

## **Explanatory Memorandum to the Official Feed and Food Controls (Wales) (Amendment) Regulations 2011**

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 Official Feed and Food Controls (Wales) (Amendment) Regulations 2011. I am satisfied that the benefits outweigh any costs.

*Gwenda Thomas AM*

Deputy Minister for Social Services

2 March 2011

# **Explanatory Memorandum to the Official Feed and Food Controls (Wales) Regulations 2011**

## **1. Description**

This Statutory Instrument will amend the Official Feed and Food Controls (Wales) Regulations 2009 (S.I. 2009/3376 (W.298)) to provide for the execution and enforcement in Wales of Regulation (EC) 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and welfare rules. The Instrument will specifically provide that a food business operator who has appealed a decision made by the competent authority to refuse or withdraw the approval or authorisation of a food business establishment, will not be able to continue to operate the establishment pending the outcome of that appeal.

## **2. Matters of Special Interest to the Constitutional Affairs Committee**

None

## **3 Legislative Background**

Welsh Ministers are designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to food (including drink) including the primary production of food and measures relating to feed produced for or fed to food-producing animals, the common agriculture policy of the European Community and measures relating to the veterinary and phytosanitary fields for protection of public health. The Welsh Ministers therefore have the power to make the Regulations under section 2(2) of the European Communities Act 1972.

This instrument is subject to the negative procedure.

## **4 Purpose and Intended Effect of the Legislation**

The principal purpose of amending the Official Feed and Food (Wales) Regulations 2009 (SI 2009/3376 (W.298)) is to increase the protection of consumers against risks associated with products of animal origin. This will be achieved by removing the right of food business operators, not compliant with food law but who have appealed against the refusal or withdrawal of authorisation of a food business establishment, to continue operating pending the outcome of an appeal.

Regulation (EC) 882/2004 on official controls was designed to ensure compliance with feed and food law and does not specifically provide a right for food business operators to continue operating pending the outcome of an appeal. The new Statutory Instrument will therefore bring domestic legislation into alignment with European legislation.

Regulation (EC) 853/2004 of the European Parliament and of the Council lays down specific hygiene rules for food of animal origin, specifies hygiene rules for businesses that produce products of animal origin which must either be registered or, where appropriate, approved by the competent authority before they can sell

food. The Food Standards Agency (“FSA”) is the competent authority under Regulation (EC) 853/2004 for the approval of slaughterhouses, cutting plants and game handling establishments where official controls are carried out by official veterinarians. Local authorities (LAs) are the competent authorities for the approval of establishments, such as processors of meat, fish, dairy and egg products, where official controls are not the responsibility of an official veterinarian.

Regulation (EC) 882/2004 of the European Parliament and of the Council, on official controls performed to ensure verification of compliance with feed and food law, requires the competent authorities to visit an establishment on receipt of an application for approval. The FSA/LA grants full approval if the establishment’s infrastructure, equipment and operational requirements comply with the relevant food law. A conditional approval, of up to six months, can be given if the establishment does not fully meet the requirements. After that six-month period, following a further assessment either a full approval or a refusal must be given.

Regulation 12 of the Official Feed and Food (Wales) Regulations 2009, which provides for the execution and enforcement of Regulation (EC) 882/2004 in Wales, allows a food business operator to appeal to the Magistrates’ Courts against a decision not to grant approval, and to continue to operate pending the determination of the appeal. Similar rules apply in England Scotland and Northern Ireland. The right to continue to operate was originally provided by domestic legislation and was retained when the new EU food hygiene and the Food Hygiene (Wales) Regulations 2006, came into force on 25 January 2006.

This Statutory Instrument removes the right of a food business operator who is not in compliance with food law to continue to operate pending the outcome of the appeal against the refusal or withdrawal of approval. Refusal or withdrawal of approval is a last resort enforcement action that would only be taken after all other options had been exhausted and serious deficiencies on the part of the food business remained. It is therefore undesirable in terms of maximising public health protection that food business operators, not in compliance with food legislation, can continue to operate until appeals are dealt with. Moreover, the appeal process can be lengthy and during this time, if the food business operator can continue to operate, continuous supervision and enforcement action may be required to safeguard food safety. This is not the most effective use of finite enforcement resources in the provision of public health, especially since it is the responsibility of the food business operator to ensure food safety.

## **5 Consultation**

Stakeholders were informed of the proposed change in policy at the Current and Future Meat Controls (CFMC) Working Group in June 2010. Stakeholders were also informed at the Chief Executive’s Industry Stakeholder Forum on June 2010. The proposed change in policy was also discussed at the July 2010 FSA open Board meeting.

The FSA held a twelve week consultation from 20 September to 10 December 2010 on the draft 2011 Regulations. Twenty-nine stakeholders and all FSA approved food business operators in Wales were consulted. Twenty-three responses were

received UK-wide and one in Wales, from Hybu Cig Cymru. A number of respondents supported the proposed changes, although several meat industry representatives expressed concerns over the proposal, in particular with regard to possible losses caused by ceasing operations pending determination of an appeal. A summary of the Wales response is attached at Annex A.

## **6. Regulatory Impact Assessment**

### **6.1 Options**

'Do nothing' would allow food business operators, not compliant with food law, to continue to operate pending determination of the appeal against the refusal or withdrawal of approval. Do nothing would be in 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.

Amending the Official Feed and Food Controls (Wales) Regulations 2009 to remove the right of the food business operator to continue operating pending the outcome of an appeal, will help enhance consumer protection, deliver assurance regarding public health and bring UK legislation into alignment with EU food law. This option will ensure a higher level of consumer protection.

### **6.2 Costs and Benefits**

A 'one-off' familiarisation cost would arise from the introduction of the proposals, which would allow food business operators, local authorities and official veterinarians to familiarise themselves with the Official Feed and Food Controls (Wales) (Amendment) Regulations 2011, which has been estimated will take ten minutes.

Closure of food business establishments would also entail a cost relevant to the food business operator. This cost is unquantifiable as it depends on the size and type of the business, volume and profit from production, and timing of appeal. However, such costs could be justified since non-compliant food business operators should not be operating. If an appeal is upheld, it is possible that businesses, through legal action, may seek redress of income lost, which would be both difficult to establish and quantify.

Introduction of the Official Feed and Food Controls (Wales) (Amendment) Regulations 2011 would deliver public health benefits as it will minimise the potential health risk to consumers posed by food business operators with poor hygiene practices.

Competent authorities will make savings by not having to carry out official controls in establishments pending the determination of appeal. Industry is likely to benefit from increased consumers' confidence in food safety.

## **7. Competition Assessment**

The Official Feed and Food Controls (Wales) (Amendment) Regulations 2011 will have a minimal impact on the number of food business operators operating in the sector. The proposal will not impose constraints on businesses compliant with the Official Feed and Food regulations. The proposal could add a food safety dimension

to the competition process and reduce the cost of customers switching between suppliers because the risk to customers consuming products from non-compliant food business operators would be minimised. The proposal would remove a distortion created by imperfect food safety information, thereby reinforcing the fairness and intensity of competition among food businesses.

#### **8. Small Firms Impact Test**

The only business costs identified would result from the need for business managers to familiarise themselves with the amended regulations, which will take around 10 minutes. Although this cost is a 'one-off', it is too small (£2.82 per business) to have a significant effect of the performance of those businesses.

#### **9. Post Implementation Review**

The FSA envisages reviewing this policy as part of a proposed EU review regarding the implementation of EU law in 2013. The effectiveness of the Regulations will also be monitored via feedback from stakeholders as part of the ongoing policy process.