



FOOD
STANDARDS
AGENCY

SCOTLAND

Buidheann
Inbhe-Bìdhe
an Alba

Official Feed and Food Controls (Scotland) Regulations 2007 - regulation 41 on expenses arising from 'additional official controls'

Guidance Notes

(December, 2007)

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Important notes

Status of these Guidance Notes

1. These Guidance Notes aim to provide informal, non-statutory advice in relation to regulation 41 of the Official Feed and Food Controls (Scotland) Regulations 2007 which relates to expenses arising from additional official controls. Regulation 41 gives effect in Scotland (in relation to official controls for which the Food Standards Agency has responsibility) to Article 28 of Regulation (EC) No 882/2004 on official controls.¹ Article 28 requires mandatory fees to be imposed in relation to expenses arising from 'additional official controls'.
2. These Guidance Notes should be read in conjunction with the SSI and with the EC Regulation.
3. The advice given and the examples used in these Guidance Notes should not be taken as an authoritative statement or interpretation of the legislation as only the courts have this power.

Purpose of these Guidance Notes

4. These Guidance Notes have been prepared by the Food Standards Agency (FSA) in the absence of the European Commission establishing detailed implementing rules or any guidance to clarify application of the Article 28 provision.
5. Liability to pay a charge (a fee) for additional official controls under Article 28 arises only in cases where there is non-compliance and the necessary control activities carried out as a result exceed those required under Community or national law and, in particular, those described in the multi-annual national control plan of the Member State. In view of that, the Agency expects that charges will apply only infrequently (a small number of cases annually) and that they will arise only in cases where unless corrective action is taken there is an imminent and/or serious risk to public health or consumer interests and where the resources required to manage the control activities fall outside the competent authority's planned activities. These Notes have been prepared on that basis and with a view to explaining Article 28 and ensuring that charges are applied in a fair and consistent manner.

Scope of these Guidance Notes

6. These Guidance Notes have been prepared in relation to the Official Feed and Food Controls (Scotland) Regulations 2007 so their scope extends only to Scotland and to the areas of feed and food law for which the FSA has responsibility at central Government level.² The Scottish Government DG

¹ Regulation (EC) No 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and welfare rules. Official Journal L191, 28.5.2004, 1-52.

² The FSA has responsibility at central Government level for the main body of feed and food law. The Department for Environment, Food and Rural Affairs (Defra) and the Agriculture/Rural Affairs Departments in the Devolved Administrations have responsibility between them for those feed and food elements that fall

Environment has been consulted during development of these Guidance Notes.

7. The FSA has prepared equivalent Guidance Notes in relation to the relevant domestic legislation in England, Wales and Northern Ireland.

Review and revision of the Guidance Notes

8. The Guidance Notes will be kept under review and will be revised and updated as necessary to reflect:
 - developments at EU level (in particular, the establishment by the European Commission of any detailed implementing rules or guidance to clarify application of Article 28 of Regulation (EC) No 882/2004);
 - changes to the UK single integrated national control plan (covering the period from January 2007 to March 2011);
 - experience of the competent authorities across the UK in relation to applying Article 28 charges in the feed and food sectors (as well as in the animal health and animal welfare sectors, where appropriate) and the establishment of relevant case law.

Further information

9. For further advice or information on the issues covered by these Guidance Notes, please contact Andrew Morrison of the Agency's Local Authority Food Law Enforcement Branch. His contact details are:

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outside the FSA's remit (e.g. beef labelling, standards for organic products, protected food names; residues of pesticides and veterinary drugs, medicated feed etc.). As regards most of these areas, the provisions in Regulation 882/2004 on expenses arising from additional official controls have been given effect at national level by including a measures in the Official Controls (Animals, Feed and Food) (Scotland) Regulations 2006 (SSI 2007/91). Again, similar measures are included in the parallel legislation for England, Wales and Northern Ireland. Measures relating to fees for official controls included in the Veterinary Medicines Regulations 2007 will ensure that the relevant provisions are applied as regards medicated feed and specified feed additives.

Introduction

10. From 1 January 2007, Regulation (EC) No 882/2004 on official controls established a framework for the financing of official feed and food controls, (Articles 26 to 29) and Member States must operate within this. Under Article 28, the competent authorities are required to charge (i.e. impose a fee) for the expenses arising from 'additional official controls' that have been carried out following the detection of non-compliance, i.e. controls that exceed the competent authority's normal control activities carried out under Community and national legislation, in particular, as described in the single integrated multi-annual national control plan.
11. The text of Regulation (EC) No 882/2004 is available on the European Commission's website at:
http://europa.eu.int/eur-lex/lex/LexUriServ/SSlste/en/oj/2004/l_191/l_19120040528en00010052.pdf
Articles 26 to 29 and Annex VI of the Regulation are reproduced at the Appendix to these Guidance Notes.
12. The latest version of the UK Multi-annual National Control Plan for January 2007 to March 2011 is available on the FSA website at:
<http://www.food.gov.uk/foodindustry/regulation/europeleg/feedandfood/ncpuk>
13. The provisions in Regulation 882/2004 on expenses arising from additional official controls, as far as this relates to those areas of feed and food law for which the FSA is responsible, are given effect in Scotland by regulation 41 of the Official Feed and Food Controls (Scotland) Regulations 2007 (similar provisions are included in the parallel legislation in England, Wales and Northern Ireland). Copies of the Regulations may be downloaded from the website of the Office of Public Sector Information at:
<http://www.food.gov.uk/foodindustry/guidancenotes/foodguid/offcexpenses>
14. The Guidance Notes (which are in Q&A format) are divided into six sections as follows:

Section 1: Legal requirements and definitions - this aims to explain the background to the requirement for competent authorities to charge (i.e. impose a fee) for expenses arising from additional official controls, and to highlight definitions which are important in terms of putting the remaining sections of the Guidance Notes into context.

Section 2: Circumstances in which charges will be made - this aims to explain when the competent authority can charge for expenses arising from additional official controls.

Section 3: Competent authorities that can levy charges - this aims to explain which competent authorities can levy charges for expenses arising from additional official controls.

Section 4: Feed and food business operators subject to charges - this aims to explain against whom the charges for expenses arising from additional official controls can be levied.

Section 5: Activities subject to charges - this aims to explain what the competent authorities can charge for.

Section 6: Level of charges - this aims to explain how much the competent authority can charge.

Section 1: Legal requirements and definitions

The Q&A in this section aims to explain the background to the requirement for competent authorities to charge (i.e. impose a fee) for expenses arising from additional official controls, and to highlight definitions which are important in terms of putting the remaining sections of the Guidance Notes into context.

Q1. What is the legal basis for the requirement to charge for expenses arising from additional official controls?

A1. Rules on the financing of official controls are set out in Regulation 882/2004 at [Articles 26 to 29](#) (see Appendix). These place a general obligation on Member States to ensure that official controls are properly financed but, in broad terms, it is left to the Member State to decide how. In doing so, however, the Member State must operate within a defined framework and should take account of certain principles in calculating fees or charges where these are imposed. The framework requires mandatory fees for certain control activities and this includes a requirement to charge for the expenses arising from control activities which are undertaken following the detection of non-compliance and that exceed the competent authority's 'normal control activities' - i.e. 'additional official controls'. This requirement is at [Article 28](#).

Q2. What are 'competent authorities'?

A2. 'Competent authorities' are defined for the purposes of Regulation 882/2004 at [Article 2\(4\)](#). In effect, these are the central authority or authorities of a Member State that are responsible for national official control arrangements as well as other authorities that have responsibility for monitoring compliance with, and enforcement of, the law.

Q3. What are 'official controls'?

A3. 'Official controls' are defined for the purposes of Regulation 882/2004 at [Article 2\(1\)](#). In effect, these are any form of check carried out by the competent authorities in the Member States to verify whether or not feed/food business operators are complying with the requirements set out in 'feed law'/'food law'. Control activities, methods and techniques are described at [Article 10](#) of Regulation 882/2004 and include, for example, inspections, audits, surveillance, sampling and analysis etc.

'Other intervention activities' undertaken by competent authorities do not constitute 'official controls' (see Q&A 4).

Similarly, enforcement measures instituted by the competent authorities following the checks referred to in the first paragraph of A3 do not constitute 'official controls' (see Q&A 5).

Q4. What are 'other intervention activities'?

A4. These activities fall into two categories: advisory and educational activities; and intelligence and information gathering. They are designed to support or increase feed/food law compliance (rather than to check for compliance). As such activities are not 'official controls', costs falling to the competent authority in relation to them cannot be recovered using [Article 28](#) (see Q&A 38).

Q5. What are 'enforcement measures'?

A5. The term 'enforcement measures' is not specifically defined in Regulation 882/2004 but, in effect, these may be described as the formal enforcement actions taken by the competent authorities following official controls in order to address or correct any non-compliances found, e.g. issuing of improvement notices, detention or destruction of feed/food, or taking prosecutions etc. 'Enforcement measures' are not 'official controls' so any costs falling to the competent authority on taking them cannot be recovered using Article 28 (see Q&A 39). Costs falling to the competent authorities for these measures where they are taken in relation to Part 3 of the Official Feed and Food Controls (Scotland) Regulations 2007 in relation to feed and food of non-animal origin from third countries may be recovered using the provision at regulation 34.

Q6. What are 'normal control activities'?

A6. Article 28 refers to 'normal control activities' and describes these as the routine control activities required under Community or national law (this includes controls carried out in relation to emergency safeguard measures, for example, those made under Article 53 of Regulation 178/2002 - see Q&A 19) and, in particular, are those described in the single integrated multi-annual national control plan of the Member State.

Q7. What is the single integrated multi-annual national control plan?

A7. The requirement to have such a plan in place is also set out in Regulation 882/2004 (Article 41). The plan should detail the roles and responsibilities of the competent authorities involved in official feed and food controls (and also animal health & animal welfare and plant health controls) and set out their planned control activities for the period of the plan. Commission Guidance suggests that the plan should cover a period of three to five years.³

Q8. Does the UK have a national control plan in place?

A8. Yes, and this is key to defining 'normal control activities' in the UK and, in turn, to determining when charges should be levied for 'additional official controls'. The UK National Control Plan for the period from January 2007 to March 2011 is published on the FSA website at the link below.

<http://www.food.gov.uk/foodindustry/regulation/europeleg/feedandfood/ncpuk>

As well as describing the roles and responsibilities of the different authorities and associated bodies that are involved with official feed and food controls and how these authorities and other bodies work together, it sets out the planned routine official control activities during the period of the plan. For local authority feed and food law regulatory services, these planned control activities are set out in more detail in each authority's Service Delivery Plan which must be in place under the terms of the *Framework Agreement on Local Authority Food Law Enforcement*.⁴

³ Commission Decision 2007/363/EC setting out guidelines to assist Member States in preparing the single integrated multi-annual national control plan provided for in Regulation (EC) No 882/2004 of the European Parliament and of the Council. Official Journal L138, 30.5.2007, 24-49.

⁴ More information is available at: <http://www.food.gov.uk/multimedia/pdfs/frameworkjuly04.pdf>.

Q9. What are 'additional official controls'?

A9. 'Additional official controls' are those undertaken following the detection of non-compliance and which exceed the routine activities of the competent authority. The *type (nature) and range* of control activities that may be undertaken is the same as for routine controls, e.g. sampling and analysis. It is the *level* of such activities, i.e. a level over and above that which is undertaken routinely, that characterises 'additional official controls'. The additional controls are required to check the extent of a problem, to verify whether corrective action has been taken, and to detect further non-compliance and/or substantiate non-compliance.

Q10. What constitutes 'non-compliance'?

A10. 'Non-compliance' is defined at Article 2(10) of Regulation 882/2004 as 'non-compliance with feed or food law and with the rules for the protection of animal health and welfare'. Within the context of the Official Feed and Food Controls (Scotland) Regulations 2007, in effect, it means non-compliance with the requirements of feed and food law for which the FSA has responsibility at central Government level.

Q11. How do Article 28 charges relate to the existing framework of sanctions and penalties for non-compliance?

A11. Article 28 charges **do not** represent a sanction or a penalty and so the provision has no effect on the existing framework of sanctions and penalties for non-compliance. Article 28 charges represent mandatory fees that are imposed to cover the costs of a certain type of official control activity (i.e. additional official controls that are undertaken following the detection of non-compliance).

Q12. What are the principles that must be taken account of in calculating the level of expenses arising from 'additional official controls'?

A12. The principles are the same as those that should be taken into account in setting fees for other official control activities where these are imposed - this is required by Article 29. The principles are set out at Articles 27(4)(a) and 27(5). In practice, these principles mean that the level of expenses charged for 'additional official controls' must not exceed the actual costs of the competent authority for the controls undertaken. In addition, Member States should consider: a) the type of business concerned and relevant risk factors; b) the interests of businesses with a low throughput; c) traditional methods used for production, processing and distribution; and d) the needs of businesses located in regions subject to particular geographical constraints. We consider that, in practice, only b) and d) could impact on the level of expenses charged (see Q&A 44).

Q13. What constitutes 'actual costs'?

A13. Actual costs for official controls should be calculated by reference to Annex VI of Regulation 882/2004 (see Appendix). This lists the criteria that should be taken into account. These are the salaries and costs (facilities, tools, equipment, training, travel and associated costs) of staff involved in carrying out official controls, and costs of sampling and laboratory analysis. This does not include costs of interventions other than official controls (i.e. advisory or educational activities or intelligence or information gathering). Similarly, it does not include costs of any associated formal enforcement actions, e.g. issuing of improvement notices, detention or destruction of feed/food, or costs (including legal fees) related to taking prosecutions.

Q14. How is the Article 28 provision of Regulation 882/2004 implemented at national level?

A14. The provisions in Regulation 882/2004 are directly applicable (i.e. they automatically have the force of law in the UK with effect from the same date that the relevant provisions in the Regulation apply) but measures are required to give effect to these at national level.

As regards the feed and food law for which the FSA has responsibility at central Government level (see para below), Article 28 is given effect in Scotland by means of regulation 41 of the Official Feed and Food Controls (Scotland) Regulations 2007.

This simply requires that 'expenses charged by a competent authority to an operator pursuant to Article 28 of Regulation 882/2004 shall be payable by the operator on the written demand of the competent authority'. In other words, when charges are applied, the feed/food business operator will receive an invoice from the relevant authority and will be required to pay it.

Similar provisions are made in the parallel legislation in England, Wales and Northern Ireland.

Q15. Which areas of feed and food law does the FSA have responsibility for?

A15. The FSA has responsibility for the main body of feed and food law (both domestic and EU), particularly as it relates to feed and food as such. The scope of these responsibilities is defined in the Official Feed and Food Controls Regulations (Scotland) 2007 at Schedules 2 and 3 which define respectively 'relevant feed law' and 'relevant food law'. In effect, this includes rules on hygiene, additives, contaminants, labelling and composition, public health issues relating to TSE⁵ rules, genetically modified feed and food, and food contact materials, and feed and food of non-animal origin imported from outside the Community.

⁵ Transmissible Spongiform Encephalopathies.

Q16. Who has responsibility at central Government level for other areas of feed and food law and how is Article 28 given effect in respect of these areas?

A16. In Scotland, the Scottish Government Rural Directorate has responsibility at central Government level for feed and food law that falls outside the Agency's remit but still falls within the scope of Regulation 882/2004. This includes, beef labelling, standards for organic products, protected food names; animal by-products (in relation to feed); animal health and animal feed aspects of TSE rules; imports from third countries of products of animal origin as regards the animal health requirements; medicated feed⁶ and specified feed additives;⁷ and, residues of pesticides and veterinary drugs.

As regards most of these areas, the Article 28 provision of Regulation 882/2004 is given effect by the inclusion in the Official Controls (Animals, Feed and Food) (Scotland) Regulations 2006 (SSI 2007/91)⁸ of a measure equivalent to that included in the FSA legislation - this is at regulation 13(2). Again, similar measures are included in the parallel legislation for England, Wales and Northern Ireland.

As regards medicated feed and specified feed additives, measures included in the UK Veterinary Medicines Regulations 2007 (SI2007/2539)⁹ on fees for official controls will ensure that Article 28 expenses are recovered.

⁶ A medicated feedingstuff is an animal feedingstuff which contains a veterinary medicinal product which can only be supplied to a keeper of animals on receipt of a prescription.

⁷ A specified feed additive is a substance which is added to animal feedingstuffs routinely, without prescription, for the prevention of coccidiosis or histomonosis, or to favourably affect the growth of animals.

⁸ A copy of SSI 2007/91 is available at: <http://www.opsi.gov.uk/legislation/scotland/ssi2007/20070091.htm>

⁹ A copy of SI 2007/2539 is available at: <http://www.opSI.gov.uk/SI/SI2007/20072539.htm>

Section 2: Circumstances in which charges will be made

The Q&A in this section aims to explain when the competent authority can charge for expenses arising from additional official controls.

Q17. When will charges be levied?

A17. Charges will be levied only where non-compliance has been established and where this has resulted in 'additional official control' activities being carried out at a level that exceeds the competent authority's 'normal control activities' i.e. those required under Community or national law and, in particular, those described in the National Control Plan.

Q18. Does the UK National Control Plan specify the levels of 'normal control activities' that take place?

Q18. Responsibility for official feed and food controls in Scotland is divided between central Government Agencies and local authorities. The National Control Plan provides general information on the planned control activities of these different authorities. However, given the number of authorities involved, it does not provide details of projected levels of control activities for each of these. Instead, it cross-refers to local business plans, service delivery agreements etc. which do provide relevant information.

In the case of local authorities, for example, the National Control Plan cross-refers to the requirement in the *Framework Agreement of Local authority Food Law Enforcement* to have a Service Delivery Plan in place.¹⁰ This Service Delivery Plan must take account of requirements in the *Feed Law Code of Practice*¹¹ and *Food Law Code of Practice for Scotland*¹² to plan enforcement activities on a risk-basis and taking account of local priorities such that a comprehensive service is provided. Such Plans should include estimates of the type and level of 'normal control activities' that will be carried out.

It should be noted that these local business plans, service delivery agreements etc. already include a degree of follow-up action, e.g. routine revisits following inspections to ensure that corrective actions have been carried out, and also estimates on the demands on the service for dealing with more routine feed/food incidents (see also Q&A 23).

Q19. Do official controls carried out in relation to emergency safeguard measures automatically constitute 'additional control activities'?

A19. No. Such measures, for example those made under Article 53 of Regulation 178/2002, are part of Community law. The issue of fees for these official controls is considered by the Commission and the Member States when the safeguard measures are put in place.

As with non-emergency measures, however, non-compliance with an emergency measure *may* result in 'additional official controls' being necessary and hence in an Article 28 charge being made.

¹⁰ More information is available at: <http://www.food.gov.uk/enforcement/foodlaw/frameagree/>

¹¹ More information is available at: <http://www.food.gov.uk/enforcement/foodlaw/feedlawcop/>

¹² More information is available at: <http://www.food.gov.uk/enforcement/foodlaw/foodlawcop/copScotland>

Q20. How will the competent authorities determine if 'normal control activities' have been exceeded?

A20. The activities described in the UK National Control Plan and local service delivery plans etc. are key to this. When these are taken into account together, we consider that 'normal control activities' are likely to be exceeded only infrequently.

We consider that, in general, such situations are likely to arise only in those cases where unless corrective action is undertaken, there is an imminent and/or serious risk to public health, or a significant risk to consumer interests (e.g. food fraud, mislabelling or mis-description, consistent and recurring breaches of food law), and where the resources required to manage the activities fall outside the authority's planned activities (if the control activities undertaken result in normal budgetary provisions being exceeded, this may be an indication that these activities fall outside planned activities, but this factor should not be used in isolation in determining if Article 28 charges are appropriate).

In practice, each situation will need to be judged on a case by case basis but in order to help ensure consistency of approach, a number of indicative factors may be used to assist in determining whether additional official controls have been carried out.

Q21. What are these indicative factors?

A21. These factors are the *severity* and *complexity* of the non-compliance, and the *nature/extent (number)* of the control activities.

- *Severity* - in determining this, consideration should be given to the nature of the risk either to public or animal health or to consumer interests, and to numbers and/or groups of consumers that are potentially affected.
- *Complexity* - in determining this, consideration should be given to the number of non-compliances detected/being detected in relation to the particular issue, the numbers of products/locations potentially affected, the number of authorities involved, and the extent of withdrawal/recall i.e. traceability.
- *Nature/extent (number) of the control activities* - in determining this, consideration should be given to the resources required to manage the activities, and to whether such activities are considered to fall within the authority's planned activities.

Where precedents for charging have been set by previous similar cases (including by other authorities), charges should be made and they should be calculated on the same basis.

Q22. What about cases where the FSA has requested competent authorities to undertake additional checks on feed or food products?

A22. In such cases, for example if the FSA requests local authorities to undertake additional checks of imported feed or food on the basis of evidence of non-compliance supplied by the European Commission and for the purpose of determining the extent of a problem, the Agency will indicate if Article 28 charges apply.

Q23. Should charges always be applied where revisits are carried out to check that non-compliances have been corrected?

A23 As noted at Q&A 18, the local business plans, service delivery agreements etc. of the competent authorities will already include a degree of follow-up action such as revisits following inspections to ensure that corrective actions have been carried out. In view of this, we do not consider that Article 28 charges should automatically be applied for all revisits. As for other cases, the indicative factors set out at Q&A 21 should be considered and judgements made on a case by case basis.

Q24. Are there any examples of when charges will be levied?

A24. Examples of situations where it is likely that there will have been non-compliance and that 'normal control activities' will have been exceeded, and hence charges applicable, include:

- Major chemical contamination incidents posing an immediate risk to public health, e.g. dioxin contamination of animal feed, which involves local authorities in prolonged investigations, including costly analyses of samples, to establish the extent of the problem and to ensure that all affected animals, animal products and animal feed are taken out of the feed and food chain.
- Major food poisoning incidents involving a number of different local authorities, and necessitating a significant number of audits of food safety management systems, and sampling and analysis of food.
- Investigations regarding the provenance of animals as required by food hygiene legislation.¹³ Where the competent authority discovers that the accompanying records, documentation or other information do not correspond with the true situation on the holding of provenance or the true condition of animals or where the official veterinarian has been deliberately misled, and additional controls (e.g. inspections at the farm of origin to check records and assess the health and welfare of animals on the farm) are needed to investigate this.¹⁴
- Where a high value pre-packed food, e.g. Basmati rice or extra virgin olive oil, has been found to be highly adulterated at point of entry into the UK, and where extensive follow-up sampling and analysis of the pre-packed food at the point of wholesale or retail sale is required to establish the extent of the problem and to ensure that corrective action is taken.

¹³ Regulation 854/2004, Annex I, Section II, Chapter II, para 5.

¹⁴ This is a special case. We consider that there are no significant differences between the provision in Regulation 854/2004 and Article 28 of Regulation 882/2004 in respect of the legal preconditions for them to apply. The only difference is that the former applies only in relation to one particular set of circumstances, whereas Article 28 is much wider in scope. Given this, we consider that the provision in Regulation 854/2004 is, in effect, a subset of Article 28.

Q25. Can Article 28 charges only be levied where the competent authority is also taking formal enforcement action (including prosecutions) against the feed/food business operator in relation to the non-compliance?

A25. No. Article 28 requires that a charge be imposed to recoup the costs of 'additional official controls'. In view of this, charges should be imposed, where this is appropriate, irrespective of whether or not the feed/food business operator concerned is prosecuted for any 'non-compliance' that led to the additional controls or whether or not other formal enforcement action is taken.

Section 3: Competent authorities that can levy charges

The Q&A in this section aims to explain which competent authorities can levy charges for expenses arising from additional official controls.

Q26. Which competent authorities can charge?

A26. The Official Feed and Food Controls (Scotland) Regulations 2007 designate the competent authorities responsible for official controls in Scotland in respect of feed and food law for which the FSA is responsible at central Government level. The provisions made to give effect to Article 28 are available to these authorities which are:

- the Agency - this covers the official control functions that FSA (including the Meat Hygiene Service) officials undertake and those undertaken on behalf of the FSA by Scottish Government Rural Payments and Inspections Directorate (which is part of the Scottish Government DG Environment)
- local authorities in Scotland - feed authorities and food authorities.

Q27. Where other Government Departments or Agencies are undertaking official control functions on behalf of the FSA will it be the Agency or the other body that makes the charge?

A27. In such cases (see Q&A 26 above), the FSA remains the competent authority in respect of the control activities. The other Departments/Agencies are acting as the Agency's agents and, in practice, it will be these agents that make and collect the charges.

Q28. Where these other Government Departments or Agencies propose to impose Article 28 charges, will the FSA have any involvement?

A28. Yes. Given the nature of the Article 28 provision, these other Government Departments or Agencies should consult with the FSA (details of the contact point are provided on page 5 of these Guidance Notes) before levying any Article 28 charges. The aim is to ensure that charges are applied appropriately and consistently.

Q29. Where local authorities propose to make Article 28 charges, will the FSA have any involvement?

A29. Any decision to proceed with Article 28 charges is for the local authority but given that we consider charges will apply only infrequently, authorities are advised strongly to consult with their representative bodies, LACORS¹⁵ or APHA,¹⁶ in the first instance and before doing so. Where further advice is required, LACORS or APHA should consult with the FSA (details of the contact point are provided on page 5 of these Guidance Notes).

¹⁵ LACORS - Local Authorities Co-ordinators of Regulatory Services.

¹⁶ APHA - Association of Port Health Authorities

Section 4: Feed and food business operators subject to charges

The Q&A in this section aims to explain against whom the charges for expenses arising from additional official controls can be levied.

Q30. Who can the competent authorities charge?

A30. Article 28 of Regulation 882/2004 specifies that the 'competent authority shall charge the operators responsible for the non-compliance, or may charge the operator owning or keeping the goods at the time when the additional official controls are carried out'. In effect, this provides the UK with an option for the provisions in the domestic legislation: these may be restricted to charging the operator responsible for the non-compliance; or, these may provide for charging either the operator responsible for the non-compliance or the operator owning or keeping the goods at the time the non-compliance is detected depending on the circumstances.

Q31. Which option is provided for in the Official Feed and Food Controls (Scotland) Regulations 2007?

A31. These Regulations do not *specifically* apply either of the above options as this is legally unnecessary and inappropriate. However, they leave scope for charging either the operator responsible for the non-compliance or the operator owning or keeping goods at the time the non-compliance is detected depending on the circumstances.

Q32. What is meant by 'operators'?

A32. In the context of the Official Feed and Food Controls (Scotland) Regulations 2007 this means 'feed business operators' and 'food business operators' as defined in Regulation (EC) No 178/2002 on General Food Law.¹⁷ These definitions are drawn broadly and some guidance on what they encompass is included in: *Guidance Notes for Food Business Operators on Food Safety, Traceability and Product Withdrawal and Recall: a guide to compliance with Articles 14, 16, 18 and 19 of General Food Law Regulation 178/2002* (July 2007). This is available on the FSA website at:

<http://www.food.gov.uk/multimedia/pdfs/fsa1782002guidance.pdf>

Q33. Who should be charged in what circumstances?

A33. The operator responsible for the non-compliance should be charged wherever possible. In cases where the cost and time involved in ascertaining who has been at fault as regards the non-compliance is disproportionate to the charges being made, the competent authority should consider charging the operator owning or keeping the goods at the time the non-compliance is detected and the additional controls are carried out. In such cases, that operator must pay the costs to the competent authority.

¹⁷ Regulation EC 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. Official Journal L31, 1.2.2002, 1-24.

Q34. Who should be charged in the case of feed and food imported from outside the Community?

A34. Regulation 178/2002 on General Food Law requires that feed and food imported from outside the Community must meet the requirements of Community law or meet other standards which are recognised as being equivalent to this. The Regulation also places responsibility for ensuring that these requirements are met by feed/food business operators. Importers fall within the definition of 'feed/food business operators' so the competent authority should charge the importer (or the importer's representative) for the expenses arising from additional official controls.

Q35. In the case of local authorities, how will charging work where more than one local authority is involved?

A35. In such cases, each local authority undertaking 'additional official controls' should levy charges in order to recover the costs only of those particular controls that it undertook, and these will be payable to that authority. Guidance on the activities that they should charge for is given in [Section 5](#), and guidance on the level that charges should be set at is given in [Section 6](#).

The local authorities involved should liaise with the Home Authority/Primary authority (if there is one) and other relevant authorities as appropriate as regards whether or not charges should be levied. It will, however, be for each individual local authority concerned to invoice the feed/food business operator concerned for the expenses arising from the activities that that authority carried out, and to pursue matters where no payment is received.

As highlighted at Q&A 29, given that we consider charges will apply only infrequently, local authorities are advised strongly to consult with their representative bodies, LACORS or APHA, on applicability of charges before they are imposed.

Section 5: Activities subject to charges

The Q&A in this section aims to explain what the competent authorities can charge for.

Q36. What can the competent authorities charge for?

A36. The competent authorities can charge for those expenses that arise from 'additional official control' activities (i.e. those controls that are carried out where non-compliance has been detected and which exceed the routine activities of the competent authority).

Q37. What types of activities constitute 'additional official controls'?

A37. The *type and range* of activities that this includes is the same as that for 'normal official controls' that are carried out routinely. These are any form of check undertaken by the competent authority to verify whether or not feed and food business operators are complying with feed and food law. The methods and techniques that are used to do so include monitoring, surveillance, verification, audit, inspection, and sampling and analysis. Examples of the control activities that might be undertaken include:

- examination of any control systems that a feed or food business operator has put in place;
- checks on the hygiene conditions in feed and food business establishments;
- assessment of procedures on good manufacturing practices, good hygiene practices, good farming practices etc.;
- examination of written material and other records;
- interviews with feed and food business operators and with their staff;
- reading of values recorded by feed or food business measuring instruments;
- controls carried out with the competent authority's own instruments to verify measurements taken by feed and food business operators; and
- any other activity required to ensure that feed or food law requirements have been met.

It is the *level* of the above activities (and non-compliance must have been detected) that determines if Article 28 applies or not. This must exceed that of the authority's 'normal control activities' (see Q&As 18 to 20).

Q38. Does this include costs associated with advisory or education activities or information or intelligence gathering?

A38. No. Such activities do not constitute official controls as they are not compliance checks but rather are interventions by the competent authority that aim to support or increase compliance.

Q39. Does this include formal enforcement actions (e.g. issuing of notices, detention or destruction of feed/food, taking prosecutions)?

A39. No. Such activities do not constitute 'official controls' as they are plainly not checks for compliance with feed/food law so charges cannot be levied under regulation 41 of the Official Feed and Food Controls (Scotland) Regulations 2007 in respect of expenses arising from these activities or arising from similar activities.

Q40. Where Article 28 charges are imposed and a subsequent related prosecution is successful and the competent authority is awarded costs (does not apply in Scotland - for info only), will the feed/food business operator be liable for paying twice for the same activities?

A40. No. Where Article 28 charges have been imposed and costs for 'additional official controls' already recovered, the competent authority may not seek to include such costs in any claim related to the prosecution and is, therefore, confined to claiming for the costs of the prosecution itself.

Q41. In the meat sector, how do Article 28 charges differ from 'additional charges' made by the Meat Hygiene Service (MHS)?

A41. The MHS charges food business operators for the 'routine' official controls that it undertakes in approved meat premises. The legal basis for this is the Meat (Official Controls Charges) (Scotland) Regulations 2007 (SSI 2007/144). The Regulations also include provision for the MHS to make 'additional charges' in certain circumstances. These 'additional charges' have a different function to that of Article 28 charges, and there is no overlap between them.

'Additional charges' apply where there is inefficiency on the part of the food business operator and enable the MHS to recoup its costs for 'routine' official control activities. Inefficiency can take various forms but these are not in the main concerned with situations where there is 'non-compliance' with food law as is required before Article 28 applies. The only exception is that 'enforcement action' constitutes inefficiency in the context of the Meat (Official Controls Charges) (Scotland) Regulations 2007 but Article 28 is again different as it does not enable charges to be made for enforcement action.

Detailed guidance on MHS 'additional charges' is included in: '*a Guide for Food Business Operators to MHS Charges for Official Controls (the Charges Guide)*.' This is available on the FSA website at:

<http://www.food.gov.uk/foodindustry/guidancenotes/foodguid/offcexpenses>

Section 6: Level of charges

The Q&A in this section aims to explain how much the competent authority can charge.

Q42. What level of charges will be made?

A42. The charge will be set at the level of the actual costs to the competent authority of undertaking the additional official control activities. The only exceptions will be where certain specific factors apply and the level of charges may be reduced below the level of actual costs (see Q&A 44 below).

Q43. How will such costs be calculated?

A43. These costs will be calculated on the basis of the criteria listed in [Annex VI](#) of Regulation 882/2004:

- the salaries of the staff involved in the official controls;
- the costs of the staff involved in the official controls (facilities, tools, equipment, training, travel and associated costs); and,
- costs of sampling and laboratory analysis.

This will ensure consistency in approach though it must be recognised that there will be a degree of variation to reflect differences in costs at the local level.

Q44. What factors have to apply before a reduction in the level of charge is considered?

A44. The following should be considered: a) the type of business concerned and relevant risk factors; b) the interests of businesses with a low throughput; c) traditional methods used for production, processing and distribution; and d) the needs of business located in regions subject to particular geographical constraints.

We consider that given that these are not charges for routine controls, in practice, only two factors are likely to be relevant: the interests of businesses with low throughputs; and the needs of businesses located in regions subject to particular geographical constraints.

Q45. For operators with a low throughput, what level of reduction will be applied?

A45. Given the wide range of sectors and types of operators covered, and differences in local circumstances, it is not possible to define exactly what 'low throughput' means or to specify a percentage reduction that will apply in all cases and this will need to be considered by the relevant competent authority on a case by case basis.

Q46. Will the level of charges levied against all operators located in regions subject to particular geographical constraints be reduced?

A46. No. We consider that such operators fall into two groups; those that are geographically remote; and those where landscape features impact on production in a disadvantageous manner.

As regards the first type, transport costs for the competent authority if checks have to be carried out at feed/food business establishments may be disproportionately high and we consider that this should be taken into account.

As regards the second type, we do not consider that any such landscape features exist that could have an impact as regards Situations where Article 28 charges are required so a reduction would not be appropriate.

Q47. Where operators are geographically remote, what level of reduction will be applied?

A47. When calculating charges due from operators in geographically remote areas, rather than charging full transport costs, an average transport overhead per official control should be applied.

Q48. Will feed and food business operators receive a breakdown of costs?

A48. The demand for payment by the competent authority should identify the official controls to which the fee relates and outline how this has been calculated.

Q49. Will feed and food business operators have a right of appeal against the charges?

A49. The Official Feed and Food Controls (Scotland) Regulations 2007 do not include a formal right of appeal. However, the reasonableness of a charge may be disputed in a civil court where the competent authority initiates proceedings for the recovery of an Article 28 charge that feed/food business operator has failed to pay.

Q50. Why has a formal right of appeal not been set down in the SSI?

A50. We consider that the civil courts will provide the most appropriate forum for dealing with grievances in respect of Article 28 charges. Determination of the issue will be quicker and less cumbersome than a formal appeal to the Sherriff Court, or an appointed person. This approach is also consistent with that taken by Scottish Government DG Environment as regards Article 28 charges imposed under the Official Controls (Animals, Feed and Food) (Scotland) Regulations 2006.

Appendix: Regulation (EC) No 882/2004 - Articles 26 to 29, and Annex VI

CHAPTER VI FINANCING OF OFFICIAL CONTROLS

Article 26

General principle

Member States shall ensure that adequate financial resources are available to provide the necessary staff and other resources for official controls by whatever means considered appropriate, including through general taxation or by establishing fees or charges.

Article 27

Fees or charges

1. Member States may collect fees or charges to cover the costs occasioned by official controls.
2. However, as regards the activities referred to in Annex IV, section A, and Annex V, section A, Member States shall ensure the collection of a fee.
3. Without prejudice to paragraphs 4 and 6, fees collected as regards the specific activities mentioned in Annex IV, section A and Annex V, section A shall not be lower than the minimum rates specified in Annex IV, section B and Annex V, section B. However, for a transitional period until 1 January 2008, as regards the activities referred to in Annex IV, section A, Member States may continue to use the rates currently applied pursuant to Directive 85/73/EEC.

The rates in Annex IV, Section B and Annex V, Section B shall be updated at least every two years, in accordance with the procedure referred to in Article 62(3), in particular to take account of inflation.

4. Fees collected for the purposes of official controls in accordance with paragraph 1 or 2:
 - (a) shall not be higher than the costs borne by the responsible competent authorities in relation to the items listed in Annex VI; and
 - (b) may be fixed at a flat-rate on the basis of the costs borne by the competent authorities over a given period of time or, where applicable, at the amounts fixed in Annex IV, section B or in Annex V, section B.
5. In setting the fees Member States shall take into consideration:
 - (a) the type of business concerned and relevant risk factors;
 - (b) the interests of businesses with a low throughput;
 - (c) traditional methods used for production, processing and distribution;
 - (d) the needs of businesses located in regions subject to particular geographical constraints.
6. When, in view of own-check and tracing systems implemented by the feed or food business as well as of the level of compliance found during official controls, for a certain type

of feed or food or activities, official controls are carried out with a reduced frequency or to take account of the criteria referred to in paragraph 5(b) to (d), Member States may set the official control fee below the minimum rates referred to in paragraph 4(b), provided that the Member State concerned provides the Commission with a report specifying:

- (a) the type of feed or food or activity concerned;
- (b) the controls performed in the feed and food business concerned; and
- (c) the method for calculating the reduction of the fee.

7. When the competent authority carries out several official controls at the same time in a single establishment, it shall consider these controls as a single activity and charge a single fee.

8. Fees relating to import controls are to be paid by the operator or his representative to the competent authority in charge of import controls.

9. Fees shall not directly or indirectly be refunded, unless unduly collected.

10. Without prejudice to the costs deriving from the expenses referred to in Article 28, Member States shall not collect any fees other than those referred to in this Article for the implementation of this Regulation.

11. Operators or other relevant businesses or their representatives shall receive proof of their payment of fees.

12. The Member States shall make public the method of calculation of fees and communicate it to the Commission. The Commission shall examine whether the fees comply with the requirements of this Regulation.

Article 28

Expenses arising from additional official controls

When the detection of non-compliance leads to official controls that exceed the competent authority's normal control activities, the competent authority shall charge the operators responsible for the non-compliance, or may charge the operator owning or keeping the goods at the time when the additional official controls are carried out, for the expenses arising from the additional official controls. Normal control activities are the routine control activities required under Community or national law and, in particular, those described in the plan provided for in Article 41. Activities that exceed normal control activities include the taking and analysis of samples as well as other controls that are required to check the extent of a problem, to verify whether corrective action has been taken, or to detect and/or substantiate non-compliance.

Article 29

Level of expenses

When setting the level of expenses referred to in Article 28, account shall be taken of the principles laid down in Article 27.

Annex VI

CRITERIA TO BE TAKEN INTO CONSIDERATION FOR THE CALCULATION OF FEES

1. The salaries of the staff involved in the official controls;
2. The costs for the staff involved in the official controls, including facilities, tools, equipment, training, travel and associated costs;
3. The laboratory analysis and sampling costs.