

EXPLANATORY MEMORANDUM TO
THE QUALITY STANDARDS FOR GREEN BANANAS (ENGLAND AND WALES)
REGULATIONS 2012

2012 No. 947

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 This instrument provides for the enforcement of the EU regulation providing for marketing standards for bananas (Commission Regulation (EU) No 1333/2011 laying down marketing standards for bananas, rules on the verification of compliance with those marketing standards and requirements for notifications in the banana sector) which imposes requirements relating not only to quality, but also to the size, presentation and labelling of bananas. The EU marketing standards for bananas exist alongside EU marketing standards for fresh fruit and vegetables, but as a separate regime.

2.2 Both sets of standards were previously enforced in Great Britain under the following domestic legislation:

- The Agriculture and Horticulture Act 1964 (as modified to apply to produce covered by EU marketing standards by the Grading of Horticultural Produce (Amendment) Regulations 1973 (SI 1973/22) as amended by The Grading of Horticultural Produce (Amendment) Regulations 1983 (SI 1983/1053));
- The Horticultural Produce Act 1986 (which modified the Agriculture and Horticulture Act 1964)
- The Grading of Horticultural Produce (Forms of Labels) Regulations 1982 (SI 1982/387).

2.3 When EU rules on marketing standards for fresh fruit and vegetables (excluding bananas) were revised, new self-contained domestic enforcement regulations were introduced, namely the Marketing of Fresh Horticultural Produce Regulations 2009 (SI 2009/1361) in England and the Marketing of Fresh Horticultural Produce Regulations (Wales) Regulations 2009 (SI 2009/1551 (W 151)) in Wales, and the 1964 and 1986 Acts were disapplied to fruit and vegetables covered by the EU rules. Scotland and Northern Ireland introduced similar regulations.

2.4 However, because the above-mentioned 2009 Regulations also revoked SI 1973/22 in England and Wales, the powers under the 1964 and 1986 Acts were no longer available for the enforcement of EU marketing standards for bananas. Therefore, a gap for the enforcement of these standards inadvertently arose which meant that new legislation was required.

2.5 This instrument therefore creates the necessary provision for enforcement, in England and Wales, of the EU quality standards for bananas. The Regulations provide inspection and enforcement powers to authorised officers appointed by the Secretary of State (currently the Rural Payment Agency Horticultural Marketing Inspectorate

Inspectors (RPA HMI)) and relevant offences eg for failing to comply with a notice served by an authorised officer in respect of sub-standard bananas.

2.6 A similar situation exists in Scotland and Northern Ireland. Scotland has already made the necessary enforcement regulations. Northern Ireland are still working on their regulations.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 It is recognised that where specific powers already exist in domestic legislation, they should generally be used in preference to the general powers in s.2(2) of the European Communities Act 1972.

3.2 Therefore, in considering how to fill the enforcement gap, thought was given as to whether to make a statutory instrument under s.11(3) and s.13(2) of the Agriculture and Horticulture Act 1964 to enable that Act to apply once again to EU marketing standards for bananas in England and Wales and to provide for re-graded and out-graded labels. However, this option was rejected. The main reason why the 2009 Regulations were introduced for the enforcement of the EU marketing standards for fresh fruit and vegetables was because the 1964 Act is outdated, complex in structure, and is not user-friendly. It was felt that it would therefore be illogical and inconsistent to return to the 1964 Act in order to make an instrument for the enforcement of the EU quality standards for bananas and that there is good reason to use the powers in s.2(2) of the European Communities Act 1972 for this purpose.

3.3 Consideration was also given as to whether to amend the respective 2009 Regulations to extend their scope to include bananas (which are listed in Part XI, as opposed to Part IX, of Annex I to Council Regulation (EC) No 1234/2007 and are subject to different rules than other fruit and vegetables). However, for policy and practical reasons – substantial amendment of two very recent Statutory Instruments which the wider fresh fruit and vegetables industry were only just becoming familiar with would have been required and would have caused confusion and disruption to the industry - this option was also rejected.

3.4 In light of these considerations, the option chosen was to make a new self-contained set of Regulations to allow for the enforcement of the EU marketing standards for bananas. This option allows for consistency where appropriate with the enforcement of EU marketing standards for fresh fruit and vegetables, whilst keeping the two regimes separate. It also only affects the banana industry, rather than the wider fresh fruit and vegetable industry.

3.5 The Department is currently considering whether the Agriculture and Horticulture Act 1964 and the Horticultural Produce Act 1986 should be put forward for repeal.

4. Legislative Context

4.1 The marketing requirements for green bananas are set out in Commission Regulation (EU) No 1333/2011 laying down marketing standards for bananas, rules on the verification of compliance with those marketing standards and requirements for notifications in the banana sector. This EU Regulation is binding in its entirety and directly applicable in all EU Member States.

4.2 The standards for green bananas within CN code 0803 90 10, excluding plantains, fig bananas and bananas intended for processing, apply after preparation and packaging. They apply to bananas originating in third countries at the stage of release for free circulation, to bananas originating in the EU at the stage of first landing at an EU port, and to bananas delivered fresh to the consumer in the producing region at the stage of leaving the packing shed (i.e. prior to, and not including, the retail stage). There is provision under Article 9 of Commission Regulation (EU) No 1333/2011 to exempt traders marketing bananas harvested in the EU or imported from third countries from regular conformity checks, if they satisfy certain conditions. Many, though not all traders, meet the conditions.

4.3 The EU marketing standards for bananas have not changed since 2006 (Commission Regulation (EU) 1333/2011 is a codification of earlier EU legislation). These Regulations therefore simply restore enforcement powers in England and Wales for these standards (see paragraph 2 above).

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 EU marketing standards exist for a wide variety of agricultural produce. These marketing standards provide a degree of consumer protection in a sector where most products are highly perishable and serious defects in the product can develop extremely rapidly. They help ensure that internal pests and disease, as well as soiling, do not affect produce, and determine whether produce is of the right maturity.

7.2 The EU marketing standards for bananas aim to keep bananas of unsatisfactory quality off the market. They also aim to ensure that produce is accurately labelled, guide production to meet consumer requirements and facilitate trade under fair conditions. These standards for bananas have been required since 1995.

7.3 As explained in paragraph 2, this Statutory Instrument will fill an enforcement gap and enable the UK to comply with its EU obligation to enforce the EU Regulation. It is made under section 2(2) of the European Communities Act 1972. Whilst Welsh Ministers can make their own Regulations in relation to Wales, in this case they have chosen to allow the Secretary of State to legislate on their behalf.

7.4 This Statutory Instrument:

- Includes powers to allow for effective inspections and enforcement such that authorised officers may, in particular:
 - be accompanied by representatives of the European Commission.

- have access to a broad range of records and inspect and check computers and associated equipment and require records to be produced.
 - seize computers where they have a reasonable suspicion that an offence under the Regulations has been committed, provided that a written receipt is given by the authorised officer and they are returned as soon as practicable.
 - affix non-compliance labels (re-graded, out-graded, labelling defect and movement control notice labels) in order to indicate the breach of the EU banana marketing standards which has occurred.
 - accept written undertakings where an inspection has been made, a breach of the standards has been detected and authorised officers have explained the options for bringing the bananas into compliance or for their appropriate sale or disposal.
 - issue warning notices to warn traders of a detected or suspected breach and to require compliance with the standards.
 - issue movement control notices to enable authorised officers to prohibit or restrict the movement of bananas if a breach of standards is detected or suspected.
- Provides a review procedure in respect of any warning notice or movement control notice issued.
 - Provides for the content of non-compliance labels.
 - Makes it an offence to fail to comply with a written undertaking or a movement control notice.
 - Makes obstruction of an authorised officer an offence.
 - Provides for offences due to the fault of another person and offences by bodies corporate, partnerships and unincorporated associations.
 - Provides for penalties. All criminal offences have a penalty fine of up to level 5 on the standard scale.
 - Includes a requirement to review the Regulations every five years in accordance with Government policy.
- ***Consolidation***

7.5 This is a free standing regulation.

8. Consultation outcome

8.1 A joint informal written consultation covering England and Wales was undertaken, in line with the Code of Practice on Consultation, from 20 September to 14 November 2010. This can be found on the Defra website at <http://www.defra.gov.uk/consult/closed>. There is a statutory duty to consult under Article 9 of Regulation (EC) No 178/2002 of the European Parliament and of the

Council. The consultation was emailed directly to 47 organisations across the industry covering banana traders, the supermarkets and the public.

8.2 An 8 week informal consultation was used rather than the full 12 week period for the following reasons:

- the urgency in making the SI to enable us to comply with our EU obligations;
- Defra is seeking to reduce the use of formal written consultations for uncontroversial matters;
- an 8-week period reflects the Commission's own recommended minimum period for consultation;
- an Impact Assessment was not required as the instrument will have no additional costs to industry;
- on the basis of past experience, limited interest was expected regarding the proposals.

8.3 The consultation sought views on the Department's preferred approach, the proposed content of the draft SI (at that time), concerns on costs to industry and on the consultation process itself. Three written responses were received. One had no comments. One questioned why EU quality standards on bananas are required at all – this is a matter for the European Commission and whilst the standards exist, the UK is under a duty to enforce them. The third respondent thought that the proposal was workable and would not result in extra costs to industry and made a suggestion for the future review of enforcement. It also raised concerns about the powers to seize computers. The Government considered these points carefully. There is an identical power to seize computers in the Marketing of Fresh Horticultural Product Regulations 2009 which is also enforced by RPA HMI. This power has safeguards included, in that it can only be used when an authorised officer has a reasonable suspicion that an offence under the Regulations has been committed. Further, any computers seized must be returned as soon as practicable. Accordingly, we believe the provision to be proportionate.

9. Guidance

9.1 The Regulations will provide the enforcement mechanism for the EU marketing standards for bananas. Industry and enforcement bodies are aware of the EU rules on the green bananas. It is envisaged that guidance on the new enforcement regime will be provided to the banana industry.

10. Impact

10.1 The impact on business will be negligible because banana traders are currently subject to inspections (albeit non-compliance cannot currently be enforced). No impact on charities or the voluntary sector is foreseen.

10.2 The only impact which is foreseen is on the public sector but this is minimal and is limited to the costs of updating software, providing new enforcement labels and some training of inspectors in relation to the provisions of the Regulations (they are already fully aware of the relevant EU Regulations).

10.3 For these reasons, a full impact assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business as well as larger ones.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is including but not limited, to exemptions/simplified inspection/less frequent reporting. However this only will apply if they meet the requirements under Article 9 of Commission Regulation (EU) No 1333/2011, which exempts traders who meet specific criteria and have obtained an exemption certificate from certain checks.

11.3 In any case, the sector affected by the legislation is composed mostly of large businesses. The UK banana trade is a multi-billion pound, multi-national industry, where even the smaller importers have one hundred-million pound turnovers. Therefore, it is unlikely that many firms employing fewer than 20 people will be affected. Moreover we do not anticipate any additional costs to businesses from the Regulations.

12. Monitoring & review

12.1 This instrument will be subject to review within 5 years of coming into force and a report must be published.

13. Contact

Andrew Chandiramani at the Department for Environment, Food and Rural Affairs (Defra). Tel: 020 7238 1208 or email: andrew.chandiramani@defra.gsi.gov.uk can answer any queries regarding the instrument.