

**2009 No. 437**

**FOOD**

**The Food (Jelly Mini-Cups) (Emergency Control) (Scotland)  
Regulations 2009**

*Made* - - - - - *10th December 2009*

*Laid before the Scottish Parliament* *11th December 2009*

*Coming into force* - - - *20th January 2010*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a) and all other powers enabling them to do so.

There has been consultation as required by Article 9 of Regulation (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety(b).

**Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009 and come into force on 20th January 2010.

(2) These Regulations extend to Scotland only.

**Interpretation**

2.—(1) In these Regulations—

“the Act” means the Food Safety Act 1990(c);

“the 1990 Regulations” means the Food Safety (Sampling and Qualifications) Regulations 1990(d);

“commercial operation” does not include exporting;

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(a) 1972 c.68 (“the 1972 Act”). Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the 1998 Act”), Schedule 8, paragraph 15(3) and the Legislative and Regulatory Reform Act 2006 (c.51) (“the 2006 Act”), section 27(1). The functions conferred on a Minister of the Crown under section 2(2) of the 1972 Act, so far as exercisable within devolved competence, were transferred to the Scottish Ministers by section 53 of the 1998 Act. In so far as not so transferred and in so far as relating to food (including drink) including the primary production of food, those functions were transferred to the Scottish Ministers by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2005 (S.I. 2005/849).

(b) O.J. No. L 31, 1.2.2002, as last amended by Regulation (EC) No. 596/2009 of the European Parliament and of the Council adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny: Adaptation to the regulatory procedure with scrutiny – Part Four (O.J. No. L 188, 18.7.2009, p.14).

(c) 1990 c.16.

(d) S.I. 1990/2463, to which there are amendments not relevant to these Regulations.

“the Commission Decision” means Commission Decision 2004/374/EC suspending the placing on the market and import of jelly mini-cups containing the food additives E400, E401, E402, E403, E404, E405, E406, E407, E407a, E410, E412, E413, E414, E415, E417 and/or 418(a);

“controlled jelly mini-cups” means any jelly mini-cups which contain any of the relevant food additives and which are intended for human consumption;

“food authority” has the meaning that it bears by virtue of section 5(2) of the Act; and

“the relevant food additives” means the food additives E400: alginic acid; E401: sodium alginate; E402: potassium alginate; E403: ammonium alginate; E404: calcium alginate; E405: propane 1,2-diol alginate; E406: agar; E407: carrageenan; E407a: processed eucheama seaweed; E410: locust bean gum; E412: guar gum; E413: tragacanth; E414: acacia gum; E415: xanthan gum; E417: tara gum and E418: gellan gum.

(2) Any expression used both in these Regulations and in the Commission Decision has the same meaning as in the Commission Decision.

(3) Any expression which is used both in these Regulations and in the Act has, save where otherwise indicated, the same meaning as in the Act.

### **Prohibitions**

3.—(1) No person shall carry out any commercial operation with respect to any controlled jelly mini-cups.

(2) For the purposes of paragraph (1), any jelly mini-cups which contain any of the relevant food additives shall be presumed, until the contrary is proved, to be controlled jelly mini-cups.

(3) No person shall use any of the relevant food additives in the manufacture of any jelly mini-cups which are intended for human consumption.

(4) For the purposes of paragraph (3), any jelly mini-cups shall be presumed until the contrary is proved to be intended for human consumption.

(5) Any person who knowingly contravenes paragraph (1) or (3) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding three months or to both.

### **Enforcement**

4.—(1) Each food authority shall enforce and execute these Regulations within its area.

(2) For the purposes of enabling a food authority to carry out its duty of executing and enforcing these Regulations, an authorised officer of that authority shall be subject to the same obligations as regards the procurement of samples under section 29 of the Act as are imposed on an authorised officer of an enforcement authority by regulations 6 to 8 of the 1990 Regulations, with the modification that any reference in those Regulations to section 29 of the Act shall be deemed to be a reference to that section as applied for the purposes of these Regulations by regulation 5(5).

(3) Each food authority shall give such assistance and information to the Scottish Ministers and the Food Standards Agency as they may reasonably request in connection with the execution and enforcement of these Regulations.

### **Application etc. of various provisions of the Act**

5.—(1) The following provisions of the Act apply for the purposes of these Regulations with the modification that any reference in those provisions to the Act or part thereof shall be construed for the purposes of these Regulations as a reference to these Regulations—

(a) section 2 (extended meaning of “sale” etc.);

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(a) O.J. No. L 118, 23.4.2004, p.70.

- (b) section 20 (offences due to fault of another person);
- (c) section 21 (defence of due diligence), with the further modifications that—
  - (i) subsections (2) to (4) shall apply in relation to an offence under regulation 3(1) and (3) as they apply to an offence under section 14 (selling food not of the nature or substance or quality demanded) or 15 (falsely describing or presenting food); and
  - (ii) in relation to an offence under regulation 3(1), the references to “sale” in subsection (4)(b) are deemed to include references to the carrying out of any commercial operation.
- (d) section 30 (analysis etc. of samples) with the further modifications that—
  - (i) the reference to “section 29 above” in subsection (1) shall be deemed to be a reference to that section as applied by regulation 5(5); and
  - (ii) in the definition of “sample” in subsection (9) the reference to “regulations under section 31 below” shall be deemed to be a reference to regulation 4(2);
- (e) section 32 (powers of entry), with the further modification that in subsection (1) the reference to “an enforcement authority” shall be deemed to be a reference to a food authority;
- (f) section 33(1) (obstruction etc. of officers);
- (g) section 33(2), with the further modification that the reference to “any such requirement as is mentioned in subsection (1)(b) above” shall be deemed to be a reference to any such requirement as is mentioned in section 33(1)(b) as applied by sub-paragraph (f);
- (h) section 35(1) (punishment of offences), in so far as it relates to offences under section 33(1) as applied by sub-paragraph (f);
- (i) section 35(2) and (3)(a), in so far as it relates to offences under section 33(2) as applied by sub-paragraph (g);
- (j) section 36 (offences by bodies corporate);
- (k) section 36A (offences by Scottish partnerships)(b); and
- (l) section 44 (protection of officers acting in good faith).

(2) Subject to paragraph (3), section 9 of the Act (inspection and seizure of suspected food) applies for the purposes of these Regulations as if it read as follows—

“9.—(1) An authorised officer of a food authority may at all reasonable times inspect any jelly mini-cups which—

- (a) have been sold or are offered or exposed for sale; or
- (b) are in the possession of, or have been deposited with or consigned to, any person for the purpose of sale or of preparation for sale.

(2) Subsections (3) to (8) apply where, whether or not on an inspection carried out under subsection (1), it appears to an authorised officer that—

- (a) any person has carried out commercial operations with respect to controlled jelly mini-cups, in contravention of regulation 3(1) of the 2009 Regulations; or
- (b) any person has used any of the relevant food additives in the manufacture of any jelly mini-cups which are intended for human consumption, in contravention of regulation 3(3) of those Regulations.

(3) The authorised officer may either—

- (a) give notice to the person in charge of the jelly mini-cups that, until the notice is withdrawn, the jelly mini-cups or any specified quantity of them—
  - (i) are not to be used for human consumption; and

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(a) Section 35(3) was amended by S.I. 2004/3279.

(b) Section 36A was inserted by the Food Standards Act 1999 (1999 c.28), Schedule 5, paragraph 16.

(ii) either are not to be removed or are not to be removed except to some place specified in the notice; or

(b) seize the jelly mini-cups and remove them in order to have them dealt with by a justice of the peace;

and any person who knowingly contravenes the requirements of a notice under subparagraph (a) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Where the authorised officer exercises the powers conferred by subsection (3)(a) that officer shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not he or she is satisfied that there has been no contravention of regulation 3(1) or (3) of the 2009 Regulations in relation to the jelly mini-cups and—

(a) if he or she is so satisfied, shall forthwith withdraw the notice; and

(b) if he or she is not so satisfied, shall seize the jelly mini-cups and remove them in order to have them dealt with by a justice of the peace.

(5) Where an authorised officer exercises the powers conferred by subsection (3)(b) or (4)(b), that officer shall inform the person in charge of the jelly mini-cups of the intention to have them dealt with by a justice of the peace and any person who under regulation 3(5) of the 2009 Regulations might be liable to a prosecution in respect of the jelly mini-cups shall, if he or she attends before the justice of the peace by whom the jelly mini-cups fall to be dealt with, be entitled to be heard and to call witnesses.

(6) If it appears to a justice of the peace, on the basis of such evidence as the justice of the peace considers appropriate in the circumstances, that any person has contravened regulation 3(1) or (3) of the 2009 Regulations in relation to any jelly mini-cups falling to be dealt with by the justice of the peace under this section, the justice of the peace shall condemn the jelly mini-cups and order—

(a) the jelly mini-cups to be destroyed or to be so disposed of as to prevent them from being used for human consumption; and

(b) any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the jelly mini-cups.

(7) If a notice under subsection (3)(a) is withdrawn, or the justice of the peace by whom any jelly mini-cups fall to be dealt with under this section refuses to condemn them, the food authority shall compensate the owner of the jelly mini-cups for any depreciation in their value resulting from the action taken by the authorised officer.

(8) Any disputed question as to the right to or the amount of any compensation payable under subsection (7) shall be determined by arbitration by a single arbiter appointed, failing agreement between the parties, by the sheriff.

(9) For the purposes of—

(a) subsection (2)(a), any jelly mini-cups which contain any of the relevant food additives shall be presumed until the contrary is proved to be controlled jelly mini-cups; and

(b) subsection (2)(b), any jelly mini-cups shall be presumed, until the contrary is proved, to be intended for human consumption.

(10) In this section—

(a) any reference to a justice of the peace includes a reference to the sheriff and to a magistrate; and

(b) “the 2009 Regulations” means the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009.”.

(3) The expressions “jelly mini-cups”, “controlled jelly mini-cups” and “the relevant food additives”, which are used in section 9 of the Act in so far as it applies for the purposes of these Regulations by virtue of paragraph (2), shall, for those purposes, bear the meanings that those expressions respectively bear in these Regulations.

(4) Section 2 of the Act (extended meaning of “sale” etc) shall apply in relation to section 9 of the Act in so far as it applies for the purposes of these Regulations by virtue of paragraph (2).

(5) Section 29 of the Act (procurement of samples) shall apply for the purposes of these Regulations with the modifications that—

(a) for the words “an enforcement authority” there shall be substituted the words “a food authority”;

(b) for paragraph (b)(ii) there shall be substituted the following provision—

“(ii) is found by him on or in any premises which he is authorised to enter pursuant to section 32 as applied for the purposes of the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009 by regulation 5(1)(e) of those Regulations;”;

(c) paragraph (c) shall be omitted; and

(d) for the words “any of the provisions of this Act or of regulations or orders made under it” in paragraph (d) there shall be substituted the words “the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009”.

(6) Regulation 9(1) of the 1990 Regulations shall apply for the purposes of these Regulations as if it read as follows—

“(1) Where a sample procured under section 29 of the Act as applied by regulation 5(5) of the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2009 has been analysed or examined pursuant to regulation 4(2) of those Regulations, the owner shall be entitled on request to be supplied with a copy of the certificate of analysis or examination by the authority which, by virtue of regulation 4(1) of those Regulations, has the duty of enforcing them.”.

## **Revocations**

6. The following Regulations are revoked—

(a) the Food (Jelly Confectionery) (Emergency Control) (Scotland) Regulations 2002(a); and

(b) the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2004(b).

*SHONA ROBISON*

Authorised to sign by the Scottish Ministers

St Andrew’s House,  
Edinburgh  
10th December 2009

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(a) S.S.I. 2002/179.

(b) S.S.I. 2004/187.

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations, which extend to Scotland only, implement Commission Decision 2004/374/EC suspending the placing on the market and import of jelly mini-cups containing the food additives E400, E401, E402, E403, E404, E405, E406, E407, E407a, E410, E412, E413, E414, E415, E417 and/or E418 (O.J. No. L 118, 23.4.2004, p.70).

These Regulations—

- (a) prohibit—
  - (i) the carrying out of commercial operations with regard to jelly mini-cups which contain any of the food additives E400, E401, E402, E403, E404, E405, E406, E407, E407a, E410, E412, E413, E414, E415, E417 or E418 and which are intended for human consumption, and
  - (ii) the use of any such additive in the manufacture of any jelly mini-cups which are intended for human consumption (regulation 3);
- (b) provide for their enforcement (regulation 4);
- (c) apply, with modifications, certain provisions of the Food Safety Act 1990 (1990 c.16) (regulation 5); and
- (d) revoke the Food (Jelly Confectionery) (Emergency Control) (Scotland) Regulations 2002 (S.S.I. 2002/179) and the Food (Jelly Mini-Cups) (Emergency Control) (Scotland) Regulations 2004 (S.S.I. 2004/187) (regulation 6).

A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen.

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