

2010 No. 329

FOOD

The Contaminants in Food (Scotland) Regulations 2010

Made - - - - *15th September 2010*

Laid before the Scottish Parliament *17th September 2010*

Coming into force - - *20th October 2010*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 16(1)(a), (e) and (f), 17(2), 26(1)(a) and (3), and 48(1) of the Food Safety Act 1990(a) and 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 the Annex to the EU instrument specified in regulation 2(3) to be construed as references to that Annex as it may be amended from time to time.

In accordance with section 48(4A) of the Food Safety Act 1990, the Scottish Ministers 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(2) and 48(1) were amended by paragraph 8 of Schedule 5 to the Food Standards Act 1999 (c.28) (“the 1999 Act”); section 17(2) was also amended by paragraph 12 of Schedule 5 to the 1999 Act; section 26(3) was amended by Schedule 6 to the 1999 Act; section 48(4) is disapplied in respect of these Regulations by virtue of section 48(4C) which was inserted by S.I. 2004/2990; 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 1998 Act”). 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 so 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 a Minister of the Crown under section 2(2) of the 1972 Act, in so far as exercisable within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. In so far as not so 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 No. L31, 1.2.2002, p.1, as last amended by Regulation (EC) No. 596/2009 of the European Parliament and of the Council adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468 with regard to the regulatory procedure with scrutiny: Adaptation to the regulatory procedure with scrutiny – Part Four (OJ No. L188, 18.7.2009, p.14).

Citation, extent and commencement

1. These Regulations may be cited as the Contaminants in Food (Scotland) Regulations 2010, extend to Scotland only and come into force on 20th October 2010.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Food Safety Act 1990;

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

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

“Commission 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(c);

“Commission 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(d).

(2) Any other expression used in these Regulations and in Commission Regulation 1881/2006 or in Commission Regulation 124/2009 has the same meaning in these Regulations as it bears in the Commission Regulation concerned.

(3) Any reference to “the Annex” is a reference to the Annex to Commission Regulation 1881/2006 as that Annex may be amended from time to time, and any reference to that Regulation is to be construed accordingly.

Offences and penalties

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

(a) Article 11 of Commission Regulation 1881/2006;

(b) Article 2 of Commission Regulation 629/2008; or

(c) Article 2 of Commission 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 Commission Regulation 1881/2006 (prohibition on the placing on the market of foodstuffs containing contaminants in excess of prescribed limits contained in the Annex), as read with the Annex and, in the case of groundnuts, other oilseeds, tree nuts, dried fruit, rice and maize, with Article 4 of that Regulation;

(b) Article 3 of Commission Regulation 1881/2006 (prohibitions on use, mixing and detoxification); and

(c) Article 1(1) of Commission Regulation 124/2009 (prohibitions on marketing or mixing foods containing coccidiostats or histomonostats at levels in excess of prescribed limits).

(a) OJ No. L 364, 20.12.2006, p.5, as amended by Commission Regulations (EC) No's 1126/2007 (OJ No. L 255, 29.9.2007, p.14), 565/2008 (OJ No. L 160, 19.6.2008, p.20), 629/2008 (OJ No. L 173, 3.7.2008, p.6), 105/2010 (OJ No. L 35, 6.2.2010, p.7) and 165/2010 (OJ No. L 50, 27.2.2010, p.8).

(b) OJ No. L 173, 3.7.2008, p.6.

(c) OJ No. L 40, 11.2.2009, p.7.

(d) OJ No. L 50, 27.2.2010, p.8.

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

Enforcement and competent authorities

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

(2) The competent authority for the purposes of—

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

is the authority having the duty to enforce under paragraph (1).

Application of various sections of the Food Safety Act 1990

5.—(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), with the modification that—
 - (i) subsections (2) to (4) apply in relation to an offence under regulation 3 as they apply in relation to an offence under section 14 (selling food not of the nature or substance or quality demanded) or 15 (falsely describing or presenting food), 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) (obstruction etc. of officers), with the modification that the reference to “any such requirement as is mentioned in subsection (1)(b) above” is 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 35(1) (punishment of offences), in so far as it relates to offences under section 33(1) as applied by sub-paragraph (e);
- (h) section 35(2) and (3) (punishment of offences), in so far as it relates to offences under section 33(2) as applied by sub-paragraph (f);
- (i) section 36 (offences by bodies corporate);
- (j) section 36A (offences by Scottish partnerships); and
- (k) section 44 (protection of officers acting in good faith).

(2) 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 the requirements specified in regulation 3(2)(a) and (c) of the Contaminants in Food (Scotland) Regulations 2010 (“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 the 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; or
 - (b) if not so satisfied, shall seize the food and remove it in order to have it dealt with by the 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 the sheriff and any person who in connection with regulation 3(2)(a) or (c) of the above Regulations 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 the 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 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.
- (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.
- (9) In this section, “authorised officer” means any person who is authorised in writing, either generally or specifically, by a food authority to act in matters arising under the Contaminants in Food (Scotland) Regulations 2010.”.

Consequential amendment

6. In Schedule 1 to the Food Safety (Sampling and Qualifications) Regulations 1990(a) (provisions to which those Regulations do not apply), for the entry relating to the Contaminants in Food (Scotland) Regulations 2009(b) there is substituted—

“The Contaminants in Food (Scotland) Regulations 2010 (to the extent that a sample falls to be prepared and analysed in accordance with Commission Regulation 1881/2006 as that expression is defined in those Regulations) S.S.I. 2010/ .”

(a) S.I. 1990/2463, relevantly amended by S.I. 1999/1603, S.S.I. 2002/267, 2003/289 and 2009/215.
 (b) S.S.I. 2009/215.

Revocation

7. The Contaminants in Food (Scotland) Regulations 2009 are revoked.

St Andrew's House,
Edinburgh
15th September 2010

SHONA ROBISON
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations revoke and re-enact with changes the Contaminants in Food (Scotland) Regulations 2009. They make provision for the continuing execution and enforcement of Commission Regulation (EC) No. 1881/2006 setting maximum levels for contaminants in foodstuffs (OJ No. L 364, 20.12.2006, p.5) (“the Commission Regulation”).

The Commission Regulation, which replaced amendments to the provisions formerly contained in Commission Regulation (EC) No. 466/2001 (OJ No. L 77, 16.3.2001, p.1), has recently been amended by Commission Regulation (EU) No. 165/2010 which concerns maximum levels for aflatoxins and the treatment of certain foods found to contain aflatoxins in excess of those levels (OJ No. L 50, 27.2.2010, p.8). The Commission Regulation has previously been amended by—

- (a) Commission Regulation (EC) No. 1126/2007 (OJ No. L 255, 29.9.2007, p.14), concerning maximum permitted levels for *Fusarium* toxins in maize and maize products;
- (b) Commission Regulation (EC) No. 565/2008 (OJ No. L 160, 19.6.2008, p.20), concerning maximum permitted levels for dioxins and PCBs in fish liver;
- (c) Commission Regulation (EC) No. 629/2008 (OJ No. L 173, 3.7.2008, p.6), concerning maximum permitted levels for certain heavy metals; and
- (d) Commission Regulation (EU) No. 105/2010 (OJ No. L 35, 6.2.2010, p.7), concerning maximum permitted levels for ochratoxin A.

These Regulations also provide for the execution and enforcement of Commission Regulation (EC) No. 124/2009 (OJ No. L 40, 11.2.2009, p.7) (“Regulation 124/2009”), which concerns maximum permitted levels for certain feed additives that may in specified circumstances occur in food.

The Regulations—

- (a) provide that it is an offence (except in certain cases relating to food placed on the market before a date given in specified EU legislation)—
 - (i) 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,
 - (ii) to use food containing contaminants at levels in excess of those permitted by the Commission Regulation as ingredients in the production of certain foods,
 - (iii) 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,
 - (iv) 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, or
 - (v) to detoxify by chemical treatment food containing mycotoxins in excess of the limits specified in the Commission Regulation (regulation 3);
- (b) specify the enforcement authorities (regulation 4);
- (c) provide for the application of specified provisions of the Food Safety Act 1990 for the purposes of these Regulations (regulation 5); and
- (d) make a consequential amendment to the Food Safety (Sampling and Qualifications) Regulations 1990 (regulation 6), the effect being to disapply the sampling and analysis provisions of those Regulations only to the extent that those matters are regulated by the EU instruments mentioned in paragraphs (a) to (d) below.

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 (OJ No. L 70, 9.3.2006, p.12), as last amended by Commission Regulation (EU) No. 178/2010 (OJ No. L 52, 3.3.2010, p.32);
- (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 (OJ No. L 364, 20.12.2006, p.25);
- (c) Commission Regulation (EC) No. 1883/2006 laying down methods of sampling and analysis for the official control of levels of dioxins and dioxin-like PCBs in certain foodstuffs (OJ No. L 364, 20.12.2006, p.32); and
- (d) 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 (OJ No. L 88, 29.3.2007, p.29).

A full impact assessment of the effect that this instrument will have on the costs of business 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.

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