SCOTTISH STATUTORY INSTRUMENTS

2009 No. 446

The Official Feed and Food Controls (Scotland) Regulations 2009

PART 2

MAIN PROVISIONS

Competent authorities

3.—(1) Subject to paragraphs (2) and (5), any body specified in Column 1 of Schedule 4 is designated as a competent authority for the purposes of the provisions of Regulation 882/2004 indicated in the corresponding entry in Column 2 of that Schedule in so far as those provisions apply in relation to relevant feed law.

(2) Where the feed authority is designated as a competent authority pursuant to paragraph (1) the designation shall extend to its area only.

(3) Subject to paragraphs (4) to (6), any body specified in Column 1 of Schedule 5 is designated as a competent authority for the purposes of the provisions of Regulation 882/2004 indicated in the corresponding entry in Column 2 of that Schedule in so far as those provisions apply in relation to relevant food law.

(4) Where the food authority is designated as a competent authority pursuant to paragraph (3) the designation shall extend to its area only.

(5) Where the Agency is designated as a competent authority pursuant to paragraph (1) or (3) for the purposes of Article 31(1) of Regulation 882/2004, the designation shall extend only to the operations in respect of which the Agency executes and enforces the Food Hygiene (Scotland) Regulations 2006(**1**) by virtue of regulation 5(1)(a) of those Regulations.

(6) Where the Agency is designated as a competent authority pursuant to paragraph (3) for the purposes of Article 31(2) of Regulation 882/2004, the designation shall extend, as regards Article 31(2)(a) to (e), only to those operations in respect of which the Agency executes and enforces the Food Hygiene (Scotland) Regulations 2006 by virtue of regulation 5(2) of those Regulations.

Exchanging and providing information

4.—(1) For the purposes of enabling competent authorities, other OFFC authorities and member States to fulfil the obligations placed upon them by Regulation 882/2004 competent authorities may exchange among themselves or provide to other OFFC authorities any information received by them in the execution and enforcement of relevant feed law or relevant food law.

(2) For the purpose of executing and enforcing relevant feed law or relevant food law, competent authorities may exchange among themselves any information received by them in the execution and enforcement of such law.

(**1**) S.S.I. 2006/3 as amended by S.S.I. 2007/11.

(3) For the purposes of facilitating the execution and enforcement of relevant feed law or relevant food law in England, Wales and Northern Ireland, competent authorities may share information received by them in the execution and enforcement of relevant feed law or relevant food law with the bodies that execute and enforce such law in those countries.

(4) Paragraphs (1), (2) and (3) are without prejudice to any other power of competent authorities to disclose information by or under Community legislation.

(5) For the purposes of this regulation, "other OFFC authorities" means authorities designated in the United Kingdom as competent authorities for the purposes of Regulation 882/2004 other than the competent authorities designated under these Regulations.

Obtaining information

5.—(1) For the purpose of enabling competent authorities and member States to fulfil the obligations placed on them by Regulation 882/2004 and for the purpose of executing and enforcing relevant feed law or relevant food law, a competent authority may require a control body—

(a) to provide the competent authority with any information which it has reasonable cause to believe the control body is able to give; and

(b) to make available to the competent authority for inspection by it any records which it has reasonable cause to believe are held by the control body or are otherwise within its control (and, if they are kept in computerised form, to make them available in a legible form).

(2) The competent authority may copy any records made available to it under paragraph (1)(b).

(3) A person who—

(a) fails without reasonable excuse to comply with any requirement imposed under paragraph (1); or

(b) in purported compliance with such a requirement furnishes information which that person knows to be false or misleading in any material particular or recklessly furnishes information which is false or misleading in any material particular,

is guilty of an offence.

(4) For the purposes of paragraph (1), the term "control body" includes any member, officer or employee of a control body.

Power to issue codes of recommended practice

6.—(1) For the guidance of feed authorities and food authorities the Scottish Ministers may issue codes of recommended practice as regards—

(a) functions conferred upon those authorities in their capacity as competent authorities by or under Regulation 882/2004; or

(b) the execution and enforcement of the Import Provisions,

and any such code shall be laid before the Scottish Parliament after being issued.

(2) The Agency may, after consulting the Scottish Ministers, give a feed authority or food authority a direction requiring them to take any specified steps in order to comply with a code issued under this regulation.

(3) In exercise of the functions conferred on them as competent authorities by or under Regulation 882/2004 and in their execution and enforcement of the Import Provisions, every feed authority and food authority—

(a) shall have regard to any relevant provision of any such code; and

(b) shall comply with any direction which is given under this regulation and requires them to take any specified steps in order to comply with such a code.

(4) Any direction under paragraph (2) shall, on the application of the Agency, be enforceable by an order of the Court of Session under section 45 of the Court of Session Act 1988(**2**).

(5) The Agency shall consult the Scottish Ministers before making an application under paragraph (4).

(6) Before issuing any code under this regulation, the Scottish Ministers shall have regard to any relevant advice given by the Agency.

Monitoring of enforcement action

7.—(1) The Agency has the function of monitoring the performance of enforcement authorities in enforcing relevant audit legislation.

(2) That function includes, in particular, setting standards of performance (whether for enforcement authorities generally or for particular authorities) in relation to the enforcement of any relevant audit legislation.

(3) Each annual report of the Agency shall contain a report on its activities during the year in enforcing any relevant audit legislation for which it is the enforcement authority and its performance in respect of—

(a) any standards under paragraph (2) that apply to those activities; and

(b) any objectives relating to those activities that are specified in the statement of objectives and practices under section 22 of the Food Standards Act 1999(**3**).

(4) The Agency may make a report to any other enforcement authority on their performance in enforcing any relevant audit legislation and such a report may include guidance as to action which the Agency considers would improve that performance.

(5) The Agency may direct an authority to which such a report has been made—

(a) to arrange for the publication in such manner as may be specified in the direction of, or of specified information relating to, the report; and

(b) within such period as may be so specified to notify the Agency of what action they have taken or propose to take in response to the report.

(6) Section 19 of the Food Standards Act 1999 shall apply in relation to information obtained through monitoring under this regulation as if it were information obtained through monitoring under section 12 of that Act.

Power to request information relating to enforcement action

8.—(1) For the purpose of carrying out its function under regulation 7 in relation to any enforcement authority the Agency may require a person mentioned in paragraph (2)—

(a) to provide the Agency with any information which it has reasonable cause to believe that person is able to give; or

(b) to make available to the Agency for inspection any records which it has reasonable cause to believe are held by that person or otherwise within that person's control (and, if they are kept in computerised form, to make them available in a legible form).

(2) A requirement under paragraph (1) may be imposed on—

(a) the enforcement authority or any member, officer or employee of the authority; or

(**2**) 1988 c.36.
(**3**) 1999 c.28.

(b) a person subject to any duty under relevant audit legislation (being a duty enforceable by an enforcement authority) or any officer or employee of such a person.

(3) The Agency may copy any records made available to it in pursuance of a requirement under paragraph (1)(b).

Power of entry for persons monitoring enforcement action

9.—(1) The Agency may authorise any individual (whether a member of its staff or otherwise) to exercise the powers specified in paragraph (4) for the purpose of carrying out its function under regulation 7 in relation to any enforcement authority.

(2) No authorisation under this regulation shall be issued except in pursuance of a decision taken by the Agency itself or by a committee, sub–committee or member of the Agency acting on behalf of the Agency.

(3) An authorisation under this regulation shall be in writing and may be given subject to any limitations or conditions specified in the authorisation (including conditions relating to hygienic precautions to be taken while exercising powers in pursuance of the authorisation).

(4) An authorised person may—

(a) enter any premises mentioned in paragraph (5) at any reasonable hour in order to inspect the premises or anything which may be found on them;

(b) take samples of any articles or substances found on such premises;

(c) inspect and copy any records found on such premises (and, if they are kept in computerised form, require them to be made available in a legible form);

(d) require any person present on such premises to provide him with such facilities, such records or information and such other assistance as he may reasonably request.

(5) The premises which may be entered by an authorised person are—

(a) any premises occupied by the enforcement authority;

(b) any laboratory or similar premises at which work related to the enforcement of any relevant legislation has been carried out for the enforcement authority; and

(c) any other premises (not being a private dwelling–house) which the authorised person has reasonable cause to believe are premises in respect of which the enforcement powers of the enforcement authority are (or have been) exercisable.

(6) An authorised person entering premises by virtue of the power of entry conferred by this regulation may be accompanied by any person the authorised person may consider appropriate.

(7) An authorised person shall on request—

(a) produce that person's authorisation before exercising any powers under paragraph (4); and

(b) provide a document identifying any sample taken, or documents copied, under those powers.

(8) If a person who enters any premises by virtue of this regulation discloses to any person any information obtained on the premises with regard to any trade secret the person making the disclosure is, unless the disclosure is made in the performance of that person's duty, guilty of an offence.

(9) Where the Agency is the enforcement authority in relation to relevant audit legislation this regulation applies in relation to the Agency in respect of its performance in enforcing those provisions, with the omission of paragraph (5)(a).

(10) In this regulation "authorised person" means a person authorised under this regulation.

Meaning of "enforcement authority" and related expressions

10.—(1) In regulations 7 to 9 "relevant audit legislation" means relevant feed law and relevant food law in respect of which the Agency is designated as a competent authority pursuant to regulation 3(1) and (3) but does not include "relevant legislation" as defined in section 15 of the Food Standards Act 1999.

(2) In regulations 7 to 9 "enforcement authority" means the authority by whom relevant audit legislation is to be enforced and includes the Agency itself if by virtue of that legislation it is the enforcement authority in relation to it but does not include the European Commission; and "enforcement" in relation to relevant audit legislation includes the execution of any provisions of that legislation.

(3) Any reference in regulations 7 to 9 (however expressed) to the performance of an enforcement authority in enforcing any relevant audit legislation includes a reference to the capacity of that authority to enforce it.

Offences relating to regulations 8 and 9

11. A person who—

(a) intentionally obstructs a person exercising powers under regulation 9(4)(a), (b) or (c);

(b) fails without reasonable excuse to comply with any requirement imposed under regulation 8(1) or regulation 9(4)(d); or

(c) in purported compliance with such a requirement furnishes information which that person knows to be false or misleading in any material particular or recklessly furnishes information which is false or misleading in any material particular,

is guilty of an offence.

Right of appeal

12.—(1) Any person who is aggrieved by a decision of the competent authority taken in respect of an establishment subject to approval under Article 4(2) of Regulation 853/2004 pursuant to—

(a) Article 31(2)(c) of Regulation 882/2004 (approval);

(b) Article 31(2)(d) of Regulation 882/2004 (conditional approval and full approval); or

(c) Article 31(2)(e) of Regulation 882/2004 (withdrawal of approval and suspension of approval),

may appeal to the sheriff.

(2) An appeal to the sheriff under paragraph (1) shall be by way of summary application.

(3) The period within which an appeal under paragraph (1) may be brought shall be 1 month from the date on which notice of the decision was served on the person desiring to appeal.

(4) Where on an appeal under paragraph (1) the sheriff determines that the decision of the competent authority is incorrect, the authority shall give effect to that determination.

(5) Where an approval is refused or withdrawn, the food business operator who, immediately before such refusal or withdrawal, had been using the establishment concerned may continue to use it, subject to any conditions imposed by the competent authority for the protection of public health, unless—

(a) the time for appealing against the decision to refuse or withdraw the approval has expired without an appeal having been lodged; and

(b) where an appeal against that decision has been lodged, the appeal has been finally disposed of or abandoned.

(6) Nothing in paragraph (5) shall permit an establishment to be used for a food business if—

(a) a hygiene prohibition order, a hygiene emergency prohibition notice or a hygiene emergency prohibition order has been imposed in relation to the establishment;

(b) a prohibition order, an emergency prohibition notice, an emergency prohibition order or an emergency control order has been imposed in relation to the establishment pursuant to section 11, 12 or 13 of the Act;

(c) the approval of the establishment has been suspended pursuant to Article 31(2)(e) of Regulation 882/2004; or

(d) the establishment is prevented from operating following the service of a remedial action notice.

(7) In this regulation each of the terms "hygiene prohibition order", "hygiene emergency prohibition notice", "hygiene emergency prohibition order" and "remedial action notice" has the meaning that it bears in the Food Hygiene (Scotland) Regulations 2006(**4**).

Appeal to Court of Session against dismissal of appeal under regulation 12(1)

13. A person who is aggrieved by the sheriff's dismissal of an appeal under regulation 12(1) may appeal to the Court of Session.

Staff of competent authority of another member State

14. An authorised officer of a competent authority may be accompanied by a member of staff of the competent authority of another member State for the purpose of conducting an administrative enquiry under Article 36 of Regulation 882/2004.

Commission experts

15.—(1) When an enforcing officer enters premises for the purposes of executing and enforcing official controls that officer may take with him a Commission expert to enable that expert to carry out functions under Article 45 of Regulation 882/2004.

(2) In paragraph (1) and regulation 17(5)(b) "enforcing officer" means an authorised officer of any authority which is responsible for executing and enforcing official controls for the verification of compliance with relevant feed law or relevant food law.

Prohibition on disclosure of trade secrets

16. If a person enters any premises by virtue of regulation 14 or 15 and discloses to any person any information obtained on the premises with regard to any trade secret the person making the disclosure is, unless the disclosure is made in the performance of that person's duty, guilty of an offence.

Execution and enforcement

17.—(1) The authority responsible for executing and enforcing regulation 5(3) shall be the competent authority who imposed the requirement on the control body concerned under paragraph (1) of that regulation.

(2) The authority responsible for executing and enforcing regulation 9(8) and regulation 11 shall be the Agency.

(**4**) S.S.I. 2006/3.

(3) The authority responsible for executing and enforcing regulation 16 shall be the authority whose officer took the person who made the disclosure on to the premises concerned.

(4) The authority responsible for executing and enforcing regulation 18(8) shall be the authority who authorised the person who entered the premises and disclosed the information.

(5) The authority responsible for executing and enforcing regulation 19 shall—

(a) where the offence relates to the execution of regulation 14, be the competent authority whose authorised officer was accompanied by a member of staff of the competent authority of another member State;

(b) where the offence relates to the execution of regulation 15, be the authority whose enforcing officer was accompanied by a Commission expert; and

(c) where the offence relates to the execution of regulation 18, be the relevant enforcement authority whose authorised officer exercised powers under that regulation.

Powers of entry

18.—(1) An authorised officer of a relevant enforcement authority other than the Agency shall, on producing, if so required, some duly authenticated document showing that officer's authority, have a right at all reasonable hours—

(a) to enter any premises within the authority's area for the purpose of ascertaining whether there is or has been on the premises a contravention of any provision of this Part of these Regulations for which that authority has enforcement responsibility pursuant to regulation 17; and

(b) to enter any premises, whether within or outside the authority's area, for the purpose of ascertaining whether there is on the premises any evidence of such a contravention within that area,

but admission to any premises used only as a private dwelling–house shall not be demanded as of right unless 24 hours' notice of the intended entry has been given to the occupier.

(2) An authorised officer of the Agency shall, on producing if so required some duly authenticated document showing that officer's authority, have a right at all reasonable hours to enter any premises for the purpose of—

(a) ascertaining whether there is or has been on the premises a contravention of any provision of this Part of these Regulations for which the Agency has enforcement responsibility pursuant to regulation 17; and

(b) ascertaining whether there is on the premises any evidence of such a contravention,

but admission to any premises used only as a private dwelling–house shall not be demanded as of right unless 24 hours' notice of the intended entry has been given to the occupier.

(3) If a sheriff, magistrate or justice of the peace, on sworn information in writing, is satisfied that there is reasonable ground for entry onto any premises for any such purpose as is mentioned in paragraph (1) or (2) and either—

(a) that admission to the premises has been refused, or a refusal is apprehended, and that notice of the intention to apply for a warrant has been given to the occupier; or

(b) that an application for admission, or the giving of such a notice, would defeat the object of the entry, or that the case is one of urgency, or that the premises are unoccupied or the occupier is temporarily absent,

the sheriff, magistrate or justice may by signed warrant authorise the authorised officer to enter the premises, if need be by reasonable force.

(4) Every warrant granted under this regulation shall continue in force for a period of one month.

(5) An authorised officer entering any premises by virtue of this regulation, or of a warrant issued under it, may be accompanied by such other persons as the officer considers necessary, and on leaving any unoccupied premises which that officer has entered by virtue of such a warrant shall leave them as effectively secured against unauthorised entry as they were found .

(6) An authorised officer entering premises by virtue of this regulation, or of a warrant issued under it, may inspect any records (in whatever form they are held) and, where any such records are stored in any electronic form—

(a) may have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or has been in use in connection with the records; and

(b) may require any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material to afford him such assistance as he may reasonably require.

(7) Any officer exercising any power conferred by paragraph (6) may—

(a) seize and detain any records which the officer has reason to believe may be required as evidence in proceedings under any of the provisions of this Part of these Regulations; and

(b) where the records are stored in any electronic form, require the records to be produced in a form in which they may be taken away.

(8) If any person who enters any premises by virtue of this regulation, or of a warrant issued under it, discloses to any person any information obtained on the premises with regard to any trade secret, that person is, unless the disclosure was made in the performance of that person's duty, guilty of an offence.

(9) Nothing in this regulation authorises any person, except with the permission of the local authority under the Animal Health Act 1981(**5**), to enter any premises—

(a) on which an animal or bird affected with any disease to which that Act applies is kept; and

(b) which is situated in a place declared under that Act to be infected with such a disease.

Obstruction etc. of officers

19.—(1) Any person who—

(a) intentionally obstructs any person acting in the execution of regulation 14, 15 or 18; or

(b) without reasonable cause, fails to give to any person acting in the execution of regulation 14, 15 or 18 any assistance or information which that person may reasonably require for the performance of functions under those regulations,

is guilty of an offence.

(2) Any person who, in purported compliance with any such requirement as is mentioned in paragraph (1)(b)—

(a) furnishes information which that person knows to be false or misleading in a material particular; or

(b) recklessly furnishes information which is false or misleading in a material particular,

is guilty of an offence.

(3) Nothing in paragraph (1)(b) shall be construed as requiring any person to answer any question or give any information if to do so might incriminate that person.

(**5**) 1981 c.22.

Penalties

20.—(1) A person guilty of an offence under regulation 18(8) is liable—

(a) on summary conviction to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment to imprisonment for a term not exceeding 2 years, to a fine or to both.

(2) A person guilty of an offence under regulation 5(3), 9(8), 11 or 16 is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) A person guilty of an offence under regulation 19 is liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or to both.

Time limit for prosecutions

21.—(1) No prosecution for an offence under this Part of these Regulations which is punishable under regulation 20(1) shall be begun after the expiry of—

(a) 3 years from the commission of the offence; or

(b) 1 year from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the knowledge of the prosecutor,

whichever is the earlier.

(2) For the purposes of this regulation, a certificate signed by or on behalf of the prosecutor and stating the date on which evidence sufficient in the prosecutor's opinion to warrant the proceedings came to the knowledge of the prosecutor, shall be conclusive evidence of that fact.

(3) A certificate stating that matter and purporting to be so signed shall be deemed to be so signed unless the contrary is proved.