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Lynne Neagle AS/MS
Y Dirprwy Weinidog Iechyd Meddwl a Llesiant
Deputy Minister for Mental Health and Wellbeing

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee

13 December 2022

Dear Huw

**The Trade in Animals and Related Products (Amendment and Legislative Functions)
and Animal Health (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022
(‘TARP ALF’)**

The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

Thank you for your letter of 12 December 2022 regarding the above titled SIs. The Government can only apologise for the time taken to respond to the report on the TARP ALF. The Report was made available to us on Wednesday 7 December and the reporting points needed detailed and thorough consideration which has taken considerable time.

TARP ALF, in particular, has been an extremely long and technically complex, 100-page instrument for officials to draft, which is a consequence of the already complex legislative context the Regulations will operate in, namely 11 EU directives, 9 retained EU regulations and 2 domestic sets of regulations, totalling several hundred pages of legislation.

The Government is grateful to the LJC Committee for its scrutiny and accepts a small number of reporting points require amendments, but is confident the Regulations, with proposed correction, remain effective, operable, and accessible. On balance, the Government considers it appropriate to proceed with submitting the Regulations to a vote in the Senedd.

The Welsh Government has carefully considered the points raised by the LJCC and are confident they can be resolved because they do not have a substantial impact upon the operation of the Regulations and should not prevent the Regulations from being made

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The Government has offered a full explanation of its position to the LJCC in a letter of response to their detailed report, and considers the errors are clear and are minor in effect, and the intention of the drafting is clear without room for real misunderstanding or for serious confusion.

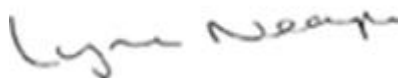
In relation to the questions on your letter, please find the Government's responses in the Annex below.

Regards

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

A handwritten signature in black ink that reads "Lesley Griffiths". The signature is written in a cursive style with a large, sweeping flourish at the end.

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ANNEX

The Trade in Animals and Related Products (Amendment and Legislative Functions) and Animal Health (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

Q1. The powers used to make these Regulations expire on 31 December 2022. Could you therefore please provide details of the powers that would be used to make corrections to any defective elements of the legislation?

We propose relying on powers under the Animal Health Act 1981.

Q2. What limitations would there be (if any) on laying legislation which is not defective after 31 December 2022 (instead of continuing with the existing Regulations before the Senedd)?

If the SI is not made before 31 December 2022, then the enabling powers will be lost to the Welsh Ministers, namely those under the EU Withdrawal Act.

Officials have started identifying alternative legal powers, to assemble an equivalent package of tools for the Welsh Ministers; however, the Government is not optimistic it will achieve good coverage. This is because at the start of this project, all UK administrations assessed what powers were in these Directives, that would be “lost” if not retained under EUWA. If a domestic alternative was available, it would not be necessary to transfer the Commission powers over, as that would have consisted of duplication.

Q3. What would be the impact of not making these Regulations before 31 December 2022?

There are various impacts. First, the enabling powers for this SI will expire on 31 December 2022 so, from a policy and legal resource point of view, this would mean restarting the work from the beginning and trying to identify new powers to make the corrections.

The difficulty with this approach is these Regulations create regulation-making powers and vest them in the Welsh Ministers. Domestic primary legislation generally sets out regulation making powers and does not permit further regulation making powers to be created in those regulations. We estimate a full analysis of available administrative and regulation making powers and trying to match them to their provisions made in this SI would take 4-6 months, during which time the inconsistencies in our domestic rulebook these Regulations are seeking to fix will be maintained.

Second, from a GB-wide coherence point of view, should the Regulations not be made, Welsh law would be inconsistent with England and Scotland equivalent, and Wales would be wholly reliant in the interim on UK Government using their concurrent plus function should any disease outbreak in another country lead to the need to quickly update any of the health conditions held within the Directives.

Q4. Why have you decided not to exercise powers contained in the European Union (Withdrawal) Act 2018 to permit the use of the urgent (made affirmative) procedure as a means of correcting the defective drafting highlighted by the Committee?

The Government considered this option and found it not to be a workable solution given volume of work required within a significantly compressed timescale. The government does not accept 18 scrutiny points from the LJCC report; therefore, a re-laid draft would still contain the provisions to which they relate.

Further, in relation to the general comments on the drafting, we could not significantly re-draft before the 31 December. Therefore the “new” regulations would only resolve around 50% of the reporting points, the same ones we can resolve on publication and by a small amending instrument if we proceed with this laid draft.

Whilst we hope our government response will resolve the 18 scrutiny points the Government does not accept, we would not want to risk pre-judging that exercise. We considered therefore the situation, and the ask of the Senedd was the same or very similar in each scenario, but under the made affirmative procedure, there was an added issue that the Withdrawal Act powers would already have expired before the Senedd voted on the “new” Regulations.

Q5. Please could you indicate which points you agree / disagree with in our report in respect of these Regulations, so that Members can understand your position?

The Government agrees with approximately half of the reporting points, with two of them requiring an amendment to the Regulations. Full details have been provided in the formal response to the LJCC report of 7 December.

Of the 34 reporting points, it is proposed a short amending instrument will resolve 2 of the reporting points.

12 reporting points are minor errors that can be corrected on publication.

In relation to 18 points, officials are content they can provide a rationale for the drafting that should resolve the LJCC’s concerns.

The final 3 reporting points do not require a government response or action.

Q6. Please could you outline what the practical effect is of this legislation being made with deficiencies versus the practical effect of not making this legislation, including any health, safety and / or biosecurity risks?

The Regulations incorporate into Welsh law import animal health and animal products provisions set in EU Directives and provides they will be enforced by the Trade in Animals and Related Products (Wales) Regulations 2011 at the point of entry, where consignments are checked, and compliance verified before consignments enter Wales.

Not making the Regulations will prolong an existing risk of an inconsistent framework for import controls. Making the Regulations now addresses that risk, when taken together with the Government's commitment to resolve the accepted reporting points. In relation to the two points which require an amendment, we consider the risk associated with those two points negligible from a biosecurity point of view in the short term.

In the short intervening period before the amendment is made, these discrepancies can be managed operationally and there will be no adverse impact on traders nor any risk of compromising animal health and welfare.

Q7. Could you please confirm whether this situation gives rise to Northern Ireland/Great Britain divergence?

If the Regulations are not made now, then Wales would continue to have deficiencies in its legal framework for the control of imports, whilst England and Scotland would not.

There are no special implications with respect to Northern Ireland since Northern Ireland is legally aligned with the EU Animal Health Regulation, so is already divergent from its GB counterparts.

Q8. How do you intend to deal with correcting the defective Regulations should they be approved by the Senedd and to what timescale?

The Welsh Government is committed to introduce an amending statutory instrument in respect of the two points we agree need rectifying, early in 2023 (January). In tandem, we will address the small minor scrutiny points on making and publication.

The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

Q9. Again, we request confirmation about which powers will be exercised to make the appropriate correcting statutory instrument?

Corrections to the 'Food 2022 Regulations' technical scrutiny points raised by the LJCC will be addressed using differing powers. Points 1 and 4 concern minor typographical errors and are proposed to be addressed by correction slips. Points 2 and 3 highlight minor incomplete amendments to two food related instruments. It is proposed to make further amendments those SIs (as they are amended by the Food 2022 Regulations) to address points 2 and 3 made using powers under section 16 of the Food Safety Act 1990. Point 5 highlights an error in the Welsh language text being inserted into an animal feed related instrument. It is proposed further amendments to that SI (as it is amended by the Food 2022 Regulations) to address the point would be made using powers under section 74A(1) (66(1) and 84) of the Agriculture Act 1970.

Q10 . What would be the impact of not making these Regulations before 31 December 2022?

Should the 'Food 2022 Regulations' not be made before 11pm on 31 December 2022, it would not be possible for them to be made at a later date in their current form as the powers in the European Union (Withdrawal) Act 2018 expire at that point.

Alternative powers are available for most provisions with the exception that there are no alternative powers available to make regulation 4(8). This provision is a new regulation-making power for the Welsh Ministers to amend the lists of undesirable substances in relation to animal feed.

Not proceeding with these proposed changes would create a period of divergence in terms of accessibility for the relevant legislation within Wales compared to England and Scotland, until such time as it might be possible to bring the Welsh Regulations into alignment with the other GB regulations.

Q11. What impact assessment has the Welsh Government carried out to come to the decision that it is preferable to amend this defective legislation in the New Year rather than withdraw it and make new regulations using other powers?

A review of the 'Food 2022 Regulations' has confirmed that it would not be possible for them to be made in the New Year in its current form under alternative powers. Changes within the 'Food 2022 Regulations' rely upon powers in the European Union (Withdrawal) Act 2018, which would have expired. The additional resource implications for the Senedd (including further scrutiny from Legislation, Justice and Constitution Committee), for FSA and for Welsh Government of withdrawal and remaking under alternative powers have been considered. Implications for stakeholders concerning an unknown period divergence in the form (although not operability) of the relevant legislation as it applies in Wales compared to England and Scotland has also been considered.

The conclusion reached is that addressing the points via correction slip and by a future appropriate legislative vehicle is the most proportionate and effective approach given the very minor nature of the errors identified - in particular as the errors do not substantively affect the operability of the 'Food 2022 Regulations' or the operability of the legislation as amended by the Regulations.

Q12. When will the correcting Regulations be laid before the Senedd?

FSA and Welsh Government have identified a suitable planned legislative vehicle that could be used to make the proposed further amendments. This Statutory Instrument does not have a working title yet, but it will contain authorisations relating to novel foods, food additives, and food flavourings. We propose to include the minor further amendments required to address the reporting points identified by the LJCC within this SI. This is currently intended to be made towards the end of the first quarter, or early in the second quarter of 2023.

Q13. Could you please confirm whether this situation gives rise to Northern Ireland/Great Britain divergence?

This situation does not give rise to Northern Ireland/Great Britain divergence. The 'Food 2022 Regulations' address issues of accessibility and clarity caused by the current incorporation, by cross reference of provisions of certain EU Directives as those Directives had effect as at implementation period completion day. The Regulations transpose those provisions directly into the Welsh domestic legislation. There are no substantive changes being made to the operation of the legislation.

