

2013 No. 217

FOOD

The Contaminants in Food (Scotland) Regulations 2013

Made - - - - *25th June 2013*

Laid before the Scottish Parliament *27th June 2013*

Coming into force - - *1st October 2013*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 16(1), 17(1) and (2), 26(1)(a) and (3), and 48(1) of the Food Safety Act 1990(a), paragraph 1A of Schedule 2 to the European Communities Act 1972(b) and all other powers enabling them to do so.

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972 and it appears to the Scottish Ministers that it is expedient for references to an Article of or Annex to the EU instruments specified in regulation 2(3) to be construed as references to that Article or Annex as it may be amended from time to time.

In accordance with section 48(4A) of the Food Safety Act 1990, they have had regard to relevant advice given by the Food Standards Agency(c).

There has been consultation as required by Article 9 of Regulation (EC) No 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(d).

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- (a) 1990 c.16. Section 1(1) and (2) (definition of “food”) was substituted by S.I. 2004/2990. Sections 16(1), 17(1) and (2) and 48(1) were amended by Schedule 5 to the Food Standards Act 1999 (c.28) (“1999 Act”). Section 26(3) was amended by Schedule 6 to the 1999 Act. By virtue of section 40(2) of the 1999 Act, amendments made by Schedule 5 to that Act are to be taken as pre-commencement enactments for the purposes of the Scotland Act 1998 (c.46). The functions of the Secretary of State, in so far as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. In so far as not transferred, and in so far as relating to food (including drink) including the primary production of food, relevant functions were transferred to the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005 (S.I. 2005/849).
- (b) 1972 c.68. Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (c.51) and amended by Part 1 of Schedule 1 to the European Union (Amendment) Act 2008 (c.7). The functions conferred on the Minister of the Crown under section 2(2), in so far as exercisable within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998. In so far as not transferred, and in so far as relating to food (including drink) including the primary production of food, relevant functions were transferred to the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005.
- (c) Section 48(4A) was inserted by paragraph 21 of Schedule 5 to the 1999 Act.
- (d) OJ L 31, 1.2.2002, p.1. That Regulation was last amended by Commission Regulation (EC) No 596/2009 of the European Parliament and of the Council adopting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny: Adaptation to the regulatory procedure with scrutiny – Part Four (OJ L 188, 18.7.2009, p.14).

PART 1

Introductory

Citation, extent and commencement

1. These Regulations may be cited as the Contaminants in Food (Scotland) Regulations 2013, extend to Scotland only and come into force on 1st October 2013.

Interpretation

2.—(1) In these Regulations —

“the Act” means the Food Safety Act 1990;

“Directive 76/621” means Council Directive 76/621/EEC relating to the fixing of the maximum level of erucic acid in oils and fats intended as such for human consumption and in foodstuffs containing added oils or fats(a);

“Directive 80/891” means Commission Directive 80/891/EEC relating to the Community method of analysis for determining the erucic acid content in oils and fats intended to be used as such for human consumption and in foodstuffs containing added oils or fats(b);

“Regulation 1881/2006” means Commission Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs(c);

“Regulation 629/2008” means Commission Regulation (EC) No 629/2008 amending Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs(d);

“Regulation 124/2009” means Commission Regulation (EC) No 124/2009 setting maximum levels for the presence of coccidiostats or histomonostats in food resulting from the unavoidable carry-over of these substances in non-target feed(e);

“Regulation 165/2010” means Commission Regulation (EU) No 165/2010 amending Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs as regards aflatoxins(f);

“authorised officer” means any person who is authorised in writing, either generally or specifically, by a food authority to act in matters arising under these Regulations;

“food authority” has the meaning given by section 5(2) of the Act;

(2) Any other expression used in these Regulations and in Directive 76/621, Directive 80/891, Regulation 1881/2006 or Regulation 124/2009 has the same meaning in these Regulations as it has in the Directive or Regulation concerned.

(3) Any reference to an Article of or Annex to Directive 76/621, Directive 80/891, Regulation 1881/2006 or Regulation 124/2009 is a reference to that Article or Annex as it may be amended from time to time, and any reference to any of those Directives or Regulations is to be construed accordingly.

(a) OJ L 202, 28.7.1976, p.35. This Directive was last amended by Council Regulation (EC) No 807/2003 (OJ L 122, 16.5.2003, p.36).

(b) OJ L 254, , 27.9.1980, p.35.

(c) OJ L 364, 20.12.2006, p.5. This Regulation has been amended by Commission Regulation (EC) No 1126/2007 (OJ L 255, 29.9.2007, p.14), 565/2008 (OJ L 160, 19.6.2008, p.20), 629/2008 (OJ L 173, 3.7.2008, p.6), and by Commission Regulation (EU) No 105/2010 (OJ L 35, 6.2.2010, p.7), 165/2010 (OJ L 50, 27.2.2010, p.8), 420/2011 (OJ L 111, 30.4.2011, p.3), 835/2011 (OJ L 215, 20.8.2011, p.4), 1258/2011 (OJ L 320, 3.12.2011, p.15), 1259/2011 (OJ L 320, 3.12.2011, p.18), 219/2012 (OJ L 75, 15.3.2012, p.5), 594/2012 (OJ L 176, 6.7.2012, p.43) and 1058/2012 (OJ L 313, 13.11.2012, p.14).

(d) OJ L 173, 3.7.2008, p.6.

(e) OJ L 40, 11.2.2009, p.7. This Regulation has been amended by Commission Regulation (EU) No 610/2012 (OJ L 178, 10.7.2012, p.1).

(f) OJ L 50, 27.2.2010, p.8.

PART 2

Erucic acid in food

Scope

3.—(1) This Part applies to—

- (a) oils, fats and mixtures of the two which are intended as such for human consumption;
- (b) compound foodstuffs described directly or by implication as specially prepared for infants and young children, to which oils, fats or mixtures of the two have been added; and
- (c) compound foodstuffs other than those described directly or by implication as specially prepared for infants and young children, to which oils, fats or mixtures of the two have been added and the overall fat content of which exceeds 5%.

(2) In paragraph (1) the expressions “infants” and “young children” have the meanings given to them in Article 2 of Commission Directive 2006/141/EC on infant formulae and follow-on formulae and amending Directive 1999/21/EC^(a).

Controls on erucic acid

4.—(1) No person may place on the market, for consumption by the final consumer, a product to which this Part applies in which the level of erucic acid exceeds 5%, calculated on the total level of fatty acids in the fat component.

(2) The level of erucic acid in a food is to be determined according to the methods of screening and analysis prescribed in Article 2 of and the Annex to Directive 80/891.

(3) Any person who contravenes paragraph (1) is guilty of an offence.

PART 3

Contaminants in food

Controls on contaminants in food

5.—(1) Subject to the transitional arrangements contained in—

- (a) Article 11 of Regulation 1881/2006;
- (b) Article 2 of Regulation 629/2008; or
- (c) Article 2 of Regulation 165/2010,

a person who contravenes or fails to comply with any of the EU provisions specified in paragraph (2) is guilty of an offence.

(2) The EU provisions are—

- (a) Article 1(1) of Regulation 1881/2006 (prohibition on the placing on the market of certain foodstuffs containing contaminants in excess of prescribed limits), as read with—
 - (i) Article 1(2) (maximum levels applying to edible part of food unless otherwise specified in the Annex);
 - (ii) Article 2 (provisions relating to the application of maximum levels to dried, diluted, processed and compound foodstuffs);
 - (iii) Article 4 (specific provisions for groundnuts, other oilseeds, tree nuts, dried fruit, rice and maize); and
 - (iv) the Annex;

^(a) OJ L 401, 30.12.2006, p. 1, amended by Commission Regulation (EC) No 1243/2008 (OJ L 335, 13.12.2008, p.25).

- (b) Article 3 of Regulation 1881/2006 (prohibitions on use, mixing and detoxification);
- (c) Article 5 of Regulation 1881/2006 (specific labelling requirements for groundnuts, derived products thereof and cereals); and
- (d) Article 1(1) of Regulation 124/2009 (prohibitions on marketing or mixing foods containing coccidiostats or histomonostats at levels in excess of prescribed limits), as read with Article 1(2) (provisions relating to the application of maximum levels to dried, diluted, processed and compound foodstuffs).

PART 4

Administration and enforcement

Penalties

6. Anyone convicted of an offence under regulation 4(3) or regulation 5(1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Enforcement and competent authorities

7.—(1) It is the duty of each food authority within its area to execute and enforce these Regulations, Regulation 1881/2006 and Regulation 124/2009.

(2) Each food authority within its area is the competent authority for the purposes of—

- (a) Article 2(2) of Regulation 1881/2006 (justification by food business operators of concentration or dilution factors); and
- (b) Article 1(1) of Regulation 124/2009 (relating to the duty to investigate the reasons for the contamination).

Application of various sections of the Food Safety Act 1990

8.—(1) The following provisions of the Act apply for the purposes of these Regulations with the modification that any reference in those provisions to the Act or Part of it is to be construed as a reference to these Regulations—

- (a) section 3 (presumptions that food intended for human consumption);
- (b) section 20 (offences due to fault of another person);
- (c) section 21 (defence of due diligence)(a) with the modification that—
 - (i) subsections (2) to (4) shall apply in relation to an offence under regulation 4(3) or regulation 5(1) as they apply in relation to an offence under section 14 or 15; and
 - (ii) in subsection (4) the references to “sale” are deemed to include references to “placing on the market”;
- (d) section 30(8) (which relates to documentary evidence);
- (e) section 33(1) (obstruction etc. of officers);
- (f) section 33(2), with the modification that the reference to “any such requirement as is mentioned in subsection (1)(b) above” shall be deemed to be a reference to any such requirement as is mentioned in section 33(1)(b) as applied by sub-paragraph (e);
- (g) section 33(3), with the modification that the reference to “subsection (1)(b) above” shall be deemed to be a reference to section 33(1)(b) as applied by sub-paragraph (e);
- (h) section 35(1) (punishment of offences), in so far as it relates to offences under section 33(1) as applied by sub-paragraph (e);

(a) Section 21 was amended by S.I. 2004/3279.

- (i) section 35(2) and (3)(a), in so far as it relates to offences under section 33(2) as applied by sub-paragraph (f);
- (j) section 36 (offences by bodies corporate);
- (k) section 36A (offences by Scottish partnerships)(b); and
- (l) section 44 (protection of officers acting in good faith).

(2) Subject to paragraph (3), section 9 of the Act (inspection and seizure of suspected food) applies for the purposes of these Regulations as if it read as follows—

“9.—(1) An authorised officer of a food authority may at all reasonable times inspect any food intended for human consumption which has been placed on the market and subsections (2) to (7) below shall apply where, on such an inspection, it appears to the authorised officer that the placing on the market of any food fails to comply with any of the requirements specified in regulation 4(1) or 5(2) of the Contaminants in Food (Scotland) Regulations 2013 (“the EU requirements”).

(2) The authorised officer may either—

- (a) give notice to the person in charge of the food that, until the notice is withdrawn, the food or any specified portion of it—
 - (i) is not to be used for human consumption; and
 - (ii) either is not to be removed or is to be removed to a place at which there are facilities to carry out sampling in the manner required by law; or
- (b) seize the food and remove it in order to have it dealt with by a sheriff.

(3) Where the authorised officer exercises the power conferred by subsection (2)(a) above, that officer shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not the food complies with the EU requirements and—

- (a) if satisfied that it does comply, shall forthwith withdraw the notice;
- (b) if not so satisfied, shall seize the food and remove it in order to have it dealt with by a sheriff.

(4) Where an authorised officer exercises the powers conferred by subsection (2)(b) or (3)(b) above, the officer shall inform the person in charge of the food of the intention to have it dealt with by a sheriff and any person who in connection with any of the EU requirements might be liable to a prosecution in respect of the food shall, if that person attends before the sheriff by whom the food falls to be dealt with, be entitled to be heard and to call witnesses.

(5) If it appears to a sheriff, on the basis of such evidence as the sheriff considers appropriate in the circumstances, that any food falling to be dealt with under this section fails to comply with any of the EU requirements the sheriff shall condemn the food and order—

- (a) the food to be destroyed or to be so disposed of as to prevent it from being used for human consumption; and
- (b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the food.

(6) If a notice under subsection (2)(a) above is withdrawn, or the sheriff by whom any food falls to be dealt with under this section refuses to condemn it, the food authority shall compensate the owner of the food for any depreciation in its value resulting from the action taken by the authorised officer.

(7) Any disputed question as to the right to or the amount of any compensation payable under subsection (6) above shall be determined by a single arbiter appointed, failing agreement between the parties, by the sheriff.

(a) Section 35(3) was amended by S.I. 2004/3279.

(b) Section 36A was inserted by the Food Standards Act 1999 (c.28), Schedule 5, paragraph 16.

(8) Any person who knowingly contravenes the requirements of a notice under subsection (2)(a) above shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.”.

(3) The expressions “authorised officer” and “food authority” which are used in section 9 of the Act so far as it applies for the purposes of these Regulations by virtue of paragraph (2) will, for those purposes, have the meanings that those expressions have in these Regulations.

Consequential amendment

9. In Schedule 1 to the Food Safety (Sampling and Qualifications) (Scotland) Regulations 2013(a) (provisions to which those Regulations do not apply), for columns 1 and 2 of the entry relating to the Contaminants in Food (Scotland) Regulations 2010(b) substitute—

“The Contaminants in Food (Scotland) Regulations 2013 (to S.S.I. 2013/217.”
the extent that a sample falls to be prepared and analysed in
accordance with Regulation 1881/2006 as that expression is
defined in those Regulations)

Revocations

10. The Regulations specified in the Schedule are revoked.

MICHAEL MATHESON
Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh
25th June 2013

(a) S.S.I. 2013/84.
(b) S.S.I. 2010/329.

SCHEDULE
Revocations

Regulation 10

<i>Regulations revoked</i>	<i>Reference</i>
Mineral Hydrocarbons in Food (Scotland) Regulations 1966	S.I. 1966/1263
Erucic Acid in Food (Scotland) Regulations 1977	S.I. 1977/1028
Erucic Acid in Food (Scotland) Amendment Regulations 1982	S.I. 1982/18
Contaminants in Food (Scotland) Regulations 2010	S.S.I. 2010/329

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, in Scotland, revoke (regulation 10 and the Schedule) and remake, with amendments, the Contaminants in Food (Scotland) Regulations 2010.

Paragraph 1A of Schedule 2 to the European Communities Act 1972 is cited in the enabling powers for these Regulations because reference is made in regulation 2 to certain EU instruments which are defined in the Regulations as meaning those EU instruments as amended from time to time.

These Regulations make provision for—

- (a) the continuing implementation of Council Directive 76/621/EEC relating to the fixing of the maximum level of erucic acid in oils and fats intended as such for human consumption and in foodstuffs containing added oils or fats and of Commission Directive 80/891/EEC relating to the Community method of analysis for determining the erucic acid content in oils and fats intended to be used as such for human consumption and in foodstuffs containing added oils or fats; and
- (b) the continuing execution and enforcement of Commission Regulation (EC) No. 1881/2006 setting maximum levels for contaminants in foodstuffs (“the Commission Regulation”).

These Regulations also provide for the execution and enforcement of Commission Regulation (EC) No 124/2009 (“Regulation 124/2009”), which concerns maximum permitted levels for certain feed additives that may, in specified circumstances, occur in food, as amended by Commission Regulation (EU) No. 610/2012.

The Regulations—

- (a) provide that it is an offence (except in certain cases relating to food placed on the market before a date specified in the relevant EU legislation)—
 - (i) to place specified foods on the market containing erucic acid in excess of permitted levels (regulations 3 and 4);
 - (ii) to place on the market certain foods if they contain contaminants of any kind specified in the Commission Regulation or in Regulation 124/2009 at levels exceeding those specified (regulation 5);
 - (iii) to use food containing contaminants at levels in excess of those permitted by the Commission Regulation as ingredients in the production of certain foods (regulation 5);
 - (iv) to mix foods that do not comply with the maximum levels prescribed by the Commission Regulation or Regulation 124/2009 with foods which do comply (regulation 5);
 - (v) to mix foods to which the Commission Regulation relates and which are intended for direct consumption or as food ingredients with foods to which the Commission Regulation relates and which are intended to be sorted or otherwise treated prior to consumption (regulation 5); or
 - (vi) to detoxify by chemical treatment food containing mycotoxins in excess of the limits specified in the Commission Regulation (regulation 5);
- (b) provide for penalties on conviction for an offence under these Regulations (regulation 6) and specify the enforcement authorities (regulation 7);
- (c) provide for the application of specified provisions of the Food Safety Act 1990 for the purposes of these Regulations (regulation 8); and
- (d) make a consequential amendment to the Food Safety (Sampling and Qualifications) (Scotland) Regulations 2013 (regulation 9).

The Commission Regulation specifies the European Union methods of sampling and analysis that are required to be used for the official control of levels of the substances covered by it. Those methods are set out in—

- (a) Commission Regulation (EC) No 401/2006 laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs, as amended by Commission Regulation (EU) No 178/2010;
- (b) Commission Regulation (EC) No 1882/2006 laying down methods of sampling and analysis for the official control of levels of nitrates in certain foodstuffs;
- (c) Commission Regulation (EC) No 333/2007 laying down the methods of sampling and analysis for the official control of the levels of lead, cadmium, mercury, inorganic tin, 3-MCPD and benzo(a)pyrene in foodstuffs, amended by Commission Regulation (EU) No 836/2011; and
- (d) Commission Regulation (EU) No 252/2012 laying down methods of sampling and analysis for the official control of levels of dioxins, dioxin-like PCBs and non-dioxin-like PCBs in certain foodstuffs and repealing Regulation (EC) No 1883/2006.

The Regulations also revoke (regulation 10 and the Schedule) and remake with changes the Erucic Acid in Food (Scotland) Regulations 1977 (as amended) and revoke the Mineral Hydrocarbons in Food (Scotland) Regulations 1966.

A Business and Regulatory Impact Assessment has been prepared and placed in the Scottish Parliament Information Centre. Copies may be obtained from the Food Standards Agency (Scotland), 6th Floor, St Magnus House, 25 Guild Street, Aberdeen AB11 6NJ and online at www.legislation.gov.uk.

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