

CONSULTATION ON THE OFFICIAL FEED AND FOOD CONTROLS (ENGLAND) REGULATIONS 2007, ASSOCIATED GUIDANCE NOTES ON EXPENSES ARISING FROM ADDITIONAL OFFICIAL CONTROLS AND REGULATORY IMPACT ASSESSMENT - SUMMARY OF RESPONSES.

Background

1. This consultation took place from 27 April to 20 July 2007. The consultation package was sent to 797 stakeholders. In total, 15 substantive responses were received (separate consultations were undertaken in Scotland, Wales and Northern Ireland).

2. We are grateful for all the comments received and have taken these into account in finalising the national legislation and associated Regulatory Impact Assessment (RIA) and in revising the Guidance Notes. The full consultation package is available on the FSA website at:

<http://www.food.gov.uk/consultations/consulteng/2007/offceng07>

3. As a supplementary exercise, the Agency sent a letter to all consultees concerning some additional proposed amendments to the SI. The letter is available on the FSA website at the following link:

<http://www.food.gov.uk/multimedia/pdfs/offcupdate11eng.pdf>

Summary of responses

4. The following organisations provided comments in response to the consultation:

- Association of Independent Meat Suppliers
- Association of Port Health Authorities
- Chamber of Shipping
- City of London
- East of England Trading Standards Association
- Government Chemist *
- Her Majesty's Revenue and Customs
- Hertfordshire and Bedfordshire Chief Officers Food Study Group
- Local Authorities Coordinators of Regulatory Services
- National Association of Agricultural Contractors
- National Farmers' Union *
- Seafish
- Wine and Spirit Trade Association

* These consultees responded to the full consultation package and to the supplementary letter.

5. The table below summarises the responses to the consultation in terms of the specific questions posed and other issues raised under the following headings:

Section A	Comments on the proposed legislation
Section B	Comments on the partial Regulatory Impact Assessment
Section C	Comments on the draft Guidance Notes on expenses arising from additional official controls

TABLE SUMMARISING CONSULTATION RESPONSES

Note - This table provides a summary of the consultation responses only. Copies of the individual responses have been filed with the Agency's Library and Information Service.

Question/issue raised in consultation	Summary of responses	FSA evaluation/response
Section A - Comments on the proposed legislation		
<p>1. Controls of feed and food of non-animal origin from outside the EU</p> <p>Amendments were proposed to: (a) help ensure more effective application and enforcement by the competent authorities; (b) provide the necessary legal basis for officials of Her Majesty's Revenue and Customs to co-operate with, and pass information to, local/port health authorities; and (c) to reformulate the provision on liability for charges such that it is consistent with the new provisions on expenses.</p>	<p>Respondents that commented agreed with the proposals. Enforcement stakeholders highlighted that guidance may be needed in respect of enforcement powers.</p>	<p>The proposed amendments will be made to the SI with the exception of the provision to permit HMRC officials to pass information to local/port health authorities. A number of legal issues still need to be resolved in respect of this but the Agency will seek to conclude this work and give effect to this provision by means of an amendment to the SI early in 2008.</p> <p>The Agency will review its Practice Guidance for local/port health on import controls and revise it, where appropriate, to reflect the practical application of the amended measures.</p>
<p>2. Recovery of expenses arising from additional official controls</p> <p>This new measure requires feed/food business operators to pay the competent authority on demand for expenses arising from 'additional official controls' (i.e. controls or checks carried out following the detection of non-compliance and which exceed the competent authority's normal control activities).</p>	<p>The majority of respondents accepted in principle that businesses should be liable for costs of additional official controls. Notwithstanding this, concern was expressed by a number of respondents as to how such charges will be applied in a fair and consistent manner, and also that there was no formal right of appeal included in the SI.</p> <p>One industry respondent opposed the new provision on the basis that it was not necessary as the UK already complies with the requirement in EU legislation to charge via the power of courts to award costs where a prosecution has been taken for non-compliance.</p>	<p>It is not true to say that the UK is already compliant with the EU requirement. The new provision is not a fine or a penalty but rather a charge or fee for undertaking official controls and it is a fundamental principle of UK law that before a compulsory charge can be levied on the citizen, Parliament must sanction it by appropriate legislation. In view of this, the legal provision will be retained otherwise the UK will be in breach of its EU obligations to give effect to the Article 28 charging provision.</p> <p>The concerns regarding fairness and consistency are noted, and the Agency has developed Guidance Notes to try to address these issues.</p>

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<p>3. Recovery of expenses relating to co-ordinated assistance with other Member States and follow-up by the Commission on intra-Community trade issues</p> <p>This new measure requires feed/food business operators to pay the competent authority on demand costs associated with administrative actions required to inform the Commission and the competent authorities of the other Member States where repeated non-compliance with feed/food law is found and where the issue may have implications in other Member States, and for the costs incurred by the Commission if it sends an inspection team to investigate such cases.</p>	<p>Respondents that commented accepted this proposal.</p>	<p>This provision will be retained.</p>
<p>4. Definitions and designation of competent authorities</p> <p>It was proposed that some of the definitions required for interpretation of the SI be amended to reflect recent changes to Community and other national legislation. Also, it was proposed that the Schedules which set out the responsibilities of the designated competent authorities be updated to include reference to those provisions in Regulation 882/2004 that applied from 1 January 2007.</p>	<p>No objections were raised.</p>	<p>The necessary amendments will be made.</p>

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Section B- Comments on the partial Regulatory Impact Assessment		
<p>5. General issues</p>	<p>One respondent agreed that where there is deliberate non-compliance the 'polluter pays' principle should apply, but that consideration should be given in cases where the non-compliance results from an unwitting act or omission.</p> <p>It was suggested that a ceiling on charges should be considered such that the ability of a business to continue trading is not jeopardised.</p>	<p>Article 28 charges and are not fines for non-compliance but rather fees for the controls carried out. The EU provision is not restricted to cases of deliberate non-compliance so the UK would not meet its EU obligations if this distinction was made.</p> <p>The Guidance Notes developed by the Agency highlight that the effects on operators with a low throughput must be taken into consideration by the competent authority in calculating the charges that apply.</p>
<p>6. Options</p> <p>Two options were proposed: do nothing - this would mean it was not possible to apply the Article 28 provision of Regulation 882/2004 in England as the competent authorities would not have the legal powers; or, adopt the SI to ensure that the competent authorities can fulfil their obligations under Regulation 882/2004.</p>	<p>Only one respondent commented on the options, supporting the second of these.</p>	<p>The Agency proposes to proceed with the second option. Not to do so, would leave the UK in breach of its EU obligations.</p>
<p>7. Social and environmental impacts</p> <p>Stakeholders were invited to comment on the Agency's assessment that the proposed measures will not have any impact on racial equality or on social or environmental sustainability issues.</p>	<p>The only stakeholder that commented agreed that the SI was unlikely to have an actual impact on these issues.</p>	<p>These issues will be re-assessed as part of post-implementation review of the measures in the SI.</p>
<p>8. Administrative burdens</p> <p>Stakeholders were asked if there were any new administrative costs arising from the SI, and for evidence of costs that would be incurred and which are over and above those that a business would incur commercially.</p>	<p>No comments were received nor did evidence provide of any additional burdens in relation to this question.</p>	<p>The Agency's view that there are no new administrative costs arising from the SI is maintained.</p> <p>As with social and environmental impacts, administrative burdens will be reassessed as part of post-implementation review of the measures in the SI.</p>

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<p>9. Costs</p> <p>Stakeholders were asked for their views on the Agency's assessment of costs to the competent authorities and businesses and to provide any cost information that may help to estimate the level of annual costs for 'additional official controls'.</p>	<p>Additional information on costs was provided by the Government Chemist (GC) in relation to dioxin analysis. The GC suggested that the new provision may increase the incentive for businesses to challenge the results of controls such that the referee service it provides (costs mainly fall to Government) to resolve disputes between business and enforcement authorities may be used more heavily,</p> <p>A request was made to provide further information on the type of incidents that were used as the basis of the estimates of costs given in the RIA.</p> <p>One enforcement stakeholder was concerned that the assumption in the RIA that the cases to which Article 28 charges may apply will be small may be used against enforcement bodies attempting to recover costs.</p>	<p>The comments on analytical costs have been reflected in the full RIA.</p> <p>As regards the incidents cited, further information is provided with the proviso that Article 28 charges did not apply at the time these incidents occurred and that the incidents have been used only to provide an indication of the types of incidents where charges should be considered and where they may apply.</p> <p>The Agency's view remains that the number of cases in which Article 28 charges will apply will be small. This is based on what the Commission indicated during the negotiations on Regulation 882/2004 i.e. that liability to pay an Article 28 charge under is likely to arise only in serious or significant cases as these would not be foreseen in the National Control Plan.</p>

Question/issue raised in consultation	Summary of responses	FSA evaluation/response
Section C- Comments on the draft Guidance Notes on expenses arising from additional official controls		
<p>10. General issues</p>	<p>A number of respondents expressed concerns about how Article 28 charges:</p> <ul style="list-style-type: none"> (a) in the meat sector, differ from 'additional charges' imposed by the MHS; (b) affect the wider framework of penalties and sanctions; and, (c) potential inconsistency in Agency Guidance with any that may be produced at EU level. <p>The importance of consistency in approach by the Agency and Defra in applying Article 28 charges was highlighted.</p> <p>Some enforcement stakeholders questioned whether Article 28 charges are in line with Hampton principles for reducing administrative burdens through effective enforcement and inspection, and their effect on businesses in the context of the 'Better Regulation Agenda'</p>	<p>The Guidance Notes have been amended to:</p> <ul style="list-style-type: none"> (a) explain that 'additional charges' apply where there is inefficiency on the part of the food business operator and enable the MHS to recoup its costs for 'routine' rather than 'additional' official controls; (b) highlight that Article 28 charges do constitute a penalty or a sanction but rather represent a fee for control activities; and (c) emphasise that that the guidance will be kept under review and revised in the light of developments at EU level. <p>As regards consistency, the Agency is continuing to work closely with Defra (and the other Agriculture/Rural Affairs Departments) with a view to ensuring consistency approach where this is appropriate.</p> <p>The Agency considers that only one of the Hampton principles is relevant to Article 28 charges, i.e. that 'regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take'. We believe that the approach being taken as regards Article 28 charges is not inconsistent with this principle. The Better Regulation Executive (with the Department for Business, Enterprise & Regulatory Reform) has been consulted and supports this view.</p>

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<p>11. Legal requirements and definitions</p> <p>This section aims to explain the background to the requirement for competent authorities to charge for expenses arising from additional official controls, and to put the remaining sections of the Guidance into context.</p>	<p>Three main issues of concern were raised in respect of this section:</p> <p>(a) whether all revisits to a feed/food business establishment should warrant Article 28 charges or whether 'routine revisits' would be exempt; and,</p> <p>(b) whether the costs of taking formal enforcement actions, e.g. legal fees incurred in taking prosecutions, constitute expenses arising from additional official controls; and,</p> <p>(c) whether the costs of providing advice to non-compliant business would be charged such that businesses may be reluctant to seek advice where needed.</p>	<p>The Guidance Notes have been amended to clarify that:</p> <p>(a) competent authorities are expected to plan to undertake a degree of revisits to check on correction of non-compliance and in such cases, consideration will need to be given to the various indicative factors listed in the guidance in determining if the revisit is 'routine' or 'additional';</p> <p>(b) formal enforcement actions do not constitute 'official controls' so that costs may not be recovered using Article 28; and,</p> <p>(c) advisory or educational activities and information/intelligence gathering by competent authorities do not constitute 'official controls' so that costs may not be recovered using Article 28</p>
<p>12. Circumstances in which charges will be made</p> <p>This section aims to explain when the competent authority can charge for expenses arising from additional official controls.</p>	<p>Respondents were concerned that the guidance provided may be interpreted differently by different competent authorities.</p> <p>There were some suggestions that providing more concrete examples of when charges apply would be helpful.</p>	<p>As Article 28 charges have yet to be applied, it is not possible to give concrete examples. The examples that are provided and the guidance that is given, however, will be kept under review and amended to reflect any developments at EU level, and in the light of the experience of the competent authorities across the UK and the establishment of relevant case law.</p>
<p>13. Competent authorities that can levy charges</p> <p>This section aims to explain which competent authorities can levy charges for expenses arising from additional official controls.</p>	<p>One respondent questioned whether local/port health authorities may make the decision to levy charges without any requirement to consult with the Agency.</p>	<p>The Guidance Notes have been amended to highlight that where local authorities are the competent authority, any decision to use Article 28 is for them but that their representative bodies or the Agency can provide advice before any such charges are levied.</p>

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<p>14. Feed and food business operators subject to charges</p> <p>This section aims to explain who the charges can be levied against for expenses arising from additional official controls.</p>	<p>One industry respondent disagreed with the Agency's proposal that in cases where the cost and time involved in ascertaining who has been at fault as regards the non-compliance is disproportionate to the charges being made, the competent authority should consider charging the operator owning or keeping the goods at the time the non-compliance is detected and the additional controls are carried out.</p> <p>Two respondents requested clarification as regards how charges will be applied where more than one local authority has undertaken additional official controls, i.e. widespread incidents.</p>	<p>As it is the EU legalisation that provides for this option, the Agency proposes to retain it.</p> <p>The Guidance Notes have been amended to provide further advice on this point.</p>
<p>15. Activities subject to charges</p> <p>This section aims to explain what the competent authorities can charge for as regards expenses arising from additional official controls.</p>	<p>Enforcement stakeholders requested clarification as regards the costs of formal enforcement actions.</p>	<p>As highlighted above, the Guidance has been amended to explain that formal enforcement actions do not constitute 'official controls' so that costs may not be recovered using Article 28.</p>
<p>16. Level of Charges</p> <p>This section explains how much the competent authority can charge as regards expenses arising from additional official controls, and what specific factors should be taken into account in calculating the charge for particular businesses. Stakeholders were asked specifically to comment on the proposed route for challenging whether charges are reasonable or not i.e. through the civil courts.</p>	<p>A number of respondents were concerned about the potentially costly process of challenging an Article 28 charge through a civil court.</p> <p>One industry respondent sought assurance that any charges made under Article 28 provisions will be clearly set out to ensure that the process is proportionate and transparent.</p>	<p>It is considered that county court proceedings embarked on by the competent authority for recovery of an Article 28 charge that an operator declines to pay is the best means for airing a grievance concerning an Article 28 charge. County Court judges are best placed to determine whether or not a defence against payment has been made by the defendant. An appeal to a (Magistrates') court or to appointed person would be a lengthier and more cumbersome process.</p> <p>As regards the transparency of charges, the Guidance Notes have been revised to highlight that any demand for payment by the competent authority should identify the official controls to which the fee relates and how this has been calculated.</p>