

T: 0300 244 4000
E: scottish.ministers@gov.scot

Finlay Carson MSP
Convener
Rural Affairs and Islands Committee
Scottish Parliament
EDINBURGH
EH99 1SP

By email: rural.committee@parliament.scot

10 June 2024

Dear Finlay

**UNITED KINGDOM STATUTORY INSTRUMENT - THE OFFICIAL CONTROLS
(AMENDMENT) REGULATIONS 2024 – DEFRA OFC/017/R**

The Clerk to the Committee wrote on 3 June 2024 seeking further information on some of the detailed provision of the above instrument. This is in preparation for the Committee's consideration of the instrument at its meeting 19 June 2024.

The Scottish Government's response to those questions are enclosed in the attached Annex.

Yours sincerely



MAIRI GOUGEON

ANNEX

Defra OFC/017/R - The Official Controls (Amendment) Regulations 2024

Question 1

The notification states that the SI is “required to provide the legislative basis to introduce aspects of the BTOM which have not yet been delivered”. Which aspects are these?

Scottish Government response

In terms of what is still to be delivered this includes elements of the targeted risk-based approach to official controls on animals and goods based on a risk categoriation that takes into account the inherent risk the commodity poses and the risks specific to the country of origin, the piloting of trusted trader and authorised operator schemes, and the digisation of certificates relating to consignments and automated or remote documentary checks.

Question 2

The proposed instrument will confer new powers to make secondary legislation. The notification says that these will be exercisable, in devolved areas for Scotland, either (1) by Scottish Ministers or (2) if Scottish Ministers consent, by UK Ministers. In relation to these powers:

(a) What parliamentary procedure will each of the new/amended regulation-making powers be subject to?

(b) Before the announcement of the general election, had it been agreed with the UK Government that it would facilitate the operation of SI Protocol 2 in relation to the use of these new powers (that is, that the UK Government would timetable its use of the power so as to allow at least 28 days for Scottish Parliament scrutiny of the Scottish Government’s proposal to consent)? We appreciate that the position of the incoming government cannot be known at present and that it would not be bound by commitments made by the outgoing government.

(c) Do Scottish Ministers anticipate that these proposed powers are likely in fact to be exercised by UK Ministers rather than Scottish Ministers (therefore by UKSI rather than by SSI)?

Scottish Government response

2.(a) As the changes are all amendments to pre-existing powers in the OCR, they will be subject to same procedure as other regulationmaking powers in Article 144 of the OCR. These will therefore remain as subject to the negative procedure.

2.(b) Yes.

2.(c) As with other UK Government proposals to legislate with regard to devolved matters, Scottish Ministers will normally wish to consent to a UK SI where the policy objectives are aligned and there are no good reasons for having separate Scottish subordinate legislation. It is anticipated at this stage that legislation will be made on a GB-wide basis (subject to further policy discussions and Scottish

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Ministers' consent) but as with previous BTOM instruments changes have in the main been primarily GB-wide so as to ensure controls are across all GB Administrations.

Question 3

The first bullet point on page 2 regarding the provisions of the SI states that [Article 48](#) will be revoked and replaced with a power to establish the cases and conditions under which "similar categories of animals and goods as currently set out in Article 48(2) may be exempted from official controls and other official activities". Can you clarify whether this is changing what is currently an exhaustive list of animals and goods to an indicative list? Why is this change needed? There does not currently appear to be a paragraph (2) of Article 48. Could clarification be provided?

Scottish Government response

This would change what is currently an exhaustive list to an indicative list. The reference to Article 48(2) in the notification was an error and should have referred to paragraphs (a) to (h)

Question 4

Regarding the second bullet point on page 2, which proposes amendments to [Article 49](#), what are the implications of removing the requirement to check consignments "on arrival"? Would they be checked at a later date?

Scottish Government response

The purpose of the amendment is to provide flexibility around when and at which BCP goods may be checked. Requiring checks at a BCP on arrival would preclude remote documentary checks in advance of arrival from a third country of the goods, or at another BCP, or an inland BCP serving multiple points of entry.

Question 5

Regarding the third bullet point on page 2, which proposes amendments to "broaden" the power in [Article 51](#)(1)(e), will the power still only remain relevant to transhipped consignments and transit of consignments but broadened to include any of the rules on official controls, rather than only identity and physical checks?

Scottish Government response

Yes.

Question 6

Regarding the fourth bullet point on page 2, which proposes that the power in [Article 53](#)(1) will be "broadened", is the effect of this to provide that checks can take place away from a border control post where they do not meet the minimum requirements set out in Article 64? Why is this change being made?

Scottish Government response

This allows for documentary, ID and physical checks to take place away from BCPs if deemed appropriate. This will allow all documentary checks to take place remotely (as can currently take place in relation to goods from the EU during the transitional staging period), and will allow for ID/physical checks to take place away from a BCP, for example, to facilitate live animal checks at destination, and

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to support elements of the Trusted Trader pilots. This power must be exercised at a later date to take effect. It is not the intention that checks will take place away from BCPs to navigate circumstances where the minimum requirements in Article 64 are not satisfied. Any checks which take place at a BCP will be at a BCP that is designated in accordance with the requirements in Article 64.

Question 7

Regarding the second bullet point on page 3 (broadening the power in [Article 64](#)) and the third-last bullet point on the same page, why are these changes being made? Are there any risks to locating border control posts away from points of entry or not carrying out checks on first arrival (e.g. to disease control)?

Scottish Government response

The limitation on the derogation from the requirement for BCPs to be located in the immediate vicinity of the point of entry in Article 64(2) that this can only be where there are specific geographical constraints is removed. This opens up the regulation-making power for derogations and conditions to be provided on a much broader basis. Any regulations using this power would have to address any additional biosecurity risks that may arise from a Border Control Post being located away from a point of entry.

Question 8

Regarding the fourth bullet point on page 3 (broadening the power in [Article 126](#) (Establishment of additional conditions for entry into GB of animals and goods) so that it can be exercised to ensure compliance with animal health, animal by-product, plant pest and plant protection product requirements), can you provide more detail as to how the existing power will be amended? Why are these new powers to legislate required?

Scottish Government response

The existing power will be amended to remove the restriction that the power cannot be exercised to establish conditions to ensure compliance with the rules referred to in Article 1(2)(d),(e), (g) and (h) of the OCR. This is required so that same power may be used to establish additional conditions to ensure compliance of animals and goods with these requirements also.

Question 9

Regarding the fifth bullet point on page 3, the proposal is to broaden the power to create penalties in [Article 139](#), so that regulations can make provision for penalties for infringements of any of the rules which official controls and official activities concern, and to make provision for civil sanctions and appeals against enforcement action. Creating or amending a power to impose penalties and sanctions is a significant matter, and this power permits the creation of criminal offences (including imprisonment of up to 2 years and an unlimited fine) and significant civil sanctions including fines based on a percentage of the operator's turnover. It appears that the effect of this broadening would be to give Ministers a power to make provision regarding penalties for any official controls-related infringements, as opposed to infringements of the legislation specified in article 139(1) (that is, the OCR and any legislation made under it). Is that a correct understanding of what is proposed? What is the justification for extending these powers? Could more detail be provided identifying which rules will become

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subject to this power that are not currently subject to it?

Scottish Government response

That is correct. This instrument expands existing powers to legislate for offences to ensure that the SPS regime, delivered by the BTOM, can be effectively enforced in order to ensure the UK maintains its high biosecurity status. Many penalties in rules for the enforcement or implementation of the OCR, and legislation made under it, are contained in domestic subordinate legislation originally made under section 2(2) of the European Communities Act 1972 which has been repealed. An example of rules for the enforcement and implementation of the OCR, and legislation made under it, that will become subject to this power is the Trade in Animals and Related Products (Scotland) Regulations 2012. It gives the ability to provide for new offences and amend existing offences, to ensure enforcement options remain complete and up to date.

The changes allow for the enforcement regime to be adapted and for the creation of new penalties where needed, for example, if we introduce new policies, such as the trusted trader schemes, we can now create new offences to enforce them. Additionally, this would allow Scottish Government to introduce civil sanction penalties following offences described within the PHR, OCR, and related legislation. This includes to enforce the Authorised Operator Status and other SPS legislation in an aligned fashion with the rest of GB.

Any use of these powers would be consulted on ahead of laying any legislation.

Question 10

Regarding the first bullet point on page 4, who will be the 'official plant health officers designated by a competent authority' and do they have sufficient resources and expertise to carry out sampling, analyses, tests and diagnoses with similar effectiveness and robustness as official laboratories? Why is this change being made?

Scottish Government response

Official plant health officers are appropriately trained to perform official controls, and other official activities, and must be authorised by the relevant GB competent authority which, in Scotland is Scottish Ministers. Official Plant Health Officers carry out all relevant inspections on imported plants and plant products, including the taking of samples as needed during physical inspections. The proposed new policy would allow for these official plant health officers to be able to perform diagnostics in relation to plants, plant products and other objects on-site (at a location or premises) without the need for an official laboratory, to be sent samples for such purposes. The official laboratories currently designated for plant health covering Great Britain are SASA (a Division of Scottish Government) in Scotland and Fera Science Ltd (Fera) based nr York. The new approach will reduce diagnostic times for certain quarantine pests, reducing import delays caused by awaiting laboratory confirmation. The detention period of a consignment awaiting diagnosis can range from one to several days. The official plant health officer performing on-site diagnostics would require to be suitably qualified, trained and experienced. The competent authority would provide the training to carry out the on-site diagnostics as part of their obligation under article 5(4) of the Official Controls Regulation. In practice, and how it has worked during a pilot, is that the

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official laboratory would provide the training and they also validate that the diagnostic method works in the environment it is intended to be used. On-site diagnostics are currently available in relation to a small number of specific GB quarantine pests. These are Vegetable Leaf Miner (several *Liriomyza* species) and Silverleaf Whitefly (*Bemisia tabaci*/BT). All other samples will continue to be sent to an official laboratory.

The detention period of a consignment awaiting diagnosis can range from one to several days and this delays the release into free circulation of goods where no GB quarantine pest is subsequently confirmed. If any such pest is confirmed the consignment will usually be destroyed at the border or occasionally re-exported. Given that imported plant goods are perishable, the import delay due to the time between sampling and diagnosis can result in substantial economic losses for the importer. The use of appropriate on-site tests for species identification directly at the points of entry will help reduce this delay.

Question 11

Regarding the change to allow certain import conditions for animals and animal products to be updated administratively (bottom of page 4) the notification states that the specified instruments will be amended to “provide for the Secretary of State, with the consent of the Scottish Ministers...to change certain conditions set out in those instruments” administratively in response to risk.

(a) Does this mean that changes to the specified legislation which currently require to be laid before and scrutinised by the Scottish Parliament will be made instead by administrative decision of the UK Ministers, of which the Scottish Parliament will be unaware? If not, please specify what the effect will be.

(b) Why is it considered appropriate the ability to alter this legislation should be changed from a power to make legislation (which involves the resultant legislation being subject to parliamentary scrutiny) to an administrative power (which does not)?

(c) why is it considered appropriate that this administrative power is conferred on UK Ministers alone and not also on Scottish Ministers?

(d) It appears that SIP2 will not apply to the use of these administrative powers. Is that correct? If so, how will the Scottish Parliament be able to scrutinise the exercise of these administrative powers within devolved competence?

Scottish Government response

11.(a) .No. Powers already exist within Scotland, England and Wales to administratively impose conditions on imports into that part of Great Britain on animals and products originating from all or part of a country or territory, in response to diseases or other circumstances that mean that animals or products originating from there may pose a risk to human or animal health: see regulation 25 of the Trade in Animals and Related Products (Scotland) Regulations 2012, with equivalent provisions in England and in Wales. Those powers will continue to remain in place, but the amendments will allow additional import conditions to be imposed, changed or removed administratively across Great Britain in a document

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published by UK Ministers with the consent of Scottish and Welsh Ministers.

11.(b) These administrative powers are considered appropriate because they concern facilitating international trade and protecting biosecurity, both of which are time sensitive matters where the UK must be able to act sufficiently quickly to meet its international obligations to trading partners, and to protect biosecurity within Great Britain.

The provision being made is in line with other provision that has already been made with Scottish Ministers consent and the Parliament's agreement.

In particular, the Import of Animals and Animal Products and Approved Countries (Amendment) Regulations 2022 (S.I. 2022/735) allowed lists of trading partners that are approved to export animals and animal products to Great Britain to be managed administratively. This SI enabled the Secretary of State, with the consent of the Scottish Ministers and the Welsh Ministers, to rapidly change country-specific import conditions for most live animals, germinal products and products of animal origin in response to biosecurity or food safety risks in approved trading partners. Significantly, the measures in that SI, and similarly this one will ensure the administrative powers cannot be used to approve the import of new commodities from a new country, or remove current minimum legally required conditions for imports of a commodity. That will continue to require secondary legislation that would be subject to parliamentary scrutiny.

While it is desirable to enable as much parliamentary scrutiny as possible, this must be weighed against the need to act quickly to protect biosecurity, facilitate trade and meet international obligations. In addition, limited parliamentary time would not be well spent on regular, relatively minor, administrative changes.

11.(c) In line with previous instruments (for example the Import of Animals and Animal Products and Approved Countries (Amendment) Regulations 2022) it is considered appropriate that the power be exercisable by the Secretary of State with the consent of the devolved administrations. Any changes will be agreed by the UK Animal Disease Policy Group and Ministers. Scottish Ministers will also retain the power to impose import conditions in relation to imports into Scotland.

11(d). The position will be the same as the existing administrative functions that have been conferred in this way, with Ministers accountable to Parliament.

Question 12

The notification says that the measures in the proposed instrument are required as a consequence of (among other things) the operation of the UK internal market established by the UK Internal Market Act 2020. What is the relevance of that Act to this proposed instrument?

Scottish Government response

See reply to question 13 below.

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Question 13

The notification says “This instrument is not relevant to the Scottish Government’s policy to maintain alignment with the EU because Great Britain is no longer part of the EU’s internal market.” [This does not provide useful information for the Committee in relation to “alignment”.] Will the law that will be put in place by this instrument be the same as, or different from, the equivalent law in the EU? To take one example, the first bullet point on page 3 says that the requirement in Article 54 for all animals and goods to be subject to documentary checks will be removed. Does the equivalent EU law require all animals and goods to be subject to documentary checks or not?”

Scottish Government response

The law that will be put in place by this instrument will differ in some respects from the equivalent law applied in the EU to imports from third countries. On the specific question regarding documentary checks, the equivalent EU law on imports from third countries requires all animals and goods subject to official controls at a border control post to be subject to documentary checks on arrival there, but does not require all animal and goods to be subject to official controls at a border control post (and therefore be subject to documentary checks).

In the absence of a comprehensive Veterinary and SPS Agreement between the UK and the EU, official controls on imports are not an area where meaningful alignment with the EU is possible. Great Britain is no longer part of the EU’s internal market where, within the EU, EU law makes provision for animals and goods to move between member States, without the sanitary and phytosanitary checks and controls that are applied to imports from third countries. Alignment in that way with EU law is not possible. The United Kingdom must apply its sanitary and phytosanitary measures to imports into Great Britain from third countries and territories, including the EU, in a way that is compatible with the United Kingdom’s international obligations, in particular under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. In so far as it applies these measures to animals and goods originating in the EU, the UK would not be aligning with EU law as it applies among Member States. The operation of the United Kingdom Internal Market Act 2020 is also relevant as it limits the value of any difference in the sanitary and phytosanitary measures which apply in relation to imports into a part of Great Britain, since the effect of that Act is that animals and goods imported into any part of Great Britain and which can be sold in that part, should be able to be sold in any other part of Great Britain.

Any differences with the equivalent law applied in the EU to imports from third countries will not create any barriers to re-entry to the European Union.

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St Andrew’s House, Regent Road, Edinburgh EH1 3DG
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