

2009 No. 215

FOOD

The Contaminants in Food (Scotland) Regulations 2009

Made - - - - *3rd June 2009*

Laid before the Scottish Parliament *4th June 2009*

Coming into force - - *1st July 2009*

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 Commission Regulation (EC) No. 1881/2006(c) as specified in regulation 2(4) to be construed as references to that Annex as 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(d).

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(e).

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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) and 48(1) were amended by the Food Standards Act 1999 (c.28) (“the 1999 Act”), section 40(1) and Schedule 5, paragraph 8; section 17(2) was amended by the 1999 Act, section 40(1) and Schedule 5, paragraphs 8 and 12; section 26(3) was amended by the 1999 Act, section 40(4) and Schedule 6; section 48(4) is disappplied in respect of these Regulations by virtue of section 48(4C), inserted by S.I. 2004/2990; amendments made by Schedule 5 to the 1999 Act shall be taken as pre-commencement enactments for the purposes of the Scotland Act 1998 (c.46) (“the 1998 Act”) by virtue of section 40(2) of the 1999 Act. The functions of the Secretary of State, so far as within devolved competence, were transferred to the Scottish Ministers by virtue of section 53 of the 1998 Act. Insofar as not so transferred and insofar as relating to food (including drink) including the primary production of food, those 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, Schedule 2. Paragraph 1A was inserted by the Legislative and Regulatory Reform Act 2006 c.51.
- (c) O.J. No. L 364, 20.12.06, p.5, as amended by Commission Regulation (EC) No. 1126/2007 setting maximum levels for certain contaminants in foodstuffs as regards Fusarium toxins in maize and maize products, O.J. No. L 255, 29.9.07, p.14, and by Commission Regulation (EC) No. 565/2008 O.J. L 160, 19.6.08, p.20, and by Commission Regulation (EC) No. 629/2008 O.J. No. L 173, 3.7.08, p.6.
- (d) Section 48(4A) was inserted by the 1999 Act, section 40(1) and Schedule 5, paragraph 21.
- (e) O.J. No. L 31, 1.2.02, p.1, as amended by Regulation (EC) No. 1642/2003 (O.J. No. L 245, 29.9.03, p.4) and Commission Regulation (EC) No. 575/2006 (O.J. No. L 100, 8.4.06, p.3) and by Commission Regulation (EC) No. 202/2008 (O.J. No. L 60, 5.3.08, p.17).

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Contaminants in Food (Scotland) Regulations 2009 and come into force on 1st July 2009.

(2) These Regulations extend to Scotland only.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Food Safety Act 1990;

“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;

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

“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(a); and

“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(b).

(2) Other expressions used in these Regulations and in the Commission Regulation or in Commission Regulation 124/2009 have the same meaning in these Regulations as in those Regulations.

(3) Unless indicated otherwise, any reference to a numbered Article is a reference to the Article so numbered in the Commission Regulation.

(4) Any reference to the Annex is a reference to the Annex to the Commission Regulation as that Annex may be amended from time to time, and any reference to the Commission Regulation is to be construed accordingly.

Offences and penalties

3.—(1) Subject to the transitional arrangements contained in Article 1 and in Article 2 of Commission Regulation 629/2008, a person who contravenes or fails to comply with any of the Community provisions specified in paragraph (2) is guilty of an offence.

(2) The provisions mentioned in paragraph (1) are—

(a) Article 1(1) (prohibition on the placing on the market of foodstuffs containing contaminants in excess of prescribed limits), as read with the Annex and, in the case of groundnuts, nuts, dried fruit and maize, with Article 4;

(b) Article 3 (prohibitions on use, mixing and detoxification);

(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).

(3) Any person guilty 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 shall be the duty of each food authority within its area to execute and enforce these Regulations, the Commission Regulation and Commission Regulation 124/2009.

(a) O.J. No. L 173, 3.7.08, p.6.

(b) O.J. No. L 40, 11.2.09, p.7.

(2) The competent authority for the purposes of—

- (a) Article 2(2) (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 shall apply for the purposes of these Regulations, with the modification that any reference in those provisions to the Act or Part thereof shall 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), as it applies for the purposes of section 14 (selling food not of the nature or substance or quality demanded) or 15 (falsely describing or presenting food);
- (d) section 30(8) (which relates to documentary evidence);
- (e) section 33 (obstruction etc. of officers);
- (f) section 35(1) to (3) (punishment of offences), insofar as it relates to offences under section 33(1) and (2), as applied by sub-paragraph (e) of this regulation;
- (g) section 36 (offences by bodies corporate);
- (h) section 36A (offences by Scottish partnerships); and
- (i) 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) shall apply 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 2009 (“the Community 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 Community 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 the sheriff.

(4) Where an authorised officer exercises the powers conferred by subsection (2)(b) or (3)(b) above, that 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 Contaminants in Food (Scotland) Regulations 2009 might be liable to prosecution in respect of the food shall, if attending 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 Community 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.”.

(3) The expression “authorised officer” which is used in section 9 of the Act so far as it applies for the purposes of these Regulations by virtue of paragraph (2), shall, for those purposes, bear the meaning that that expression bears in these Regulations.

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 2007(b), substitute—

“The Contaminants in Food (Scotland) Regulations 2009 (to the extent that a sample falls to be prepared and analysed in accordance with the Commission Regulation as that expression is defined in those Regulations)

S.S.I. 2009/215.”

Revocation

7. The Contaminants in Food (Scotland) Regulations 2007 and the Contaminants in Food (Scotland) Amendment Regulations 2007(c) are both revoked.

SHONA ROBISON
Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh
3rd June 2009

(a) S.I. 1990/2463, relevantly amended by S.I. 1999/1603, S.S.I. 2002/267 and 2003/289.
(b) S.S.I. 2007/29.
(c) S.S.I. 2007/470.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, which extend to Scotland only, revoke and re-enact with changes the Contaminants in Food (Scotland) Regulations 2007 (“the 2007 Regulations”). They make provision for the execution and enforcement of Commission Regulation (EC) No. 1881/2006 setting maximum levels for certain contaminants in foodstuffs (O.J. No. L 364, 20.12.06, p.5) (“the Commission Regulation”), and of 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 food. (O.J. No. L 40, 11.2.09, p.7.) (“Regulation 124/2009”).

Regulation 3 provides that it is an offence (except in certain cases relating to food placed on the market before a date given in specified Community legislation)–

- (a) to place on the market certain foods if they contain contaminants of any kind specified in the Commission Regulation or Regulation 124/2009 at levels exceeding those specified;
- (b) to use food containing such contaminants at such levels as ingredients in the production of certain foods;
- (c) to mix foods that do not comply with the maximum levels referred to above with foods which do so comply;
- (d) 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
- (e) to detoxify by chemical treatment food containing mycotoxins in excess of the limits specified in the Commission Regulation (regulation 3).

Regulation 4 specifies the enforcement authorities and regulation 5 provides for the application of specified provisions of the Food Safety Act 1990 for the purposes of these Regulations.

Regulation 6 makes a consequential amendment to the Food Safety (Sampling and Qualifications) Regulations 1990 in so far as they extend to Scotland, the effect being to disapply the sampling and analysis provisions of those Regulations only to the extent that those matters are regulated by the Community instruments mentioned in paragraphs (a) to (d) below.

The Commission Regulation specifies the Community 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 (O.J. No. L 70, 9.3.06, p.12);
- (b) Commission Regulation (EC) No. 1882/2006 laying down methods of sampling and analysis for the official control of the levels of nitrates in certain foodstuffs (O.J. No. L 364, 20.12.06, p.25); and
- (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 (O.J. No. L 364, 20.12.06, p.32);

- (d) Commission Regulation (EC) No. 333/2007 laying down 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 (O.J. L 88, 29.3.07, p.29).

A full regulatory impact assessment, which includes a compliance cost assessment of the effect which these Regulations would have on business costs, has been prepared for these Regulations 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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