EXECUTIVE NOTE

THE FOOD ADDITIVES (SCOTLAND) AMENDMENT REGULATIONS 2012

SSI 2012/119

1. Description

1.1 The above instrument was made by the Scottish Ministers in exercise of the powers conferred by sections 16(1)(a) and (f), 17(1) and (2) and 48(1) of the Food Safety Act 1990, paragraph 1A of Schedule 2 to the European Communities Act 1972 and all other powers enabling them to do so. The instrument is subject to negative resolution procedure and does not amend primary legislation.

2. Policy Objective

2.1 This instrument, which extends to Scotland only, provides for the execution and enforcement of three European Commission Regulations which a) establish an EU list of food additives, b) establish an EU list of food additives approved for use in food additives, food enzymes, food flavourings and nutrients and c) set down specifications for the food additives in those lists. The instrument also corrects an erroneous reference in the Food Additives (Scotland) Regulations 2009 (reference should have been made to the Mineral Hydrocarbons in Food (Scotland) Regulations 1966).

3. Legislative Background

3.1 The instrument is necessary to clarify and update the enforcement provisions in the Food Additives (Scotland) Regulations 2009 and to provide for the execution and enforcement of three directly applicable EU Regulations, which will amend Regulation (EC) No. 1333/2008 ("Regulation 1333/2008") on food additives and provide for the associated transitional arrangements.

3.2 Commission Regulation (EU) No. 1129/2011 ("Regulation 1129/2011") will amend Annex II to Regulation 1333/2008, establishing an EU list of food additives (to which there is a derogation, provided for by Commission Regulation (EU) No. 1131/2011). Commission Regulation (EU) No. 1130/2011 ("Regulation 1130/2011") will amend Annex III to Regulation 1333/2008 establishing an EU list of food additives approved for use in food additives, food enzymes, food flavourings and nutrients. Regulation (EU) No 231/2012 ("Regulation 231/2012") will set down specifications ('purity criteria') for food additives in the EU lists at Annex II and Annex III to Regulation 1333/2008 established by Regulations 1129/2011 and 1130/2011.

3.3 This instrument also corrects an erroneous reference in regulation 18 (consequential amendments) of the Food Additives (Scotland) Regulations 2009. The error was recently identified by the Food Standards Agency in the course of a review of food additives legislation. This instrument amends the Mineral Hydrocarbons in Food (Scotland) Regulations 1966; and deletes the provision in the 2009 Regulations which purported to amend the Mineral Hydrocarbons in Food Regulations 1966, which does not in fact have any application in Scotland.

4. Policy Background

4.1 Commission Regulations 1129/2011 and 1130/2011 were published on 12th November 2011 and entered into force on 2nd December 2011. These Regulations amend Annexes II and III to Regulation 1333/2008, which contain a list of food additives approved for use in foods and their conditions of use. Those amendments were given effect in domestic law - also on 2 December 2011 - by way of the ambulatory reference provided for by regulation 2(4) of the Food Additives (Scotland) Regulations 2009. However, Regulations 1129/2011 and 1130/2011 also contain transitional provisions, which the ambulatory reference may not have been sufficient to implement.

4.2 The transitional measures in Regulations 1129/2011 and 1130/2011 mean that most (but not all) of the amendments to Annexes II and III of Regulation 1333/2008 will not take effect until 1st June 2013. Until then, the existing EU legislation which lists approved food additives will continue to apply. For those food additives to which the transitional measures do not apply, Regulations 1129/2011 and 1130/2011 take effect from the date that those Regulations entered into force - 2nd December 2011.

4.3 This SSI will put the effect of the ambulatory reference beyond doubt by inserting reference to the transitional measures in the 2009 Regulations. Since it is an offence under regulation 14 of the 2009 Regulations to contravene a specified provision of Regulation 1333/2008 (which includes Annexes II and III), the Food Standards Agency (FSA) in Scotland has contacted local authorities and the Crown Office and Procurator Fiscal Service to make them aware of this situation.

4.4 This has not been put beyond doubt sooner due to the delayed publication of Regulation 231/2012. Regulation 231/2012 specifies the purity criteria for the food additives listed in amended Annexes II and III of Regulation 1333/2008. The purity criteria provides the thresholds/tolerances that must be applied to the additives approved for use in food under Annexes II and III. Without this purity criteria, it is not possible to apply those parts of Annexes II and III which took effect on 2nd December 2011, in practice.

4.5 The Commission's intention had been to publish Regulation 231/2012 on the same date as Regulations 1129/2011 and 1130/2011. Regulation 231/2012 was not, however, published on the same date. The FSA was initially informed that there would be a delay, perhaps of around two months. However, Regulation 231/2012 was not published until 22nd March 2012**.** It entered into force 20 days after publication (11th April 2012) and applies purity criteria from 1st December 2012 to the existing EU legislation which lists approved food additives; the exception to this being provisions in relation to the food additives listed in amended Annexes II and III of Regulation 1333/2008 to which the transitional provisions in Regulations 1129/2011 and 1130/2011 do not apply. These took effect on 2nd December and for which the purity criteria in Regulation 231/2012 will now apply to on 11th April 2012.

4.**6** This has meant, despite Regulations 1129/2011 and 1130/2011 entering into force for a small number of food additives on 2nd December 2011, there was at that time no purity criteria for those food additives. Given the complexity of these Regulations, the delay in publication of Regulation 231/2012 and timescales involved, and the need to consider proper use of parliamentary time and how best to meet stakeholder expectations, the FSA decided that the most prudent course would be to wait for the publication of Regulation 231/2012 so that one amending SSI could then be made to give effect to all three interrelated Regulations at the same time, as soon as possible.

4.7 The FSA in Scotland is not aware that the resulting delay has caused either industry or enforcers any problems – the Crown Office and Procurator Fiscal Service and local authority enforcement bodies have been made aware of the situation and have confirmed that there has not been any relevant prosecutions regarding food additives since 2nd December 2011. Local authorities have been advised that no enforcement action should be taken until the 2009 Regulations have been amended by this instrument.

4.8 Following the publication of Regulation 231/2012, the FSA arranged a common coming into force date of 23rd May 2012 across the UK to achieve a consistent approach, taking account of the differences in scrutiny procedure and parliamentary timetables.

4.9 The FSA plans to provide for direct enforcement of Regulation 1333/2008 (as amended) when existing Directives are disapplied and the requirements for additives become wholly contained within Regulation 1333/2008 in June 2013. This instrument is an interim, amending measure. In order to fully enforce the EU Regulation – after the long transitional period during which EU controls are partly contained in Directives and partly in Regulations – the plan is to revoke and replace the 2009 Regulations with a fundamentally revised SSI.

5. Consultation

5.1 The FSA consulted UK industry informally during extensive EU negotiations on all three EU Regulations. The European Commission also consulted widely. Comments from UK industry were noted and any concerns raised largely resolved by the UK delegation during EU negotiations. The provisions of Annex II, parts of Annex III and the new Regulations on specifications are largely a consolidation of existing legislation with which industry is familiar. New restrictions on lycopene and additives in additives, enzymes and nutrients have been the subject of extensive discussions with industry and account has been taken as far as possible of industry requirements.

5.2 A public consultation on the draft implementing Regulations was issued in Scotland between 19 December 2011 and 20 February 2012 to a wide range of Scottish stakeholders including trade associations, local authorities, consumer organisations and sector specific organisations.

6. Impact

6.1 A Business and Regulatory Impact Assessment has not been produced for this instrument as:

- The new EU Regulations largely consolidate technical amendments to existing legislation with which UK industry and enforcers are familiar, and this instrument is only required to ensure the EU provisions have adequate enforcement provisions in Scotland.

- The FSA and the European Commission consulted informally with stakeholders during the EU negotiations on all three EU Regulations. These consultations did not bring to light any new impacts for UK industry or enforcement bodies.

- The EU Regulations have lengthy transitional arrangements. It is therefore anticipated that any incremental impact that would arise from the EU Regulations would be negligible.

6.2 The December 2011 consultation on the draft of this instrument and associated EU legislation did not identify any new impact on industry or enforcers; only one Scottish stakeholder responded - a local authority - who valued the information given. The industry sector most affected by this instrument is manufacturers of food additives and, to the best of the FSA in Scotland's knowledge, none are currently based in Scotland.

7. Other Administrations

7.1 This instrument applies in relation to Scotland only. Equivalent Regulations will apply in England, Wales and Northern Ireland.

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April 2012