

Explanatory Memorandum to the Animal Feed (Wales) Regulations 2010

This Explanatory Memorandum has been prepared by the Food Standards Agency and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Member's Declaration

In my view the explanatory memorandum gives a fair and reasonable view of the expected impact of the Animal Feed (Wales) Regulations 2010. I am satisfied that any benefits outweigh any costs.

Gwenda Thomas AM

Deputy Minister for Social Services

25 October 2010

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1. Description

The Animal Feed (Wales) Regulations 2010 (“the Regulations”) will provide for the execution and enforcement in Wales of Regulation (EC) No. 767/2009 of the European Parliament and of the Council on the placing on the market and the use of feed.

2. Matters of special interest to the Constitutional Affairs Committee

The Regulations make amendments and modifications to the Agriculture Act 1970, where that Act would otherwise duplicate or be incompatible with the provisions of Regulation (EC) No. 767/2009. In addition, the Regulations, make consequential and other amendments to the Feed (Hygiene and Enforcement) (Wales) Regulations 2005 and the Official Feed and Food Controls (Wales) Regulations 2009. These other amendments include corrections in relation to matters previously reported on by the Constitutional Affairs Committee (“the Committee”): in the case of the Feed (Hygiene and Enforcement) (Wales) Regulations 2005, the amendment is at regulation 15(5) of the Regulations (the Committee’s reference CA486 refers); and in the case of the Official Feed and Food Controls (Wales) Regulations 2009, the amendment is at regulation 16, paragraphs (2) to (4) (the Committee’s reference SLC375 refers).

3. Legislative Background

Welsh Ministers have the powers to make these Regulations under sections 66(1), 68(1), 74A(1), (2) and (4) and 84 of the Agriculture Act 1970; and pursuant to the Welsh Ministers’ designations under section 2(2) of the European Communities Act 1972 in relation to: measures in the veterinary and phytosanitary fields for the protection of public health; the common agricultural policy of the European Community; and measures relating to feed produced for or fed to food-producing animals.

This instrument is subject to the negative procedure.

4. Purpose and Intended Effect of the Legislation

Regulation (EC) No. 767/2009 is part of the Commission’s modernisation and simplification programme, which replaces five separate Directives in this area and brings their provisions together in one comprehensive document. It is intended to ensure the harmonised application of feed labelling provisions throughout the EU and facilitate the functioning of the internal market by simplifying certain technical requirements. The EU Regulation also removes a number of burdens on the feed industry, particularly on existing requirements for a dossier assessment of new bioprotein products before they are brought to market and the compulsory percentage declaration of the ingredient compound feed. In addition, the EU Regulation also introduces two voluntary measures, a catalogue of feed materials and Code of Practice on good labelling, which are expected to achieve the same harmonised results as the present but without the need for prescriptive legislation.

The EU Regulation is to some extent a consolidatory and simplification measure, and applies directly to Member States. However, there would need to be extensive amendments made to the Feeding Stuffs (Wales) Regulations 2006 (SI 2006/116 (W.14)) (which have already been amended several times) to remove those of its provisions which conflict with those of the Regulations, as well as to put into place new provisions to allow its enforcement. It has therefore been decided that it would be simpler to repeal the existing legislation in its entirety and to make a new set of Regulations – the Animal Feed (Wales) Regulations 2010. These will:

- Provide for the enforcement of certain provisions of Regulation (EC) No. 767/2009: For feed legislation, this is achieved by linking the Articles of the EU Regulation to the powers already held by local authority enforcement officers, as set out in Part 4 of the Feed (Hygiene and Enforcement) (Wales) Regulations 2005 (SI 2005/3368 (W.265));
- Designate competent authorities for the enforcement of the selected provisions: Regulation (EC) No. 767/2009 refers in several of its provisions to the role of competent authorities in their enforcement or interpretation. It is therefore necessary to designate the competent authorities in question. For the most part this is local authorities, however, in a limited number of instances it is necessary to designate the FSA as a competent authority;
- Re-enact those provisions of the Feeding Stuffs (Wales) Regulations 2006 (as amended): Four of the nine measures covered by the Feeding Stuffs (Wales) Regulations 2006 (as amended) remain outside the scope of Regulation 767/2009. It is therefore necessary for the provisions relating to the implementation and enforcement of these measures to be re-enacted in the Regulations. Re-enactment of the provisions of Directives 82/475, 2002/32 and 2008/38 will include making the references to their Annexes ambulatory. Re-enactment of European Regulation 1831/2003 will be by linking its provisions to powers of enforcement;
- Make references to the lists of categories of feed material for non-food-producing animals, undesirable substances, products of particular nutritional purposes and the Annexes to Regulation (EC) No. 767/2009 ambulatory: The Regulations implement the lists in the Annexes to these directives by reference to them. These references are ambulatory, therefore future amendments to the lists will take effect when they are expressed to do so in relevant amending EU legislation, rather than having to be individually transposed into law by amending statutory instruments;
- Increase penalties for breaches of animal feed legislation relating to labelling and composition: The current penalties for failure to comply with the requirement of the Feeding Stuffs (Wales) Regulations 2006 (as amended) are set out in Section 7A of the Agriculture Act 1970. Although this Act has been modified several times in line with the requirements of contemporary legislation, the scale of penalties has not kept pace with the increased recognition of the role that animal feed plays in the safety of the food chain. It is now felt that these penalties, in particular the maximum of the fines

available are no longer 'effective, proportionate and dissuasive', as required by Article 31 of Regulation (EC) No. 767/2009, and that the opportunity should therefore be taken to revise them;

- Modify or amend primary legislation to disapply its provisions where they repeat, conflict or overlap with the provisions of Regulation 767/2009: As well as containing powers to make secondary legislation, Part IV of the Agriculture Act 1970 includes a number of provisions which deal with feed law. Many sections of the Act now overlap provisions of Regulation 767/2009. Sections 73 and 73(A) of the Act have already been disapplied, except in respect of feed for non-food-producing animals, in order to avoid duplication of the feed-related provisions of European Regulation 178/2002 – these sections are now to be disapplied altogether as a consequence of the extension of these feed-related provisions to non-food-producing animals by Regulation (EC) No. 767/2009. Other sections of Part IV of the Agriculture Act 1970 are also disapplied. Those sections of the Agriculture Act 1970 to be disapplied or amended are dealt with in regulation 14 of the Regulations 2010.

5. Consultation

The FSA undertook a public consultation on the draft text of the Regulation in April-May 2008, to gather views in advance of the negotiations in Brussels. There were further meetings and discussions with key stakeholder groups both throughout the negotiations and subsequent to the measure's formal adoption.

A formal public consultation on the draft Animal Feed (Wales) Regulations 2010 ran from 31 March to 18 June 2010. Seventeen key stakeholders in Wales were consulted. Ten responses were received UK-wide to the consultation, 1 in Wales. Responses indicated agreement to the approach to the enforcement of the Regulations, and none dissented from the potential benefits and costs. The FSA has subsequently met with trade organisations and enforcement bodies to discuss aspects of the Regulation. The FSA is also drawing up guidance to the interpretation and enforcement of the Regulations, which is expected to be published on the FSA website later this year.

Regulatory Impact Assessment

5.1 Options

Do nothing would mean leaving all the existing legislation in place, which would mean that UK feed labelling would be out of step with that in other Member States. Do nothing would be a breach of the UK's obligations as an EU Member State, and could give rise to infraction proceedings against the UK by the Commission in the European Court of Justice under Article 258 of the Treaty on the Functioning of the EU.

Making the Animal Feed (Wales) Regulations 2010 will provide for the enforcement of Regulation 767/2009 which would remove a number of current administrative burdens from the feed industry and to provide for the introduction of the Community Catalogue of feed materials and the Code of Practice for good labelling. Making the legislation to provide for the enforcement of Regulation 767/2009 will also be

commensurate with the UK's obligations as an EU Member State under the Treaty of Functioning of the EU.

5.2 Costs and Benefits

There will be significant savings to both the feed industry and enforcement authorities from the repeal of the existing requirements for the mandatory percentage declaration of the ingredients of compound feed. The Agricultural Industries Confederation (AIC), the trade association for feed compounders and feed merchants, estimated in 2008 that the savings to be realised from the removal of this burden would be £42.72 million per year for the UK as a whole. This has since been updated to represent 2009 prices, and the annual benefit for Wales is now calculated at £1.6 million per year.

Repeal of the existing requirement for mandatory percentage declaration will therefore remove the considerable existing cost burden and so represent a significant saving to the UK feed industry.

The repeal of Directive 82/471 concerning certain products used in animal nutrition will clearly have savings for the feed industry, however, it is difficult to quantify this because there is no recent record of actual costs from which potential costs can be extrapolated.

There may also be some costs associated with Regulation 767/2009, in particular the requirement to label all additives subject to a maximum permitted level, which will chiefly affect feed manufacturers. The AIC calculated in 2008 that for livestock feed this provision would incur a one-off cost of £505,000 and have a continuing annual cost of £672,000 in the UK at 2008 prices. By updating the figures to 2009 prices, the provisions will impose a one-off cost for feed businesses in Wales of £19,000 and an annual cost of £25,000.

The pet food industry may also face additional costs from the requirement to label; all additives. However, responses to the earlier consultation while the EC Regulation was still under negotiation did not reflect the cost of the whole industry.

There may also be costs associated with the removal of the existing derogation for the labelling of the analytical constituents of agri-industrial products with moisture content of more than 50%, however, it is not possible to estimate these costs because it is not known what volumes of products may be affected.

Regulation 767/2009 also introduces a requirement that complimentary feeds should not contain levels of additives of more than 100 times the maxima of additives in complete feeds which may have cost implications for manufacturers of complimentary feeds. However, these costs cannot be quantified because data on the number of complementary feed products potentially affected or the possible costs of their reformation is not available. Regulation 767/2009 also amends the limits of variation, which could have potential cost implications for feed manufacturers, who suggest that while the Regulation was still under negotiation that in certain cases they might be unable to meet the new limits. Following the formal adoption of the Regulation, these limits were reviewed and amended by the Standing Committee on the Food Chain and Animal Health, in some cases being relaxed.

However, stakeholders have not commented further on the revised tolerances, and in consequence, it has not been possible to quantify their potential impact.

There is a new requirement for claims made in support of products to be understandable by purchasers and verifiable by enforcement officers, and for scientific substantiations of them to be available on request. This may have some cost implications for manufacturers who need to revise the claims they make. However, the number of claims to which this might potentially apply and the costs of revising them is expected to be relatively small, and impact mostly in niche products marketed for particular conditions or species.

Pet food manufacturers will be required to provide contact details on labels for purchasers to obtain further information about their products which might have some cost implications. However, these costs are expected to be minimal because labels already supply contact details.

It will be necessary for all feed business operators to spend some time becoming familiar with the Regulations. There may be a one-off cost associated with this, although it is likely to be small because the Regulation primarily consolidates existing measures with which the businesses are already familiar.

6. Competition Assessment

Data compiled by the office for National Statistics for the Inter-Departmental Business Register shows that in 2009 there were 405 premises manufacturing prepared feeds for farm animals in the UK, 15 such premises are in Wales. The FSA's assessment is that the Animal Feed (Wales) Regulations 2010 will have little direct impact on competition in the UK feed industry. It will not limit the number or range of businesses operating in the sector by imposing exclusive rights to supply products or by creating a licensing scheme for them; it will not raise the costs of feed ingredients to some suppliers relative to others or alter the costs of feed ingredients to some suppliers relative to others or alter the costs of entering or leaving the feed market; it will not limit the ability of businesses to compete by attempting to control the prices charged, to limit the scope for innovation or to restrict the ability to advertise feed products; and it will not limit incentives to compete by exempting any businesses from general competition law or by amending existing intellectual property rights.

However, it is possible that the repeal of mandatory percentage ingredient declaration could have some indirect impact on competition in the feed sector because it will mean that businesses are no longer required to declare their feed formulations on product labels, which at present allows other firms to appropriate the details of those formulations and offer identical products at lower prices because they have no research budget to recoup. Against this, however, should be set the disincentive to innovation and research attributable to mandatory percentage ingredient declaration because of the requirement to declare commercially sensitive product formulations.

7. Small Firms Impact Test

Regulation 767/2009 contains a number of benefits for feed businesses. It is expected that small and medium sized enterprises will benefit in particular from the repeal of the requirement to declare the ingredients of compound feed by their percentage weight of inclusion, the current costs of which are likely to bear more heavily on them than larger companies.

8. Post Implementation Review

It is anticipated that the Animal Feed (Wales) Regulations 2010 will be reviewed not less than five years after 1 September 2010 (i.e. the date from which Regulation 767/2009 applies in Member States).