



Food Standards Scotland (FSS) response to UK Government (UKG) consultation on Draft Guidance on the Operation of the CMA's UK Internal Market Functions;

Introduction

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

FSS' constitution reflects the need, previously identified following major UK food scandals, to ensure that government policy formation in this area is clearly separate from those responsible for food industry growth and promotion. The purpose of this deliberate separation of roles is to improve consumer confidence by protecting their interests and help ensure the food industry complies with legal standards, maintaining the reputation of Scottish food and drink.

Its role and remit is similar to the Food Standards Agency ("the FSA"), in so far as its key purpose is to protect consumers in Scotland's interests with respect to food and feed safety and standards. However, FSS' remit is wider and retains policy responsibility for consumer facing food labelling and diet and nutrition.

The wider constitutional context in which we operate is in line with the exceptions to the general reservation on matters relating to trade and industry in the Scotland Act 1998. This includes advice on the regulation of imports and exports of food and feed into Scotland for the purposes of protecting public health and consumer protection in so far as it relates to the subject matter of the Food Safety Act 1990.

FSS' response to this consultation, provided below, is in the context of this policy remit. There are a number of issues and outstanding questions that need to be addressed before the guidance could be applied.

Detail

We recognise that the United Kingdom Internal Market Act 2020 ("the Act") places an obligation (under section 31) on the CMA to report on the operation of the UK internal market. That assessment will require the establishment of an agreed baseline against which progress or its health and functioning can be assessed.

At a very basic level, the Act does not define the 'UK Internal Market' and therefore does not define or otherwise provide the metrics or parameters against which its

effectiveness or otherwise can be assessed. Instead, Section 33(8) of the Act refers to matters which a review undertaken by CMA may consider, (among other things):

- (a) developments in the operation of the internal market, for example as regards—*
 - (i) competition,*
 - (ii) access to goods and services,*
 - (iii) volumes of trade (or of trade in any direction) between participants in different parts of the United Kingdom, and*
- (b) the practical implications of differences of approach embodied in regulatory provisions, falling within the scope of this Part, that apply to different parts of the United Kingdom.*

In Section 34, on any “qualifying proposals” :

Advice given [by the CMA] or a report provided...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.*

It is the function of FSS and the FSA in the rest of the UK to provide balanced advice to Ministers as to whether or not specific measures relating to food or feed offer appropriate levels of consumer protection. Having in place a robust system of checks and balances on the market is, in our view, an integral part of a healthy internal market and trade operates within that context. This includes the ability of any administration, where appropriate, to take an evidence based and proportionate approach to an intervention in accordance with respective competences, and in line with recommendations made by the OECD (more detail below).

Our general comment on the guidance is that it should set a broader agreed baseline for assessment of ‘The UK Internal Market’; one which explicitly acknowledges the wider public good that the market serves.

Trade flows, in and of themselves, are no indicator of market health or functioning. Similarly, if the cost of an intervention to a business sector results in cost reductions over the longer term due to improved public health outcomes, then the market, however affected by that intervention, will have delivered a net benefit. If a higher bar is placed on entry into the market, due to a public health prerogative in one part of the UK and that in turn results in higher levels of assurance to trading partners, that may also result in an economic good. Due to high levels of food exports from Scotland, taking a ‘big picture’ approach, including consideration of economic impacts is a standard policy consideration in relation to food matters in Scotland. Equally, even where an intervention creates a cost in the market the public health benefits may well be an objectively justified reason for such an intervention. Governments “interfere” in the market frequently - we would not have seen the changes made to smoking legislation, for example, which have clearly impacted the industry adversely but had a significant public health benefit

As per our [response](#) to the White Paper last year, we would therefore reiterate that whilst public health recommendations need to take into account the economic impact on affected businesses, they should not be determined by a financial assessment of the benefit alone. That ethos is at the heart of why Food Standards bodies across the UK were set up to work, independent of Ministers and industry.

We would ask therefore for respective competences relating to consumer protection be respected in relation to any assessment of the internal market, in so far as consumer related matters are concerned.

Whilst it is the function of food authorities across the UK to place consumer interests at the heart of policy making, we do this in line with guidance relevant to policy officials and departments across the UK as a whole, including relevant impact assessment guidance, which sets out requirements for assessing economic benefits and disadvantages associated with the options appraisal process.

It is noted at paragraph 2.21 of the Draft Guidance, that further to a request to undertake a report and a regulatory proposal:

The OIM will only consider economic effects and only those effects of the regulation in so far as they impact the effectiveness of the internal market.

At paragraph 3.2, the Draft Guidance states that:

Much of the OIM's analytical work will relate to the impact of divergent regulatory approaches on the 'effective operation of the internal market'. We consider that 'effective operation' in this context includes the following, recognising the balance to be struck between frictionless trade and devolved policy autonomy:

- *Minimised barriers to trade, investment and the movement of labour between all parts of the UK (subject to relevant exclusions).*
- *Ensuring that businesses or consumers in one part of the UK are not favoured over others.*
- *Effective management of regulatory divergence (including through the use of common frameworks).*

We would like to understand what is meant by favouring consumers in one part of the UK over others in relation to food safety and standards.

It is our statutory duty to protect the interests of consumers in relation to food in Scotland. If that were to mean that current safeguards in law were to be maintained in Scotland, whilst deregulatory approaches were taken elsewhere (for example), that would simply be a democratically taken position in line with existing accountabilities. Food safety and standards requirements fall under the ambit of health protection. Therefore adding or removing friction to the market for public health protection purposes should not be considered secondary in any holistically defined internal market. Those frictions, and the ability to add or remove them, are forces within which the market operates and their efficacy and appropriateness should not be considered solely through an economic lens nor in pursuit of a lowest common denominator approach. Defining "disadvantage" solely in terms of economic

disadvantage may fuel a “race to the bottom” on cost, quality and consumer protection.

In order to assuage those who may view the Internal Market Act as a drive towards lowering standards across the UK as a whole, perhaps this statement should be turned on its head to state that consumers in one part of the UK should not be placed at a disadvantage compared to others, with “disadvantage” defined to incorporate public health, quality and other standards, rather than simply the ability to access goods at a lower cost? Consumers in all parts of the UK would continue to benefit from any higher standards of production should they purchase goods produced in accordance with those standards.

Conversely, businesses should be disadvantaged if they do not meet legislative standards which are set for the purpose of achieving a legitimate aim. They should not however be arbitrarily discriminated against and we would suggest rewording here to reflect that point. In summary, those who meet standards in law should not be discriminated against, and businesses who do not meet legal standards should indeed be placed at a disadvantage compared to others.

To reiterate, it is an inevitable consequence of our statutory function that we will indeed look to ensure consumer interests in Scotland are protected. The Scotland Act 1998 (as amended) did not reserve consumer protection in relation to food (indeed the subject matter of the Food Safety Act 1990 remains explicitly excluded from the general reservation).

It would be useful to understand how the CMA intend to interact with policy areas such as ours in terms of making any definitive statements relating to consumer protection given its status under the Scotland Act and our own role as per the Food Scotland Act 2015.

It would also be useful to understand how the CMA envisages assessing the impact of any regulatory differences on the internal market. As a regulator, involved in processing a high volume of potential changes to retained EU law, it would be useful to understand the gap in economic assessment that the OIM will fulfil bearing in mind that policy makers take into account the views of businesses in developing proposals. For matters in scope of common frameworks, we do so in partnership with the responsible departments across the UK. FSS is responsible for the following 3 framework areas in Scotland (the organisations bracketed hereunder refers to the relevant UK Government authority’s area of responsibility)

- Food and Feed Safety and Hygiene (FSA)
- Food Compositional Labelling and Standards (Defra)
- Nutrition Labelling, Composition and Standards (DHSC)

At the heart of the Framework with FSA sits a [risk analysis process](#), and within that engagement with stakeholders and relevant partners within Government is anticipated and indeed takes place currently. As part of our engagement process we would welcome engagement with the CMA/OIM as part of the policy cycle.

We also note the reference at paragraph 3.3 to the OECD report – “[International Regulatory Co-operation and Trade: Understanding the Trade Costs of Regulatory Divergence and the Remedies](#)”. This report makes a number of recommendations as to how trading costs (focussing on international trade) can be reduced. This includes:

- *Increasing the transparency of regulatory frameworks*
- *Applying good regulatory policy practices*
- *Considering more systematically international standards in the development or revision of regulation*

The report itself references and follows on from the [OECD 2012 Recommendation of the Council on Regulatory Policy and Governance](#), which places significant emphasis on consultation and impact assessment as the basis on which ‘good regulation’ is made. It is recommended in this report that governments undertake:

ex ante impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs.

On the basis that the role of the OIM/CMA is to assess the effectiveness or health of the internal market, and given policy is made on the basis of whether the benefits of a proposal outweigh the disadvantages, we might envisage a scenario whereby businesses producing high fat/salt/sugar foods could indeed be subject to additional restrictions or legislation in one part of the UK, ahead of other parts of the UK.

Would we be correct to assume that any OIM report looking at the aggregated effects of legislation in that sector would set any such report in the context of wider strategies in Government?

It would be useful to have confirmation that any report or undertaking by the CMA/OIM would acknowledge wider strategic priorities, for example any in relation to public health where relevant to the policies under consideration by the OIM.

The purpose of such hypothetical public health interventions is to fetter the market in some way in order to deliver a public good, whether in one GB country or all 4 parts of the UK. An opportunity will have been missed unless annual reports or reviews undertaken by the CMA/OIM acknowledge the place of legitimate aims and the role in administrations in pursuing those whether unilaterally or collectively.

In any case, as part of that cost/economic assessment, given the interconnected nature of the food supply chain in the UK, potential effects outwith Scotland are routinely assessed as part of determination of acceptability and proportionality of applying market restrictions in any given instance. It is our view that the guidance (for example at paragraphs 3.3 to 3.7 and chapter 4) should recognise the international principles associated with developing any potential intervention in the market as acknowledged by the OECD. The ability to undertake these interventions

reflect the reality of internal markets across the world. That reality, as part of any baseline assessment of the efficacy of the internal market should be reflected, certainly in terms of scene setting or context both in any guidance and in any reports made under the Act.

Paragraphs 3.3 to 3.7 of the Draft Guidance make an unqualified reference to the potential for food related safety or labelling requirements to be considered a barrier to trade. We do not regard that as an acceptable approach and OIM should support a legitimate market intervention made in line with good policy approaches and international conventions governing trade. In any case any labelling related to food safety is, by definition, legitimate. We believe the guidance and intention needs to be made much clearer here so the underlying intention is understood.

The four country nature of the UK frameworks and economic drivers relating to ongoing trade with the EU and or Northern Ireland mean that there are normative forces acting in relation to food policy in the UK, with EU rules forming a significant gravitational pull. As the independent food safety and standards regulator for Scotland we will continue to approach potential interventions based on international principles underpinning the risk analysis process and policy making generally. We will continue to do this in line with the framework arrangements we have agreed to date with other UK regulators.

We would welcome any engagement with partners as to how the policy process could be improved in accordance with internationally recognised best practice, and in turn how reporting against this might be reflected in any review or report undertaken by the OIM.

Noting at paragraph 3.19 of the Draft Guidance that the annual report “*will also review the impact of common framework agreements on the internal market, and any interaction between the operation of the market access principles and common framework agreements*”. This reflects in general terms the statutory obligation in the Act itself. The common frameworks for which FSS has policy responsibility in Scotland are essentially ‘ways of working’ documents.

In their current, provisionally agreed form, they recognise the equality in decision making powers in the constituent parts of the UK and set out more detailed mechanisms for how officials and Ministers will interact in the course of policy discussions, risk analysis and dispute resolution etc. Frameworks in and of themselves are tools for delivering a policy outcome but do not impact the internal market itself – it is the decisions reached under the framework which have the potential to create market effects. Rather they accord parity to the constituent parties within the agreement itself.

Frameworks in our area also includes a mechanism for review in order to provide assurance that the framework continues to meet the principles and objectives set out in the Joint Ministerial Committee (European Negotiations) [communiqué](#) of October 2017 and that they are working in practice as per the terms agreed. Regular reports submitted to the Scottish Parliament are also envisaged for our two most advanced frameworks (Food and Feed Safety and Hygiene/Nutrition Labelling Composition

and Standards). This commitment was made further to parliamentary scrutiny and feedback from legislatures across the UK in the course of framework development.

How will these mechanisms for framework review and reporting align with those envisaged in the Act? Would it be more appropriate for the OIM in this guidance to more explicitly reference the governance and review arrangements that have already been agreed by officials as recommended by legislatures?

Frameworks themselves are about reaching consensus (whether towards a common 4 country output, or to agree divergence within the UK/GB). In and of themselves they simply formalise many of the pre-existing policy liaison mechanisms that have worked successfully across the UK since devolution.

It would be useful to understand what additional metrics the OIM would apply to assessing their effectiveness, that would differ from the 4 country review mechanisms built into frameworks themselves.

To return to the point that we make at the outset – regarding the absence of a definition of “the UK internal market” and the barometer used to assess its effectiveness and health needs to be set out in ways that do not place economics as the sole determinant. The guidance should acknowledge the principles associated with the regulation of international trade and more explicitly reference those legitimate aims which may have wider societal benefits and around which trade is surely required to operate. The purpose of having arm’s length food regulators advising government, is to place legitimate public health interventions outwith the direct influence of government departments charged with looking after business interests.

In summary we suggest the following amendments to the Guidance document.

1. Whilst the guidance is predicated on the statutory provisions ascribed to the OIM, those statutory provisions do not describe what the UK internal market is and how its effectiveness or health should be assessed. The guidance should reflect international conventions relating to trade and exemptions in specific cases where an overriding public interest test is met. That was the case whilst the UK was an EU member and commitments were made in relation to maintaining at least the same levels of protection post EU exit. The Act does not prevent this approach being reflected in any guidance issued by the CMA/OIM. Our general comment on the guidance therefore is that it should set a broader baseline for assessment of ‘The UK Internal Market’; one which explicitly acknowledges the wider public good that the market serves and in which it has to operate in order for the market to work in line with broader public policy goals.
2. The guidance refers to the OIM having a role in assessing the benefits and disadvantages of market interventions for consumers of market interventions. FSS was set up to protect the interests of consumers in relation to food in Scotland and this competence should be respected in relation to any assessment or report that the CMA may wish to undertake. Consumer

protection in relation to food is also wholly devolved. Contradictory advice or even advice from disparate parties could serve to undermine the authority of those bodies responsible for that in the UK. The guidance should recognise respective competences more explicitly and aver to taking advice from responsible parties as appropriate. It might be appropriate for the OIM to be assured around the systems (which it is possible to do), but the individual decisions themselves made by UK regulators, should not be a part of the consideration by the OIM. It would simply be inappropriate for the OIM, with no expertise in food safety, to reach a contradictory view to the regulators. If that is the intention, then the process which would support OIM decisions which contradict regulators' decisions would need to be spelled out.

3. The guidance should also be mindful that any consumer protection intervention undertaken in one administration is without prejudice to policy choices made in other jurisdictions. Paragraph 3.2 of the Draft Guidance should state that consumers in one part of the UK should not be placed at a disadvantage compared to others, provided "disadvantage" is defined more broadly than economic disadvantage alone.
4. Reference to businesses in Paragraph 3.2 should refer to discrimination. If devolved legislatures can, despite the Act, continue to apply laws to producers in their own nation and the public interest test is met, assessment of discrimination or disadvantage needs to be highly caveated.¹ Legitimate aims, especially on public health grounds, must be permissible otherwise interventions on public health grounds are effectively ruled out. This surely cannot be the intention of the Internal Market Act. It would also place us in a position that no other developed country has adopted in terms of reasons for market intervention.
5. It would be useful to understand how the CMA intend to interact with policy areas in terms of making any definitive statements relating to consumer protection given its status under the Scotland Act and our own role as per the Food Scotland Act 2015.
6. It would be useful to have confirmation that any report or undertaking by the CMA/OIM would acknowledge wider strategic priorities, for example any in relation to public health where relevant to the policies/sector under review/consideration by the OIM
7. We suggest that it would be appropriate for this guidance to explicitly reference the governance and review arrangements for frameworks that have already been agreed by officials as recommended by legislatures.

¹ Article 168 TFEU and Article 114 TFEU. The Court of Justice of the European Union has ruled on numerous occasions on how the EU can pursue public health objectives through the integration of the internal market, evoking Article 114 as the legal basis.

[https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf)

8. Frameworks themselves are about reaching consensus. It would be useful to understand what additional metrics the OIM would apply to assessing their effectiveness, that would differ from the 4 country review mechanisms built into frameworks themselves.

Yours sincerely

