consumers in relation to food

16. The Explanatory Notes to the Bill advise that, “*The Competition and Markets Authority (CMA) was chosen by UK Government Ministers as the most appropriate body to operate these new UK internal market functions...the CMA has a statutory duty to seek to promote competition, both within and outside the UK, for the benefit of consumers.* Reports can be requested from the CMA on any new regulatory proposal and the CMA should they chose to undertake such a report “*may consider among other things the potential economic effects of the proposed regulatory provision on the effective operation of the internal market in the United Kingdom, including—*

- (a) indirect or cumulative effects;*
- (b) distortion of competition or trade;*
- (c) impacts on prices, the quality of goods and services or choice for consumers.*

17. Food safety and consumer protection fall clearly within the ambit of FSS and is in line with the exception to the reservation at C7 in the Scotland Act. It remains unclear how the CMA will protect consumers in our policy area, given the provisions in this Bill as outlined above. Our assessment of the Bill aligns with our assessment of the White Paper which in summary was:

- *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.*

Summary

18. The UK Governments own [Regulator's Code](#) advises that: “Regulators should avoid imposing unnecessary regulatory burdens through their regulatory activities and should assess whether similar social, environmental and economic outcomes could be achieved by less burdensome means.”

19. In this context, ‘*other less burdensome means*’ would be to allow the UK Frameworks process to proceed as intended, and to evaluate its impact (in line with standard policy evaluation approaches). A further option would be either to simply retain - with the necessary modifications – the principles embodied in the current EU law on mutual recognition, or rely on the equivalent WTO rules which the UK has already signed up to. In other words, and as we said, in our consultation¹, there is already sufficient international legal underpinning governing ‘the market’ which in tandem with the statutory roles afforded to UK food safety bodies provide the necessary protection for consumers. Again we made this point in our consultation response.

20. In our response to the White Paper we cited examples of responsible policy making² that were fully cognisant of UK market issues and industry pressures. These approaches are always evidence based and take into consideration as a matter of course industry impacts as well as consumer interests. Our preference would be to continue engaging with UK departments on where improvements to policy making approaches could be made, where these are not already being accounted for in UK frameworks processes. In our opinion, regulation should always be evidence based and proportionately applied to the matter in hand.

21. The Bill does not advance the protection of consumers – other than in cost reduction - and alas turns the notion of evidence based policy making on its head. As a public body with a duty to protect consumers we would rightly be criticised for taking the approach adopted with the Bill and it clouds what is currently a very clear relationship between consumers, businesses and regulators, to the detriment of all. If consumer interest is defined solely by cost then inevitably it will drive down standards because lower standards are less costly.

¹ Para 7.5 of FSS response to the IM consultation

² Cf examples 1,2 and 3 in the IM consultation response.