

EXPLANATORY MEMORANDUM TO

THE FOOD FOR SPECIFIC GROUPS (INFORMATION AND COMPOSITIONAL REQUIREMENTS) (ENGLAND) (AMENDMENT) REGULATIONS 2017

2017 No. 62

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the Instrument

- 2.1 These Amendment Regulations are made to correct drafting defects in an earlier instrument (The Food for Specific Groups (Information and Compositional Requirements) (England) Regulations 2016 (S.I. 2016/688)) (“the 2016 Regulations”). This Instrument corrects technical and typographical errors in the 2016 Regulations which implement the requirements of European Regulation 609/2013 on food for specific groups. The 2016 Regulations contain the offences and penalties for non-compliance with compositional, labelling and advertising rules, and also introduce a new lighter touch enforcement regime so that the first formal action under the 2016 Regulations would be to issue an Improvement Notice rather than a criminal sanction.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Joint Committee on Statutory Instruments (“the Committee”) considered the 2016 Regulations at a meeting on 20 July 2016, making the following request for clarification to the Department of Health:

“Are the references to section 33(2), regulation 4(5) and Part 5 of Schedule 3 in section 35(2) of the Food Safety Act 1990 as applied by paragraph 8 of Schedule 2 correct? If so, explain how regulation 4(5) and Part 5 of Schedule 3 apply section 33(2).”

- 3.2 On 26 July 2016, the Department submitted a memorandum in response confirming that the referencing is incorrect, apologising for the error and thanking the Committee for alerting it to the error. The Department also reported additional errors in referring to the title of the 2016 Regulations in Schedule 2, and confirmed an intention to correct these errors as well.
- 3.3 The Committee published the 9th Report of Session 2016-17 on 14 October 2016, drawing the special attention of both Houses to the 2016 Regulations, on the grounds of defective drafting and acknowledging the candour of the Department in stating the additional relatively minor errors. The Committee requests the Department of Health provides written confirmation when the appropriate remedial action has been taken.

The Amendment Regulations

- 3.4 Regulation 3 amends Schedule 2 of the 2016 Regulations in order to correct the reference to the title of the 2016 Regulations. Regulation 3 corrects the references contained in paragraph 8 of Schedule 2 to the 2016 Regulations, as queried by the Committee. In addition, Regulation 3 also amends Schedule 2 to insert a new paragraph 6A specifically applying s.35(1) of the Food Safety Act 1990 to the 2016 Regulations; this new provision is intended to ensure clarity because under s.35 there is a difference between the punishments available for offences committed under sections 33(1) and 33(2) of the Food Safety Act 1990.
- 3.5 In addition to the above amendments, the Department has identified and made the following additional corrections:
- 3.5.1 Regulation 2 amends regulation 4(5) of the 2016 Regulations, to specifically refer the application of section 39 of the Food Safety Act 1990, to an appeal against an improvement notice. This amendment makes the wording in regulation 4(5) consistent with other regulatory provision within regulation 4 of the 2016 Regulations.
- 3.5.2 Regulation 4(a) amends Schedule 3 of the 2016 Regulations, by substituting wording concerning the modification of section 10(1) of the Food Safety Act 1990, to properly reflect policy instructions following the consultation conducted before the 2016 Regulations were made.
- 3.5.3 Regulation 4(b) amends Schedule 3 of the 2016 Regulations, by deleting extraneous wording concerning the modification of section 10(1) of the Food Safety Act 1990.
- 3.5.4 Regulation 4(c) amends Schedule 3 of the 2016 Regulations, by correcting a typographical mistake, concerning the modification of section 39(1) of the Food Safety Act 1990.
- 3.5.5 Regulation 4(d) amends Schedule 3 of the 2016 Regulations, to correct numbering.
- 3.5.6 Regulation 5 corrects the date contained in the reference to the Co-ordination of Regulatory Enforcement (Enforcement Action) Order 2009.
- 3.6 These Amendment Regulations will be issued free of charge to persons who bought S.I. 2016/688.

Other matters of interest to the House of Commons

- 3.7 As this Instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

From 20 July 2016, the 2016 Regulations implemented the EU Regulation 609/2013 creating a new regime for regulating the compositional, labelling and advertising requirements for food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control.

5. Extent and Territorial Application

- 5.1 This Instrument extends only to England.

5.2 This Instrument applies only to England.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 These Amendment Regulations will correct the 2016 Regulations which implement the European Regulation 609/2013 which was adopted to simplify existing compositional and labelling rules covering foods for particular nutritional uses (Directive 2009/39/EC referred to as PARNUTS). The 2016 Regulations revoke and replace the PARNUTS legislation and focus on the general compositional and information requirements for the four new categories of food: (i) infant and follow-on formula (ii) processed cereal-based food and baby food (iii) medical foods (iv) total diet replacement for use in energy restricted diets for weight control. Delegated Regulations providing the detailed labelling and compositional rules for these four categories of food will start to apply from 2019 onwards.

7.2 The 2016 Regulations use powers in the Food Safety Act 1990, with appropriate modifications, to apply the provisions relating to Improvement Notices (which include powers of entry and rights of appeal) for the purposes of enforcement under the 2016 Regulations. The Improvement Notice regime is also inserted into the existing SIs that contain criminal offences, thus the first formal action under the 2016 Regulations is to issue an Improvement Notice rather than a criminal sanction.

8. Consultation outcome

8.1 Under s.48(4) of the Food Safety Act 1990 the obligation to consult is set aside under s.48(4C) if consultation has taken place under Article 9 of Regulation EC 178/2002. Article 9 requires public consultation during the preparation, evaluation and revision of food law, except where the urgency of the matter does not allow it.

8.2 A limited technical consultation was held for a four week period from 27th January to 24th February 2016, focusing purely on the proposed improvement notice enforcement regime of the 2016 Regulations.

8.3 These Amendment Regulations correct errors and typographical mistakes in the 2016 Regulations, without making a change to the policy intention previously consulted upon. These Amendment Regulations give correct legal effect to the previous consultation exercise and outcome.

9. Guidance

9.1 All interested parties including enforcement authorities will be informed when these Amendment Regulations come into force and information about the key changes will be highlighted. Updated guidance will be published online at www.gov.uk and information will be circulated directly to enforcement authorities via the Knowledge Hub.

9.2 Guidance on the use of Improvement Notices has been published by the Food Standards Agency, which has been asked for advice about these Amendment Regulations.

10. Impact

10.1 These Amendment Regulations are required to ensure that the legislative framework set out in the 2016 Regulations is appropriately worded in order to properly effect the enforcement regime set out in Schedule 2 and Schedule 3 of the 2016 Regulations.

10.2 The impact on business, charities or voluntary bodies, and the public sector, was set out in the Impact Assessment produced in June 2016 to accompany the 2016 Regulations.

10.3 The public sector equality duty and the duties of the Secretary of State under the NHS Act 2006 were also considered in the Impact Assessment, which was produced in June 2016 to accompany the 2016 Regulations.

10.4 An Impact Assessment has therefore not been prepared for this instrument.

11. Regulating small business

11.1 These Amendment Regulations seek to correct errors in the wording of the 2016 Regulations. The impact of the 2016 Regulations on regulating small business has been considered in the Impact Assessment that accompanied the 2016 Regulations.

12. Monitoring & review

12.1 It is not appropriate in the circumstances to make statutory provision for review in these Amendment Regulations. This is because the purpose of these Amendment Regulations is to correct errors and typographical mistakes to ensure that the legislation is appropriately worded to provide for the enforcement regime to take proper effect. As such, the cost of conducting a statutory review and monitoring impacts would be disproportionate to the economic impact of these Amendment Regulations

13. Contact

13.1 Debby Webb at the Department of Health Telephone: 020 7972 4742 or email: debby.webb@dh.gsi.gov.uk or Nutritionlegislation@dh.gsi.gov.uk can answer any queries regarding the Instrument.