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## ANNUAL GOVERNANCE REPORT

### Report by Heather Hancock, Chairman of the FSA Board

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## 1 Summary

### 1.1 The Board is asked to:

- **Confirm** the Terms of Reference for the Board, Standing Orders for Board and Committee meetings, and the Business Committee's Terms of Reference, with no changes since their last review in September 2019;
- **Agree** the Terms of Reference for the Audit and Risk Assurance Committee, as reviewed by the Committee on behalf of the Board in May 2020; and
- **Recommit** to having a common position across the three countries unless there is a material reason not to, and to clearly differentiate advice on public health/consumer interest grounds, from wider political positions that may vary in the three administrations.

## 2 Introduction

- 2.1 The Food Standards Act 1999 provides that the Agency may regulate its own proceedings. Good governance requires that the Board and its Committees operate to clear, agreed Terms of Reference (ToR) and in accordance with Standing Orders. Since 2014, the Board has reviewed its suite of ToR and Standing Orders annually.
- 2.2 In line with the ToR, the Board delegates to Committees certain functions mainly associated with implementation and corporate governance of the Agency. Committees currently constituted under this power are the Business and Audit & Risk Assurance Committees.
- 2.3 The Board agrees and reviews the ToR of the Business and Audit & Risk Assurance Committees annually, together with the ToR and Standing Orders for the Board.
- 2.4 We also annually consider the effectiveness of the Board, and in the last three years this has taken particular account of the changing demands on the FSA and the Board as a result of the UK leaving the EU.
- 2.5 In addition, this year, since the outbreak of COVID-19, temporary adjustments have been adopted in relation to FSA Board meetings.

### 3 Annual Review of Terms of Reference and Standing Orders

#### Terms of Reference for the Board

- 3.1 No changes are proposed to the Board ToR (**Annex A**). These were substantially changed to reflect preparations for EU Exit, but as yet, of course, those changes are untested.

#### Terms of Reference for the Business Committee

- 3.2 We are not proposing any changes to the Business Committee ToR (**Annex B**). They will remain as the Board agreed them in September 2019.

#### Terms of Reference for the Audit & Risk Assurance Committee (ARAC)

- 3.3 The current ToR for ARAC were most recently reviewed by the Committee, on the Board's behalf, in May 2020. Updates were made in relation to references to the 'Head of Internal Audit' being amended to the 'Head of Audit Assurance'.
- 3.4 If the Board are content with the proposed updated ARAC ToR (**Annex C**), they will be updated as ARAC agreed them in May 2020. ARAC and then the Board will review them again in May 2021.

#### Standing Orders

- 3.5 The Standing Orders for Board and Committee meetings (**Annex D**) were most recently reviewed and agreed by the Board in September 2019.
- 3.6 We are not proposing any changes to the Standing Orders.

### 4 Annual Review of Board Effectiveness

- 4.1 Every year the FSA Board is expected to undergo a review of effectiveness. In September 2019 the Board agreed to wait until the UK had exited the EU and the new arrangements for the Board, as agreed in paper FSA 18-09-08 Governance Review, had been properly tested before commissioning a full external review of the operation of the Board.
- 4.2 While the UK exited the EU in January 2020, we are currently in the Transition period and so there has not yet been the opportunity to bed in and test the new arrangements for the Board.
- 4.3 Given the significant impact the new arrangements will have on the role of the Board, the recommendation is to wait until the Transition period is over and our new arrangements have been properly tested before a full external review of the operation of the Board is commissioned. This is not ideal, but the changing external environment makes it the best option.

- 4.4 Pending that test of our governance arrangements, as amended in anticipation of EU Exit and the end of the Transition period, and given that several Board members have joined the FSA since the last governance review, the Board may find it helpful to have the attached overview of the powers and authority of the FSA in relation to Ministerial decision making. This note is a useful reminder that the scope and reach of FSA decision making and action is, in fact, unchanged by EU Exit, although the institutional framework through which, or with which, we achieve our statutory purposes has changed. It is timely as we reflect on the chance that the domestic landscape for regulatory and policy decisions on food and feed will become more complicated to navigate after the Transition period, especially the possibility of different decisions being reached in any of our three countries, and the complicating factor of the Northern Ireland Protocol. **Annex E** helps to explain the difficulties that may arise in this regard.
- 4.5 The Board has consistently reiterated its commitment to delivering a three-country approach, reaching a shared risk management position across England, Wales and Northern Ireland unless there is compelling evidence that a different approach is required, so that it can be clearly differentiated from political considerations which are the proper domain of Ministers.
- 4.6 In terms of other aspects of Board effectiveness, an annual review of this is led by the Deputy Chair of the Board in discussion with Board members. The FSA has been without a Deputy Chair since April 2019 until July 2020 when Dr Hussey was appointed. Last year, the departing Deputy Chair's review findings were fed into the Board effectiveness review in September 2019. This year, Dr Hussey has begun an informal review with current Board members and will reflect any measures that could improve Board effectiveness in the Board discussion.

## 5 Board Appointments

- 5.1 Appointments to the FSA Board are made by Health Ministers in England, Wales and Northern Ireland. The statutory requirement for Board membership is 8-12 members, plus the Chair and Deputy Chair. This requirement reflected there being two appointees for Scotland, which is no longer required since Food Standards Scotland was created as a stand-alone department and Board north of the border. The working assumption is therefore that the Board should be between 6-10 members, plus the Chair and Deputy Chair.
- 5.2 Changes in Board membership since the last governance review, and forthcoming recruitment processes, are shown in the table below:

Board Position	Appointment end date	Appointee Name	Term	Notes on appointment
Chair	1 October 2020	Heather Hancock	Second term of 3 years	Vacancy, recruitment process not yet started
Deputy Chair	30 June 2023	Ruth Hussey	First term of 3 years	Served 4 years previously as Board member for Wales
Member	31 August 2020	Mary Quicke	First term of 3 years	Vacancy from 1 September 2020, recruitment process not yet started
Member	31 March 2021	David Brooks	Second term of 2 years	New Board member required from 1 April 2021, recruitment process not yet started
Member	31 August 2020	Stuart Reid	First term of 3 years	Vacancy from 1 September 2020, recruitment process not yet started
Member for Wales	30 June 2020	Vacant		Recruitment of new Board member underway
Member for Northern Ireland	No date set	Colm McKenna	Second term, began 1 September 2019 originally for 1 year	Second term has been extended indefinitely due to COVID-19 impacts
Member	17 November 2022	Margaret Gilmore	First term, expires 17 November 2022	
Member	17 November 2022	Tim Riley	First term, expires 17 November 2022	
Member	17 November 2022	Mark Rolfe	First term, expires 17 November 2022	

5.3 Whilst the relevant Ministerial department leads on each appointment process and approvals, some aspects of the recruitment process fall to the FSA. It is important to the Board, and the FSA more widely, that Board recruitment reaches candidates from under-represented groups, to improve the quality of our decision making. To ensure that we achieve greater diversity in Board membership, the Deputy Chair has agreed to champion this issue. Over the coming months she will work on developing relationships with bodies and networks that can introduce FSA appointment opportunities to a wider pool of talent.

## 6 COVID-19 AND CHANGES TO 2020 FSA BOARD MEETINGS

- 6.1 In the light of advice on working arrangements as a result of the COVID-19 pandemic, the Chair made adjustments to arrangements for Board and Business Committee meetings for the latter part of 2020.
- 6.2 Since June 2020, Board and Business Committee meetings have been conducted online and will continue to be so until the end of 2020. This is in line with Government advice on working from home where possible and avoids the need for Board members and officials to travel. It is also the best way of ensuring that everyone has the same opportunity to participate.
- 6.3 We have maintained our commitment to openness and transparency by live streaming the meetings.
- 6.4 In an effort to avoid lengthy virtual meetings, we have increased the frequency of meetings, with each event being for a maximum of 2.5 hours.
- 6.5 These arrangements are short term measures. The conduct of meetings online restricts in-person access and makes for more disjointed discussions. If conditions permit, we will cease these temporary measures and revert to Board meetings held in person as of March 2021 at the latest.
- 6.6 The Board has 'keep in touch' calls with the Chief Executive in the months in which there is not a scheduled Board meeting. These are information sharing opportunities in addition to the weekly email of information circulated to the Board.
- 6.7 From April - July 2020 these calls happened twice monthly to allow the Board to be updated on the FSA's incident management and operational aspects of the COVID-19 pandemic.

## 7 CONCLUSION AND RECOMMENDATIONS

- 7.1 The Board is asked to:
- **Confirm** the Terms of Reference for the Board, Standing Orders for Board and Committee meetings, and the Business Committee's Terms of reference, with no changes since their last review in September 2019;
  - **Agree** the Terms of Reference for the Audit and Risk Assurance Committee, as reviewed by the Committee on behalf of the Board in May 2020; and
  - **Recommit** to having a common position across the three countries unless there is a material reason not to, and to clearly differentiate advice on public health/consumer interest grounds, from wider political positions that may vary in the three administrations.

## ANNEX A

### TERMS OF REFERENCE FOR THE FSA BOARD

(AS AGREED AT THE BOARD MEETING ON WEDNESDAY 19 JUNE 2019)

**Purpose:** The Board is established by the legislation that established the FSA and constituted in line with the Food Standards Act 1999. It exists to represent the public interest and ensure that the organisation puts consumers first, to set strategy for the FSA, and to take major decisions on policy and key issues of principle, informing advice given to Ministers in Westminster and Wales and Northern Ireland. The Board has overall collective responsibility for the activities of the Food Standards Agency in England, Wales and Northern Ireland, and for ensuring that the FSA discharges its statutory duties to protect public health and consumers' interests in relation to food. The Board also, through the Chair, appoints the Chief Executive and holds her/him accountable, and supports the Chief Executive in the discharge of her/his role as Accounting Officer.

**Devolution:** The interests of Wales and Northern Ireland are taken into account in Board decisions and deliberations through advice from the Food Advisory Committees of these countries. Board papers are normally the subject of FAC consideration prior to their consideration in the Board.

**Delegation:** The Board may delegate to Committees certain functions mainly associated with implementation and corporate governance of the Agency. Committees currently constituted under this power are the Business and Audit and Risk Assurance Committees.

**Transparency:** The Board meets in the open so that it is clear to interested parties and the public on what basis it has taken its decisions and what evidence it has taken into account in reaching them, unless there are particular reasons why something cannot be considered in public. For example, since the FSA leads for the UK Government in negotiations on matters of food and animal feed law in Europe, discussions on the approach to be taken in those negotiations are held in private. Committees of the Board will also be held in public or will have their minutes published- unless there are particular reasons why specific issues cannot be considered in public.

**Membership:** In line with the 1999 Food Standards Act the Board will consist of a Chair, Deputy Chair and between 6 and 10 other members of whom 1 shall be appointed by the Welsh Government and 1 shall be appointed by the Department of Health for Northern Ireland; the others shall be appointed by the Secretary of State.

**Chairman:** The Chair and Deputy Chair of the FSA are appointed by Ministers in England, Wales and Northern Ireland acting jointly.

**Quorum:** Four Board Members, of whom one to be one of the Members from Northern Ireland or Wales plus the Chair of the meeting.

**Attendance:** Members of the Executive shall also be required to attend and participate in Board meetings.

**Reporting:** The Board will approve an annual report of our activities and performance which will be laid before the Westminster Parliament, the Welsh Government and the Northern Ireland Assembly.

**Effectiveness:** The Board will undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual members in line with best practice outlined in the UK Corporate Governance Code.

**Meetings:** The Board shall meet at least 4 times a year.

As part of their meetings the members of the Board will meet three times each year in closed session to discuss issues related to governance, the performance of the Chief Executive, and the functioning of the relationship with the Executive from the perspective of the Board.

**Responsibilities:**

The Board:

- sets strategy, strategic priorities and strategic outcomes;
- identifies and monitors strategic, reputational and corporate risk; determines the FSA risk appetite;
- takes major decisions on the regulatory and controls framework;
- takes major decisions on policy and key issues of principle;
- informs advice to Ministers, and on more prominent issues provides advice to Ministers;
- has collective responsibility for FSA activities and discharge of our statutory duties;
- through the Chair, appoints the CEO and holds him/her accountable; and
- approves the Annual Report.

## ANNEX B

### TERMS OF REFERENCE FOR THE FSA BUSINESS COMMITTEE (AS AGREED AT THE BOARD MEETING ON WEDNESDAY 19 JUNE 2019)

**Purpose:** The Business Committee is a committee to which the FSA Board has delegated functions as detailed below. It exists to provide appropriate high-level oversight of financial and operational matters at Board level and support the translation of policy into effective results.

**Transparency:** It meets in the open so that it is clear to interested parties and the public on what basis it has taken its decisions and what evidence it has taken into account in reaching them. There are some issues that need to be discussed in private, because they relate to issues that are commercial in confidence, are the subject of live negotiations in which the public interest could be adversely affected, or relate to individuals.

**Membership:** All members of the Board are members of the Business Committee. The Chief Executive and members of the Executive Team are also members of the Business Committee up to a number equivalent to the Non-Executive members of the Board excluding the Chair. The Chief Executive will be responsible for determining which members of the Executive are members of the Business Committee.

**Chair:** The Chair of the FSA.

**Quorum:** Four Non Executive Board Members, of whom one to be one of the Members from Northern Ireland or Wales plus the Chair of the meeting, plus three Executive Team members including the Chief Executive or their nominated deputy.

**Reporting:** The Business Committee will publish its minutes. The Terms of Reference for the Business Committee will be reviewed annually by the Board together along with the Terms of Reference and Standing Orders for the Board.

**Meetings:** The Business Committee shall meet at least 4 times a year.

#### **Responsibilities:**

The Business Committee will on behalf of the Board:

1. Scrutinise the financial and other performance information relating to the FSA and advise the Chief Executive in the discharge of the Accounting Officer responsibilities.
2. Identify and monitor operational and delivery risks.
3. Approve the annual business plan and maintain oversight of major financial decisions in line with that plan.

4. In private, consider confidential matters relating to the position to be adopted on behalf of the UK in international discussions concerning food and animal feed law.
5. Consider such other matters as may from time to time be delegated to the Business Committee by the main Board.

The Chair may decide that specific issues must be remitted to the Board for decision.

## **ANNEX C**

### Terms of Reference for the Audit and Risk Assurance Committee (ARAC)

#### **Purpose**

The Audit and Risk Assurance Committee is an advisory Committee of the FSA Board with no executive powers. It is responsible for reviewing, in a non-executive capacity, the comprehensiveness and reliability of assurances on governance, risk management and the control environment. It is also responsible for reviewing the integrity of financial statements and the annual report.

#### **Membership**

A minimum of four Members of the FSA Board appointed by the FSA Chair under delegated powers following consultation with the Committee Chair. At least one of those appointed will be a Board Member for Wales or Northern Ireland.

The term of appointment will normally be coterminous with an individual's term of appointment to the FSA Board and will automatically cease if an individual ceases to be a Board Member.

At least one of the Committee members should have recent and relevant financial experience.

All new members will be provided with induction training and the FSA will provide for any additional development which is deemed necessary for the member to fulfil their role on the Committee. The Chair of the Audit and Risk Assurance Committee will hold an annual review with each member and any training or development needs will be taken forward with the agreement of the Chair and Accounting Officer.

#### **Committee Chair**

Appointed from the membership of the Committee by the Chair of the FSA under delegated powers. The term of appointment will normally be coterminous with an individual's term of appointment to the FSA Board.

#### **Co-option**

The Committee may co-opt additional members (whether members of the FSA Board or not) for a period of up to one year to provide specialist skills, knowledge or experience. Co-opted members will have a right to speak, but not vote. Co-opted members will not be included in any calculation of the quorum.

#### **Quorum**

Three Non-Executive Board Members.

## **Attendance**

The Chief Executive, as Accounting Officer, the Director of Finance and Performance, the Planning Manager, the Head of Audit Assurance, and a representative<sup>1</sup> of the external auditors would normally be invited to attend.

Directors and other officials will be invited to attend as required.

## **Reporting**

The Audit & Risk Assurance Committee Chair will provide the Chair of the FSA and the Board with a written update on the key elements of Committee meetings. The Audit & Risk Assurance Committee will report formally in writing to the Board, annually, to support the finalisation of the accounts and the Governance Statement and to update the Board on the work of the Committee, Internal and External Audit and any areas requiring specific attention.

## **Meetings**

The Audit & Risk Assurance Committee will meet at least four times a year. The Chair of the Committee will convene additional meetings as necessary. The Committee has the right to sit privately without any non-members present for all or part of a meeting.

Additionally, the members of the Committee will meet with the Head of Audit Assurance and, separately, the External Auditors, annually, in closed meetings when the efficacy of the processes, trust, co-operation and any other issues can be discussed and future action agreed.

The FSA Chair, the Board or the Accounting Officer may ask the Audit and Risk Assurance Committee to convene further meetings to discuss specific issues on which they want the Committee's advice.

## **Responsibilities**

The Audit & Risk Assurance Committee will advise the FSA Board and Chief Executive on:

1. The strategic processes for risk management, the high-level control and governance framework and the effectiveness of its operation in practice;
2. The contents of the Governance Statement;
3. The accounting policies, the accounts, and the annual report of the FSA, including the judgements used in producing the accounts, the adequacy of disclosures, the process for review of the accounts prior to submission for audit,

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<sup>1</sup> This includes third parties appointed to carry out external audit work on the National Audit Office's behalf

- levels of error identified, and management's letter of representation to the external auditors;
4. The effectiveness of the design and operation of financial systems and controls;
  5. The planned activity and results of both internal and external audit and the results of other, external assurance reports;
  6. The resourcing and effectiveness of the internal audit function;
  7. Provide independent scrutiny of the audit process of the Local Authority audit system;
  8. The adequacy of the management response to issues identified by audit activity, including external audit management letters;
  9. Assurances relating to the corporate governance requirements for the organisation;
  10. Proposals for tendering for either Internal or External Audit services or for the purchase of non-audit services from contractors who provide audit services;
  11. Anti-fraud policies and whistle-blowing processes, and arrangements for special investigations; and
  12. The Committee's effectiveness having reviewed its own performance, constitution and terms of reference and recommending any changes it considers necessary.

### **Information Requirements**

The Audit & Risk Assurance Committee will be provided with, where appropriate:

1. Any changes to the organisation's Corporate Risk Register that are relevant to the responsibilities of the Committee;
2. The risk management strategy;
3. Management assurance reports, and report on the management of major incidents, 'near misses' and lessons learned;
4. Progress reports from the Head of Audit Assurance summarising:
  - a. work performed (and a comparison with work planned)
  - b. key issues emerging from Internal and Local Authority Audit work
  - c. management action in response to issues identified and agreed
  - d. changes to the Audit Assurance plans

- e. any resourcing issues affecting the delivery of Audit Assurance objectives
5. Progress reports from the External Audit representatives summarising work done and emerging findings;
6. External assurance and compliance reports in relation to the FSA's activities;
7. Audit Assurance strategies and annual plans;
8. The Head of Audit Assurance's Annual Opinion and Report;
9. Quality Assurance reports on the Audit Assurance function;
10. The draft accounts of the organisation;
11. The draft Governance Statement
12. Any changes to accounting policies;
13. Proposals to tender for audit functions;
14. Summary of findings of every Audit Assurance report;
15. External Audit's management letter; and
16. A report on cooperation between the FSA auditors and external auditors.

The Audit & Risk Assurance Committee will work with the FSA's Executive Management Team to ensure that the Board can be confident that risk management processes, content, mitigating and recovery actions are appropriate and correctly resourced.

### **Notes**

1. The Chair of the Audit & Risk Assurance Committee will have free and confidential access to the Chair and Chief Executive of the FSA whenever appropriate.
2. The Head of Audit Assurance and the representatives of External Audit will have free and confidential access to the Chair of the Committee.
3. The Committee may procure specialist ad-hoc advice at the expense of the FSA, subject to the cost being agreed by the Chief Executive as Accounting Officer.

## **ANNEX D**

### **STANDING ORDERS FOR FOOD STANDARDS AGENCY BOARD MEETINGS**

(amended in July 2019 following the June 2019 Board Meeting)

#### **Preamble**

1. These Standing Orders apply to all Committees exercising powers or functions delegated by the Board (currently the Business and Audit and Risk Assurance Committees). They do not apply to the Scientific Advisory Committees.
2. Unless otherwise stated, any action required by these Standing Orders to be undertaken by the Chair may, in his/her absence, also be undertaken by the Deputy Chair.
3. Any reference to a Board meeting means an Open Board meeting and a Business Committee meeting, unless otherwise stated.

#### **Date and Time of Meetings**

4. The FSA Chair (Chair) shall, by the end of March, annually determine the dates, times and places of ordinary Open and Business Committee meetings for the year following, but the Board shall meet at least four times in each calendar year. The Chair may re-arrange the date, time and place of any ordinary Board meeting, convene an additional meeting or cancel any meeting where there are no matters for decision or discussion.
5. The locations for Board meetings shall be set so as to ensure that at least one meeting every year is held in Wales or Northern Ireland.
6. Any Board meeting may be conducted wholly or in part by electronic means including by video conference, an internet video facility or telephone conference.
7. The location of a meeting held by electronic means shall be deemed to take place where the largest group of those Board members participating is assembled or, if there is no group which is larger than any other group, where the Chair of the meeting is located.

#### **Agenda**

8. The Board Secretary shall send an agenda for each Board meeting by email and/or by post to every Board member at least ten clear working days before the date of the meeting or, in the event of urgency, at the earliest possible opportunity.

9. Failure to send or deliver an agenda to any Board member shall not invalidate the proceedings.
10. A copy of the agenda for each Board meeting shall be published on the FSA website at least three clear working days before the meeting.

### **Business to be transacted**

11. The Board Secretary shall maintain a list of future agenda items for the year ahead. This list shall be compiled following discussion with the Chair, other Board members and the Chief Executive. However, the Board Secretary shall additionally consult the Chair and the Chief Executive on the business to be transacted at each meeting prior to the distribution of the agenda.
12. Any Board member may request the Chair to consider including an item on an agenda provided he or she has given at least 15 clear working days' notice before the meeting to the Chair or the Board Secretary.
13. Only the business specified in the agenda for the meeting may be transacted save that business of an urgent nature that is not included in the agenda may also be discussed and determined at any meeting.

### **Chairing of Meetings**

14. Board meetings shall be chaired by the Chair of the FSA or, in his/her absence, the Deputy Chair. In the event that neither the Chair nor Deputy Chair is present, the Board members present may appoint one of their number to chair the meeting. The decision of the meeting Chair on any question of procedure raised at a meeting shall be final.

### **Quorum**

15. The quorum for Board meetings shall be the Chair of the meeting plus four other Board members of whom one must be one of the members for Wales or Northern Ireland.
16. If there is no quorum within 30 minutes of the scheduled start of a Board meeting, or if the meeting becomes inquorate during the proceedings, the meeting shall be adjourned and the business postponed either to: a. a date, time and place fixed by the Chair of the meeting at the adjournment; or b. the next ordinary Board meeting.
17. Where Board members are not able to attend a meeting, they shall send their apologies in advance to the Board Secretariat. A Board member shall not be

absent from more than two consecutive meetings without the prior agreement of the Chair.

### **Interests to be declared at meetings**

18. A Board member shall notify the Chair (or the Deputy Chair in the case of the Chair having an interest) in advance of the meeting of any interest that they may have in any agenda item and declare the nature of the interest at the meeting before the matter is discussed. In accordance with the provisions of the Code of Conduct, the Chair shall decide whether the Board member may remain present at the meeting for the discussion on that item and any decision thereon.
19. The Board Secretary or such other person present to take the minutes of the meeting shall record the declaration of interest, its nature and whether the individual left the room in the minutes of the meeting.

### **Minutes of Board meetings**

20. The Board Secretary shall arrange for minutes to be prepared for all Board meetings. The minutes of a meeting shall be confirmed as a correct record at the next following Board meeting. When the next meeting is an additional meeting, the minutes may be confirmed at the next ordinary Board meeting. Once confirmed, the minutes are conclusive evidence of the decisions of the Board.
21. A copy of the minutes of Board meetings shall be published on the FSA website.

### **Decisions and voting**

22. Decisions of the Board shall be taken by such method as the Chair chooses to ascertain the views of those present at the meeting. Where any matter is voted upon, it shall be decided by a majority of those present.
23. In the event that a vote is tied, the Chair shall have a second or casting vote.
24. Any Board member may request that his or her vote or abstention is recorded in the minutes.
25. The Board Secretary or such other person present to take the minutes of the meeting shall record all Board decisions in the minutes of the meeting.

### **Written Resolutions**

26. A written resolution signed by at least three quarters of appointed Board members shall be as valid as if it had been agreed at a Board meeting. Such a resolution may consist of several documents in the same form each signed by one or more Board members including electronic signatures.

#### **Delegation of powers and inter-sessional work**

27. The Board has authorised the Chair to discharge such powers of the Board as he/she deems necessary in order to deal with the business of the Agency between Board meetings. Where, in the opinion of the Chair, significant operational or other matters require approval by the Board between meetings papers shall be circulated for approval by written resolution. Where, in the opinion of the Chair, full Board consideration is not justified or when circumstances make it impractical or unnecessary to consult the Board collectively, the Chair shall report to the Board at the earliest opportunity on any action that he or she may take.

#### **Variation or Suspension of these Standing Orders**

28. The Board shall review these Standing Orders annually, along with the terms of reference for the Board and each of its Committees, to ensure their continued effectiveness.
29. These Standing Orders shall not be varied or suspended unless a majority of those present at the meeting where the matter is considered so agree.

### **COMMITTEES OF THE BOARD WHICH EXERCISE POWERS OR FUNCTIONS ON ITS BEHALF**

#### **Application to Committees - General**

30. Standing Orders 7, 9, 10, 11, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25 and 26 shall apply to Committees with any necessary modifications and subject to the provisions of Standing Orders 31 to 36 below.

#### **Date and Time of Meetings**

31. Each Committee shall annually determine the dates, times and places of its ordinary meetings for the year ahead but shall meet at least once each year or on such number of occasions as the Board might specify in terms of reference for each Committee.
32. The Committee Chair may re-arrange the date, time and place of any ordinary meeting, convene an additional meeting or cancel any meeting where there are no matters for decision.

## **Agenda**

33. The Board Secretariat shall send an agenda for each Committee meeting by email and/ or by post to every Committee member at least five clear working days before the date of the meeting or, in the event of urgency, at the earliest possible opportunity.

## **Chairing of Meetings**

34. The Chair of each Committee shall be appointed by the FSA Chair for such term as he/she may determine, but ordinarily to run concurrent with the remainder of a Board member's term of office.
35. In the absence of the Chair, the other Committee members present shall appoint one of their number to chair the meeting.
36. Business Committee meetings shall be chaired by the Chair of the FSA or, in his/her absence, the Deputy Chair. In the event that neither the Chair nor Deputy Chair is present, the Board members present may appoint one of their number to chair the meeting. The decision of the meeting Chair on any question of procedure raised at a meeting shall be final.

## **Membership**

37. Membership of each Committee shall be in accordance with the terms of reference for each Committee.
38. All members of the Board are members of the Business Committee. The Chief Executive and members of the Executive Team are also members of the Business Committee up to a number equivalent to the Non-Executive members of the Board excluding the Chair.

## **Quorum**

39. Unless otherwise stated the quorum for any Committee meeting shall be a minimum of three or such greater number as the Board may state in the terms of reference for the Committee.
40. The quorum for the Business Committee shall be four Non-Executive members, of whom one to be one of the members from Northern Ireland or Wales plus the Chair of the meeting, plus three Executive Team members including the Chief Executive or their nominated deputy.

## **Definitions**

**Agenda** – means the reports or papers for the meeting together with the cover sheet listing the items for consideration at a meeting

**Clear Working Days** – excludes the day on which the Agenda is distributed, the day of the meeting, Saturdays, Sundays and Public Holidays.

## ANNEX E

### Food Standards Agency Governance and Powers

#### INTRODUCTION

1. As we approach the end of the Transition Period and prepare for the FSA to assume new responsibilities, this paper provides a timely summary of the FSA's responsibilities and powers. The response to COVID-19, and the need for the FSA to provide emergency advice to local and national government about risk and risk management has also highlighted the importance of a clear understanding of what the FSA is empowered to do, and how it discharges its statutory responsibilities.
2. Background information about the history of problems with food safety and authenticity that lead to the FSA's creation can be found in the report of Professor Phillip James (1997) and the subsequent Government White Paper ("The Food Standards Agency – A Force for Change") (1998). The White Paper is particularly helpful in explaining the then Government's original intentions in relation to the role of the FSA.

#### SUMMARY

3. Questions arise from time to time as to the extent of the Food Standards Agency's (FSA) powers and responsibilities vis a vis the Administrations in England, Wales and Northern Ireland, and local authorities in those three countries. What is the extent of the FSA's remit: when can it determine issues, and when is its role advisory; when, if at all, in relation to local authorities, can it direct as opposed to recommend?
4. In summary, save for its role in the carrying out Official Controls in meat plants, the role of the FSA is essentially an advisory one. The FSA was created in the wake of the Bovine Spongiform Encephalopathy and other food-related crises at the end of the 20<sup>th</sup> century to safeguard consumers' interests by ensuring that there is a separate body, created by statute and non-ministerial, able to give independent advice to Ministers and the public to guard against risks associated with the consumption of food.
5. The FSA can make policy recommendations to Governments in all three countries and to other public authorities. It has no power to determine policy itself. In relation to local authorities, the FSA can give guidance and can recommend a course of action but has no power of direction. That power rests with Ministers.
6. Whilst the remit of the FSA varies across the three countries, the nature of its powers and responsibilities vis a vis the Administrations of those three countries is identical, save in one respect: where the FSA acts on behalf of the UK Government in international relations it acts for the Westminster Government. Any arrangements to consult or otherwise involve the Devolved Administrations in the FSA's international work, whether in Brussels or

elsewhere, need to take account of the wider UK Government devolutionary arrangements for working with those Administrations.

7. The UK's departure from the EU, and the end of the post-departure Transition Period do not in themselves alter any of the above.

## **DETAIL**

8. The remit and powers of the Food Standards Agency (FSA) derive from a combination of four sources: the FSA's legal constitution, the operation of Devolution within the UK, arrangements put in place as part of the administration of government and custom and practice – particularly as regards working with the EU - developed since the FSA was created.

### **The Law – the FSA as a “Creature of Statute”**

9. The law governing the FSA – its creation, constitution, purpose and functions – is largely contained in the Food Standards Act 1999 (the 1999 Act).
10. Section 1 of the 1999 Act creates the FSA and, in subsection (2), states:  
*“The main objective of the Agency in carrying out its functions is to protect public health from risks which may arise in connection with the consumption of food (including risks caused by the way in which it is produced or supplied) and otherwise to protect the interests of consumers in relation to food.”*
11. As a statutory creation the FSA can only do the things Parliament has, through statute, given it a power or duty to do. Those things – the FSA's functions – are set out elsewhere in the 1999 Act. Its objective in Section 1(2) is not a power. A decision or action may be highly desirable or essential in order to protect public health from an acute food safety risk but the FSA itself is not able to make that decision or take that action unless power to do so is conferred on the FSA by another provision of the 1999 Act or by another statutory provision.
12. The 1999 Act is a comparatively short statute (43 sections and some schedules). The provisions to highlight for the purpose of this paper, in relation to the FSA's powers, are Sections 6, 7 and 9, which confer powers for the FSA to develop policy and give advice to Ministers, other public bodies and the public, in relation to food and animal feed, and Sections 19 and 20 which deal with the FSA's power to publish its advice and information and to give guidance on the control of foodborne diseases. The key point in relation to policy is that the FSA's power is to develop, not to determine. The FSA has no power to determine food safety or any other food-related policy.

### **Administration of Government**

13. For the first ten years of its existence the FSA's remit reflected the intentions of the Government on its creation in 2000. The FSA was responsible for the development of food safety policy, and of much nutritional and food labelling policy throughout the UK. In 2010 the incoming Conservative/Liberal

Democrat coalition moved the FSA's responsibility for nutrition policy and non-food safety (i.e. authenticity) labelling in England to the Department of Health in the case of nutrition policy, and to the Department of the Environment, Food and Rural Affairs (DEFRA) in the case of labelling. These changes were made through "machinery of government" procedures. They were treated in the same way as other alterations in responsibilities and remits might be handled between government departments. No changes were made to the 1999 Act. Two points follow from this:

- Since they were done through the "machinery of government" procedures they could be undone, in whole or in part in the same way, and
- Because no alteration or limitation has been made to the functions and objective of the FSA under the 1999 Act there is no "interest of consumers in relation to food" that is "off limits" for the FSA. Strictly it could amount to an unlawful fettering of discretion if the FSA regarded itself as having no power to opine or advise on – for example – a matter of labelling policy in England. However, it might be thought under the current arrangements that the role of the FSA in relation to those areas of policy moved elsewhere in England in 2010 is a residual one – akin to a "watching brief" - so that the FSA would express a view or give advice only if it felt that interests of consumers were at risk of very significant imminent harm.

### Devolution

14. The period leading up to the creation of the FSA coincided with devolution of substantial responsibilities to newly established administrations in Scotland, Wales and Northern Ireland. Food and animal feed became matters of devolved competence and the 1999 Act reflected this in the way the FSA is constituted, governed and managed. The FSA is unusual if not unique, in having been set up after the Devolution Settlement, but with a UK-wide remit. The FSA Board had to contain members (one for each of Wales and Northern Ireland, two for Scotland) appointed by the Devolved Administrations<sup>2</sup> and the FSA had to maintain offices in and appoint Directors for each country. Advisory Committees were created for Wales, Scotland and Northern Ireland to advise the FSA Board on matters connected with its functions in those countries. Finally, the Devolved Administrations are able, if they so decide, to remove responsibilities from the FSA and deal with the relevant matters themselves. The Scottish Government invoked this power and created Food Standards Scotland in 2015.
15. The FSA's responsibilities and accountability to the Devolved Administrations in Wales and Northern Ireland are equivalent, in areas within the devolved competence of those Administrations, to its responsibilities and accountability

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<sup>2</sup> The devolutionary provisions of the 1999 Act relating to Scotland became inoperable after the creation of Food Standards Scotland in 2015. Orders were prepared under s.33 of the 1999 Act and s.104 of the Scotland Act to make amendments reflecting the creation of FSS. They still have not been made. This is because the s.33 order has to be approved by all 4 legislatures and that has never (due to logistical issues only) been achieved

to the Westminster Government. International relations are not matters of devolved competence. Where the FSA works in Europe or elsewhere it does so as part of the Westminster, UK, Government.

### **Custom and Practice**

16. The preceding sections of this paper may create the impression that the FSA is a purely advisory body, with no executive power at all. In practice the FSA has exercised considerable executive authority in a number of areas.
- In the event of a food poisoning incident or outbreak other government departments, local authorities, industry and consumers look to the FSA to take swift, decisive action. Whilst there can from time to time be uncertainty as to the boundaries of this area of FSA responsibility – is a particular incident a matter for the FSA, or for DEFRA or Public Health England? – the FSA's role in managing food safety incidents has never been challenged.
  - The FSA has clear responsibilities for applying food safety legislation in certain food businesses<sup>3</sup>. When the FSA was created the former Meat Hygiene Service (MHS) already existed as an agency within DEFRA. The MHS became an Executive Agency of the FSA. In 2010, to realise management and financial efficiencies the organisations of the FSA and MHS were merged.
  - The White Paper prior to the 1999 Act made clear that it was envisaged that the FSA would assume responsibility in Brussels for providing technical input to working groups of the EU. In practice, as the way in which the making of subordinate legislation in Brussels has evolved, with more and more decisions taken by Commission Working Parties and other committees, FSA officials took on a greater responsibility for contributing the UK position in relation to those decisions. This FSA role has been uncontroversial. The nature of decisions taken (for example appropriate levels for the presence of certain contaminants in food, or the addition or removal of a particular imported food or food ingredient from a list of approved imports into the EU) has been technical and the FSA developed effective mechanisms for identifying the rare occasions when a particular issue was politically, or for other reasons, sensitive and for ensuring wider government involvement on those occasions.

### **The FSA and Local Authorities**

17. Local authorities had been exercising functions in relation to food safety and authenticity for a long time prior to the FSA's creation. Like the FSA local authorities are statutory corporations and in relation to food safety many of their functions were codified and strengthened in the Food Safety Act 1990.
18. Sometimes officials in central government regard local authorities as their agents, acting on their behalf. In some instances this may be correct. However, in the case of local authorities' functions in respect of food safety and authenticity, and the relationship between the FSA and local authorities, it

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<sup>3</sup> The relevant legal provisions are contained in regulations made under the European Communities Act 1972 rather than the 1999 Act.

is not. The FSA has no power to direct local authorities, or any particular authority. The FSA can advise and give guidance, but if it is thought that a local authority must be directed to take, or refrain from taking, a particular action, it is the Secretary of State in England, and in the Devolved Administrations it is the appropriate Minister within that Administration, who under the Food Safety Act 1990 has the relevant power. This is the case whether the local authority is in England, Wales or Northern Ireland (or Scotland, as Food Standards Scotland illustrated with the long-running litigation concerning a food business selling unpasteurised cheese). It is clear from the 1999 Act that the FSA's relationship with local authorities is more one of monitoring, and, if appropriate of reporting poor performance<sup>4</sup>, than of directing.

**'Policy', 'Guidance', 'Recommendations' and 'Advice'**

19. The FSA's status, and the way in which the FSA describes itself or is described by others, are not always helpful in maintaining clarity as to the extent of the FSA's powers and role.
20. The FSA is a non-ministerial department. That status is frequently useful. It means that when, within the Whitehall Departmental world, invitations are being issued to "all departments", the FSA can have a seat at the table. But it is easy for newcomers to the FSA, particularly those with experience of working within other departments, to assume that, like other departments, there will be some policy areas that are exclusive to the FSA; that in those areas the decision of the FSA is final. Strictly this can never be correct. It may be that in practice, recognising that in some areas the expertise of the FSA is preeminent and that it would be wasteful and unnecessary to replicate that expertise elsewhere in government, Ministers are content to accept a recommendation from the FSA without question. But any Minister – whether in Westminster, Wales or Northern Ireland – can choose not to follow FSA advice, whether that advice is a mild suggestion of the strongest recommendation.
21. The FSA is often labelled as a "regulator" of the food industry, for certain purposes. But it lacks many of the attributes commonly regarded as those of a regulator. Save for meat plants, the FSA cannot tell food businesses what they must do or not do or take action to sanction businesses for regulatory breaches. In the majority of cases those powers belong to local authority officials. And as indicated above, the FSA cannot insist that those officials take, or refrain from taking, any particular action. The FSA's "guidance" is just that. A local authority that fails to follow guidance from the FSA without good reason might place itself in a difficult position in any subsequent proceedings, but "guidance" can never be mandatory.

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<sup>4</sup> Under the Official Food and Feed Control Regulations 2009 the FSA can require a local authority to publish an FSA report into its performance

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## The Impact of Leaving the European Union

22. During the 1990s and first decade of the 21<sup>st</sup> Century much of European food law became harmonised across the EU. An interlocking group of EU Regulations established a common regulatory framework and regulatory decisions were mostly taken at a European level, in Brussels. Once the harmonised framework was in place, relatively few further significant decisions fell to be made. There were a large number of detailed, small-scale decisions taken on a day to day basis, but member states were content for those to be taken in technical committees. The consequence of this within the UK was that the FSA was largely left to get on with its role of representing the UK in Brussels, with other government departments taking little interest in its work. This raised an obvious question, as part of the FSA's EU Exit preparations: how should those regulatory decisions previously taken in Brussels be handled in future?
23. After considerable discussion, debate and deliberation it was decided that regulatory decisions in relation to food safety previously the responsibility of the EU's decision-making framework would be taken by Health Ministers who would receive advice in relation to those decisions from the FSA. It was recognised that the precise relationships between FSA advice, potential further input from officials in Health departments, Westminster Ministers and their counterparts in Devolved Administrations would need to evolve through practice. In due course, Ministers confirmed to Parliament, the FSA would be given the power to make regulatory decisions and the process for then 'activating' that power would be set out. To date there has been no progress on this commitment and no timeline set, as Ministers do not consider it critical to EU Exit/Transition 'Day One' requirements.
24. On a number of occasions during the three years preceding the UK's departure from the EU the FSA experienced the consequences of the ambiguities and uncertainties inherent in the UK's Devolution Settlement. There was (and probably will continue to be) disagreement between officials in Westminster and those in Edinburgh, Cardiff and Belfast as to whether functions returning from the EU to the UK should become responsibilities of the Westminster Government or – where the area had been devolved to the Devolved Administrations – should in effect pass straight to those Administrations.
25. As a body whose responsibilities are in most instances owed equally to Westminster, Welsh and Northern Irish Administrations, the FSA can find itself in an acutely difficult position. The potential for those difficulties arising in relation to the way in which the UK Government attempts to deal with the position of Northern Ireland is very clear, and will require the FSA to focus on its core qualities: its independence, its ability to move quickly (more quickly than other departments, anyway) and its openness.