WELSH STATUTORY INSTRUMENTS

2010 No. 2394 (W.206)

FOOD, WALES

The Contaminants in Food (Wales) Regulations 2010

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. These Regulations, which apply in relation to Wales, revoke and re-enact with changes the Contaminants in Food (Wales) Regulations 2009 (S.I. 2009/1386 (W.142) (as amended)). 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. L364, 20.12.2006, p.5) ("the Commission Regulation").

2. The Commission Regulation, which consolidated and made further amendments to the provisions formerly contained in Commission Regulation (EC) No. 466/2001, 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. L50, 27.2.2010, p.8). The Commission Regulation has previously been amended by—

(a) Commission Regulation (EC) No. 1126/2007 (OJ No. L255, 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. L160, 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. L173, 3.7.2008, p.6), concerning maximum permitted levels for certain heavy metals; and

(d) Commission Regulation (EU) No. 105/2010 (OJ No. L35, 6.2.2010, p.7), concerning maximum permitted levels for ochratoxin A.

3. These Regulations also provide for the execution and enforcement of Commission Regulation (EC) No. 124/2009 (OJ No. L40, 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.

4. 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*);

(d) make a consequential amendment to the Food Safety (Sampling and Qualifications) Regulations 1990 in so far as they apply in relation to Wales (*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 paragraph 5(a) to (d) below.

5. 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. L70, 9.3.2006, p.12), as amended by Commission Regulation (EU) No. 178/2010 (OJ No. L52, 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. L364, 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. L364, 20.12.2006, p.32);

(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. L88, 29.3.2007, p.29).

6. A regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations and is available from the Food Standards Agency, 11th Floor, Southgate House, Wood Street, Cardiff, CF10 1EW.

WELSH STATUTORY INSTRUMENTS

2010 No. 2394 (W. 206)

FOOD, WALES

The Contaminants in Food (Wales) Regulations 2010

Made *28 September 2010*

Laid before the National Assembly for Wales *30 September 2010*

Coming into force *22 October 2010*

The Welsh 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(**1**), and now vested in them(**2**), as read with paragraph 1A of Schedule 2 to the European Communities Act 1972(**3**).

These Regulations make provision for a purpose mentioned in section 2(2) of the European Communities Act 1972 and it appears to the Welsh Ministers that it is expedient for references to the Annex to the EU instrument as specified in regulation 2(4) to be construed as references to that Annex as it may be amended from time to time.

(**1**) 1990 c.16. Section 1(1) and (2) (definition of "food") was substituted by S.I. 2004/2990. Sections 17 and 48 were amended by paragraphs 12 and 21 respectively of Schedule 5 to the Food Standards Act 1999 (1999 c.28), "the 1999 Act". Section 48 was also amended by S.I. 2004/2990. Section 26(3) was amended by Schedule 6 to the 1999 Act. Section 53(2) was amended by paragraph 19 of Schedule 16 to the Deregulation and Contracting Out Act 1994 (1994 c.40), Schedule 6 to the 1999 Act, S.I. 2004/2990 and S.I. 2004/3279.

(**2**) Functions so far as exercisable in relation to Wales were transferred to the National Assembly for Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672) as read with section 40(3) of the 1999 Act and thereafter transferred to the Welsh Ministers by paragraph 30 of Schedule 11 to the Government of Wales Act 2006 (2006 c.32).

(**3**) 1972 c.68. Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (2006 c.51) and amended by Part 1 of Schedule 1 to the European Union (Amendment) Act 2008 (2008 c.7).

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

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(**1**), there has been open and transparent public consultation during the preparation and evaluation of these Regulations.

Title, application and commencement

1. The title of these Regulations is the Contaminants in Food (Wales) Regulations 2010, they apply in relation to Wales and come into force on 22 October 2010.

Interpretation

2.—(1) In these Regulations—

"the Act" ("*y Ddeddf*") means the Food Safety Act 1990;

"authorised officer" ("*swyddog awdurdodedig*") means any person who is authorised in writing, either generally or specifically, by a food authority or as the case may be a port health authority to act in matters arising under these Regulations;

"the Commission Regulation" ("*Rheoliad y Comisiwn*") means Commission Regulation (EC) No. 1881/2006 setting maximum levels for certain contaminants in foodstuffs(**2**);

"Commission Regulation 629/2008" ("*Rheoliad y Comisiwn 629/2008*") means Commission Regulation (EC) No. 629/2008 amending Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs(**3**);

"Commission Regulation 124/2009" ("*Rheoliad y Comisiwn 124/2009*") means Commission Regulation (EC) No. 124/2009 setting maximum

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(**1**) OJ No. L31, 1.2.2002, p.1. That Regulation was 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/EC 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).

(**2**) OJ No. L364, 20.12.2006, p.5. This Regulation has been amended by Commission Regulations (EC) No's 1126/2007 (OJ No. L255, 29.9.2007, p.14), 565/2008 (OJ No. L160, 19.6.2008, p.20) , 629/2008 (OJ No. L173, 3.7.2008, p.6), 105/2010 (OJ No. L35, 6.2.2010, p.7) and 165/2010 (OJ No. L50, 27.2.2010, p.8)

(**3**) OJ No. L173, 3.7.2008, p.6.

levels for the presence of coccidiostats or histomonostats in food resulting from the unavoidable carry-over of these substances in non-target feed(**1**);

"Commission Regulation 165/2010" ("*Rheoliad y Comisiwn 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(**2**);

"food authority" ("*awdurdod bwyd*") does not include a port health authority;

"non-target feed" ("*bwyd anifeiliaid ar gyfer anifeiliaid nad ydynt yn darged*") has the meaning given to it by Commission Regulation 124/2009;

"port health authority" ("*awdurdod iechyd porthladd*") means in relation to any port health district constituted by order under section 2(3) of the Public Health (Control of Disease) Act 1984(**3**), a port health authority for that district constituted by order under section 2(4) of that Act.

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

(a) Article 11;

(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 mentioned in paragraph (1) are—

(**1**) OJ No. L40, 11.2.2009, p.7.
(**2**) OJ No. L50, 27.2.2010, p.8.
(**3**) 1984 c.22.

(a) Article 1(1), (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;

(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) 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 and each port health authority within its district to execute and enforce these Regulations, the Commission Regulation and Commission Regulation 124/2009.

(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 apply for the purposes of these Regulations with the modification that any reference in those provisions to the Act or Part thereof 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)(**1**) with the modification that—

(i) subsections (2) to (4) are to apply in relation to an offence under regulation 3

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

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" is to 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 35(1)(**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)(**2**), 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)(**3**); and

(k) 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 reads 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 are to 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 (Wales) 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—

(**1**) Section 35(1) is amended by the Criminal Justice Act 2003 (2003 c.44), Schedule 26, paragraph 42, from a date to be appointed.

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

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

(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 justice of the peace.

(3) Where the authorised officer exercises the power conferred by subsection (2)(a) above, that officer must, 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, must forthwith withdraw the notice;

(b) if not so satisfied, must seize the food and remove it in order to have it dealt with by a justice of the peace.

(4) Where an authorised officer exercises the powers conferred by subsection (2)(b) or (3)(b) above, that officer must inform the person in charge of the food of his or her intention to have it dealt with by a justice of the peace and—

(a) 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 must, if he or she attends before the justice of the peace by whom the food falls to be dealt with, be entitled to be heard and to call witnesses; and

(b) that justice of the peace may, but need not, be a member of the court before which any person is proceeded against for an offence in connection with regulation 3(2)(a) or (c) of the above Regulations in relation to that food.

(5) If it appears to a justice of the peace, on the basis of such evidence as the justice considers appropriate in the circumstances, that any food falling to be dealt with under this section fails to comply with the EU requirements the justice must 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 justice of the peace by whom any food falls to be dealt with under this section refuses to condemn it, the food authority must 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 is to be determined by arbitration.

(8) Any person who knowingly contravenes the requirements of a notice under subsection (2)(a) above is 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" ("*swyddog awdurdodedig*") and "food authority" ("*awdurdod bwyd*") 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), are to, for those purposes, bear the meanings that those expressions respectively bear in these Regulations.

Consequential amendment

6. In Schedule 1 (provisions to which those Regulations do not apply) to the Food Safety (Sampling and Qualifications) Regulations 1990(**1**) in so far as they apply in relation to Wales, for the entry relating to the Contaminants in Food (Wales) Regulations 2009(**2**) there is substituted the following entry—

"The Contaminants in Food (Wales) Regulations 2010 (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.I. 2010/2394 (W.206) ."

(**1**) S.I. 1990/2463; relevant amending instruments are S.I. 1999/1603, S.I. 2005/364 (W.31), S.I. 2006/485 (W.55), S.I. 2006/1850 (W.193), S.I. 2007/840 (W.73) and S.I. 2009/1386 (W.142).

(**2**) S.I. 2009/1386 (W.142), as amended by S.I. 2009/2939 (W. 256).

Revocations

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

Gwenda Thomas

Deputy Minister for Health and Social Services, under authority of the Minister for Health and Social Services, one of the Welsh Ministers

28 September 2010