

ADVISORY COMMITTEE ON ANIMAL FEEDINGSTUFFS

60th Meeting of ACAF on 16 January 2013

Discussion Paper:

BALANCE OF EUROPEAN COMPETENCES REVIEW

Action: the Committee is asked to:

- a) note the presentation (ACAF/13/01 A) and the information contained in this paper;
- b) discuss whether the current balance of competences, with feed law being European in origin, is in the best interests of the UK; and
- c) consider providing formal evidence to the review, either as a Committee or as individuals.

**Balance of Competences
Review Team
January 2013**

Balance of European Competences Review

Purpose

1. To inform the Committee about the UK Government's Balance of European Union Competences Review and encourage submission of evidence.

Background

2. The UK Government is carrying out a UK-wide Review of the Balance of Competences between the European Union (EU) and the UK. This is an audit of what the EU does and how it affects the UK.

3. There will be 32 separate reports covering all areas of European competence. Competence refers to where the European Treaties give the European Union power to act.

4. The Food Standards Agency (FSA) and the Department for Environment, Food and Rural Affairs (Defra) are leading on a report on Animal Health, Welfare and Food Safety. This report will include feed legislation.

5. The Review relies on obtaining robust evidence from a wide range of stakeholders with expert knowledge. FSA/Defra issued a Call for Evidence on 27 November 2012 (a copy is at Annex I).

Discussion

6. The EU can only act to make legislation, or take other action, where it has been given power to do so by the European Treaties. This power to act is known as competence. The EU has very wide competence in relation to food and feed. The form of competence the EU has for food/feed is 'shared', meaning that where the EU has acted Member States are normally stopped from doing so. The EU has legislated widely for food and feed, leaving the UK and other Member States little room to take national action.

7. The Review is asking whether this wide ranging EU action is in the UK's best interests. In effect, the questions are:

- is legislation needed in any particular area? and,
- if so, is it better for the UK that this legislation is made at the national, EU or other international level?

8. The Review will also look at process issues – for instance, is the European process sufficiently transparent, risk-based, proportionate, etc? What the Review is not about is looking at the detail of individual pieces of legislation and asking if the requirements are precisely what the UK would want. For instance, the Review will not consider whether the list of feed additives is precisely the right one from the UK's point of view. It is instead about whether there should be a list and whether it is in the UK's interests that this list is set at the European level.

9. The balance of competences reviews will not make recommendations. However they will provide an important evidential base for future policy. It is therefore vital that stakeholders are involved and submit evidence.

Conclusions

13. The Committee is asked to:

- a) note the presentation (ACAF/13/01 A) and the information contained in this paper;
- b) discuss whether the current balance of competences, with feed law being European in origin, is in the best interests of the UK; and
- c) consider providing formal evidence to the review, either as a Committee or as individuals.

**Balance of Competences Review Team
January 2013**

**Annex I – Call for Evidence, Animal Health, Welfare and Food Safety Review
Annex II – List of Food and Feed law**



Department
for Environment
Food & Rural Affairs



Food
Standards
Agency

Call for Evidence

Animal Health, Welfare and Food Safety Review

November 2012



*Review of the
Balance of Competences*

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CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

Animal Health, Welfare and Food Safety Review

Department for Environment, Food and Rural Affairs and the Food Standards Agency

Closing date: 28 February 2013

Introduction

1. This review is part of a Coalition commitment to examine the balance of competences between the UK and the European Union (EU). The review will provide an analysis of what membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. We have not been tasked to produce specific recommendations or to look at alternative models for the UK's overall relationship with the EU.
2. The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between autumn 2012 and autumn 2014. The review is led by the UK Government but will also involve non-governmental experts, organisations and other individuals who wish to feed in their views. Foreign governments, including our EU partners and the EU institutions, are also being invited to contribute.
3. The Department for Environment, Food and Rural Affairs (Defra), in collaboration with the Food Standards Agency (FSA), is leading this review on animal health, welfare and food safety.¹ Together, Defra and the FSA play a central role in ensuring the highest standards of animal health, welfare and food safety, not just for domestic consumers in the UK, but also to foster vital trade with EU Member States and the wider world. This country leads the world in its concern for animal health and welfare and through the work of Defra we strive to reduce animal suffering wherever possible and to promote high standards of welfare across Europe. Key to this is making sure we have the right measures in place to respond quickly and effectively to the threats of animal disease. FSA works to ensure the safety of the food we eat, and plays an important role in ensuring the quality and high reputation of the food products we export.

¹ 'Food' includes drink, including bottled water.

Call for evidence

4. This public call for evidence sets out the scope of the review of the balance of competences in the areas of animal health, animal welfare, food safety, feed safety, labelling and food quality and compositional standards. We invite input from anyone with relevant knowledge, expertise or experience.

Please send your evidence to balanceofcompetences.ahwfs@defra.gsi.gov.uk by 28 February 2013. The same email address should be used for any related enquiries.

5. Your evidence should be objective, factual information about the impact or effect of the competence in your area of expertise. We will expect to make available your response and the name of your organisation unless you ask us not to (but please note that, even if you ask us to keep your contribution confidential we might have to release it in response to a request under the Freedom of Information Act). We will not publish your own name unless you wish it included. Please base your response on the questions listed on page 16 and indicate clearly the subject area(s) (e.g. animal health, animal welfare, food safety, labelling etc.) you are referring to.

What is competence?

For the purposes of this review, we are using a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the single market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must act in accordance with fundamental rights as set out in the Charter of Fundamental Rights (such as freedom of expression and non-discrimination) and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence, it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU treaties.

Devolution

6. The review of the balance of competences is a UK Government initiative and this call for evidence is addressed to interested parties throughout the UK. The views of the devolved administrations will be an important factor; the issues should be examined from the point of view of the best interests of the UK as a whole, but the subject areas covered by the Animal Health, Welfare and Food Safety Review are devolved matters where the administrations in Scotland, Wales and Northern Ireland are responsible for the implementation of EU legislation.

Animal Health, Welfare and Food Safety (AHWFS) Review

7. This review will focus on the issues associated with protecting animal health, animal welfare and food safety. Maintaining a strong internal market, while allowing sufficient national and local choice on issues such as how to deal with risk, creates some challenges and tensions.
8. Agricultural products and food are sectors where trade within the EU creates significant benefits for both consumers and for UK producers, and ensures a more resilient UK food system. However, applying fair rules to that trade at EU level also creates tensions. National or regional preferences in terms of risk (what level of precaution should apply to rules on food, or to animal diseases with the potential to affect humans?), treatment of animals (what production conditions are acceptable for food sold to our consumers?), or consumer information (what labelling should be required on food?) could lead to the adoption of different approaches, and to rules which – intentionally or unintentionally – get in the way of trade. Setting common standards at EU level is one way to avoid this as well as to protect public health from risks associated with traded food and feed. A key question for this review will be whether the benefits to the UK of protecting consumers and the functioning of the internal market justify the high level of EU competence in this area.
9. In some areas, EU legislation has followed an approach developed in the UK; in animal welfare for example, rules on egg production or pig production drawing largely on UK experience have been applied at EU level. In such cases, effective application of those rules across the rest of the EU should prevent UK producers from being disadvantaged by the application of more demanding standards in the UK. In other areas, EU legislation may be less closely linked to UK societal preferences. Even in areas where there is a clear logic for action being taken at EU level, the process of decision-making (including a desire to take into account different priorities) may lead to approaches which appear more complex or burdensome than they need to be.
10. This review will link to a number of reviews led by other Government departments. Findings and evidence from our review will be shared with the

teams leading these related reviews as appropriate. You may be interested in other reviews that relate directly to the AHWFS Review, namely:

- **Health**, led by the Department of Health (semester 1). This review includes competence in relation to nutrition and nutrition labelling, food supplements, fortified foods, alcohol in relation to public health and food for particular nutritional uses, such as infant formula.
 - **Internal Market Synopsis**, led by the Department for Business, Innovation and Skills (semester 1). This review includes discussion of Article 114 of the Treaty of the Functioning of the European Union, on which much of the legislation covered in the AHWFS Review is based.
 - **Environment**, led by Defra (semester 2). This review will be launched in spring 2013 and will cover legislation relating to wildlife in general, such as protecting species, habitats and biodiversity. While the AHWFS Review covers genetically modified food and feed safety including labelling, the Environment Review will examine environmental safety of genetically modified organisms, including wider public health aspects. This will include consideration of risk in relation to field trials and commercialisation.
 - **Agriculture**, led by Defra (semester 3). This review will be launched in autumn 2013 and will cover the Common Agricultural Policy in general, with read-across to the Internal Market Review. Any discussion relating to the health and welfare of livestock will however take place under the AHWFS Review. The Agriculture Review will also cover plant health, seed propagation and marketing. Plant feedstuffs will be covered in the AHWFS Review to the extent that they relate to animal feed safety where the focus is on protecting the human food chain.
11. The AHWFS Review will also have links and dependencies with other reviews on issues such as; external representation in international organisations, i.e. World Organisation for Animal Health (**Foreign Policy** Review, semester 1); intra EU trade and EU-third country Free Trade Agreements (**Trade and Investment** Review, semester 2) and animal testing (**Research and Development** Review, semester 2). The AHWFS Review will however discuss the welfare of animals used in scientific testing. For further detail on all reviews visit the Foreign and Commonwealth Office's website at: www.fco.gov.uk/en/global-issues/european-union/balance-of-competences-review
12. The AHWFS Review is subject based rather than focused on a specific Treaty Article. This call for evidence is divided into two sections:
- Section A:** Animal health and animal welfare
- Section B:** Food safety, including feed safety, food labelling, quality and compositional standards.

Livestock facts and figures^a

Beef and dairy sector

There are now just under 10 million head of cattle in the UK, including 1.7 million beef cows. In 2011, the UK produced 931,000 tonnes of beef and veal, making it the EU's fourth largest producer, accounting for 8% of EU production. In 2011 the UK imported 235,000 tonnes of beef and veal worth £858m and exported 144,000 tonnes worth £437m. The bulk of trade is with other EU countries – almost 90% of imports come from Europe and 96% of UK exports go to Europe. In 2011, the dairy industry produced 13.6 billion litres of milk,^b accounting for 16% of gross UK agricultural output by value and making the industry the largest single agricultural sector in value terms at £3.7bn.

Sheep sector

There are now 31.6 million head of sheep in the UK, including 14.9 million in the female breeding flock. The UK is the largest producer of sheep meat in the EU accounting for a quarter of the EU sheep population. In 2011 UK production of mutton and lamb rose to 301,000 tonnes and accounted for 5% of gross UK agricultural output. Around 85% of imported carcass meat and cuts come from Australia and New Zealand whereas over 90% of UK exports go to EU countries. In 2011 the UK imported 88,000 tonnes of mutton and lamb worth £412m and exported 96,000 tonnes worth £374m.

Pig sector

At December 2011, the size of the UK pig herd was 4.3 million pigs. In 2011, the UK produced 759,000 tonnes of pig meat with the value of output (mainly from pig meat production) rising to £1.1bn. Almost all imports come from Europe and three quarters of UK exports go to Europe. In 2011 the UK imported 373,000 tonnes of pig meat worth £724m and exported 144,000 tonnes worth £171m.

^a All figures from the Defra Livestock Statistics Team, SLMLF – Sept 2012

^b Agriculture in the United Kingdom, 2011.

Available at:

www.defra.gov.uk/statistics/files/defra-stats-foodfarm-crosscutting-auk-auk2011-120709.pdf

Section A: Animal health and animal welfare

13. Animal health is concerned with preventing the spread of diseases among animals. Animal welfare is concerned with ensuring the well-being and humane treatment of animals. There is an overlap between the two because diseases can adversely affect the well-being of animals and poor management of their welfare may make them more susceptible to disease. Some animal diseases can be spread to humans so animal health and welfare issues can also have implications for human health. In addition, the use of veterinary medicines and medicated feedingstuffs has a direct connection with the health and welfare of animals, and veterinary medicine residues in livestock may also impact on human health.

Question: what evidence is there that EU action on animal health and welfare benefits or disadvantages the UK?

14. The main Treaty Articles under which EU animal health and welfare legislation has been made are what are now Articles 43 (common agricultural policy measures) and 114 (internal market measures) of the Treaty on the Functioning of the European Union. In general, EU animal health and welfare measures are areas of shared competence, which fall under 'internal market' and 'agriculture and fisheries'. This means that to the extent that the EU has enacted legislation relating to animal health and welfare, the UK does not have competence to act other than in accord with that legislation. To the extent that animal health can have consequences for human health, the EU has a supporting competence and may coordinate or supplement the actions of the Member States. More

Poultry sector^a

The total number of chicken and other table fowl is around 100 million birds. In 2011, poultry meat production stood at 1.6 million tonnes, valued at £1.9bn, while the value of eggs for human consumption was around £550m, with production of 9.85 billion eggs. Almost all trade is with other EU countries, with almost all imports coming from Europe and around two thirds of UK exports going to Europe. In 2011 the UK imported 412,000 tonnes of poultry meat worth £1,079m and exported 295,000 tonnes worth £307m. The UK also imported 68,000 tonnes of whole egg and egg products worth £130m and exported 17,000 tonnes worth £48m. Almost all trade is with other EU countries.

Animal health and welfare facts and figures^c

The EU requires all Member States to carry out active surveillance for transmissible spongiform encephalopathies (TSEs). In 2011, 645,960 cattle were tested for BSE (Bovine Spongiform Encephalopathy) across the UK, while 21,326 sheep and goats were tested for scrapie. A further 1,249 sheep and goats were tested for scrapie under the EU's Compulsory Scrapie Flocks Scheme.

Between January 2007 and December 2009, 1,203 deer were tested for TSEs across the UK. Provisional data for 2011 shows the number of cattle tested for Bovine TB (tuberculosis) in Great Britain to be 7,578,945, with a further 777,600 tested in Northern Ireland.

In 2011, 1,739 individual farms received a welfare inspection from the Animal Health Veterinary Laboratories Agency^d. In 2010, the number of farms inspected was 2,099.

^c Statistics available at: www.defra.gov.uk/statistics/foodfarm/landuslive/stock/animal-disease-statistics/

^d Statistics available at: www.defra.gov.uk/statistics/foodfarm/landuslive/stock/welfare/

information on these issues is available in part A of the legal annex.

Question: how might the national interest be served by action on animal health and welfare being taken e.g. at regional or national level, in addition to or as an alternative to action at EU level?

Question: how might the UK benefit from the EU taking more or less action on animal health and welfare in future?

15. The EU has exclusive competence in the areas of the customs union and the common commercial policy. The UK does not therefore have competence to act in relation to trade with third countries, including in relation to animal health and welfare issues connected with such trade.

Question: what advantages or disadvantages might there be in the EU having exclusive competence for negotiating trade agreements with third countries?

16. A series of EU Directives and Regulations have been enacted covering issues such as disease prevention and control (e.g. foot and mouth disease, classical swine fever, salmonella, rabies and African horse sickness), imports and intra-EU trade in animals and animal products (e.g. meat, honey), the welfare of farmed animals (e.g. during transport) and of other animals (e.g. bees), veterinary medicines (e.g. vaccines) and medicated feedingstuffs. In relation to animal welfare, the scope for EU action has expanded from a concern to ensure equal conditions of competition in relation to trade in farmed animals, to a wider interest in the welfare of all animals.

Question: does EU legislation on animal health and welfare provide the right

balance between protecting animal and public health and the interests of UK businesses?

17. The European Commission is proposing to introduce a new EU Animal Health Law intended to establish a legal basis for a common EU animal health policy and a single regulatory framework for animal health. A formal adopted proposal is expected by spring 2013. In January 2012 the Commission published a new EU Strategy for the Protection and Welfare of Animals which includes consideration of the creation of a consolidated EU legislative framework and improved action to ensure Member State compliance with EU animal welfare rules.²

Question: could action be undertaken differently e.g. are there ways of improving EU animal health and welfare law, for example, to focus more on required outcomes using a more evidence and risk-based approach? Would this deliver more in the national interest?

18. The Defra website provides general guidance on animal welfare, plus specific regulations on welfare during transport, on-farm, at slaughter and at market, as well as severe weather advice.³ The main animal welfare legislation requires that owners ensure animals have a suitable diet and environment; exhibit normal behaviour patterns; are housed with, or apart from, other animals and are protected from pain, injury, suffering and disease.

Question: what future challenges or opportunities might we face on animal health and welfare and what impact might these have on the national interest?

Question: what impact might any future enlargement of the EU have on animal health and welfare?

Question: are there any general points you wish to make which are not captured above?

19. Part A of the legal annex sets out in more detail how competence has developed for animal health and welfare, as well as indicating where future measures are planned. Below are two case studies showing areas where the EU has differing competence on animal health and welfare:

No EU competence: Welfare of wild animals

The EU rules on animal welfare considered in this call for evidence relate to the treatment of farmed or captive animals, not to animals in the wild. This is because the Treaties do not confer competence on the EU to act in relation to animal welfare except where it is relevant to areas of shared competence such as the internal market, agriculture and fisheries, and environment (Article 4(2) TFEU).

Member States therefore retain the competence to legislate on the welfare of wild animals as well as on certain other animal protection topics (e.g. the use of animals in competitions, shows, cultural or

² http://ec.europa.eu/food/animal/welfare/actionplan/actionplan_en.htm

³ www.defra.gov.uk/food-farm/animals/welfare/

sporting events and the management of stray dogs). An example of such legislation in England and Wales is the Hunting Act 2004, which prohibits all hunting of wild mammals with dogs, except where it is carried out in accordance with the conditions of an exemption, and all hare coursing events. There is no EU component to the Act.

The EU has legislated to protect certain species of wild animal (rather than to protect the welfare of individual wild animals) by means of laws such as the Habitats Directive (Council Directive 92/43/EEC) and the Wild Birds Directive (Directive 2009/147/EC) made under the Treaty provisions on environment (Article 192 TFEU). These protections will be considered in the forthcoming call for evidence on the environment.

EU competence: Foot-and-Mouth Disease

The first legislation at EU level specifically addressed at tackling Foot-and-Mouth Disease (FMD) was Council Directive 85/511/EEC introducing Community measures for the control of FMD. This set out the minimum control measures to be applied by Member States in the event of outbreaks of FMD, including measures for testing, imposing movement restrictions, the slaughter of infected animals and the use of vaccination by national authorities. It was subsequently amended by Council Directive 90/423/EEC to ban the use of FMD vaccines except in emergencies. The EU ban on the use of vaccination followed a Commission study which concluded that an EU vaccination policy could have adverse consequences for EU trade with third countries under World Organisation for Animal Health (OIE) rules.

In 2001, FMD controls were imposed by the UK authorities using powers in the Animal Health Act 1981 which pre-dated the EU level legislation. Major restrictions on the marketing and movement of UK animals and animal products were imposed by the Commission, which also authorised the use of emergency vaccination for cattle in Cumbria and Devon and for rare or endangered animals. In the event, however, vaccination against FMD was not used in the UK.

In the light of the experience of the 2001 outbreak both EU and UK legislation on FMD was amended. In the UK, the powers in the Animal Health Act 1981 have been strengthened by amendments made in the Animal Health Act 2002, which among other things create a duty for the Secretary of State to consider vaccination and establish a clear legal basis for the slaughter of vaccinated animals. At EU level, Council Directive 2003/85/EC has introduced enhanced procedures for the use of emergency vaccination by Member States to control outbreaks of FMD in their territories.

Section B: Food safety (including feed safety), labelling, food quality and compositional standards

20. There is a significant body of European legislation on food and feed safety and hygiene, labelling and compositional standards. Feed safety and hygiene ensures that animal feed does not introduce contaminants or pathogens to the human food chain via animals produced for food and is an integral part of food safety and hygiene. This review covers all aspects of food law apart from nutrition and nutrition labelling, and food supplements, all of which are covered by the Health Review.

21. The competence to make food law does not derive from a specific 'food' legal base in the Treaty. As discussed in part B of the legal annex, in the early days the focus was on free movement of goods as set out in the directly applicable Treaty Articles 34 and 35 (quantitative restrictions on imports and exports respectively).⁴ Article 115 (internal market measures decided by unanimity) provided the basis for harmonisation of food law. Subsequently the Article 114 (internal market measures decided by qualified majority voting) became available and has continued to be used for much food law. The introduction in 1992 of Article 168(4)(b) (veterinary and phytosanitary measures protecting public health) added a further Treaty base that could be used for food law and reflected the increased focus on public health. Food is obviously closely related to agricultural markets and instruments relating to feed and products such as beef, milk, fats and oils, fruit juices and honey are just some that rely on Article 34 (common agricultural policy).
22. Food law is shared competence. As the EU has legislated widely there is little room for national measures, apart from those instances where EU legislation contains flexibilities that allow Member States to act differently. One such example is under the hygiene legislation in relation to traditional methods of production, processing or distribution. There are a number of such flexibilities allowed in food law and the UK seeks to use these to the national benefit.

The importance of trade

23. Trade, and the creation of the single European market, was a major driver of EU food law from the beginning and has remained so. Consistency of regulation provides confidence in the quality and safety of freely traded product. The UK has been a strong supporter of the development of the single market. Food and feed are internationally traded commodities. The value of food exports in the UK in 2011 was £18.1bn. The value of food imports in the UK in 2011 was £36.7bn. Around 40 percent of the UK's food supply is imported.⁵
24. The value of UK food and drink exports to the EU in 2011 was £12.3bn (current prices); accounting for 69% of all UK food and drink based exports. For the same period the value of UK food and drink imports from the EU was £26.5bn (current prices); representing 63% of all food and drink imports in the UK.⁶ This results in a trade deficit with the EU in the food and drink sector of approximately £14.2bn (current prices). Compared with the EU, the value of trade between the UK and non-EU countries is more modest. In 2011, the value of exports and imports in this sector was £7.2bn (current prices) and £12.1bn (current prices) respectively.⁷ In the last 14 years, trade between the UK and EU in food and drink produce has grown steadily. Between 1998 and 2011 both exports and

⁴ Article numbers are given for the Treaty of the Functioning of the European Union (TFEU)

⁵ Based on provisional 2010 figures sourced from *Agriculture in the United Kingdom, Department for Environment, Food and Rural Affairs: UK food production to supply ratio ('self-sufficiency')* -

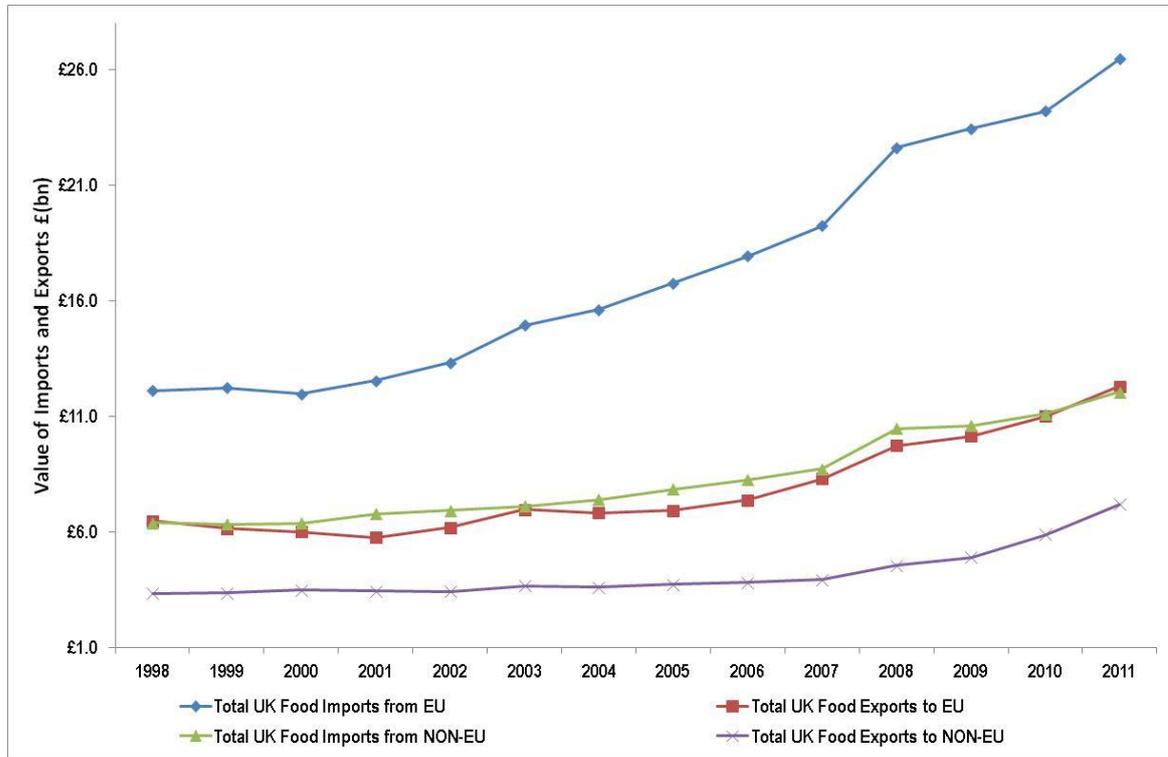
www.defra.gov.uk/statistics/files/defra-stats-foodfarm-food-trade-selfsuff-110525.xls

⁶ Source: ONS - www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?dataset=mq10

⁷ Source: ONS - www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?dataset=mq10

imports showed strong positive growth of 11.6% and 9.3% respectively. However, for the same period, export growth to non-EU countries was markedly stronger showing an increase of 22.2%. These trends are illustrated in the chart below.

Value of UK Trade with EU and Non-EU Regions - Food and Drink Sector
(Current prices) (source ONS Data)



25. One of the key considerations for this review is likely to be whether harmonisation at the European level and creation of the single market has been advantageous to the UK. The data above clearly shows that UK businesses trade more widely than just within the EU. Might this suggest that a focus on greater harmonisation at a world level (e.g. through the Codex Alimentarius Commission) would be preferable? Equally are there any arguments to support a more national approach?

Question: What evidence is there that EU action to create the single market for food has been advantageous or disadvantageous for the UK?

Question: What evidence is there that the national interest in terms of trade is best served by action at the EU level, national level or by action being taken at a different level, e.g. in Codex Alimentarius?

The importance of protecting public health

26. The UK has a long history of food safety law and protecting the public from food safety risks remains a priority. Food safety impacts on everyone. The estimated

annual cost of foodborne illness for the UK is approximately £2bn.⁸ It is estimated that each year in the UK there are about 1 million people who suffer a foodborne illness (1 in 60 people), of which 20,000 receive hospital treatment with approximately 500 deaths.⁹ These figures illustrate why, particularly after the initial focus on creating the internal market, much EU food law has been focused on protecting public health. The fact that food is traded internationally means that food risks can be carried across borders and EU food law recognises this by facilitating the sharing of information and incident handling.

27. General food labelling and quality and compositional standards are also partly about protecting consumers' interests and ensure that people are not misled as to the content or quality of food.¹⁰
28. As EU measures have been introduced, Member States, including the UK, have had to remove conflicting national legislation. In some cases this has led to a reduction in the standard set and the removal of what may have been seen as useful protection on non-safety issues.

Food law is typically about finding the correct balance between protecting consumers, in terms of safety, but also in relation to wider interests, and serving business interests in terms of limiting burdens and enabling market access.

Question: Has EU action in food law provided the right balance between protecting the consumer and protecting the interests and reputation of UK businesses?

Question: Is there evidence that legislating for consumer protection at the European level has been advantageous or disadvantageous to the UK national interest?

The importance of the food sector to the economy

29. The UK food industry is significant and there are approximately 587,900¹¹ food businesses in the UK.¹² In Q1 2012 it was estimated that the UK food sector employed 3.7 million (14% of national employment).¹³ Approximately 95% of these businesses are small and medium sized enterprises. It is important to ask how the development of EU food legislation has impacted on these businesses, which are so important to the UK economy and to the UK Government's growth agenda.

⁸ The estimated cost for all of the UK is based on ascertainment rates in England and Wales. These are then used to estimate the rates and annual costs for Scotland and Northern Ireland. The estimated annual cost for England and Wales in 2009 was £1.8bn

⁹ Annual Report of the Chief Scientist 2010/11 - www.food.gov.uk/multimedia/pdfs/publication/csr1011.pdf

¹⁰ They are also important for the single market and can have some food safety implications.

¹¹ Local Authority Enforcement Monitoring System (LAEMS)

¹² Food Statistics Pocketbook 2012 - www.defra.gov.uk/statistics/files/defra-stats-foodfarm-food-pocketbook-2012-121005.pdf

¹³ Idem.

30. Since the mid to late 1990s a central principle of EU food law has been that it should be science based. The UK Government has strongly supported this as a way of not only protecting the consumer, but also of achieving proportionate and risk based controls that minimise burdens on business.

Question: What evidence is there that the principle of science based food legislation at the European level has served the national interest well? Are there any concerns about the principle and its application? Are there any examples of where it was not followed?

External representation

31. EU Member States, including the UK, have long been members of the Codex Alimentarius Commission (Codex), which negotiates and harmonises world-wide food standards. These standards are important as they can be used in World Trade Organisation disputes and many countries base their national legislation on them. In 2003 the EU formally joined as a member of Codex. There has always been a degree of coordination between Member States in Codex discussions for issues that are harmonised within the EU, but before the EU joined, representation was solely by the individual Member States. Now the EU represents all Member States at Codex on matters which have already been fully harmonised across Europe; this means that the EU and its Member States can present a strong negotiating bloc. However, on matters which have not yet been fully harmonised, and where the EU and its Member States cannot reach agreement on a line to take, they may not be able to contribute effectively to the debate.

Question: What impact has the EU taking on the representational role at the Codex Alimentarius Commission had on the UK national interest?

The future

32. Regulation 882/2004/EC provides a framework for official controls, such as inspections or approvals, which Member States carry out to verify businesses' compliance with EU agri-food legislation. The rules are harmonised in order to afford EU citizens a high level of human, animal and plant health and guarantee the functioning of the internal market. The review aims to simplify and clarify the legal framework and address issues relating to the financing of official controls, specifically their sustainability in the current economic climate. The most controversial aspect is likely to be financing, where the intention is to significantly increase the number of controls with mandatory charges on industry. While initial UK views are broadly supportive of the review overall, there is concern about the direction of travel in relation to charging.
33. Commission proposals on the review of the hygiene package are expected in early 2013. The review is welcomed and is expected to look at a number of areas, including the provision of derogations for establishments producing certain

highly refined products (such as gelatine), the simplification of the system for notifying national measures allowed by the flexibilities in the hygiene legislation, and the modernisation of meat controls. The UK has been pressing for meat controls that are more risk based, reduce costs on business and improve public health protection without compromising the export trade.

Question: How might the UK benefit from the EU taking more or less action on food law in the future?

Question: Could action be undertaken differently e.g. are there ways of improving EU food law?

Question: What future challenges or opportunities might we face in the area of food law and what impact might these have on the national interest?

Question: Are there any general points you wish to make which are not captured in any of the other questions?

34. Part B of the legal annex sets out more detail on how competence has developed for food law and on the Codex Alimentarius Commission. There is also a separate list of the current significant EU food law.

Call for evidence – complete list of questions

Questions in relation to section A: animal health and animal welfare

- What evidence is there that EU action on animal health and welfare benefits or disadvantages the UK?
- How might the UK benefit from the EU taking more or less action on animal health and welfare in future?
- What advantages or disadvantages might there be in the EU having exclusive competence for negotiating trade agreements with third countries?
- How might the national interest be served by action on animal health and welfare being taken e.g. at regional or national level, in addition to or as an alternative to action at EU level?
- Does EU legislation on animal health and welfare provide the right balance between protecting animal and public health and the interests of UK businesses?
- Could action be undertaken differently e.g. are there ways of improving EU animal health and welfare law, for example, to focus more on required outcomes using a more evidence and risk-based approach? Would this deliver more in the national interest?
- What future challenges or opportunities might we face on animal health and welfare and what impact might these have on the national interest?
- What impact might any future enlargement of the EU have on animal health and welfare?
- Are there any general points you wish to make which are not captured above?

Questions in relation to section B: food safety (including feed safety), labelling, food quality and compositional standards

- What evidence is there that EU action to create the single market for food has been advantageous or disadvantageous for the UK?
- What evidence is there that the national interest in terms of trade is best served by action at the EU level, national level or by action being taken at a different level, e.g. in Codex Alimentarius?
- Has EU action in food law provided the right balance between protecting the consumer and protecting the interests and reputation of UK businesses?

- Is there evidence that legislating for consumer protection at the European level has been advantageous or disadvantageous to the UK national interest?
- What evidence is there that the principle of science based food legislation at the European level has served the national interest well? Are there any concerns about the principle and its application? Are there any examples of where it was not followed?
- What impact has the EU taking on the representational role at the Codex Alimentarius Commission had on the UK national interest?
- How might the UK benefit from the EU taking more or less action on food law in the future?
- Could action be undertaken differently e.g. are there ways of improving EU food law?
- What future challenges or opportunities might we face in the area of food law and what impact might these have on the national interest?
- Are there any general points you wish to make which are not captured in any of the other questions?

LEGAL ANNEX

Introduction

The Treaty on the European Economic Community (EEC Treaty) was signed in Rome on 25 March 1957 – along with the Treaty establishing the European Atomic Energy Community (Euratom) – and entered into force on 1 January 1958. The EEC Treaty had a number of economic objectives, including establishing a European common market. Since 1957 there has been a series of Treaties extending the objectives of what is now the European Union beyond the economic sphere. The amending Treaties (with the dates on which they came into force) are:

- the Single European Act (1 July 1987), which provided for the completion of the single market by 1992;
- the Treaty on European Union – the Maastricht Treaty (1 November 1993), which covered matters such as justice and home affairs, foreign and security policy, and economic and monetary union; and
- the Treaty of Amsterdam (1 May 1999), the Treaty of Nice (1 February 2003) and the Treaty of Lisbon (1 December 2009), which made a number of changes to the institutional structure of the EU.

Following these changes, there are now two main Treaties which together set out the competences of the European Union:

- the Treaty on European Union (TEU);
- the Treaty on the Functioning of the European Union (TFEU).

The Union must act within the limits of competence conferred on it by the Member States. Articles 3 to 6 TFEU set out the categories of exclusive, shared and supporting competencies into which EU policies and actions fall. In the majority of contexts, competence is shared between the EU and Member States; however there are certain areas where the EU has only a supporting competence and limited situations where its competence is exclusive.

Article 2(2) TFEU provides that in areas of shared competence the Member States may exercise their competence to the extent that the EU has not exercised its competence. The areas of shared competence are set out in Article 4(2) TFEU and include:

- (a) internal market; . . .
- (d) agriculture and fisheries, excluding the conservation of marine biological resources; . . .
- (e) environment; . . .
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.”

Animal health and welfare measures generally fall within the ambit of ‘internal market’ and ‘agriculture and fisheries’. Food safety (including feed safety) and food labelling, food quality and composition measures generally fall within the ambit of ‘internal market’, ‘agriculture and fisheries’ and ‘public health matters’. This means that to the extent that the EU has enacted legislation relating to animal health and welfare or food law, the UK does not have competence to act other than in accord with that legislation.

To the extent that animal health and welfare or food law can have consequences for human health it may also be covered by “common safety concerns in public health matters”. In this case, Article 168 TFEU gives the EU competence to carry out actions to support, co-ordinate or supplement the actions of the Member States in the area of the protection and improvement of human health. In accordance with Articles 2(5) and 6(a) TFEU such actions will not supersede the competence of Member States in that area and any legislation adopted by the EU must not entail harmonisation of Member States’ laws or regulations. However, as an exception to this, competence under Article 168(4)(b) TFEU, which provides that the EU may adopt “measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health”, is an area of shared competence.¹⁴ Action by the EU in relation to public health can therefore have the effect of superseding the competence of the UK and requiring harmonisation across the EU.

The EU has exclusive competence in the areas of the customs union and the common commercial policy (Article 3(1)(a) and (e) TFEU). The UK does not therefore have competence to act in relation to trade with third countries, including in relation to animal health and welfare or food law issues connected with such trade.

The EU legislative process

EU legal acts such as Regulations and Directives are generally adopted by what, after the Lisbon Treaty, is known as the ‘ordinary legislative procedure’ (formerly known as the ‘co-decision procedure’). In most cases, only the European Commission can propose a new legal act. But it cannot become law unless it is jointly adopted by the Council (which is composed of ministers from each Member State) and the European Parliament. Under this procedure, the Council acts on the basis of qualified majority voting (QMV), where only a specified majority of votes is required and the share of votes of each Member State reflects its population size. The Treaties also set out a small number of cases where EU legal acts are adopted under different procedures (referred to as ‘special legislative procedures’).

¹⁴ Article 168(4)(b) TFEU, which supersedes Article 152(4)(b) of the EEC Treaty as amended by the Treaty of Amsterdam.

Some Treaty Articles, such as those promoting free movement or prohibiting anti-competitive practices within the EU, are of direct effect in themselves. Other Articles provide the legal base on which secondary EU legislation made by the European Parliament and Council can be founded. Secondary legislation may delegate power to the Commission to make further legislation.¹⁵ The effect of EU harmonising legislation is that Member States must enact domestic legislation to give effect to it and remove national legislation that is inconsistent with it.

Food and Veterinary Office

In 1991 the European Commission set up an office to carry out inspection missions to ensure that Member States were properly implementing animal health and welfare legislation and food or feed safety and hygiene. The office, known since 1996 as the Food and Veterinary Office (FVO), also ensures that third country suppliers to the EU market observe the requirements of legislation in respect of their exports.

Following a FVO mission to a Member State, a report is presented by the Commission to the Member State concerned which details all the findings and makes recommendations where failings have been revealed. Such recommendations may extend to encouragement to make changes to domestic implementing legislation to ensure that Member States avoid infraction proceedings being brought by the Commission. In the event that the FVO mission finds an immediate threat to consumer, animal or plant health the Commission can take emergency or safeguard measures, which may include legal action (usually by directly applicable Commission Decisions), to prevent trade in particular animals, plants or products derived from them.

Process Issues

The secondary legislation may delegate to the Commission power to make tertiary legislation; this is increasingly used to a significant extent for food and animal health and welfare law. Since the Lisbon Treaty the tertiary legislation is in the form of either delegated acts or implementing acts. Delegated acts supplement or amend non-essential elements of secondary legislation. Controls over the Commission are provided through powers of the Council or European Parliament to revoke or object to particular delegated acts.

The other type of tertiary legislation, implementing acts (and their predecessor), has been particularly used in the area of food law. There are several types of procedure for implementing acts, but the most common is where the Commission can act with control provided by Member States in the form of an expert committee. In this case there are two mechanisms for adoption of an implementing act – the advisory procedure and the examination procedure. The advisory procedure gives minimal Member State control over the Commission; the examination procedure gives

¹⁵ Articles 288 to 290 TFEU.

greater control to Member States and includes the use of an appeals committee if a qualified majority vote (QMV) by Member States delivers a negative opinion on the Commission's proposals. If under the examination procedure the committee of Member States gives no opinion (i.e. there is no QMV for or against the proposal) then the Commission can choose to adopt the measure (subject to certain constraints). This can work in the UK's interest if we are in a minority in favour of a proposal, but equally works against us if we are in the minority against.

PART A: ANIMAL HEALTH AND WELFARE

Section 1: Development of competence

The competence conferred by the original EEC Treaty¹⁶ in relation to animals which are 'agricultural products' has not been significantly changed by subsequent Treaties. Currently the TFEU provides that the internal market shall extend to 'agricultural products' and defines this term as including the products of stockfarming and of fisheries. It includes live animals, animal products, fish and plants.¹⁷

Competence in relation to animals which are not 'agricultural products' is conferred by general Treaty provisions relating to the creation of the internal market and the free movement of goods which are also essentially unchanged in scope since the establishment of the EEC and the UK's accession in 1972. Article 114 TFEU is now the key provision.¹⁸

The precursor to Article 168 TFEU, which confers a power on the European Parliament and the Council to adopt measures in the veterinary and phytosanitary fields which have as their direct objective the protection of human health, was introduced by the Treaty of Amsterdam in 1997.¹⁹

In relation to animal welfare, the scope for EU action has expanded from a concern to ensure equal conditions of competition in relation to trade in farmed animals to a wider interest in the welfare of all animals in certain policy areas.

The first Treaty reference to animal welfare was in a Declaration annexed to the Treaty on European Union which called on the European institutions and Member States to pay full regard to the welfare requirements of animals when legislating on "the common agricultural policy, transport, the internal market and research".²⁰ The Treaty of Amsterdam (1997) introduced a legally binding Protocol on the protection

¹⁶ Articles 38 to 47 and Annex II to the EEC Treaty.

¹⁷ Articles 38 to 44 and Annex I to the TFEU.

¹⁸ Article 100 of the EEC Treaty was supplemented by Article 100a by the Single European Act; replaced by the Maastricht Treaty; renumbered as Article 95 by the Treaty of Amsterdam; and then superseded by Article 114 TFEU.

¹⁹ Article 152 of the EEC Treaty.

²⁰ Declaration 24.

and welfare of animals which became the cornerstone for the development of policies and legislation concerning animal welfare in the Community. The Protocol had a similar scope to the Declaration and ensured the improved protection and respect for the welfare of animals “as sentient beings”; it also included a reference to respecting “the customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage”.²¹ The Protocol was in turn superseded by Article 13 TFEU, which reaffirms the EU’s commitment to animal welfare, placing it on an equal footing with other key principles the EU must respect when formulating and implementing its policies, and which extends the scope of this principle to the Union’s fisheries, technological development and space policies.²²

Until the Treaty of Lisbon the adoption of measures relating to animal health and welfare was the prerogative of the Council. EU competence on animal health and welfare was initially exercised by the Council in reliance on Articles 43 and 100 of the EEC Treaty and then solely on the basis of Article 43.²³ The use of Article 100 in this area was the result of a political compromise reached within the Council in 1964; Article 100 required unanimous voting in relation to directives for the approximation of provisions directly affecting the establishment or functioning of the common market, whereas Article 43 required only QMV in relation to measures necessary for the pursuit of the objectives of the common agricultural policy. The Council ceased relying on both Articles 43 and 100 for legislation concerning animal health and welfare in December 1985,²⁴ a change which was upheld by the Court of Justice of the European Union, formerly known as the European Court of Justice (ECJ).

By Article 43(2) TFEU the European Parliament now has a role in the adoption of animal health and welfare measures through the application of the ordinary legislative procedure.

Section 2: Current state of competence

The main Treaty Article under which EU animal health and welfare has been enacted is now Article 43 TFEU. Article 43(2) TFEU provides for the adoption by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, of legislation necessary for the pursuit of the objectives of the common agricultural policy.

Article 43 TFEU is also used as the legal basis for EU legislation regulating the use of medicated feedingstuffs and veterinary medicine residues in livestock. However,

²¹ Protocol No 33. Treaty Protocols have the same status as primary law.

²² In 2001 the ECJ observed in Case C-189/01 Jippes that “although there exist various provisions of secondary legislation referring to animal welfare, they likewise contain no indication that the need to ensure animal welfare is to be regarded as a general principle of Community law” (paragraph 76).

²³ Article 43 of the original EEC Treaty was renumbered as Article 37 by the Treaty of Amsterdam and then superseded by Article 43 TFEU.

²⁴ C 131/86 UK v Council (paragraphs 8-29). Article 114 TFEU, which superseded Article 100, now requires QMV.

EU rules concerning the approval and manufacture of veterinary medicines are made under what is now Article 114 TFEU, which provides for the adoption of legislation which has as its object the establishment and functioning of the internal market.²⁵

Animal health and welfare measures taken by Member States are also subject to the rules on the free movement of goods in Articles 28 to 37 TFEU.²⁶ Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports and all measures having equivalent effect between Member States, and have been interpreted widely by the ECJ. Article 36 TFEU provides for exemptions from Articles 34 and 35 including where justified on the grounds of “the protection of health and life of humans, animals or plants”; these exemptions have been interpreted narrowly by the ECJ.²⁷

Gibraltar is generally not subject to EU animal health and welfare rules. Under the UK’s Act of Accession (1972) certain provisions of EU law do not apply to Gibraltar including those relating to the free movement of goods and the common agricultural policy. Gibraltar is however bound by measures adopted under Article 114 TFEU that are intended to harmonise conditions of competition.²⁸

The Isle of Man and the Channel Islands are subject to EU animal health and welfare rules only to the extent those rules concern quantitative restrictions and other import measures in respect of agricultural products.²⁹

Major pieces of EU legislation

A list of the major pieces of EU legislation in animal health and welfare is provided on our website via www.defra.gov.uk/corporate/about/how/europe/review/. The legislation covers disease prevention and control; imports and intra-EU trade in animals and animal products; welfare of farmed animals; welfare of other animals, and veterinary medicines, medicated feedingstuffs and veterinary medicine residues in livestock.

Major proposed pieces of EU legislation

²⁵ The original Article 100 of the EEC Treaty was supplemented by Article 100a by the Single European Act then replaced by the Maastricht Treaty and renumbered as Article 95 by the Treaty of Amsterdam before being superseded by Article 114 TFEU.

²⁶ Unless otherwise provided for in Articles 39 to 44 (Article 38(2) TFEU).

²⁷ In Case 5/94 Hedley Lomas (which concerned a refusal by the UK to issue export licences for the export to Spain of live sheep on the grounds that their treatment in Spanish slaughterhouses would be contrary to EU rules on stunning) the ECJ ruled that recourse to Article 36 was no longer possible in an area harmonised by EU legislation: “A Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law” (paragraph 20).

²⁸ Article 355(3) TFEU.

²⁹ Article 355(5)(b) TFEU and Article 1 of Protocol 3 to the UK’s Act of Accession.

The Commission has consulted on a new EU Animal Health Law intended to establish a legal basis for a common EU animal health policy and a single regulatory framework for animal health (see paragraph 17).

The Commission published a report on animal cloning for food production on 19 October 2010 and recommended a five year ban on cloning in the EU, on the use of cloned animals and on the sale of food from clones. Negotiations between the European Council and the European Parliament on amendments to the proposed EU Novel Foods Regulation that would have changed current EU rules on food from cloned animals and their descendants broke down on 29 March 2011. A Commission consultation on a comprehensive set of possible measures on animal cloning for food production to be proposed in legislation for adoption in 2013 ended on 3 September 2012.

UK implementation

The UK has given legal effect to EU law in this area of competence by making numerous statutory instruments under powers conferred by domestic legal bases such as the European Communities Act 1972, the Finance Act 1973, the Bees Act 1980, the Animal Health Act 1981,³⁰ the Zoo Licensing Act 1981 and the Animal Welfare Act 2006.

Animal health and welfare is a devolved area.

External representation

The World Organisation for Animal Health (OIE) develops standards that serve as a reference for international trade. All the Member States of the EU are members of the OIE. In 2004 the EU signed an agreement with the OIE to become a formal observer of the OIE. The EU shares the competence with its Member States on the basis of the level of harmonisation of the relevant legislation.

The EU is a member of the World Trade Organisation (WTO), as are all the Member States. Animal and plant health measures affecting international trade are subject to the WTO Agreement on Application of Sanitary and Phytosanitary Measures. The Commission negotiates and acts within the WTO on behalf of the Member States, in accordance with its exclusive competence in the areas of the customs union and the common commercial policy (Article 3(1)(a) and (e) TFEU).

On-going differences of view between the UK and other European states/ institutions

The UK Government agrees with the European Food Safety Authority that for cattle and pigs there is no evidence of any difference in food safety between food products from conventionally bred animals, and from cloned animals and their

³⁰ The Animal Health Act 1981 was a consolidation of the earlier Diseases of Animals Acts 1935, 1950 and 1975 together with the Rabies Act 1974 and the Ponies Act 1969. It was significantly amended by the Animal Health Act 2002 and, in respect of Scotland, by the Animal Health and Welfare (Scotland) Act 2006.

descendants. It considers that a ban on cloning, use of clones and food from clones (as recommended by the Commission on 19 October 2010) would be disproportionate in terms of food safety and animal welfare. The welfare of all farmed animals, including clones and their descendants, is already protected by current welfare legislation.

This consultation/call for evidence document does not cover developments after November 2012, for example major ECJ cases referred to the Court or legislative proposals presented to the Council by the Commission.

PART B: FOOD LAW

Section 1: Development of competence

This part deals with food law³¹ relating to food and feed safety (including hygiene³²), labelling, food quality and composition. It does not cover nutrition,³³ nutrition labelling or food supplements.

EU competence to make food law does not derive from a specific 'food' legal base in the Treaty but has developed as case law has developed in relation to directly applicable Articles on free movement of goods and as EU legislation has been made in new areas using general legal bases.

In the early years after the Treaty of Rome EU food law derived from the Treaty obligation to ensure the free movement of food throughout the common market. The EU legislation relating to food law that was adopted in the early years was piecemeal and, requiring unanimity, built up very slowly. The first 'harmonisation' Directive to be agreed was for food colouring (EEC Council Directive of 23 October 1962) and used the E- number classification system for the first time. Directives for preservatives (EEC Council Directive 64/54 in 1963) and antioxidants (EEC Council Directive 70/357 in 1970) followed. Council Directive 79/112/EC relating to the labelling, presentation and advertising of food stuffs for sale to the ultimate consumer was agreed in 1978.

The 1979 ECJ judgment in Cassis de Dijon³⁴ made it clear that the Treaty prohibition (now in Article 34 TFEU) on measures having effect equivalent to quantitative restrictions on imports from other Member States is not limited to

³¹ The term 'food law' is defined broadly in Regulation (EC) No 178/2002, (the General Food Law) to include EU and national law: Article 3 provides that 'food law' means the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level; it covers any stage of production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals. Food includes drink, apart from drinking water unless it is bottled.

³² "Hygiene" in the context of food and feed safety is generally used to refer to practices and procedures in production, handling and distribution.

³³ The Health Review covers nutrition.

³⁴ Case C-120/78.

measures that discriminate against imports but extends to any measure applying to home products and imports alike.³⁵

Subsequent to Cassis de Dijon, the Commission took a broader, but still limited, approach to food which was set out in a communication called 'Completion of the Internal Market: Community legislation on foodstuffs' (1985).³⁶ This document set out the need for a strategic (rather than piecemeal) public health and consumer protection element in food law and the need for an 'official control' structure to monitor and enforce food law. This initiative produced framework Directives on food matters including hygiene (in 1995), additives (in 1988) and official controls (in 1989).

While the development of EU food law had been slow because of the requirement of unanimity, increased access to QMV where legislation was required to complete the internal market was provided by the Single European Act (1986). The Treaty of Maastricht (1992) also introduced a public health legal base into the EEC Treaty which was expanded in the Treaty of Amsterdam (1997).

Various food emergencies including the BSE crisis, which came to a head in 1996, also prompted a far-reaching reform of food law. Regulation (EC) 178/2002 created a comprehensive food safety legal framework covering food 'from farm to fork' with extensive traceability obligations and an obligation on Member States to report food incidents to the Commission where they could be relayed across the EU. It also established the European Food Safety Authority which, giving scientific advice in relation to food, indicates the EU assuming a scientific competence (of a non-legal nature). Another 'package' of measures consolidated and reorganised the existing EU hygiene legislation.³⁷ Another measure set out the general control principles that Member States must have in place so that they can ensure compliance with food and feed legislation.³⁸

Section 2: Current state of competence

The main Treaty Articles relevant to food law are:

- the directly applicable Articles 34 (prohibition on quantitative restrictions on imports and measures having equivalent effect) and 35 (prohibition on quantitative restrictions on exports and measures having equivalent effect)
- Article 43 (Common Agricultural Policy) is a legal base for measures that relate to animal feed and food sources (animals and crops) as well as food, in particular quality and composition standards

³⁵ Exceptions to the free movement of goods doctrine are set out in Article 36 TFEU (including 'the protection of health and life of humans'); the ECJ has ruled that these must be interpreted narrowly.

³⁶ Communication from the Commission to the Council and the European Parliament. COM (85) 603 final, 8 November 1985.

³⁷ Regulations (EC) Nos. 852/2004, 853/2004 and 854/2004 of the European Parliament and of the Council.

³⁸ Regulation (EC) No. 882/2004 of the European Parliament and of the Council.

- Article 114 (measures approximating national laws for internal market purposes)
- Article 168 (public health), in particular 168(4)(b) (measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health)³⁹

In addition, Article 31 (common customs tariff) is used for a measure relating to fish marketing; Article 42 (competition in production and trade of agricultural products) and Article 115 (internal markets measures requiring unanimity) are used as legal bases for labelling/composition measures; Article 192(2)(b) (management of water resources) is a legal base for bottled water legislation, and Article 207 (common commercial policy) is used a legal base for Regulation (EC) No 178/2002.

There are several provisions in EU food law permitting Member States to make 'national' measures. The UK has availed itself of several of these measures, including in relation to emergency measures, the direct supply of small quantities of primary products, in relation to traditional methods of production, processing or distribution of food and the sale of raw milk.

The elements of this competence, other than those deriving from customs rules and quantitative restrictions do not apply in the Channel Islands and the Isle of Man. This competence applies in Gibraltar save for those parts that derive from Article 114 TFEU that are intended to promote the free movement of goods.

Major pieces of EU legislation

Some of the key pieces of legislation relating to food safety, labelling and compositional standards are described below; a more extensive list of the major pieces of EU legislation is available on our website via www.defra.gov.uk/corporate/about/how/europe/review/.

The General Food Law, Regulation (EC) No. 178/2002, is made under Articles 43, 114, 207 and 168(4)(b). It sets out several general principles which are to apply to food law (such as the precautionary principle and transparency), sets out food and feed safety requirements (making it clear that responsibility for safe food and feed being placed on the market rests with food and feed business operators) and provides that food must be traceable the length of the food chain and must be withdrawn or recalled where appropriate. It establishes the European Food Safety Authority and sets out its functions. It creates a rapid alert system where the existence of a food risk is transmitted by a Member State to the Commission who then transmits it to other Member States. It also provides for the Commission (or Member States, as an interim measure where the Commission has failed to act) to legislate to prevent the placing on the market of food and feed likely to constitute a

³⁹ The precursor of Article 168(4)(b) was introduced by the Treaty of Maastricht (as Article 129) and modified by the Treaty of Amsterdam (becoming Article 152) (1997). Legislation made under Article 168(4)(b) is adopted using the ordinary legislative procedure.

serious risk to human health, animal health or the environment. As indicated above, this Regulation also cites Article 207 (common commercial policy) because of the way its import and export provisions affect and encompass international trade as well as the internal market.

The Food Hygiene package comprises Regulations (EC) Nos. 852/2004, 853/2004 and 854/2004. Regulation (EC) No. 852/2004 is made under Articles 114 and 168((4)(b) and Regulation (EC) No. 853/2004 and Regulation (EC) No. 854/2004 are both made under Article 168(4)(b). The hygiene package sets out general hygiene rules for all food business operators and specific rules for food business operators handling products of animal origin. It also sets out specific rules for the organisation of official controls on products of animal origin

General food labelling is currently covered by Directive 2000/13/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs. This Directive is a codified version of Directive 79/112/EC on the approximation of the laws of Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer. The Treaty base for Directive 2000/13/EC is Article 114 TFEU.

Directive 2000/13/EC will be replaced by the Food Information Regulation (Regulation 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers). This Regulation, which is made under both Article 114 and Article 169 TFEU,⁴⁰ combines the elements of Directive 2000/13/EC on the labelling presentation and advertising of foodstuffs with Directive 90/496/EC on nutrition labelling for foodstuffs. Most of the new rules will apply from 13 December 2014 although there are some provisions (relating to minced meat) that will apply from 1 January 2014. The obligation to provide nutritional information will apply from 13 December 2016.

In addition to the general food labelling rules described above, there are also rules covering specific compositional and labelling requirements for particular foodstuffs such as bottled water and fruit juices.

Major proposed pieces of EU legislation

The following items are identified in the Annex to the Commission Work programme for 2013, and are discussed in more detail in paragraphs 32 and 33:

- A new Regulation on Official Controls (to replace Regulation (EC) No. 882/2004)
- Revision of the Hygiene Package legislation (Regulations (EC) Nos. 852/2004, 853/2004 and 854/2004)

⁴⁰ Article 169 TFEU provides that the EU shall contribute to protecting the health, safety and economic interests of consumers.

UK implementation

The UK has given legal effect to EU food law by making statutory instruments providing for the execution and enforcement of EU Regulations and implementing EU Directives.

Devolution legislation has conferred on Scotland and Wales the power to make their own food regulations. Northern Ireland makes its own food legislation.

Statutory instruments to give legal effect to EU food law have been made using domestic legal bases such as the broad regulation making powers set out in section 16 and 17 of the Food Safety Act 1990 and section 2(2) of the European Communities Act.

There was a certain congruence between developing EU food law and existing domestic law and so it has only exceptionally been necessary to amend primary legislation. An example of this is the amendment to section 7 of the Food Safety Act to provide that 'in determining... whether any food is injurious to health regard shall be had to [part of] Regulation (EC) No. 178/2002'. More extensive modifications have had to be made to Part IV of the Agriculture Act 1970 to remove overlap with directly applicable EU law relating to animal feed.

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PB 13839

Department for Environment, Food and Rural Affairs

Food Standards Agency

Food law legislation

(Instruments relevant to feed are highlighted in blue)

Topic area and key EU Legislation	Treaty Base in TFEU	Description of the legislation
Food and feed safety		
Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety	43, 114, 207, 168(4)(b)	Establishes general principles of food law (including traceability and incident reporting), principle of control from farm to fork and establishes the European Food Safety Authority.
<p>Food Hygiene</p> <p>Regulation (EC) No 852/2004 of the European Parliament and of the Council on the hygiene of foodstuffs</p> <p>Regulation (EC) No 853/2004 of the European Parliament and of the Council laying down specific hygiene rules for food of animal origin</p> <p>Regulation (EC) No. 854/2004 of the European Parliament and Council laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption</p>	<p>114, 168(4)(b)</p> <p>168(4)(b)</p> <p>168(4)(b)</p>	Establishes a comprehensive and integrated hygiene rules covering all food from the farm to the point of sale to the consumer.
Regulation (EC) No 882/2004 of the European Parliament and of the Council	43, 114,	Establishes principles for official feed and food controls undertaken

on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules	168(4)(b)	by Member States. To ensure that official controls are carried out regularly, on a risk basis and with appropriate frequency.
Regulation (EC) No 767/2009 of the European Parliament and of the Council on the marketing and use of feed	43, 168(4)(b)	Lays down rules on the placing on the market and use of feed for food-producing animals or pets taking account of feed safety , public health protection, consumer information and the internal market.
Regulation (EC) No 183/2005 of the European Parliament and of the Council laying down requirements for feed hygiene	43(2), 168(4)(b)	Establishes a comprehensive hygiene policy for feed businesses and to implement the application of good hygiene practice at all levels of production and use of feed
Regulation (EC) No 1829/2003 of the European Parliament and of the Council on genetically modified food and feed	43, 114, 168(4)(b)	Provides for the general framework for regulating genetically modified (GM) food and feed in the EU
Council Regulation (EEC) No 315/93 laying down Community procedures for contaminants in food	114	Establishes rules and principles for the EU wide treatment of contaminants in food and sets out the framework for the establishment of EU wide maximum levels for certain contaminants in order to protect public health.
Regulation (EC) No 1333/2008 of the European Parliament and of the Council on food additives	114	Establishes rules for the use of food additives in food and their conditions of use.
Regulation (EC) No 1334/2008 of the European Parliament and of the Council on flavourings and certain food ingredients with flavouring properties for use in and on foods	114	Establishes general rules for the use of flavourings in and on foods and for the evaluation and authorisation of certain types of flavourings.
Regulation (EC) No 2065/2003 of the European Parliament and of the Council on smoke flavourings used or intended for use in or on foods	114	Establishes general rules for the use of smoke flavourings and for their evaluation and authorisation.

Regulation (EC) No 1332/2008 of the European Parliament and of the Council on food enzymes	114	Establishes general rules for the use of food enzymes and for their evaluation and authorisation.
Directive 2009/32/EC of the European Parliament of the Council on the approximation of the laws of the Member States on extraction solvents used in the production of foodstuffs and food ingredients	114	Sets out rules for the use of extraction solvents in the production of foods.
Regulation (EC) No 1935/2004 of the European Parliament and of the Council on materials and articles intended to come into contact with food	114	Sets out general requirements for all food contact materials (e.g. Packaging materials; utensils, cutlery and dishes; processing machines; food containers) and for the development of specific controls (e.g. migration limits) and authorisations on subsets of these.
Directive 1999/2/EC of the European Parliament and of the Council on the approximation of the laws of the Member States concerning foods and food ingredients treated with ionising radiation	114	Establishes rules for the manufacture, marketing and importation of foods and food ingredients treated with ionising radiation.
Regulation (EC) No 258/97 of the European Parliament and of the Council concerning novel foods and novel food ingredients	114	Lays down the rules for the risk assessment and authorisation of novel foods.
Council Directive 89/108/EEC on the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption	114	Lays down the rules for the quick-freezing, packaging, labelling and inspection of quick-frozen foodstuffs.
Food labelling		
Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers.	114	Specific rules relating to food safety (e.g. labelling of food allergens and provisions on use by dates) are contained in the general rules on the provision of information to

		consumers.
Regulation (EC) No 1760/2000 of the European Parliament and of the Council establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products .	43, 168	Establishes labelling provisions which apply to specific products, such as beef and veal.
Compositional standards, labelling and associated criteria		
Council Directive 98/83/EC on the quality of water intended for human consumption	192	Establishes rules governing the quality of bottled waters for human consumption to protect human health
Directive 1999/4/EC of the European Parliament and of the Council relating to coffee extracts and chicory extracts	114	Establishes rules governing the definition and labelling of soluble coffee products
Directive 2000/36/EC of the European Parliament and of the Council relating to cocoa and chocolate products intended for human consumption	114	Establishes rules governing the definition and labelling of cocoa and chocolate products
Council Regulation (EC) No 104/2000 on the common organisation of the markets in fishery and aquaculture products	31, 42, 43	Establishes rules governing the marketing of fishery and aquaculture products
Council Directive 2001/110/EC relating to honey	43	Establishes rules governing the definition and labelling of honey
Council Directive 2001/111/EC relating to certain sugars intended for human consumption.	43	Establishes rules governing the definition and labelling of certain sugars
Council Directive 2001/112/EC of 20 December 2001 relating to fruit juices and certain similar products intended for human consumption	43	Establishes rules governing the definition and labelling of fruit juices and nectars
Council Directive 2001/113/EC relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption	43	Establishes rules governing the definition and labelling of jams and marmalade

Council Directive 2001/114/EC relating to certain partly or wholly dehydrated preserved milk for human consumption	43	Establishes rules governing the definition and labelling of dehydrated milk products
Articles 114 to 116 of Council Regulation(EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products	42, 43	Establishes rules governing the definition and labelling of milk and milk products (Article 114), spreadable fats and oils (Article 115), and products of the eggs and poultry meat sectors (Article 116)
Directive 2009/54 of the European Parliament and of the Council on the exploitation and marketing of natural mineral waters	114	Establishes rules governing the marketing of natural mineral waters within the EU