

## **Submission from Friends of the Earth on the Official Controls (Amendment) Regulations 2024 and response by the Department for Environment, Food and Rural Affairs**

The Official Controls (Amendment) Regulations 2024 amends regulations to provide a long term legislative basis for the Border Target Operating Model (BTOM).

Part 2 of the instrument amends EU regulation 2017/625 “on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products”. The explanatory memorandum includes an explanation that it, in part, “uses powers conferred by the Retained EU Law (Revocation and Reform) Act 2023 to amend or replace provisions in the Official Controls Regulation and other relevant legislation to:

- Provide a long-term legislative basis for the BTOM beyond reliance on the [Transitional Staging Period] for relevant goods;
- Ensure that the BTOM can be updated dynamically in response to risk by allowing changes to be made administratively; and
- Provide the legislative basis for further aspects of the BTOM to be delivered including Trusted Trader Schemes.”

The instrument makes a number of grammatical amendments; amendments that account for the existence of digital certificates, remote/automated examination, Northern Ireland, official plant health officers and a national reference lab, etc.; and some change to enforcement/cost recovery regimes.

However, there are two main areas of concern relating to the first and second bullets in the quoted EM above which, in our opinion, are not sufficiently justified nor is the impact and risk sufficiently considered, despite being flagged in the explanatory memorandum.

- I. **Moving border controls away from borders: Regulation (7)** continues to implement the agenda that we and others (eg Finlay Carson MSP letter) have previously raised concerns and questions about in previous BTOM SIs. Specifically, that official controls will be performed at places other than the point of entry and other specified locations. It changes the concept (in article 44(3) of the EU regulations) of an “appropriate place” to perform controls from one “including” [subsections a-e] to one “including, but not limited to” [subsections a-g], and adds “a control point” as place (g). Other regulations do similar (eg the EM flags 7, 9, 11, 14, 16, 17 and 18 as providing “flexibility on location and timing” of “documentary checks”) – ie in (14) the inserted (iii) allows for identity and physical checks to take place “at another appropriate place”, and the substituted (e) allows for automated and offsite documentary checks. This is described in the EM as “Regulations 7 and 14 provide for flexibility on the location of identity and physical checks, so that these may take place away from a [Border Control Point], such as at place of destination.” **Whilst we understand the policy intent, as mentioned, we are not convinced it is unproblematic. Questions were raised during previous changes to the BTOM about rationale, risk and precautionary measures. It would be helpful for the Department for Environment, Food and Rural Affairs to be asked to explain how these questions/concerns raised previously have been addressed.**

## 2. **Allowing the authority to designate derogations/exemptions:**

- **Regulation (8)** removes the blanket requirement for documentary checks “on animals and goods other than those subject to official controls at border control posts under Section II” in article 45 of the EU regulations. Instead these are required only “depending on the risk to human, animal or plant health, animal welfare or, as regards GMOs and plant protection products, also to the environment”, like identity and physical checks. This raises concerns. **The EM says this allows the frequency of checks to be “based on risk”, but it is difficult to see how the risk of misdeclaration to avoid documentary checks has been factored in. Although these are a lower risk group, the potential for entirely unchecked and potentially risky products to enter is concerning. The EM doesn’t mention any assessment of risk/potential impact on the environment or public health. A performance management framework is flagged, but will not be in place until the BTOM is fully operational and no detail on how it will assess the impact of this change on misdeclaration/import fraud is offered.**
- Regulation (10) amends article 48 of the EU regulations, changing it from allowing “the appropriate authority” to make regulations [emphasis added] “to **supplement** this regulation concerning rules establishing the cases where, and the conditions under which, **the following categories** of animals and goods are exempted from Article 47 (on animals and goods subject to official controls at border control posts), and when such exemption is justified” to: allowing the authority to establish “**the cases** where, and the conditions under which, **categories of animals and goods, including those listed in paragraph 2, may be exempted** from any of the requirements of **this Regulation or legislation made under this Regulation or treated as if made under this Regulation, or from any of the rules referred to in Article 1(2)** to the extent that these are used for the verification of compliance with rules in Article 1(2), including by amendment or modification of those requirements or rules.” It then provides for a range of things that the regulations “may” cover, although this is not a prescriptive or exhaustive list. Regulation (15) does similar in terms of the frequency of checks. The EM says: “Regulation 10 allows for the categorisation of animals and animal products based on risk and provides the ability to exempt goods categorised as low risk from checks and certification requirements at a BCP and provides that risk levels may be published and managed online by the appropriate authority, rather than set in regulations.” **This raises similar concerns. It allows the authority to go beyond the scope of the categories of potentially exempted goods and the requirements of not only the regulation itself but other subordinate legislation. Some of the other smaller amendments later on change specific wording in line with this. Does the approach here present a risk for modifications to be made beyond the scope intended, ie by giving the authority the power to treat the relevant lists of good/products as indicative, and to deregulate beyond these potentially inappropriately?**

26 November 2024

## Response from the Department for Environment, Food and Rural Affairs (Defra)

***Q1: Whilst we understand the policy intent [for checks away from BCPs], as mentioned, we are not convinced it is unproblematic. Questions were raised during previous changes to the BTOM about rationale, risk and precautionary measures. It would be helpful for the Department for Environment, Food and Rural Affairs to be asked to explain how these questions/concerns raised previously have been addressed.***

### **Defra's Response:**

Overall, the Border Target Operating Model (BTOM) strikes the appropriate balance between protecting the UK's public health, food supply chains and farming industries and natural environment, and setting a pragmatic, proportionate controls regime. For example, by taking a risk-based approach our controls are focused on consignments proven to cause the most significant biosecurity risk.

### Impact of this instrument on checks away from BCPs

This instrument provides **the ability** for documentary, identity and physical controls to take place at places other than Border Control Posts or control points. Currently, some controls already take place away from Border Control Posts and control points, such as documentary checks which take place remotely, and ID and physical checks on live animals from the EU which take place at destination. This instrument provides the legislative framework for these policies to continue, or be extended to non-EU goods. As it is important that the BTOM can be responsive to changing biosecurity and public health risk, this instrument provides the legislative basis for this approach to be extended to other goods in future, depending on risk. However, **this instrument does not itself make any changes to where controls are currently conducted.**

We will seek views from stakeholders on any proposed legislative changes which impact where checks can take place and will consider these responses ahead of legislation being made. The relevant Statutory Instruments would also be subject to parliamentary scrutiny.

### Responding to stakeholder feedback

The BTOM has been the focus of multiple rounds of engagement. Following the launch of the draft BTOM in April 2023, the Government ran a 6-week stakeholder engagement period. In addition to Government-led events for UK and international traders, business representative bodies and for our trading partners, various trade bodies organised their own events to which Government officials were invited. Around 10,000 participants registered for Government-led events and we received over 200 written responses to our online portal. We also received over 650 responses to our SPS-focussed sessions from a wide range of stakeholders including food retailers, producers, the logistics sector and many more. Around half of respondents to the online portal were traders, with the majority involved in moving Sanitary and Phytosanitary goods. The majority of responding businesses identified as small or medium-sized enterprises.

This feedback was considered, and then informed the final BTOM which was published in August 2023.

Further targeted stakeholder engagement has taken place on statutory instruments to implement BTOM policies, so that views can be considered ahead of legislation being finalised and laid before parliament for scrutiny.

We will continue to engage with stakeholders as implementation continues. For example, when the BTOM was published, it indicated that late 2024 was the target date for implementing the BTOM controls on live animals at the border. At this point, physical inspections of live animal imports from territories subject to transitional import arrangements would move away from destination to be conducted at a BCP, bringing them in line with the existing controls for Rest of the World countries. The published date was a target pending confirmation of implementation arrangements.

After reviewing our position and after regular engagement with key trade associations in the live animal trade sector, we have recently confirmed that BTOM live animal import controls at the border will not start during 2024. We will provide a further update on the timeline for implementation by Summer 2025. We will look to confirm a revised start date for these controls as soon as we can. In the intervening period we will continue to maintain the existing system of effective controls on ROW imports through BCPs, and controls on imports from territories subject to transitional import arrangements at destination.

***Q 2a: The EM says [the amendment in Regulation 8] allows the frequency of checks to be “based on risk”, but it is difficult to see how the risk of misdeclaration to avoid documentary checks has been factored in. Although these are a lower risk group, the potential for entirely unchecked and potentially risky products to enter is concerning. The EM doesn’t mention any assessment of risk/potential impact on the environment or public health.***

#### **Defra’s Response:**

##### For Animal Health

Defra has undertaken the risk modelling necessary to categorise animals and animal products, advised by an expert panel comprised of risk analysts, risk managers and policy representatives from the Animal and Plant Health Agency, the Food Standards Agency (which advises the UK and Welsh Governments), and Food Standards Scotland, alongside public health and disease control policy experts from the UK Health Security Agency and from the UK, Welsh and Scottish Governments.

We now have the ability to formally categorise imports of animals and their products as low, medium, or high risk, and for each category to require different levels of documentation and checks depending on the risk posed to animal and plant health, food and feed safety, biosecurity, animal welfare and public health, alongside any specific risk from the country/region of origin.

The categorisation approach draws on a range of data including disease outbreak data, known public health risks, transmission data, trade restrictions, non-compliance data and our confidence in the exporting country's production standards and health controls, among other sources.

The categorisation is based on the inherent risk that the commodity poses to animal health, food and feed safety and biosecurity, and public health, alongside the risks specific to the country of origin. Risk assessment by country/commodity combination will be based on data sets drawn from domestic sources such as trade volume, compliance data or intelligence on emerging hazards; and international sources such as World Animal Health Organisation (WOAH) and the European Rapid Alert System for Food and Feed (RASFF).

The risk management model has been developed to assess the likelihood of various hazards arriving at the UK border. A panel of risk managers including subject matter experts and risk analysts will consider each of the country/commodity combination hazards and will recommend a risk categorisation. This recommendation is then presented to FSA/FSS governance and Animal Disease Policy Group (ADPG) (and Aquatic Animal Health Board as required) where it is formally agreed, with ADPG acting on behalf of Defra and Devolved Government Ministers. However, where there may be additional factors to consider, the technical governance recommendations will be presented to Ministers for the final decision.

The default documentary check rate remains at 100% and we have introduced the **ability** to reduce the requirement to carry out documentary checks on all imports, expanding existing powers to allow the frequency of such checks to take the new risk-based approach. Further legislation is needed for any changes to take effect.

Whilst low risk goods do not require certification or routine checks under the BTOM, we have retained the scope to be able to pull low risk goods (or medium risk goods that have not been targeted for a check) in for checks based on intelligence. For example, If the competent authority/ PHA have concerns then they can detain the consignment in the Border Control Post (BCP) for a check, on a risk or random basis. This is the reason why we have a condition for low-risk goods to enter through a point of entry with a designated BCP. Low risk animal goods must also comply with SPS import rules as set out in the relevant commodity legislation.

#### For Plant Health

The BTOM introduces an enhanced risk-based approach, where regulated plants and plant products are categorised into high, medium, and low risk categories. Controls are appropriately weighted against the risks posed to GB – so the higher the risk category of a plant or plant product, the more biosecurity assurances we need, in the form of import controls. There are plants and plant products which are not regulated at all, and those that are prohibited entirely.

***Q 2b: A performance management framework is flagged, but will not be in place until the BTOM is fully operational and no detail on how it will assess the impact of this change on misdeclaration/import fraud is offered.***

## **Defra's Response:**

### For Animal Health

GB already has robust inland surveillance programmes in place to ensure that new or emerging risks are detected and acted upon in a timely manner. Under the BTOM, existing data and intelligence generated through these programmes will be used to monitor compliance with import rules and assess emerging trade related risks. Outputs from these programmes will be fed into the review cycle of risk categorisation.

We will gather and share data from surveillance checks, carried out by competent authorities, to identify emerging risks and trends that would contribute to the regular review of country and commodity risk categorisation so that import controls on animals and animal products remain targeted and proportionate.

### For Plant Health

The UK plant health service, working jointly under the Provisional Plant Health Common Framework, deliver inland surveillance activities across the UK, to ensure that new or emerging plant health risks are detected and acted upon in a timely manner. Additionally, there is a systematic, proactive screening of potential new and emerging plant health risks, which are listed in the UK Risk Register. Risks are reviewed monthly by an expert group and Ministers, and prioritised for actions such as surveillance, enhanced inspection, regulation, national measures, import controls, research and awareness raising.

***Q 2c: Does the approach [to amending Article 48] present a risk for modifications to be made beyond the scope intended, ie by giving the authority the power to treat the relevant lists of good/products as indicative, and to deregulate beyond these potentially inappropriately***

## **Defra's Response:**

As there are no existing enabling powers that would allow the changes required to continue with the implementation of the BTOM, section 14 of the REUL Act has been used to replace those provisions in assimilated law that need to be delivered for these purposes. Section 14 of the REUL Act allows provisions under assimilated law inherited from the EU to be replaced with provisions that achieve the same or similar objectives or alternative provisions. That includes replacing and adapting existing regulation-making powers in assimilated law to these ends as that will enable the whole of the framework of official controls to be modernised and allow future changes to be consistent with that updated framework.

This SI revokes and replaces Article 48 of the Official Controls Regulation to support implementation of the BTOM to date, and provide the legislative framework for future implementation. For example, the powers in the amended Article 48 will be exercised in a later instrument to support the exemption of low-risk goods from certification and checks on a permanent basis. The list of goods within scope of the amended Article 48 is indicative to ensure

that our legislation is future proofed to allow the BTOM to be adapted over time, in response to risk.

We will engage with stakeholders on proposals to exercise powers under the Official Controls Regulations, including the amended Article 48, and relevant instruments will be laid before parliament for scrutiny.

**28 November 2024**