

Written Ministerial Statement

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Department of Agriculture, Environment and Rural Affairs

IMPLEMENTATION OF SANITARY & PHYTO-SANITARY CHECKS AT NORTHERN IRELAND POINTS OF ENTRY UNDER THE NORTHERN IRELAND PROTOCOL

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Mr Poots (The Minister of Agriculture, Environment and Rural Affairs): I submitted a paper for consideration at the Executive meeting on 27 January on Sanitary and Phyto-sanitary checks, that are currently being delivered under the Northern Ireland Protocol at Northern Ireland Points of Entry. Following receipt of legal advice, it was my intention to submit a revised paper for consideration by the Executive. As this will now not be possible within this mandate, I would like to share this paper with you today.

Under the 'Agreement on the Withdrawal of the United Kingdom from the European Union (the Withdrawal Agreement) and the Protocol on Ireland/Northern Ireland' (the NI Protocol), Northern Ireland (NI) must align with the European Union's (EU) SPS rules. The EU Official Controls Regulation (OCR) requires that, in order to protect public health and the health of animals and plants, SPS checks must be carried out on live animals and agri-food products that enter the EU common regulatory zone from non-EU countries ('third countries'). These checks are enshrined in domestic legislation, namely The Official Controls (Animals, Feed and Food) Regulations (Northern Ireland) 2019 and The Plant Health (Official Controls and Miscellaneous Provisions) Regulations (Northern Ireland) 2019, as amended by The Plant Health (Official Controls and Miscellaneous Provisions) Regulations (Northern Ireland) 2020.

In summary, under the Withdrawal Agreement, the NI Protocol and domestic law, DAERA is legally required to carry out SPS and other regulatory checks on live animals and agri-food products that enter NI from Great Britain (GB). In practical terms, this means that goods entering NI from GB should be subject to documentary checks and a range of identity and physical checks, depending on the type of consignment.

At a meeting of the NI Executive on 21 May 2020, the minutes recorded:

Protocol: Agri-food Requirements

The First Minister advised that;

- (i) the UK Government had published its policy approach to the implementation of the Protocol, and that this confirmed the need for arrangements to control the entry of agri-food products into Northern Ireland, but also the need to simplify and minimise such checks;*
- (ii) she and the deputy First Minister would continue to engage with the Westminster Government on this matter, including by means of the JMC (EN) meeting later that day.*

It was agreed that the Minister of Agriculture, Environment and Rural Affairs would take the lead on this issue with the support of a cross Departmental group; and that officials would confirm to Whitehall that the necessary work would be taken forward with DEFRA, Cabinet Office and the NIO to move this forward.

At its height this decision empowers me, as Minister, to 'take the lead' on 'this issue.' 'This issue' isn't defined though reference is variously made to the UK Government's publication of its policy approach (including the need to simplify and minimise checks) and the engagement with the Westminster Government by the First Minister and deputy First Minister.

Demonstrably this decision does not (insofar as it may be needed) authorise a particular implementation of the protocol, much less any of the particular judgments my department has taken over the last thirteen months.

Though it is more debatable, neither do I believe that it is of sufficient clarity to effect a delegation of the Executive's normal role to myself to take such decisions without recourse to the Executive.

OPERATIONAL READINESS PROGRAMME

On 26 May 2020, I appointed the former Permanent Secretary, Dr Denis McMahon, as Senior Responsible Owner (SRO) for the SPS Operational Delivery programme. The purpose of this programme was to deliver the people, processes, IT and facilities necessary to provide SPS checks in compliance with the Department's legal responsibilities.

Given the challenging timeline for implementation, it was not possible to develop the permanent facilities required to fully deliver the checks required under OCR by the time the EU exit transition period ended on 31 December 2020. Consequently, temporary contingency facilities were developed to ensure day one readiness. Work on the temporary facilities was completed on time at Belfast, Larne and Warrenpoint Ports, followed by the completion of work at Foyle Port in February 2021.

SPS CHECKS AT NI POINTS OF ENTRY

On 1 January 2021, following the end of the EU exit transition period, SPS checks on GB goods entering NI commenced. Consistent with the UKG's Command Paper and its unilateral declaration of December 2020, checks on all consignment types were not carried out in line with the requirements set out in OCR. Retail products from certain food suppliers that met a range of trust criteria were subject to simplified procedures, provided that they were destined solely for sale in NI and that a number of conditions were met. This proposal was further developed to become the Scheme for Temporary Agri-Food Movements to Northern Ireland (STAMNI scheme) and was initially proposed to be in place for a period of three months.

In its December 2020 Command Paper, UKG also stated that, for a period of six months, some chilled meats, such as sausages, which are usually prohibited or restricted from entering the EU from third countries, could continue to enter NI from GB if they met a number of conditions.

It should be noted that neither the UKG Command Paper nor its unilateral declaration of December applied DAERA's legal requirement to carry out SPS and other regulatory checks on live animals and agri-food products that enter NI from Great Britain (GB) under the Withdrawal Agreement, the NI Protocol and domestic law.

In addition to the reduced checks set out in the UKG Command Paper, a number of additional flexibilities within the EU legislative framework were utilised, including the use of seal checks as an alternative to identity checks, the use of electronic certification and online document checking and, for certain consignment types, the flexibility to defer checks or vary from the baseline level of checks set out in EU legislation on the basis of a risk assessment.

In order to provide certainty and clarity for businesses, my Department published a Compliance Protocol which explained that businesses were expected to move towards full compliance with OCR before the end of the grace periods and that, in the intervening period, any enforcement action would be proportionate to the level of risk to the integrity of the EU internal market.

VOLUMES

Since checks commenced on 1 January 2021, UKG has extended the retail and prohibited or restricted goods grace periods a number of times, culminating in an announcement by Lord Frost on 6 September 2021 that the grace periods that were in place would continue indefinitely, whilst technical discussions between the EU and UKG to address NI Protocol issues continued.

Even with these grace periods, NI POEs are currently processing in excess of 2,500 Common Health Entry Documents (CHEDs) per week. Approximately 90% of these CHEDs relate to Products of Animal

Origin, which must be validated and recorded by one of my department's Official Veterinarians. These volumes should be considered in the context of full implementation of OCR, in the absence of the mitigations currently in place through the UKG grace periods, where it is estimated that NI POEs would be required to process in excess of 12,500 CHEDs per week across all consignment types. Under EU law, these would also require a significant number of identity and physical checks.

In addition, each consignment covered by a CHED requires an identity check and EU law dictates that a range of physical checks are also required, the frequency depending on the type of consignment. In 2021, approximately 7,000 physical checks were delivered at NI POEs.

EU AUDIT

Between 21 and 30 June 2021, officials from the European Commission carried out an audit (called 'Commission Control') to assess whether the system of controls in place at NI POEs met EU requirements. In October 2021, the Commission shared a draft report setting out its findings, stating that there are *'several critical factors which collectively and critically undermine the credibility of guarantees given by the United Kingdom Government in respect of its obligations to implement Union law, made applicable to and in the United Kingdom in respect of movement of animals and SPS goods into the EU SPS area via border control posts in Northern Ireland by the Protocol'*.

The Commission's concerns were substantially directed towards resourcing and infrastructure, as well as the lack of a functional customs control system for animals and goods that enter the EU SPS area from GB. They concluded that, *'even the highest priority checks foreseen by DAREA are not systematically implemented thereby undermining confidence in the competent authorities' ability to verify the compliance of animals and SPS goods entering the EU SPS area* and *'there are significant shortcomings and non-compliances with Union legislation in relation to entry of SPS goods and animals into the EU SPS area. These concern, inter alia, consignments which are not declared or not notified by operators prior to arrival, the failure of the Northern Ireland Executive to apply fees for performing official controls on animals and SPS goods originating in Great Britain, policy decisions to avoid implementing checks on non-commercial movements of pet animals and SPS goods arriving in personal luggage and post and, crucially, the absence of a functioning Customs' system to ensure that all eligible consignments of animals and SPS goods are presented for controls at the BCPs or points of entry.'* The Commission concluded, *'the structural weaknesses in the operating system undermine guarantees that only compliant goods are permitted to enter the EU SPS area through the designated BCPs in Northern Ireland.'*

The report also made eight recommendations to address what it sees as the most significant shortcomings to ensure the relevant competent authorities in NI could deliver SPS checks in line with the requirements of EU law. The Commission recommended that:

- (i) Competent authorities should have access to a sufficient number of staff;
- (ii) Appropriate facilities are put in place to deliver the checks;
- (iii) There should be close co-operation between competent authorities;
- (iv) Fees and charges are collected in line with OCR;
- (v) Any SPS consignments that have not been properly notified prior to entering NI are placed under detention;
- (vi) Documentary and identity checks should be undertaken on non-commercial pet animals entering NI from GB; and
- (vii) Checks should be delivered on personal consignments that form part of passengers' personal luggage.

CURRENT POSITION

On 21 July 2021, UKG published a further Command Paper, announcing that the NI Protocol has led to considerable disruption and diversion of trade and that the burdens that have been faced will be exacerbated over time as various grace periods end. The July 2021 Command Paper proposed that SPS goods that enter NI from GB would not require checks or certification, provided they are only ever intended to be consumed in NI. It also proposed that any goods destined for, or produced for, the EU Single Market would need to meet EU rules in full and goods exported from GB via NI to the Republic of Ireland (ROI) would need to meet full normal EU customs processes. UKG also committed to enforcing any requirements in EU law for checking goods intended for ROI and stated that live animals

entering NI from GB would be subject to arrangements that pre-dated EU exit, namely that animal movements be pre-notified, accompanied by health documentation and subject to 100% checks.

In response, the EU published a series of Non-Papers on 13 October 2021, setting out its proposals for implementing the NI Protocol. The EU's Non-Paper on SPS Issues proposed that GB retail goods could enter NI under 'simplified access' procedures and that prohibited or restricted meat products could continue to enter NI from GB, provided that the basic production requirements in GB remain aligned with those in the EU. The EU also proposed that the number of identity and physical checks required under EU law would be reduced by managing checks as part of an overall system of risk management as opposed to managing checks at the level of individual traders, consignments and products.

Whilst there is some common ground, significant differences remain between the EU and the UK's preferred approaches to implementing SPS checks at NI POEs. At present, the UK and the EU are currently engaged in intensified discussions with a view to finding permanent solutions and, on 14 January 2022, the UK Foreign Secretary, Liz Truss, and European Commission Vice-President, Maroš Šefčovič, released a joint statement that they '*share a desire for a positive relationship between the EU and the UK underpinned by our shared belief in freedom and democracy.*'

As noted in the EU Audit Report, the infrastructure limitations and lack of veterinary resource mean that my officials have been unable to fully meet the legal requirement to deliver SPS checks on GB goods entering NI, even with the various grace periods and flexibilities currently in place. As a consequence, officials have had to prioritise checks to focus on those with the highest degree of risk to NI and the EU single market.

On 23 December, consistent with using resources most effectively to implement the underlying aspirations of the protocol, I instructed officials to increase checks on goods entering the ROI from GB via NI with immediate effect and asked them to ensure that checks on goods entering NI from GB are taken forward solely on a risk based approach.

LEGAL POSITION

I did not previously bring the implementation of SPS checks on GB products entering NI (under the NI Protocol) to the Executive. Furthermore, I do not believe that the Executive decision of 21 May 2020 constitutes Executive approval of the decisions which have, and continue to be taken in relation to SPS checks. (If that minute could be read as to authorise Executive approval then it would appear to delegate decision making to me as DAERA Minister.)

In so far as DAERA continued to apply domestic legislation that pre-dates EU exit and the current Executive mandate where, at the time the domestic legislation was introduced, the UK was still an EU Member State and was not considered to be a third country, I believe we have a reasonably solid legal foundation for continuing these checks.

However, with the end of the EU exit transition period - the EU now considers GB to be a third country, whereas NI remains part of the EU's single market and continues to apply EU law listed in Annex 2 of the NI Protocol – additional checks are required. (The NI Protocol is an integral part of the Withdrawal Agreement between the EU and UK which established the UK's withdrawal from the EU. The Withdrawal Agreement entered into force on 31 January 2020, after having been agreed by the UK and EU at the European Council on 17 October 2019.)

These are not the only legal duties I have to observe. In addition to those legal duties arising out of the NI Protocol, I also have legal duties pursuant to the Northern Ireland Act 1998 and the Northern Ireland Ministerial Code. Section 28A(1) requires me to act in accordance with the provisions of the Ministerial Code. Section 28A(10) deprives me of authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5). Subsection (5) provides that the Ministerial Code must include provision for requiring Ministers to bring to the attention to the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee. Section 20(3) gives the Executive responsibility inter alia for 'cross-cutting' issues. Section 20(4) gives the Executive responsibility for (in the absence of an agreed programme (for government) for significant or controversial matters.

It is clear that the decisions around the implementation of the protocol are both significant and controversial. It is also likely that they would be regarded by a court as cutting across the responsibilities of other Ministers. In such circumstances a strong case can be made that I have lacked the Ministerial authority to take decisions as to the nature of the implementation of the protocol.

No satisfactory Executive agreement, or arguably no Executive agreement at all exists to determine how these additional checks may be carried out.

As set out at paragraphs 2 and 3 above, DAERA is legally required to carry out SPS and other regulatory checks on live animals and agri-food products entering NI from GB under domestic and EU legislation. It is equally clear that for the reasons set out in this paper the requirements under the Withdrawal Agreement, the NI Protocol and domestic law are not being met.

Questions of implementation of the protocol, in particular in circumstances where it is logistically impossible to implement the protocol in total, are essentially political choices. According to the Departments (Northern Ireland) Order 1999 the department operates subject the direction and control of the Minister and in turn I am subject to duties to refer matters to the Executive. I believe it would be invidious to place officials in a position of taking decisions about which aspects of the implementation of the protocol should be prioritised in circumstances of limited resources. Seeking to place such responsibility on officials to take such decisions would not avoid my legal responsibilities nor those of the Executive.

On 21 December 2021, I received a Pre-Application Protocol letter for a Judicial Review (JR) in relation to the implementation of the NI Protocol and, in particular, the checks on goods entering NI from GB. The basis of the potential JR was that this matter should have been brought to the NI Executive as it is significant and controversial. The applicant has presently decided not to take the matter further in light of my undertaking to bring a paper to the Executive in relation to the continued and future implementation of the protocol.

In the absence of my paper being tabled for discussion at the Executive meeting on 27 January, I do not have an agreed Executive position on this issue. I have therefore reconsidered the legal basis for the checks which have taken place above and beyond those which were in place at the end of the EU exit transition period and have instructed my officials to halt all checks that were not in force on 31 December 2020.

As you will be aware, my decision is subject to judicial review and on Friday 4 February the High Court suspended its implementation until further Order from the Court or until the conclusion of the Judicial Review proceedings.