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Convener of the Rural Affairs, Islands and Natural
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Scottish Parliament
EDINBURGH
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21 March 2021

Dear Finlay,

The Import of Animals and Animal Products and Approved Countries (EU Exit) (Amendment) Regulations 2022

I am writing to you in response to your correspondence of Thursday 10 March in relation to The Import of Animals and Animal Products and Approved Countries (EU Exit) (Amendment) Regulations 2022 and the questions raised seeking further information.

Please see the answers listed according to your numbering below.

1. Please identify the specific existing legislative provisions (as amended by previous deficiency correcting SIs) which confer powers on Scottish Ministers (as the appropriate authority) by regulations to amend a third country list that would be replaced by this proposed SI, and indicate what parliamentary procedure applies to the exercise of those powers by SSI currently.

ANSWER: No powers of the Scottish Ministers to make regulations by SSI to amend a third country list are being replaced by this proposed SI. The powers to make regulations affected are powers of the Secretary of State, but ones only exercisable with the consent of appropriate authorities.

Regulations 3 – 17 of the Trade in Animals and Animal Products (Legislative Functions) and Veterinary Surgeons (Amendment) (EU Exit) Regulations 2019 (SI 2019/1225) confer powers on the Secretary of the State, with the consent of the appropriate authority, to amend third country lists of certain animals and animal products that may be imported into Great Britain. The third country lists are contained in specified Commission Regulations and Commission Decisions that form part of retained EU law, and amendments may be made where necessary or appropriate in light of an assessment to the risks of animal health, public health or, in some cases, both. The powers contained in SI 2019/1225 are regulation-making powers subject to

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negative procedure, and are not being amended by the proposed SI. These regulation-making powers will continue to be exercised by the Secretary of State with the consent of the Scottish Ministers in order to approve or delist a country for import of a commodity.

The proposed SI will however enable the Secretary of State, with the consent of the Scottish Ministers in relation to Scotland, to administratively specify certain conditions relating to the import into Great Britain of certain animals and animal products, rather than by way of exercise of these regulation-making powers. These conditions are summarised in the Annex to the Notification. For the avoidance of doubt, in order to add or remove a third country from a list contained in any of the retained EU law listed in the Annex, this cannot be done administratively and can only be achieved using the regulation-making powers contained in SI 2019/1225. Any SI made under the regulation-making powers contained in SI 2019/1225 would continue to be notified to the Scottish Parliament under SI Protocol 2.

For completeness, Articles 126 – 128 of Regulation (EU) 2017/625 were amended by SI 2020/1481 to confer powers on the appropriate authority to draw up regulations on import conditions for animals and goods entering Great Britain from third countries, and includes a power to draw up lists of third countries (see Article 126(2)(a)). These powers will not be affected by the proposed SI.

2. Please explain why it is no longer considered appropriate for Scottish Ministers to exercise this power and for it instead to be exercised administratively by the Secretary of State, subject to consent of the Scottish Ministers. Is the Scottish Government confident that the interests of the Scottish Ministers and the Secretary of State will always align on import controls in devolved areas? If so, can you explain how you will be working together to reach agreement on these issues?

ANSWER: The powers to amend third country lists conferred by SI 2019/1225 are currently conferred on the Secretary of State with the consent of the Scottish Ministers in relation to Scotland. Under the proposed SI, the powers will continue to be conferred upon the Secretary of State with the consent of the Scottish Ministers.

The Scottish Government is confident that sufficient protections exist in order to ensure that agreement can be reached in relation to important controls in devolved areas. This is in part because Sanitary and Phytosanitary (SPS) import decisions are science-based, as required under the UK Government's various trade agreements with trading partners and under World Trade Organisation rules, and that these are made on a Great Britain or UK wide basis informed by the recommendations of the Animal Disease Policy Group.

As this is a cross-governmental body that includes the Chief Veterinary Officers of the four UK administrations, including that of the Scottish Government, alongside the Food Standards Agency, Food Standards Scotland, the Animal and Plant Health Agency and other relevant bodies, we are confident that we will continue to work together to reach agreement on these issues and ensure Scotland's interests are served.

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3. For the avoidance of doubt, can the Scottish Government confirm:

1. That the proposed SI will not change any of the procedures, evidence-gathering or decision-making processes around assessing biosecurity and food safety risks, and concerns solely the matter of whether they are made administratively or by statutory instrument?

ANSWER: The proposed SI will not change the requirement for an assessment of the risks to public and animal health which has been approved by the Secretary of State and appropriate authorities.

2. That the areas that the notification proposes to be amended administratively relate only to import controls to address biosecurity matters and food safety issues (e.g. that concern public and animal health risks such as BSE and avian flu) and not to import controls in relation to food production standards (e.g. in relation to animal welfare, environment, etc) which may be affected by trade agreements?

ANSWER: The third country lists that are relevant to the proposed SI can only be amended where necessary or appropriate in light of an assessment to the risks of animal health, public health or, in some cases, both.

4. Some powers to amend third country lists have been previously conferred on the Secretary of State with the consent of the appropriate authority (the Scottish Ministers in Scotland). Deficiency-correcting SI 2019/1225 contains various such powers – e.g., article 7, which conferred a regulation-making power on the SoS with the consent of the appropriate authority to amend the third country lists in Commission Regulation (EC) No 798/2008 relating to where poultry and poultry products may be imported. The exercise of the newly created administrative powers is subject to the consent of the Scottish Ministers. However, as an administrative power, rather than an SI, the process set out in SI Protocol 2 would not apply and so there would be no opportunity for Parliamentary scrutiny by the Scottish Parliament (or indeed the UK Parliament). Please explain why it is considered appropriate for powers that would otherwise be subject to scrutiny in the Scottish Parliament (whether by SSI, or SI notification engaging SI Protocol 2) to no longer be subject to such parliamentary scrutiny.

ANSWER: The amendments set out in this instrument will allow the Secretary of State, with the consent of the Scottish Ministers and the Welsh Ministers, to respond quickly and effectively to changes in biosecurity risk. This instrument has been drafted in a such a way as to ensure that as much parliamentary oversight as possible is retained. Only import conditions that must be amended quickly (sometimes within days) have been removed from legislation. A Statutory Instrument will continue to be required to approve or delist a country for import of a commodity, meaning that both the UK Parliament and the Scottish Parliament (by virtue of SI notification engaging SI Protocol 2) should continue to have oversight of these amendments. .



Prior to EU Exit, the power to amend these lists was conferred on the European Commission using its delegated powers, meaning amendments were dealt with by an EU committee. This instrument aims to strike a balance between the requirement for appropriate parliamentary scrutiny and the need for effective biosecurity controls.

Decisions on the use of these powers will continue to be informed by the recommendations of the Animal Disease Policy Group, which is a UK-wide policy forum that incorporates experts from across government including the Chief Veterinary Officers of Wales, Scotland, Northern Ireland and the United Kingdom, Scottish Government, Welsh Government, Defra, DAERA, the Food Standards Agency, the Animal and Plant Health Agency, and where appropriate, public health and aquatics experts.

5. When the UK was a member of the EU, what procedure would the European Commission adopt to the passing of amendments to third country lists via tertiary legislation, and what would this involve in terms of scrutiny?

ANSWER: Within the EU, amendments are made to third country lists by the European Commission under examination procedure: where draft implementing acts have to be approved by a committee of the Member States, although they can be immediately applicable on grounds of urgency.

6. Please explain why it would not be possible for regulations to be made urgently (e.g., if subject to negative procedure, breaching the 28 day rule where necessary), and whether this amounts to a failure of EU law to operate effectively which may be remedied using the deficiencies power in section 8 of EUWA.

ANSWER: Trading partners that are approved to export animals and animal products to Great Britain must comply with country-specific import conditions that are found in retained EU law. Urgent amendments to these conditions may be required to respond to changes in risk, including to safely manage trade from countries experiencing animal disease outbreaks.

Amendments to these import conditions in retained EU law are currently made by Statutory Instrument, with an expectation that they may be made in compliance with SI Protocol 2. In practice we expect that the changes of the kind proposed be made by administrative decision are unlikely to ever be ones in which negative procedure and the application of SI Protocol 2 will be appropriate. Even when negative procedure is used and the normal conventions about laying and notification are breached, there is a significant gap between the identification of risk and the legal adjustment of import conditions. Both trade bodies and trading partners have raised concerns about the lack of responsiveness of the current legislative mechanism.

Timely amendments to import conditions are also necessary to meet trade agreement obligations. Failure to meet these obligations may lead to legal challenge from trading partners, or retaliatory action against exports from Great Britain. Currently, when trading partners quickly respond to changes in disease status in Great Britain in order to support export trade, Great Britain is unable to reciprocate.

By way of example, on 26 October 2021 the Animal Disease Policy Group recommended that import conditions in relation to the import of certain poultry and poultry products from Ukraine to Great Britain should be amended to recognise regionalisation measures applied by the Ukrainian authorities. This served a dual purpose of ensuring that imports of products from

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regions of Ukraine that were experiencing outbreaks of avian influenza would be subject to appropriate controls, whilst also allowing trade to resume from regions of Ukraine where disease outbreaks had been successfully controlled.

In order to implement this recommendation, a UK SI AH/062 (the Approved Country Lists (Animals and Animal Products) (Amendment) (No. 2) Regulations 2021) was drafted and notified to the Scottish Parliament under SI Protocol 2 on an urgent basis. AH/062 came into force on 17 December 2021, meaning there was a gap of approximately 7 weeks between the identification of risk and the legal adjustment of import conditions. The amendments proposed by the SI currently being notified would have allowed the necessary adjustments to have been made administratively and in a more timely fashion.

This instrument has been drafted in a such a way as to ensure that as much parliamentary oversight as possible is retained. Only import conditions that must be amended quickly (sometimes within days) have been removed from legislation. A Statutory Instrument will continue to be required to approve or delist a country for import of a commodity. This instrument aims to strike a balance between the requirement for appropriate parliamentary scrutiny and the need for effective biosecurity controls.

In our view, this remains a failure of retained EU law to operate effectively. Prior to withdrawal, the Commission was able to legislate quickly and frequently using its delegated powers, to enable the conditions and information provided in third country lists to be quickly updated to reflect changing circumstances and risk while allowing biosecurity to be maintained.

The amendments made by this instrument confer powers on the Secretary of State, with consent of the Scottish Ministers (in relation to Scotland) and the Welsh Ministers (in relation to Wales), to change import conditions for animals and animal products entering Great Britain, by specifying the change in a document published for that specific purpose rather than in legislation. The functions that were previously carried out by the European Commission to protect human and animal health are therefore transferred in a way that enables them to be exercised promptly and effectively.

7. The table (pages 5 to 10 of the notification, referring to 16 pieces of retained EU law being amended) appears to provide one example of powers conferred on the Secretary of State to do things administratively in the first row in relation to changing the BSE classification of a country or region and the date from which that classification is to apply, which refers to SSI 2019/588 (which should be to SI 2019/588). Please explain the extent to which powers are already conferred (either on the Secretary of State, subject to consent of Scottish Ministers, or on Scottish Ministers) to amend third country lists administratively. Are the majority of existing powers to make regulations, or are there already a number of administrative powers to amend third country lists?

ANSWER: At present the only way to make any amendments to third country lists is by making regulations. The proposed SI will continue to require that regulation-making powers are exercised by the Secretary of State with the consent of the Scottish Ministers in order to approve or delist a country for import of a commodity. The proposed SI will allow certain import conditions related to the third country lists, as listed in the Annex to the Notification, to be exercised administratively.

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There are various import requirements that can currently be managed administratively that the proposed SI will not change. For example, health certificates for imports to Great Britain can currently be managed administratively.

8. The proposed SI is stated to be subject to the affirmative procedure, albeit it would appear to be an extremely expedited affirmative procedure as it would come into force on 1 April, two days after it is laid. Please explain why it is necessary for the instrument to come into force so quickly.

ANSWER: The expectation is that the SI will be laid in draft on 30 March 2022, with debates taking place in early June. The SI is subject to affirmative procedure and will come into force the day after it is made. This is expected to be late June/early July.

I look forward to hearing from you by after your meeting on 23 March.

Yours sincerely,



MAIRI GOUGEON