

Primary Authority Assured Advice

(Regulated group concerning online food information)

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To:

All members of the regulated group. This has the status of Primary Authority Advice in England.

Date of Issue: 1st October 2017 (Part I); 1st February 2018 (Part II).

Version: v2.0

Dealing with Local Authorities:

An enforcing authority, proposing to take enforcement action against a business, is only required to notify the primary authority, where they are **aware** that the business is a member of a regulated group. While guidance states that the enforcing authority should ask you whether you are relying on Primary Authority advice, we recommend that you ensure you communicate this as soon as possible, and do not wait to be asked. (para 21.5 of the Statutory Guidance refers). The scheme does not allow for a business to make a notification to the primary authority where an enforcing authority has already taken action in respect of which it [the enforcing authority] failed to make the required notification to the primary authority (para 21.20 of the Statutory Guidance refers).

Additionally, the rules allow for you (or the Co-ordinator) to notify the primary authority (para 21.19 of the Statutory Guidance refers).

Once a primary authority receives notification, statutory time limits apply (usually 5 days) in which time they must respond to the notification. (Paras 21.9 & 21.10 of the Statutory Guidance refer).

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1. Relevant Legislative Extracts

Regulation (EU) 1169/2011 on the Provision of Food Information to Consumers:

Article 2

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

2. The following definitions shall also apply:

(c) 'mandatory food information' means the particulars that are required to be provided to the final consumer by Union provisions;

Article 7

Fair information practices

1. Food information shall not be misleading, particularly:

a) as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;

(b) by attributing to the food effects or properties which it does not possess;

(c) by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;

(d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.

2. Food information shall be accurate, clear and easy to understand for the consumer.

(...)

4. Paragraphs 1, 2 and 3 shall also apply to: (a) advertising;

Article 8

Responsibilities

(...)

5. Without prejudice to paragraphs 2 to 4, food business operators, within the businesses under their control, shall ensure compliance with the requirements of food information law and relevant national provisions which are relevant to their activities and shall verify that such requirements are met.

Article 9

List of mandatory particulars

1. In accordance with Articles 10 to 35 and subject to the exceptions contained in this Chapter, indication of the following particulars shall be mandatory:

-
- (a) the name of the food;*
 - (b) the list of ingredients;*
 - (c) any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form;*
 - (d) the quantity of certain ingredients or categories of ingredients;*
 - (e) the net quantity of the food;*
 - (f) the date of minimum durability or the 'use by' date;*
 - (g) any special storage conditions and/or conditions of use;*
 - (h) the name or business name and address of the food business operator referred to in Article 8(1);*
 - (i) the country of origin or place of provenance where provided for in Article 26;*
 - (j) instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions;*
 - (k) with respect to beverages containing more than 1,2 % by volume of alcohol, the actual alcoholic strength by volume;*
 - (l) a nutrition declaration.*

Article 14
Distance selling

1. Without prejudice to the information requirements laid down in Article 9, in the case of prepacked foods offered for sale by means of distance communication:

(a) mandatory food information, except the particulars provided in point (f) of Article 9(1), shall be available before the purchase is concluded and shall appear on the material supporting the distance selling or be provided through other appropriate means clearly identified by the food business operator. When other appropriate means are used, the mandatory food information shall be provided without the food business operator charging consumers supplementary costs;

(b) all mandatory particulars shall be available at the moment of delivery.

2. In the case of non-prepacked foods offered for sale by means of distance communication, the particulars required under Article 44 shall be made available in accordance with paragraph 1 of this Article.

Article 36
(Voluntary Food Information)
Applicable requirements

1. Where food information referred to in Articles 9 and 10 is provided on a voluntary basis, such information shall comply with the requirements laid down in Sections 2 and 3 of Chapter IV.

2. Food information provided on a voluntary basis shall meet the following requirements:

- (a) it shall not mislead the consumer, as referred to in Article 7;*
- (b) it shall not be ambiguous or confusing for the consumer; and*
- (c) it shall, where appropriate, be based on the relevant scientific data.*

(...)

Article 44
National measures for non-prepacked food

1. Where foods are offered for sale to the final consumer or to mass caterers without prepackaging, or where foods are packed on the sales premises at the consumer's request or prepacked for direct sale:

(a) the provision of the particulars specified in point (c) of Article 9(1) is mandatory;

(b) the provision of other particulars referred to in Articles 9 and 10 is not mandatory unless Member States adopt national measures requiring the provision of some or all of those particulars or elements of those particulars.

The Food Information Regulations (2014):

Foods that are not prepacked etc. – general requirement to name them

6.—(1) A food business operator who offers for sale a food to which this regulation applies must provide the particulars required by Article 9(1)(a) (the name of the food) as read with—

(a) Article 17(1) to (4), and

(b) in the case of food offered for sale using a minced meat designation as a name—

(i) Article 17(5) and point 1 of Part B of Annex VI, and

(ii) point 3 of Part B of Annex VI as read with regulation 4 and Schedule 2.

(2) This regulation applies to a food that is offered for sale to a final consumer or a mass caterer and is—

(a) not prepacked,

(b) packed on the sales premises at the consumer's request, or

(c) prepacked for direct sale.

(3) This regulation does not apply to a food prepared to be ready for consumption by a final consumer that is offered for sale to a final consumer by a mass caterer (whether at a mass catering establishment where sales are made in person to a final consumer or by means of distance communication) as part of their business as a mass caterer.

(4) The particulars must appear—

(a) on a label attached to the food, or

(b) on a notice, ticket or label that is readily discernible by an intending purchaser at the place where the intending purchaser chooses that food.

(5) Paragraph (4) does not apply in the case of an offer for sale made by means of distance communication.

Foods that are not prepacked etc. containing meat and other ingredients

7.—(1) A food business operator who offers for sale a food to which this regulation applies must provide the particulars required by Article 9(1)(d) (quantity of certain ingredients), as read with Article 22 and Annex VIII, in respect of the ingredients in the food that are meat.

(2) This regulation applies to a food (other than a food specified in Schedule 3) that is offered for sale to a final consumer or a mass caterer, contains meat and any other ingredient and is—

(a) not prepacked,

(b) packed on the sales premises at the consumer's request, or

(c) prepacked for direct sale.

(3) This regulation does not apply to a food prepared to be ready for consumption by a final consumer that is offered for sale to a final consumer by a mass caterer (whether at a mass catering establishment where sales are made in person to a final consumer or by means of distance communication) as part of their business as a mass caterer.

(4) The quantity of meat specified in the particulars mentioned in paragraph (1) is to be determined taking into account the provisions relating to total fat and connective tissue content in point 17 of Part B of Annex VII, including any downward adjustment needed in a case where the total fat and connective tissue content in the food exceeds the values indicated in the table in that point.

(5) The particulars must appear—

(a) on a label attached to the food, or

(b) on a notice, ticket or label that is readily discernible by an intending purchaser at the place where the intending purchaser chooses that food.

(6) Paragraph (5) does not apply in the case of an offer for sale made by means of distance communication.

(...)

Part I

Article 14, Food Information to Consumers Regulation (EU) 1169/2011 (FIC)

Unless otherwise stated, all referenced articles are a reference to those provisions of regulation (EU) 1169/2011 concerning the provision of Food Information to Consumers (FIC).

Independent Obligation

- 1.1. The provisions of art 14 create an independent obligation to comply with arts 9(1) and 44 (as read with art 2(2)(c)) when selling food using distance selling means (including online, or through any other digital distance selling medium).
- 1.2. Simply copying the label elements from a physical product and presenting the same online, may not necessarily meet the requirements of Article 14. In such circumstances, if the source (physical) product is non-compliant, the digital product will also be non-compliant.
- 1.3. Businesses should take appropriate steps to ensure that the digital product version, offered for sale online, complies with arts 9(1) and 44 (as read with art 2(2)(c)) even where the source (physical) product is found to be non-compliant.

'...other appropriate means...'

- 1.4. Where a retailer refers consumers to a 3rd party in order to obtain mandatory food information, but nonetheless allows the consumer to complete the purchase before and without doing so, this may not meet the retailer's responsibility to appropriately ensure compliance with relevant food information law.
- 1.5. Whereas the wording of Article 14(1)(a) does allow '*...other appropriate means...*' to be used to convey mandatory food information, this must be considered in the context of art 8(5), which requires that FBO's, '*...within the businesses under their control, shall ensure compliance with the requirements of food information law and relevant national provisions...*' (emphasis added).
- 1.6. Given that a retailer is obligated by art 8(5) to **ensure** compliance within the business under their control, referring the consumer to a 3rd party website to obtain mandatory food information is not therefore likely to constitute **appropriate** means (as required by art 14(1)(a)). In other words, it is not likely to be sensibly feasible for a retailer, who stocks multiple (possibly hundreds, or thousands) of rapidly changing online food products, to be able to **ensure** that each is compliant, if the mandatory food information is only accessible via 3rd party sites. The retailer would need to satisfy themselves (on an ongoing basis) that the referee site(s) are both *live* and that they carry *accurate* mandatory food information, in order to meet the test of **ensuring** compliance.

- 1.7. A disclaimer proffered by the retailer, stating that the consumer understands that they can obtain mandatory food information from a 3rd party (in the context of allowing the consumer to complete the purchase without doing so) may not be sufficient to defeat the retailer's legal obligation to ensure provision of the same.

Non-prepacked Foods (sold online)

- 1.8. In addition to the requirements of art 44 (as read in conjunction with art 14(2)) - namely, that allergen information must be provided in the case of non-prepacked foods offered for sale by means of distance communication - Regulations 6 and 7 of The Food Information Regulations 2014 (FIR), require that the name of the food and the quantitative indication of meat (QUID), if relevant, must also be provided.
- 1.9. The exemptions to providing the particulars mandated by FIR, for foods sold by means of distance selling, as set out at regulations 6(3) and 7(3), will only apply to mass-caterers (e.g. restaurants).
- 1.10. While the provision of additional label elements (extra to those set out in para 1.8) will be permitted (subject to art 36) in respect of non-prepacked food offered for sale online, to do so will not be mandatory.

Advertising ('Coming Soon...')

- 1.11. The provisions of Articles 14(1) and 14(2) apply where foods are '*...offered for sale by means of distance communication...*' (emphasis added). Consequently, the mandatory label elements required by arts 9 and 44 are not likely to be required in digital advertisements for food products, provided that the consumer is not able to purchase the product directly.
- 1.12. However, all such advertisements are likely to be caught under the provisions of art 7(4)(a) (*see Part IV herein*) and must not be misleading.
- 1.13. For clarity, and in the spirit of applying food information law consistently - from the tangible sector to the digital sector (itself an objective of FIC)¹ - the requirement set down in art 14, namely: '*...mandatory food information (...) shall appear on the material supporting the distance selling...*', is not interpreted as including digital advertising for a food, which does not directly allow the consumer to purchase the product.

--- PART I END ---

¹ Recital 27, FIC

Part II

(Responsibilities)

2. Relevant Legislative Extracts:

Regulation (EU) 1169/2011 on the Provision of Food Information to Consumers (FIC)

Article 1

Subject matter and scope

(...)

3. This Regulation shall apply to food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers...

(...)

Article 2

Definitions

(...)

2. (a) 'food information' means information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication;

(...)

Article 6

Basic requirement

Any food intended for supply to the final consumer or to mass caterers shall be accompanied by food information in accordance with this Regulation.

Article 8

Responsibilities

1. The food business operator responsible for the food information shall be the operator under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer into the Union market.

2. The food business operator responsible for the food information shall ensure the presence and accuracy of the food information in accordance with the applicable food information law and requirements of relevant national provisions.

3. Food business operators which do not affect food information shall not supply food which they know or presume, on the basis of the information in their possession as professionals, to be non-compliant with the applicable food information law and requirements of relevant national provisions.

4. Food business operators, within the businesses under their control, shall not modify the information accompanying a food if such modification would mislead the final consumer or otherwise reduce the level of consumer protection and the possibilities for the final consumer to make informed choices. Food business operators are responsible for any changes they make to food information accompanying a food.

5. Without prejudice to paragraphs 2 to 4, food business operators, within the businesses under their control, shall ensure compliance with the requirements of food information law and relevant national provisions which are relevant to their activities and shall verify that such requirements are met.

(...)

Regulation (EC) 178/2002, General Food Law (GFL)

Article 3 Other Definitions

(...)

2. 'food business' means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food;

3. 'food business operator' means the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control;

(...)

Definitions & Applicability

- 2.1. A 'Food Business Operator' (FBO) is required to ensure compliance with food law within the business under their control.
- 2.2. Furthermore, specifically in respect of food information law, an FBO will have varying levels of responsibility, dependent upon their role, and as set out in Article 8.
- 2.3. The effect of Articles 1(3) and 2(2)(a) is such that each of the responsibilities set down in Article 8 are likely to have equivalent effect to Electronic Food Business Operator's (eFBOs) at every stage of the *digital* food information supply chain.

- 2.4. An 'eFBO', for the purposes of this advice, is a business, which handles digital food information. The term is applied equally to those businesses who are 'pure eFBOs' (i.e., they are *only* concerned with the supply of electronic food information and are not involved in the supply of the tangible food product itself) and also to businesses involved in both the supply of digital food information *and* the supply of the physical food product (e.g. a retailer who displays online food information for purchase, and who also supplies the purchased food).

Duty not to Supply non-compliant food information

- 2.5. Whereas Article 8(3) may be properly construed as relating solely to FBOs who supply 'food' (rather than food information), the effect of Article 8(5) is likely to impose the same obligations and standards on eFBOs, who are responsible for ensuring compliance with food information within the businesses under their control. It follows that this is likely to require such operators to not knowingly provide or supply non-compliant digital food information.

Responsibility for Changed or Modified Online Food Information

- 2.6. Further to Article 8(4), where online food information is changed or modified, responsibility for that information will rest with the party who caused the change or modification. This is likely to be the case whether it is done intentionally or accidentally.
- 2.7. In respect of *intentional* changes or modifications, the nature of the change or modification may inform an eFBO's actions. For example:
- 2.7.1. If the change or modification is simply to correct a spelling or syntax error, this is not likely to alter the responsibilities regarding compliance with food information law, as the nature of the information is likely to remain unchanged.
- 2.7.2. However, if the change or modification alters the nature of the information (either intentionally or accidentally) the eFBO causing the change will become responsible for that information. *An example may be to alter/correct the values of nutrients in the repeated (Front of Pack) nutrition information to match that which is contained in the main Nutrition Declaration (where a discrepancy is found). In such circumstances, care should be taken to ascertain the correct values. Agreement between the parties (for the protection of both parties) to make such a change, should be sought.*

--- PART II END ---