EXPLANATORY MEMORANDUM TO

THE FOOD (AMENDMENT AND TRANSITIONAL PROVISIONS) (ENGLAND) REGULATIONS 2021

2021 No. 616

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs (Defra) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The amendments proposed in this secondary legislation are required mainly as a result of the UK's exit from the European Union (EU), while limited additional provisions are included to support businesses in adjusting to the changes.

2.2 This Statutory Instrument (SI) will enable continued compliance with World Trade Organisation (WTO) rules which provide that imports from some WTO member states must not be treated more favourably than imports from others unless this is otherwise established in a free trade agreement (Most Favoured Nation). The amendments will also help ensure that imported products meet compositional rules for food in England.

2.3 Most of the amendments are made by removing existing EU and European Economic Area (EEA) recognition provisions from the regulations and providing a period of adjustment for businesses. The relevant regulations are:

2.3.1 The Bread and Flour Regulations 1998

2.3.2 The Jam and Similar Products (England) Regulations 2003

2.3.3 The Products Containing Meat etc. (England) Regulations 2014

2.3.4 The Spreadable Fats (Marketing Standards), the Milk and Milk Products (Protection of Designations) (England) Regulations 2008

2.4 A further change introduces an exemption in relation to flour to allow the production and sale of unfortified wheat flour in England for export or for use in products for export and to allow the import of unfortified wheat flour for use in products for export.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments OR the Select Committee on Statutory Instruments OR the Sifting Committees.

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The UK has left the EU and the Transition Period has come to an end. The amendments to be made by the Food (Amendment and Transitional Provisions) (England) Regulations 2021 are needed to reflect the UK's new status outside the EU and to ensure that the UK – as a member of the WTO in its own right – demonstrates compliance with WTO Most Favoured Nation rules.

6.2 This SI will be subject to the overriding provisions of the United Kingdom Internal Market Act 2020 (UKIM) in the internal market under the market access principles for goods contained in Part 1 of that Act. (See paragraphs 7.4 and 7.5 below for further detail.)

7. Policy background

What is being done and why?

7.1 National rules for certain food compositional standards in the UK include specific recognition clauses to make clear which countries were exempt from needing to meet these rules. This was to meet the requirement that all European Economic Area (EEA) member states recognise each other's products as fit for their respective markets because they meet all applicable harmonised EU legislation which is agreed upon as acceptable standards. This ensures the free movement of goods throughout the EU's Single Market. Products imported into the UK from third countries, which are not legally placed on the market in an EEA member state, do have to comply with UK standards. However, the recognition clauses – in relation to products containing meat, bread and flour, fruit curds and mincemeat – allow products legally marketed in EU and EEA countries – and Turkey in the case of the Products Containing Meat etc. (England) Regulations 2014 – to be legally sold in England even if they do not meet the compositional standards laid down in these regulations. A recognition clause applying to spreadable fats allows spreadable fats lawfully marketed in Norway, Iceland and Liechtenstein to be placed on the market in England even if they do not meet domestic marketing standards.

7.2 Since the UK has left the EU and the Transition Period has ended, the mutual recognition principle in the EU/EEA no longer applies to products from the UK exported to EU and EEA countries. Under WTO Most Favoured Nation rules the UK will not be able to allow preferential market access for imports which don't meet its national rules, and it would also not be appropriate to unilaterally recognise EU rules now that the UK is no longer a member of the EU Single Market. We are therefore removing the recognition clauses from the regulations listed in item 2.3.

7.3 We are also introducing a period of adjustment to allow businesses time to prepare for the changes: until 30th September 2022 for recognition amendments relating to bread

and flour, fruit curds and mincemeat and spreadable fats, and – initially until 12th December 2021 – for products containing meat. This shorter period is due to the fact that the Products Containing Meat etc. (England) Regulations 2014 are currently due to expire on 13th December 2021. We are however taking steps to amend those regulations to ensure they remain in force, and a new period of adjustment until 30th September 2022 will be provided at that point.

7.4 Furthermore, we are introducing an exemption to the fortification requirement in the Bread and Flour Regulations 1998, which will allow the production and sale of unfortified flour in England if it is for export or used in products for export and the import of unfortified flour if it is used in products for export. This will ensure continued access to unfortified flour for businesses preferring to incorporate unfortified flour in products they make for the export market while ensuring that flour sold for domestic consumption contains the specified nutrients, thus continuing to meet public health objectives.

7.5 Since food compositional standards policy is devolved, amendments to similar analogous regulations in Scotland, Wales and Northern Ireland would need to be made separately by the Devolved Administrations. Since those changes would not be made at the same time, and in Northern Ireland some may not be made at all so as to maintain compliance with the Northern Ireland Protocol, the relevant compositional rules would differ across the UK nations at least for a time. However, the United Kingdom Internal Market Act 2020 (UKIM) has introduced new market access principles – including for mutual recognition of goods – which would mitigate potential impacts of divergent regulation on trade within the UK.

7.6 The effect of UKIM Act provisions is that products which are brought into England from another part of the UK may not be required to meet the English regulations listed in section 2.3 above. In respect of the amendments made by this SI, the UKIM mutual recognition principle is expected to have the following effects: goods produced in, or first imported into, Scotland can continue to be sold in England, as long as they meet relevant regulations in Scotland. Equally, a good produced in, or first imported into, Wales may be sold in England if it meets relevant regulations in Wales. Goods brought into England from Northern Ireland (NI) may be sold here if they are qualifying NI goods as defined in section 47 of the UKIM Act. Conversely, goods produced in or imported into England which meet the regulations as amended by this SI may continue to be sold in Scotland and Wales. In accordance with NI Protocol obligations, products originating in England (or Scotland or Wales) will have to comply with relevant rules in force in NI to allow them to be sold in NI.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because the provisions in it are required to reflect the UK's position outside the EU and as a member of the WTO in its own right.

9. Consolidation

9.1 In respect of the Bread and Flour Regulations 1998 Defra plan in the future to consolidate these and other previous amendments as part of a future review of bread and flour regulatory provisions in England.

9.2 Defra has no plans to consolidate the other regulations amended by this SI at this time but will keep the matter under review.

10. Consultation outcome

10.1 The consultation was published on Citizen Space and ran from 08/02/2021 until 22/03/2021 and we received 24 responses. Known stakeholders were notified directly before and at the start of the consultation, and a notice signposting the consultation was published on the Food Standards Agency's Knowledge Hub and in the Ministry of Housing, Communities and Local Government's newsletter for local authorities.

10.2 It should be noted that respondents were required to answer all questions but may have only been interested in responding to a particular section. Several respondents stated their knowledge was limited on some changes that did not relate to their industry.

10.3 In respect of our proposal to remove the recognition clause in the Products Containing Meat etc. (England) Regulations 2014 half of respondents agreed with the proposal with half also reporting that they think it would have a positive effect due to requiring imports to meet our standards and benefiting consumers. Only one respondent disagreed, and one thought it would have a negative effect.

10.4 In respect of our proposal to remove the recognition clause in the Jam and Similar Products (England) Regulations 2003 half of respondents agreed with the proposal with slightly less than half reporting they think it would have a positive effect. No respondents disagreed, and none thought the proposal would have a negative effect.

10.5 In respect of our proposal to remove the recognition clause in the Spreadable Fats (Marketing Standards), the Milk and Milk Products (Protection of Designations) (England) Regulations 2008 half of respondents agreed with the proposal with slightly less than half also reporting they think they would have a positive effect. Only one respondent disagreed, and one thought it would have a negative effect.

10.6 In respect of our proposal to remove the recognition clauses in the Bread and Flour Regulations 1998 just over half of respondents agreed with the proposal to remove the recognition clause – acknowledging potential benefits to increased competitiveness for UK millers. Approximately 17% disagreed, and 25% thought it would have a negative effect. Some respondents emphasised the need for engaging the Devolved Administrations for consistency of amendments to avoid internal market disruption. Some responded negatively to the proposal due to anticipated production/logistical changes for a few producers and the likely loss of export opportunities across the UK nations on their part.

10.7 In respect of our proposal to allow flour sold for use in products for export to be exempt from fortification requirements 63% agreed with the proposal, with some responses showing support for the proposed exemption as it would allow increased flexibility for manufacturers producing products for export and create new business opportunities for millers. 8% disagreed, and 8% thought it would have a negative effect. Several respondents thought that a full review of the Bread and Flour Regulations 1998 should be considered at this time, rather than separately as is currently planned.

10.8 There were varying views about the length of the planned period of adjustment. In relation to bread and flour approximately 29% of respondents agreed with our proposal as the right amount of time, about 21% thought it too long and around 17%

believed it too short (30% did not know or answer, and one respondent said it was not needed). In relation to removal of the other recognition clauses approximately 29% of respondents agreed with our proposed length, 17% thought it too long, 8% thought it too short (46% did not know or answer). No one thought it was not needed.

10.9 We have communicated our proposals to the Devolved Administrations and have been in ongoing discussions about opportunities to enable amendments and periods of adjustment to be aligned across the UK nations where possible.

11. Guidance

11.1 Existing guidance on the gov.uk website covering the Regulations which this SI amends will be supplemented to reflect the proposed amendments.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the expected impact falls below the threshold above which a full impact assessment would be required. A Regulatory Triage Assessment has been prepared.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to provide a period of adjustment until September 2022. (See item 7.3 above for further detail.)

14. Monitoring & review

14.1 The approach to monitoring of this legislation is determined by monitoring arrangements laid down in the regulations which are being amended.

14.2 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Lord Gardiner of Kimble has made the following statement:

It is not appropriate in the circumstances to make provision for review of this legislation since the Regulations which are being amended remain in force and contain separate review clauses where appropriate.

15. Contact

15.1 Yvonne Riedel-Brown at the Department for Environment, Food and Rural Affairs Telephone: 020 841 52222 or email: Yvonne.Riedel-Brown@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Karen Lepper, Deputy Director for Consumers and Sustainability, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Victoria Prentis, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.