EXPLANATORY MEMORANDUM TO

THE FOOD AND FEED (CHERNOBYL AND FUKUSHIMA RESTRICTIONS) (AMENDMENT) (EU EXIT) REGULATIONS 2019

[2019] No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by Food Standards Agency and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 *The Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019* (the instrument) are being made to fix inoperabilities in the retained EU legislation on special conditions for the import of food and feed that have been affected by nuclear accidents at Chernobyl, Ukraine and Fukushima, Japan (as listed in paragraphs 6.3 and 6.4) that will arise as a consequence of the UK's exit from the European Union (EU).

2.2 This instrument is a legislative consequence of the UK's decision to leave the European Union, which will also result in our departure from the European Atomic Energy Community ("the Euratom Treaty"). The Euratom Treaty covers civil nuclear policy and legislation across the EU including emergency response to nuclear incidents.

2.3 As a responsible government, we will continue to proportionately prepare to ensure readiness on exit day in all scenarios. The purpose of this instrument therefore, is to ensure that there will continue to be a functioning statute book on exit day which maintains continuity in relation to the Food and Feed (Chernobyl and Fukushima Restrictions) policy and legislation.

Explanations

What did any relevant EU law do before exit day?

2.4 EU law prohibits the import of food and feed from countries affected by the Chernobyl nuclear accident and from Japan following the Fukushima nuclear accident that exceeds the maximum permitted levels of radioactive contamination specified. EU law also imposes special conditions on certain food and feed products listed including pre-export testing and declarations which must accompany the consignment. Further details can be found in section 6 below.

Why is it being changed?

2.5 The changes introduced come as a result of EU exit. The retained EU law will need to be adapted in order for it to be operable in the UK after exit. All rules will remain the same. What will change is references to terms such as "Community", and "Member states". Where necessary, functions currently undertaken by for instance the European Commission will be replaced by references to domestic risk management authorities.

What will it now do?

2.6 The new instrument will ensure that appropriate legislation remains in place after EU exit. The changes introduced do not affect the essence of the legislation but ensure that the legislation remains operable after EU exit. The maximum levels for radioactive contaminants in food will remain as they are now and the same will be true for sampling and analysis rules.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European Union (Withdrawal) Act 2018) ("the Act") and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom for those aspects amending deficiencies in European legislation. The elements of the instrument addressing deficiencies in the Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019 will only apply in England and equivalent measures to amend the respective legislation in the devolved administrations will be made there.

4.2 The territorial application of this instrument is the entirety of the United Kingdom for those aspects amending deficiencies in retained EU law. The elements of the instrument addressing deficiencies in the Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019 will only apply in England and equivalent measures to amend the respective legislation in the devolved administrations will be made there.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for Public Health and Primary Care, Steve Brine has made the following statement regarding Human Rights:

"In my view the provisions of the Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 The Act repeals the European Communities Act 1972 on exit day. It maintains all domestic law and retains previously directly applicable European Union legislation provided it is in the English language. Section 8(1) and 8(2) of the Act enable UK Ministers to fix deficiencies in retained EU law enabling retained legislation and the safeguards it provides to operate effectively following the UK's exit from the EU.

6.2 The EU legislation sets out special conditions on the import of food that is specific to the circumstances arising following the Chernobyl and Fukushima nuclear accidents.

6.3 In the case of Chernobyl, there is a framework regulation which sets out the maximum permitted levels that apply and this is supplemented by an implementing regulation that specifies detailed rules. These Regulations are listed below:

- **The framework regulation:** Council Regulation (EC) No 733/2008 of 15 July 2008 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station (which repealed and replaced the previous framework regulation Council Regulation (EEC) No 737/90)
- **The implementing regulation:** Commission Regulation (EC) No 1635/2006 of 6 November 2006 laying down detailed rules for the application of Council Regulation (EEC) No 737/90 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station

6.4 Council Regulation 733/2008 has been amended by Council Regulation 1048/2009 of 23 October 2009 which extends its period of application until 31 March 2020. Also, of relevance is Commission Regulation 1609/2000 of 24 July 2000 establishing a list of products excluded from the application of Council Regulation (EEC) No 737/90, but no amendments are required under the Act to maintain operability of this regulation.

6.5 In the case of Fukushima, the framework is provided by Council Regulation (Euratom) 2016/52 (subject to a separate instrument being made under the Act as *The Food and Feed (Maximum Permitted Levels of Radioactive Contamination) (Amendment) (EU Exit) Regulations 2019*) and an implementing regulation as detailed below:

- Commission Implementing Regulation (EU) 2016/6 of 5 January 2016 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station and repealing Implementing Regulation (EU) No 322/2014

6.6 This Regulation has been amended by Commission Implementing Regulation (EU) 2017/2058 which updated references to the new framework regulation, revised the foods and prefectures of Japan to which the special conditions apply and set a new date of 30 June 2019, by which this Regulation must be reviewed.

6.7 Powers are provided to enforcement officers to implement these EU Regulations through declarations issued under the Official Food and Feed Controls (England) Regulations 2009 and the Trade in Animals and Related Products Regulations 2011.

6.8 Article 9 of Regulation (EC) No. 178/2002 states that there will be open and transparent public consultation during the preparation, evaluation and revision of food law, except in urgent circumstances. Following EU Exit, this will continue to be the case with all future revisions of food law. Public consultation has been completed, as shown below, in accordance with this.

7. Policy background

What is being done and why?

7.1 Radioactivity in food can be natural or manmade. Manmade radioactive contaminants can enter food as a result of routine operations or following a nuclear accident or other radiological emergency. For routine operations, exposure to radioactive contaminants is regulated by measures including the Ionising Radiation Regulations 2017 and the Environmental Permitting (England and Wales) Regulations 2016. In the event of a nuclear accident or other radiological emergency, additional measures may be required to protect the public which includes preventing contaminated food and feed from being placed on the market.

7.2 This instrument will fix the inoperabilities in retained direct EU legislation relating to controls on the import of food and feed from countries known to have levels of radioactive contamination that are potentially detrimental to public health. These countries are non-EU countries which were affected by the Chernobyl nuclear accident and regions of Japan which were affected by the Fukushima nuclear accident. These controls have been put in place to protect members of the public and failure to maintain effective controls may increase the risk to UK consumers.

7.3 The changes introduced in this instrument and listed below will ensure that the legislation remains operable.

- Functions currently undertaken by the European Commission in reviewing and making changes to legislation will in the future be the responsibility of the 'appropriate authority'

  "appropriate authority" means—

  (a) in relation to England, the Secretary of State;

  (b) in relation to Wales, the Welsh Ministers;

  (c) in relation to Scotland, the Scottish Ministers;

  (d) in relation to Northern Ireland, the Northern Ireland devolved authority

- References to "Member States" or "Community" at various places will be replaced with UK relevant references, e.g. "Member States shall check compliance with the maximum permitted levels laid" will become "The food authority must check compliance with the maximum permitted levels laid". Food authorities are usually local authorities or port health authorities.
- Under the retained EU Law, the "Food Safety Authority" will have a role in providing food safety advice to the appropriate authority. The "Food Safety Authority" means

  (a) as regards England, Wales and Northern Ireland, the Food Standards Agency (FSA);

  (b) as regards Scotland, Food Standards Scotland (FSS)

- Currently EU Member States are required to provide certain information to the Commission, such as information concerning the application of Regulation 733/2008 notably cases of non-compliance with the maximum permitted levels. The requirement to report back to the Commission will not be necessary after exit.

7.4 These controls are regularly reviewed and can be amended or revoked if they are no longer required to protect public health. The retained EU legislation relating to food and feed from countries affected by the Chernobyl nuclear accident will expire on 31 March 2020 unless further legislation is passed following a review by the UK government that determines these controls should be retained. The retained EU legislation relating to food and feed from Japan following the Fukushima nuclear accident shall be reviewed by the UK government before 30 June 2019 to determine if these controls should be retained or amended. These reviews will take into account the evidence on current levels of contamination of food and feed in the affected countries.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the powers in section 8 of the European Union (Withdrawal) Act 2018, which allows Ministers to regulate to prevent, remedy or mitigate deficiencies in retained EU law that arise as a consequence of the UK's withdrawal from the European Union. This instrument is being enacted on a UK wide basis. Amendments made through this instrument will enable the retained EU law to operate effectively across the UK. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 No consolidation is required.

10. Consultation outcome

10.1 A full public consultation was carried out from 4 September until 14 October 2018 on the FSA's proposed approach to retained EU law for food and feed safety and hygiene. This approach proposed making a number of corrections to the retained EU law which includes the Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019, using powers under the European Union Withdrawal Act. It was proposed in our approach that the corrections would be made by way of statutory instruments of which 15 had been prepared. Key corrections would provide a suitable replacement for the risk management function currently undertaken by the European Commission and for the risk assessment function currently undertaken by the European Food Safety Authority (EFSA), amongst other minor, non-controversial amendments. The corrections would not result in any material change in the level of protection to human or animal health, or to the high standard of domestic or imported food and feed which consumers expect. The statutory instruments which would make the corrections will be subject to review and approval by Parliament.

10.2 The consultation covered the proposed approach used for all of the FSA's Statutory Instruments in relation to EU Exit. It received 50 responses of which 82% supported or did not disagree with the proposed approach being outlined by the Food Standards Agency. 16% of replies contain mixed comments. The main concerns regarding the FSA approach in general were related to the communication of change and ensuring sufficient lead time is given. A more detailed analysis of the responses can be seen at the published link below.

10.3 One respondent raised concerns around the timeframe for delivering the legislation needed for day one readiness.

10.4 The consultation and its responses can be viewed at:

10.5 https://www.food.gov.uk/news-alerts/consultations/proposed-approach-to-retained-eu-law-for-food-and-feed-safety-and-hygiene

11. Guidance

11.1 It is considered that guidance is not required for this instrument, as it generally maintains existing regulations and does not introduce new requirements.

12. Impact

12.1 The impact on business, charities or voluntary bodies is minimal. According to the ONS Inter Departmental Business Register (IDBR) there were 214,175 businesses active in the agri-food sector in 2017. The FSA envisages minimal one-off familiarisation costs to businesses, charities and voluntary bodies; where we estimate that it will take each organisation less than 60 minutes[1] to read and understand the proposed regulations and then disseminate the information to key staff within their organisation. However, it is unlikely that the envisaged changes will present any other impact on businesses', charities or voluntary bodies' day to day operations as the rules are not changing as a result of this instrument. The associated direct cost for businesses has been calculated by applying the 2017 median annual wage for "production managers and directors" of £22.05 and uprating it by 20% to account for overheads[2]. Multiplying this wage rate with the expected familiarisation time gives an estimated total one-off cost to businesses of £5.7m. After adjusting for inflation and applying a discount rate of 3.5% as per HMT Green Book guidance, this translates to an Equivalent Annual Net Direct Cost to Business (EANDCB) of approximately £600,000.

12.2 In terms of the impact on the public sector, there are approximately 419 Local Authorities (LAs) and 35 Port Health Authorities (PHAs) in the UK, which enforce existing food and feed law and will continue to enforce the retained EU law after the UK's EU Exit. The FSA envisages minimal one-off familiarisation time costs to LAs and PHAs; where we estimated that it will take authorities less than 60 minutes to read and familiarise themselves with the EU Regulations and then disseminate to staff and key stakeholders. It is estimated that one officer in each of these authorities (one Food/Feed Officer from each local authority; and one 'Port Health Officer' from each PHA) will need to undertake this task. The instrument is not considered to add additional or new burdens on enforcement bodies, other than those identified here.

12.3 An impact assessment has not been produced for these Regulations, which the FSA has certified as being below the *de minimis* threshold of +/- £5m equivalent annual net direct cost to business. The Regulations are designed only to fix the inoperability of retained EU law (detailed in Section 6) and ensure the continued safety of food and feed after the UK leaves the EU. The Regulations provide continuity for stakeholders and the FSA has not identified any significant impact on stakeholders other than in relation to a negligible one-off familiarisation cost from the legislative change.

[1] Please note the familiarisation time has been amended from less than 30 to less than 60 minutes following consultation feedback.

[2] Wage rate taken from the ONS' 2017 Annual Survey of Hours and Earnings (ASHE), table 14.6a.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 Over 90% of the UK food industry sector comprises small and micro businesses and EU legislation generally applies to food and feed businesses regardless of size, as requirements are intended to be risk based to reflect the activities undertaken by business. Due to the high ratio of small and micro food businesses in the UK, it is often not feasible to exempt smaller businesses from new food measures, as this would fail to achieve the intended effect of reducing risks to public health. The FSA makes every effort to identify the impacts and minimise burdens on small and micro businesses where possible.

13.3 The changes made to the legislation will provide continuity for business and should not impact on the day-to-day workload of small and micro businesses as all food and feed safety standards and legal definitions are maintained.

14. Monitoring & review

14.1 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Christopher Thomas at the Food Standards Agency can be contacted with any queries regarding the instrument. Telephone: 020 7276 8728 or email: christopher.thomas@food.gov.uk

15.2 Michael Wight, Deputy Director for Food Policy, at the Food Standards Agency can confirm that this Explanatory Memorandum meets the required standard.

15.3 Steve Brine Parliamentary Under Secretary of State for Public Health and Primary Care at the Department for Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 Steve Brine Parliamentary Under Secretary of State for Public Health and Primary Care has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Food and Feed (Chernobyl and Fukushima Restrictions) (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate".

1.2 This is the case because: the instrument only fixes the inoperabilities detailed in section 2 of this Explanatory Memorandum and adds no additional legislative measures.

2. Good reasons

2.1 Steve Brine Parliamentary Under Secretary of State for Public Health and Primary Care has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: because the legislation will create a level playing field in the area of radioactive contaminants in foods preventing UK businesses from being placed in a disadvantageous position when trading overseas.

3. Equalities

3.1 Steve Brine Parliamentary Under Secretary of State for Public Health and Primary Care has made the following statement(s):

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.".

3.2 Steve Brine Parliamentary Under Secretary of State for Public Health and Primary Care has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Steve Brine have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.".

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.