POLICY NOTE

THE SCOTLAND ACT 1998 (MODIFICATION OF SCHEDULE 5) ORDER 2014

SI 2014/1559

1. The above instrument is proposed to be made under section 30(2) of the Scotland Act 1998. Section 30(2) provides a mechanism whereby Schedule 4 or Schedule 5 to that Act can be modified by an Order in Council. By virtue of section 115 of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act 1998, this Order is subject to affirmative resolution procedures in both Houses of the UK Parliament and the Scottish Parliament.

Policy objectives

2. The purpose of this Order is to amend Schedule 5 to the Scotland Act 1998 to bring the Scottish Parliament's legislative competence better into line with the executive competence of the Scottish Ministers both by updating the definition of 'food' in the 1998 Act, thus bringing it in to line with EU legislation, and by amending Section J4 of Schedule 5, with respect to animal feeding stuffs.

Current situation

3. At devolution the regulation of food safety and standards was devolved under the 1998 Act. Under Section C7 (consumer protection) in Schedule 5 there is an exception for the "subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)". This reference picked up – and continues to pick up by virtue of paragraph 5 (interpretation) of Part 3 of Schedule 5 - the definition of "food" under the Food Safety Act 1990 as it stood at devolution on 1 July 1999. Post-devolution that definition was changed on a GB-wide basis by the Food Safety Act 1990 (Amendment) Regulations 2004 (S.I. 2004/2990) to align it with the new, and slightly different, EU definition of "food" (contained in Article 2 of Regulation (EC) No. 178/2002). The definition at devolution and the definition post-devolution are largely similar, but they are not identical. In addition, Section C7 and Sections C5 (import and export control) and C8 (product standards, safety and liability) also contain exceptions for matters which include "food". The term is undefined in that context and it is possible that without express definition could be taken to have the now out of date meaning referred to above. This resulted in a mismatch between what constituted "food" in the 1998 Act and "food" as it was (and is) understood in EU law. The legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers was therefore limited by an out of date definition of "food".

4. To ensure that the Scottish Ministers could continue to regulate food safety and standards by giving full effect to EU law in this otherwise devolved area, an Order made under section 63 of the 1998 Act (SI 2005/849) transferred necessary functions in food law to the Scottish Ministers. Those were functions (in so far as not already devolved) under the Food and Environment Protection Act 1985 ("the 1985 Act"), the Food Safety Act 1990 ("the 1990 Act")

and the Food Standards Act 1999 ("the 1999 Act"). Both the 1985 Act and the 1999 Act define food as having the same meaning it does under the 1990 Act and the transferred functions were limited by the newer definition of food rather than the older one.

5. The effect of this is, essentially, that any differences between the definition of food at devolution and the definition of food under EU law post-devolution have been removed in respect of the Scottish Ministers' functions. This enables the Scottish Ministers to regulate substances as food to the full extent of the EU definition of food. However, this does not affect the legislative competence of the Scottish Parliament as it remains in the position that it was in at devolution in 1999.

6. In relation to non-medicinal animal feed and additives, the regulation of animal feed safety and standards was also devolved under the 1998 Act, except for the regulation of veterinary medicines which was reserved. Section J4 reserves the subject-matter of the Medicines Act 1968 ("the 1968 Act"). Section 130(1) of the 1968 Act (as it stood as at 1 July 1999) defined "medicinal product" as including substances fed to animals and, therefore, veterinary medicinal products.

7. Prior to 2005 legislation regulating veterinary medicinal products was made under the 1968 Act or under that Act together with section 2(2) of the European Communities Act 1972. It was subsequently agreed between the Veterinary Medicines Directorate (an executive agency of the Department for Environment, Food and Rural Affairs) and the Food Standards Agency that certain zootechnical additives which do not have a medicinal effect on the animals that consume them should be regulated within the framework of animal feed law rather than veterinary medicines legislation. This led to the Veterinary Medicines Regulations 2005 (SI 2005/2745) which gave effect to this agreement. It was agreed that the Veterinary Medicines Directorate would regulate for the UK all matters falling within the scope of those Regulations. The 2005 Regulations have since been revoked – being replaced or amended by new veterinary medicines regulations almost every year; however, the definitions of "veterinary medicinal product" and "specified feed additives" have been unchanged since 2005. The latest regulations are the Veterinary Medicines Regulations 2013 (SI 2013/2033) which came into force on 1 October 2013.

8. In effect, certain animal feedstuffs and additives ceased to be veterinary medicinal products (due to the narrower scope of the 2005 Regulations compared to the 1968 Act) yet continued to fall within the scope of the 1968 Act (the subject-matter of which is reserved by J4). An Order made under section 63 of the 1998 Act (SI 2006/304) transferred functions in respect any feeding stuff used for oral feeding or feed additive which is not regulated under the 2005 Regulations to the Scottish Ministers. This ensures that the Scottish Ministers can legislate for and control all non-medicinal animal feed in Scotland. However, this does not affect the legislative competence of the Scottish Parliament, which remains as it stood at devolution in 1999.

Effect of Instrument

9. The section 30 Order will update Schedule 5 to the Scotland Act 1998 to reflect changes in the definition of "food" and the agreement reached regarding regulation of animal feeding stuffs will allow the introduction of primary legislation in the Scottish Parliament to constitute a new food body with functions which align fully with the scope of EU legislation on food safety and standards and animal feeding stuffs. It will do this by:

a) inserting a definition of food into Sections C5, C7 and C8 in Schedule 5 to make clear that reference to "food" in Schedule 5 is to mean the definition of food in the Food Safety Act 1990 as amended by SI 2004/2990;

b) amending the exception under Section C7 for the "subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)" so that it picks up the definition of food in that Act as amended by SI 2004/2990; and

c) updating Section J4 to reflect changes that have been made to medicines legislation since devolution by reserving what now comprises veterinary medicinal products and specified feed additives in terms of SI 2013/2033.

10. Articles 2 to 4 of this Order insert a definition of food (with the meaning it has in the Food Safety Act 1990 as at 7th December 2004) into Section C5 (import and export control), Section C7 (consumer protection) and Section C8 (of product standards, safety and liability). Those Sections contain exceptions for "food". Article 3 also modifies the exception under Section C7 for the "subject-matter of section 16 of the Food Safety Act 1990 (food safety and consumer protection)" so that it refers to that subject-matter as at 7th December 2004. The date "7th December 2004" is when SI 2004/2990 amended the definition of food in the Food Safety Act 1990 to mean the EU definition of food contained in EC Regulation 178/2002.

11. Article 5 amends Section J4 (medicines, medical supplies and poisons) so that the reservation of the subject-matter of the Medicines Act 1968 does not include veterinary medicinal products. Instead the regulation of veterinary medicinal products and specified feed additives (and their incorporation into animal feeding stuffs and matters arising from that incorporation) will be reserved by a separate reservation within Section J4. The terms "veterinary medicinal products" and "specified feed additives" will take their meaning from the Veterinary Medicines Regulations 2013 (SI 2013/2033) as at 1st October 2013 (the date those Regulations came into force) and so will not include the zootechnical additives (referred to above at paragraph 7) which do not have a medicinal effect.

12. The UK Government has agreed to this proposed course of action, and to the laying the draft instrument before both Houses of Parliament at Westminster for approval, as required by section 115 of, and paragraphs 1 and 2 of Schedule 7 to, the Scotland Act 1998.

Consultation

13. Although there has been no general consultation specific to this Order, this instrument has been prepared in consultation with the United Kingdom Department of Health, the Department for the Environment, Food and Rural Affairs and the Scotland Office.

Financial Effects

14. This instrument will have no direct financial effect on the Scottish Government. The establishment of the new food body and the provision of its budget from the Scottish Ministers and from a budget transfer from the FSA of around £3.5 million is not dependent on this instrument.

15. The instrument has no financial effect on business, charities or voluntary bodies.

Scottish Government
March 2014