

Food labelling (and information): the new regime

Jonathan Goulding and Anna Medvinskaia

The law of food labelling is on the cusp of change, with new rules coming into force next week. The new regime takes account of changes in the food sector and applies to all food information provided to consumers, not just the information provided on labels. The aim is to "*serve the interests of the internal market by simplifying the law, ensuring legal certainty and reducing [the] administrative burden, and benefit citizens by requiring clear, comprehensible and legible labelling of foods*" (Recital 9 of FIR). This article discusses the main changes, as provided for in the EU Food Information Regulation (No 1169/2011) ('the FIR') and the Food Information Regulations 2014 ('the FI Regulations 2014').

Most of the FIR's provisions begin to apply on 13th December 2014, although products that are placed on the market or labelled before that date are allowed to be sold, regardless of how long this takes. This will be particularly relevant to products with a long shelf life, such as frozen and tinned foods. The two regimes are therefore likely to coexist for some time.

Scope

The FIR applies to all foods intended for the final consumer, including foods delivered by mass caterers, and foods intended for supply to mass caterers. Its requirements bind food business operators (FBOs) at all stages of the supply chain, where their activities concern the provision of food information to consumers (Article 1(3)).

The use of the term 'food information' is deliberate; the scope of the FIR goes beyond the mere labelling of food. The FIR covers all information concerning food that is 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*". This means, for instance, the provision of information about food in social media will fall within the ambit of the FIR.

The FIR makes it clear that its application is without prejudice to labelling requirements provided for in specific Union provisions applicable to particular foods (Article 1(4)).

Key changes

The FIR repeals a number of Directives, including Directive 2000/13/EC on the labelling, presentation and advertising of foodstuffs and Directive 90/496/ECC on nutrition labelling for foodstuffs.

Many of the requirements of FIR are similar to those contained in Directive 2000/13/EC on food labelling. However, the FIR also introduces a number of important changes:

- Information as to allergens will now have to be provided in relation to 'non-prepacked' food;
- Country of origin labelling will be mandatory not only for beef, as is the case at present, but also for pork, lamb, goat and poultry meat (from 1st April 2015);
- Nutritional labelling will be compulsory in all foods from 13th December 2016, not only where a nutritional claim is made, as is the position now; and
- Food sold beyond its 'use by' date will be deemed to be unsafe even if, from a microbiological point of view, it would be fit for human consumption.

General requirements

The FIR sets out a number of 'fair information practices, which include that food information shall not be misleading (Article 7(1)) and shall be accurate, clear and easy to understand for the consumer (Article 7(2)).

Mandatory particulars

Article 9 of FIR expands the list of mandatory particulars contained in Article 3 of Directive 2000/13/EC on food labelling (and implemented by reg. 5 of the Food Labelling Regulations 1996). It requires indication of the following:

- (a) the name of the food;
- (b) a list of ingredients;
- (c) any allergenic ingredient or processing aid (listed in Annex II) used in the manufacture or preparation and still present in the finished product, even if in an altered form;
- (d) quantity of certain ingredients or category of ingredients;
- (e) net quantity;
- (f) the date of minimum durability or the 'use by' date;

- (g) any special storage conditions and/or conditions of use;
- (h) the name/business name and address of the operator under whose name or business name the food is marketed or, if that operator is not established in the EU, the importer into the EU;
- (i) the country of origin or place of provenance if failure to give such particulars might mislead a consumer as to the true origin or provenance of the food and for meat falling within CN codes in Annex XI;
- (j) instructions for use if it would be difficult to make appropriate use of the food in the absence of such instructions;
- (k) the actual alcoholic strength by volume for beverages containing more than 1.2% by volume of alcohol; and
- (l) a nutrition declaration.

Certain food groups will have to bear additional mandatory particulars (Article 10). The food groups and particulars that must accompany them are listed in Annex III of the FIR. For instance, where the durability of a food has been extended by means of packaging gases, it must bear the words "*packaged in a protective atmosphere*". Additional mandatory particulars must also be given in the case of foods containing sweeteners or beverages with high caffeine content. Further, frozen meat must provide particulars as to the date of freezing or the date of first freezing where the meat has been frozen more than once.

The FIR prescribes the manner in which mandatory food information shall be presented to consumers:

- In the case of pre-packed food, mandatory food information shall appear directly on the package or on a label attached to it (Article 12(1));
- It must be marked in a conspicuous place in such a way as to be easily visible, clearly legible and, where appropriate, indelible (Article 13(1));
- It must be written in the font size prescribed by the FIR, which may be reduced in the case of smaller packages (Articles 13(2) and (3));
- It shall appear in a language easily understood by the consumers of the Member State where a food is marketed (Article 15(1)).

Certain foods are exempt from certain mandatory particulars of the FIR. The exceptions are contained in Article 16 and must be addressed by practitioners when advising a client about a specific food product. Practitioners should also consult the individual provisions dealing with specific mandatory particulars, as these contain individual exemptions. For instance, certain foods and constituents of foods are exempt from the requirement to include a list of ingredients by virtue of Articles 19 and 20.

Name of the food

Article 17 provides that the name of the food shall be its legal name, defined as the name of a food prescribed in the EU law applicable to it or, in the absence of such provisions, the name provided for in the laws, regulations or administrative provisions applicable in the Member State in which the food is sold to the final consumer or to mass caterers (Article 2(2)(n)).

In the absence of a legal name, the name of the food shall be its customary name, defined as a name which is accepted as the name of the food by consumers in the Member State in which the food is sold, without that name needing further explanation (Article 2(2)(o)) (for instance, "cheese" or "ham").

If no legal or customary name is available for a food, the descriptive name of the food shall be used. This is defined as a name providing a description of the food, and if necessary its use, which is sufficiently clear to enable consumers to know its true nature and distinguish it from other products with which it might be confused (Article 2(2)(p)).

The FIR prohibits the name of the food from being replaced with a name protected by intellectual property, brand name or fancy name (Article 17(4)).

Whilst the FIR only requires the name of the food to be provided in relation to prepacked food, Article 44(1)(b) allows Member States to adopt national measures to make the name of the food (or indeed any of the other particulars set out in Articles 9 and 10) mandatory also for non-prepacked food. The UK has made use of this provision; regulation 6 of the FI Regulations requires FBOs to provide the name of food that is non-prepacked etc when is offered for sale to a final consumer of mass caterer.

Allergenic ingredients

The new law on allergenic ingredients, which must be listed alongside the other ingredients of the food, represents one of the biggest departures from the old regime. The FIR requires allergenic ingredients to be emphasised, but gives FBOs discretion as to the means by which this is done (Article 21(1)(b)).

Importantly, the requirement to provide allergen information under the FIR applies also to food that is not pre-packed (Article 44(1)(a)) i.e. food purchased in restaurants, bars and cafes. The justification for this is set out in recital 48 of the Preamble: "*Evidence suggests that most food allergy incidents can be traced back to non-prepacked food.*"

The UK has introduced national measures concerning the means by which allergen information for non-prepacked etc foods can be communicated, as provided for by Article 44(2) of FIR. Regulation 5 of the FI Regulations provides that such information can be provided orally. Where a FBO intends to provide such information orally, it must notify customers in writing (e.g. by way of a label, sign or menu) that details of the allergenic substance or product can be obtained by asking a member of staff.

Regulation 10 of the FI Regulations criminalises the failure to comply with the FIR provisions relating to the provision of information on allergenic ingredients.

Quantity of certain ingredients

Regulation 7 of the FI Regulations extends the requirement to provide information as to quantity of certain ingredients to non-prepacked food that contains meat and other ingredients. This extension of the scope of FIR is permitted by Article 44(1)(b) FIR.

Minimum durability and use-by dates

The date of minimum durability shall be used for foods that are not required to bear a 'use-by' date (Article 24(1)). The date of minimum durability is defined as "*the date until which the food retains its specific properties when properly stored*" (Article 2(2)(r)).

A 'use-by' date shall be used if, from a microbiological point of view, the food is highly perishable and is therefore likely after a short period to constitute an immediate danger to human health. After the use-by date has passed a food shall be deemed to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002.

Mandatory nutrition declaration

The contents of the mandatory nutrition declaration are set out in Article 30. The FIR prescribes the manner in which the relevant values shall be calculated, expressed and presented (Articles 31 to 35).

Enforcement

The FIR will be enforced by means, in the first instance, of the service of an improvement notice (with the exception of FIR provisions dealing with food safety). The use of improvement notices as the 'first stop' for enforcement constitutes a formal mechanism for highlighting non-

compliance and guiding FBOs without the need for criminal proceedings. The improvement notice must specify:

- the officer's grounds for believing that the person is failing to comply with FIR (with specific reference to their food business and which practice is at fault);
- which provision of FIR has been breached;
- what measures are needed to be taken in order to maintain compliance with FIR;
- the date by which the measures must be put in place; and
- details of the right of appeal.

An enforcement officer may suggest a broad range of measures in order to ensure compliance with FIR. For instance, an FBO may be required to remove products from sale until the necessary measures have been put in place. An improvement notice may also direct 'over labelling', 'over stickering', or replacement of the product label with a corrected version. An FBO that fails to comply with an improvement notice commits a criminal offence.

As noted above, food sold past its use by date will be deemed to be unsafe under Article 14 of Regulation (EC) No 178/2002. The contravention of Article 14(1) of Regulation (EC) No 178/2002 is an offence under the Food Safety and Hygiene (England) Regulations 2013. Accordingly, when prosecuting an offence for the contravention of Article 14(1), the Prosecution will not be required to prove that the food sold after its use by date is actually unsafe.

The failure to comply with the FIR provisions on allergen information will constitute an offence under regulation 10 of the FI Regulations. A person found guilty of an offence under the FI Regulations will be liable to a fine. The limit currently stands at £5,000, but section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will remove the limit altogether.

Draft guidance on the FI Regulations was recently published by Defra (together with the Food Standards Agency and the Department of Health) (June 2014).

Final remarks

Whilst the FIR may be less ambitious than the original Commission proposal, it imposes a host of new obligations on FBOs, which will be difficult and costly to implement. The late publication of the FI Regulations, a mere five months before the transition to the new regime, has placed further pressures on FBOs. It remains to be seen whether consumers benefit from the additional information or whether they will be left overwhelmed by the amount of information provided. On the other hand, many FBOs already go beyond the legal requirements

in the provision of information on labels, for instance with respect to origin labelling (as they see this as offering them a competitive advantage). The FIR can therefore be seen as a means of streamlining the information provided, making it more accessible to consumers.

Jonathan Goulding

Anna Medvinskaia