

GOVERNMENT RESPONSE

Consultation on: Draft Weights and
Measures (Food) (Amendment)
Regulations 2014 and Guidance

NOVEMBER 2014

GOVERNMENT RESPONSE TO THE CONSULTATION ON WEIGHTS AND MEASURES (FOOD) (AMENDMENT) REGULATIONS 2014

Introduction

1. This document analyses responses to the public consultation on the Government's proposals to amend national Weights and Measures legislation on packaged food to take account of the EU Regulation on Food Information to Consumers (1169/2011) ("FIC"). The consultation opened on 11 September 2014 and closed on 20 October 2014. This document also sets out the Government's response to the points raised in response to the consultation questions.

Executive Summary

2. FIC will take effect from 13 December 2014. It includes directly applicable requirements for mandatory quantity labelling for pre-packed foods intended for supply to consumers or mass caterers. As a result, all overlapping or conflicting provisions in national weights and measures law must be revoked to ensure compliance with EU law. In addition, FIC does not include enforcement provisions and there is an obligation on Member States to ensure that the new EU requirements can be enforced effectively in national law.
3. It is necessary to amend existing national law on weights and measures to take account of FIC by revoking any overlapping or conflicting national rules that apply to pre-packed foods, and to bring enforcement of the weights and measures requirements of FIC within the existing weights and measures enforcement framework. A Statutory Instrument, the Weights and Measures (Food) (Amendment) Regulations 2014 ("the Regulations") has been prepared for these purposes. The consultation sought views on whether the draft Regulations and the corresponding amendments to national law were clear were workable, and sought comments on draft guidance relating to the Regulations ("the Guidance").
4. A total of 10 responses were received. As a result of the responses and further discussions with stakeholders some minor changes have been made to the draft Regulations and to the Guidance to aid clarity and consistency. These changes are listed at paragraph 49 (changes to the Regulations) and paragraph 65 (changes to the Guidance).

Indication of who responded

5. The consultation document was sent directly to around 80 stakeholders and was available through both the National Measurement Office ("NMO") website homepage and the Gov.uk main consultations web page. A news story highlighting the consultation was issued through the NMO web site

and email alerts system. NMO officials also gave presentations on the proposals before the start of the consultation period to members of the Food and Drink Federation (“FDF”), the Leatherhead Foods Regulatory Network and at the Trading Standards Institute national conference.

6. A total of 10 formal responses were received. NMO is grateful to all those who gave thought to the workability of the draft legislation and took the time to respond. All responses have been analysed and considered. We have taken account of respondents’ views and, where appropriate, have amended our proposals.
7. The table below shows the breakdown of responses by type of organisation.

Type of Organisation	Responses received
Business Representative Body / Trade Association	3
Individual	1
Micro Business	1
Local Government	3
Others	2

8. A list of those organisations or individuals who responded, who did not request confidentiality, can be found at Annex A.

Analysis and Government Response

Question 1

Do you consider that there are any provisions which do not work or are unclear? If yes, please explain your reasons.

9. A majority of respondents commented to identify specific elements or provisions in the draft Regulations that they felt were unclear or caused confusion. However, the Primary Authority Supermarkets Group (“PASG”) commented that “On the whole the draft Regulations are clearly worded and their effect is clear”.
10. This section considers each issue raised in the consultation responses and provides a Government Response for each one. A list of amendments to the Regulations is included at paragraph 49.

Definition of Pre-packed

11. Five respondents commented on the definition of “pre-packed”. Northamptonshire County Council and Sue Powell commented that the new definition was unclear and suggested that the Regulations should instead refer to foods that are not pre-packed foods within the scope of

FIC. The Trading Standards Institute (“TSI”) and SCOTTS expressed concern that the definition of “pre-packed” in the Regulations was different to that used in the Weights and Measures Act 1985 (“WMA”) or to that used in food law. The FDF were also concerned that using a different definition from that in FIC might cause confusion. CEnTSA also commented that it was unclear why the word ‘loose’ has been used to replace the wording of ‘not pre-packed’ in the proposed amendments to the Weights and Measures Act 1963 (Cheese, Fish, Fresh Fruits and Vegetables, Meat and Poultry) Order 1984 (“the 1984 Order”).

Government Response

12. Unfortunately, slotting together parallel regimes for those products subject to FIC and those subject to national law is inherently complicated.
13. We have considered the alternative formulation suggested by Northamptonshire County Council, but as it would not be clear on the face of the legislation what it applied to, we have concluded that it would make the Regulations less clear.
14. The difficulty with using a definition of pre-packed that applies to all products not subject to FIC is that it could extend the scope of the national rules to new products. In order to retain the status quo, the definition must cover products which are not only excluded from the scope of FIC, but were also within scope of the WMA definition, therefore it is not sufficient simply to refer to items which aren’t within the scope of FIC. That is also the reason why the term “loose” has been used, as “not pre-packed” could include within its scope products caught by FIC, following the amendments that have been made to the definition of “pre-packed”.
15. However, the Government has taken on board that this definition is causing some concern and has amended the Guidance to clarify this further. A table has also been added to explain when the different regimes applicable to packaged foods will apply.

Font size

16. Two respondents, SCOTTS and TSI expressed concern that requiring a larger font size for e-marked packages defeats the purpose of having a consistent approach under FIC and will make it difficult for consumers, particularly vulnerable consumers, to understand quantity information.

Government response

17. The e-marking system, which allows packages to apply an e-mark if they are between 5 g and 10 Kg and 5 ml and 10 L and meet the rules of the Weights and Measures (Packaged Goods) Regulations 2006 (“PGR”), is derived from separate EU legislation (Directive 76/211/EEC). Therefore, Member States do not have any discretion to disapply the rules of that Directive for e-marked packages. However, the Government does not believe that this will cause confusion for consumers as the minimum size of quantity labelling for e-marked packages is larger than for those under FIC and so retention of this system should be beneficial for consumers.

Definition of Direct Sale

18. Northamptonshire County Council commented that the definition of direct sale is not sufficiently clear as it is not defined in FIC and its definition in the Food Labelling Regulations 1996 is being revoked.

Government Response

19. The term “pre-packed for direct sale” is intended to apply to those foods that have been packed on the same premises from which they are being sold. The Government agrees inclusion of an explanation of this term would be helpful and will include it in the Guidance to the Regulations.

Definition of FIC

20. Northamptonshire County Council commented that the term “FIC” has not been defined in the Weights and Measures (Intoxicating Liquor) Order 1988 (“ILO”) as it has been in the other Orders being amended.

Government Response

21. Having considered this comment, the Government has changed its approach. As the term “FIC Regulation” will be defined in the WMA, it is not necessary or desirable to define it additionally in secondary legislation made under that Act. Therefore, the definitions included in the Weights and Measures (Miscellaneous Foods) Order 1988 (“MFO”) and the 1984 Order will be deleted from the Regulations to bring them into line with the ILO.

Definition of meat

22. CEnTSA commented that the definition of “meat” is unchanged and covers only cattle, sheep and swine. As there is now a broader range of meats sold in the market place they suggested that the definition should be extended to cover loose sales of other meats such as venison and alligator to reflect the current market place.

Government Response

23. The Government will consider the issue of scope when it reviews the operation of the remaining provisions that apply to loose foods next year. However, the intention of the current exercise is to retain the status quo for transactions outside the scope of FIC.

Fruits and Vegetables by count or by bunch

24. CEnTSA also suggested that the lists of fruits or vegetables that can be sold loose by count or by the bunch should be extended or made more general to reflect modern practices.

Government Response

25. The Government will consider the issue of scope when it reviews the operation of the remaining provisions that apply to loose foods next year. However, the intention of the current exercise is to retain the status quo for transactions outside the scope of FIC.

Regulation 29(b)

26. Northamptonshire County Council commented that the words “Article 2(2)(e) of” are omitted in Regulation 29(b).

Government Response

27. The Government agrees and will amend the Regulations to include this reference.

Definition of “container” for chocolate and cocoa products

28. Northamptonshire County Council expressed concern that the definition of “container” given in Regulation 13(h) is not identical to that in the WMA, and that this may not maintain the status quo.

Government Response

29. It was necessary to include a definition of “container” in the Regulations, as the previous definition which applied to cocoa and chocolate products for the purpose of the MFO cross-referred to the Cocoa and Chocolate Products Regulations 1976, which have now been revoked. However, the Government agrees that the new definition could be confusing and so will amend the definition to match exactly the definition from the 1976 Regulations and will clarify in the Regulations that it only applies in relation to these products (therefore in relation to any other products the definition in the WMA will continue to apply).

Schedule 7 Weights and Measures Act

30. Howard Burnett Consultants Ltd commented that Schedule 7 of the WMA specifies requirements for composite goods (multipacks) and collections of goods (mixtures) that at present include foods and which may conflict with the requirements in Annex IX FIC.

Government Response

31. The Government agrees that there is a potential conflict and will exclude products subject to FIC from the scope of Schedule 7.

Drained Net Weight

32. Sue Powell and the TSI expressed disappointment and concern that the provision at Art 8(2) of the PGR which requires that the drained net weight be treated as the nominal quantity (i.e. it may be an average weight and benefit from the tolerances of the average system) has not been amended to bring it into line both with FIC and with earlier advice from LACORS that the PGR was out of line with European law in this respect.

Government Response

33. The Government had planned to address this issue as part of this exercise. However, further informal discussions with the European Commission that have taken place subsequently have suggested that the existing law is not in fact out of line with European law. The Government intends to take this forward through discussion with TSI and business to agree an approach to working practices that reflects existing practice

across Europe. However, it is no longer clear that any legislative change is necessary.

Articles 15 and 16

34. Northamptonshire County Council questioned the need to retain Articles 15 (quantity by number) and 16 (other pre-packed foods) as these areas will be subject to the directly applicable rules under FIC.

Government Response

35. These provisions are being retained as the policy is to retain provisions that apply to packages that fall outside the scope of FIC in order to maintain the status quo. The scope has been drastically reduced by the change to the definition of “pre-packed”, but the provisions must be retained as they still have application in relation to products sold by relevant wholesale or by direct sale.

Biscuits exemption

36. The UK Weighing Federation expressed concern as to why “biscuits, other than wafer biscuits which are not cream-filled” are exempted from quantity marking below 50 g rather than 5 g.

Government Response

37. This exemption maintains an existing exemption under Article 3(2) and column 4 of Schedule 1 to the MFO. However, the scope of the MFO has been narrowed and the 50 g exemption now only applies to biscuits outside the scope of FIC. The exemption from quantity marking below 5 g applies to packages that are subject to FIC.

Chocolate exemption

38. Both the PASG and TSI commented that retention of exemptions from quantity labelling for products above 5 g was not in the spirit of FIC.

39. PASG also questioned why the exemption for chocolate products below 50 g had been revoked from the PGR but was retained under the MFO.

Government Response

40. The scope of the previous exemptions from quantity labelling under MFO exemption have been limited by the change to the definition of “pre-packed”, and will not apply to any products subject to FIC. The Government will consider the future of this and other exemptions for the remaining categories of products subject to national rules when it reviews the operation of the remaining provisions next year.

41. The exemptions at Schedule 6 of the PGR can be revoked (with the exception of its application in relation to sugar, as to which see paragraph 48 below), because this Schedule has effectively become redundant – any products which would have fallen within its scope are now covered by FIC, unlike in relation to the MFO, which still applies to products made up for direct sale or made up in advance in an open container, and products for relevant wholesale.

Consolidation

42. CEnTSA have suggested consolidating the remaining requirements into a single Statutory Instrument.

Government Response

43. The Government will consider this as part of next year's review. However, guideline consolidated texts of the food orders will be made available in order to aid understanding of the remaining provisions.

Non Foods

44. Both SCOTTS and TSI suggested that the requirements for quantity labelling of goods other than foods should also be reviewed and updated.

Government Response

45. A review of the quantity labelling requirements for non-foods is outside the scope of this consultation. However, the Government acknowledges the concerns of respondents in this area and will consider a wider review when time and resources allow.

Cross referencing to national laws

46. TSI also raised a concern that the new cross references to other regulations in the MFO definitions refer only to England regulations, whereas the previous regulations referred to were UK wide.

Government Response

47. The Government agrees that the cross referencing can be improved and will amend the Regulations to include equivalent references to definitions in national law for Scotland and Wales.

Sugar exemption

48. In addition, the Government proposes to amend the Regulations to maintain the exemption from quantity labelling for sugar below 20 g (rather than the 5 g limit under FIC) currently found in Schedule 6 of the PGR, as this is derived from separate European law (Article 2(2) of Directive 2001/111/EC).

List of Government Changes to the Regulations as a result of the Consultation

49. Amendments will be made to the Regulations to:

- remove the definition of "FIC Regulation" from the MFO and the 1984 Order;
- include a reference to Article 2(2)(e) in Regulation 29 (now Regulation 14);
- clarify the definition of "container" for cocoa and chocolate products to ensure consistency with the previous definition;
- exclude products subject to FIC from the scope of Schedule 7 of the WMA;

- include cross referencing to national laws in Scotland and Wales for the relevant definitions in the MFO;
- re-instate exemption for sugar below 20 g (rather than 5 g).

Question 2

50. Do you have any comments on the draft Guidance? If yes, please provide details.

51. Eight of the respondents made comments on the Guidance. There was broad agreement that the Guidance should be improved to make it more useful to regulators, business and consumers. The particular issues raised are covered in detail below.

More practical examples and guidance on FIC

52. SCOTTS, TSI and Sue Powell all commented that the Guidance was not helpful as it listed each provision of the law but did not include practical examples or illustrations. The PASG also commented that the Guidance was not clear enough as it failed to specify which items can be sold by weight and which by number. The Health Food Manufacturers Association (“HFMA”) also raised the question of which foods can be sold by number. The Food and Drink Federation requested more guidance on FIC and how it will apply to foods sold by number and to multipacks.

Government Response

53. It is not intended that the Guidance should be prescriptive with regard to particular products or foodstuffs, or for it to be a guide to FIC. It is intended to be a guide to the new national Regulations. However, the Government has taken on board the comments and agrees that the Guidance can be improved. It will be amended to include a table showing how to identify which requirements apply to different product categories and to provide more guidance on the definitions of “pre-packed” and “direct sale”. A separate reply has been sent to the HFMA in response to their specific questions.

54. In addition, given the interest in separate guidance on FIC, NMO will explore with FDF, TSI and other stakeholders the possibility of developing separate non statutory guidance on FIC.

Front of Pack

55. The PASG and TSI commented that this was a missed opportunity to clarify the position on whether the quantity information must be provided on the front of the pack under the PGR.

Government Response

56. There has been no change to the requirements regarding the location of the quantity information and the existing guidance under the PGR is still in place.

Definitions of pre-packed

57. Northamptonshire County Council suggested that the different definitions of pre-packed under the WMA and the Regulations should be included next to each other.

Government Response

58. The Guidance will be amended to explain the new definitions more clearly and will include a table to explain which requirements apply to different product categories.

PGR Guidance

59. The FDF noted that the PGR guidance will need to be updated to take account of the changes being made by the Regulations.

Government Response

60. The Government agrees that consequential amendments will be needed to the PGR guidance and intends to make these and circulate them to stakeholders in draft as soon as possible.

Clarification that amendments to the PGR are limited to foods

61. Howard Burnett Consultants Ltd commented that the Guidance should be clarified to make it clearer that the amendments to the PGR are limited to non e-marked packages of foods.

Government Response

62. The Government agrees and will clarify this point in the Guidance.

Cross reference to PGR guidance on legibility

63. Howard Burnett Consultants Ltd suggested that the Guidance could cross refer to the PGR guidance on legibility.

Government Response

64. The Government agrees and will amend the Guidance to include a cross reference.

List of Government Changes to the Guidance as a result of the Consultation

65. Changes will be made to the Guidance to:

- clarify what is meant by the term “pre-packed” in different legislation;
- include a table showing which requirements apply to different product categories;
- include a definition of “direct sale”;
- include a cross reference to PGR guidance on legibility;
- clarify that the changes to PGR are limited to non e-marked foods only.

General comments

66. SCOTTS and TSI commented that it was unfortunate and regrettable that the consultation was not published until 11 September 2014, leaving only a short period in which to comment.

Government Response

67. The Government regrets that there was not more time available for stakeholders to comment on the draft documents, but the main driver has been to meet the deadline for implementation of 13 December 2014. Unfortunately, other priorities meant that this process could not be started earlier.

Next Steps

68. The Government will make the changes to the Regulations and they will come into force on 13 December 2014.

69. The Government will make changes to the draft Guidance on the Regulations and will publish it on the Gov.uk website alongside the new Regulations.

Annex A: List of Respondents

CEnTSA (Central England Trading Standards Authorities)

Food and Drink Federation

Health Food Manufacturers Association

Howard Burnett Consultants Ltd

Northamptonshire County Council

Primary Authority Supermarkets Group

SCOTTS (Society of Chief Officers of Trading Standards in Scotland)

Sue Powell

Trading Standards Institute

UK Weighing Federation

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