



FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

The Food (Scotland) Act 2015 (Compliance Notices) Regulations 2023

Date: May 2023
Stage: Final
Source of intervention: Scotland
Type of measure: Regulation
Contact for enquiries: Raymond Pang
Tel: 07392 318229
E-mail: Raymond.pang@fss.scot



1. Title of Proposal

1.1. The Food (Scotland) Act 2015 (Compliance Notices) 2023 Regulations

2. Purpose and intended effect

2.1. Objectives

2.2. The purpose of the Scottish Statutory Instrument are as follows:

2.3. To implement a new formal enforcement option for Local Authority (LA) Authorised Officers (AO) in the regulation of food standards (food information, composition standards, novel foods and food for specific groups).

3. Background

3.1. Legislative Background

3.1. At present, in the event of a food standards breach, whether intentional or not, there are limited powers for AOs to use, other than submitting a report to the Procurator Fiscal (PF) or in the case of food information matters, issuing a Seizure and Detention Notice under Section 15B of the Food Safety Act 1990. These mechanisms are often time consuming and are often disproportionate to the offence.

3.1. Currently there are a range of enforcement options AO's have at their disposal to deal with breaches in food hygiene matters; there is the option to use a Hygiene Improvement Notice (HIN), Remedial Action Notice (RAN) and a Hygiene Emergency Prohibition Notice (HEPN). These different notices allow the AO to take a graduated and proportionate approach in the enforcement of food hygiene law. There is a degree of flexibility in the timescale in which the business must comply with the notice which will be set by the AO's professional judgement, although a minimum of 14 days is given to the business to comply by.

3.1. Section 33 of The Food (Scotland) Act 2015 introduced an additional food information requirement for food business operators by inserting section 15C Duty to report non-compliance with food information law into the Food Safety Act 1990. From 1 April 2015 it became an offence for any food business operator who considers that food information law has been contravened to fail to notify Food Standards Scotland (FSS). This requirement aligns the duty to report any breach of food information law with the duty to report unsafe food.

Part 3 of the Food (Scotland) Act 2015 makes provision for the use of Compliance Notices as an alternative to criminal proceedings in relation to relevant offences. This new scheme aligns the treatment of food suspected of being in breach of Food Standards Law with the treatment of food which is believed to be in breach of Food Hygiene Law.

3.2. Background to Compliance Notices

What is a Compliance Notice?

3.2. A compliance notice is a notice requiring the person to whom it is issued to take steps to ensure that the person ceases to commit a relevant offence.

Who can serve a compliance notice?

3.2. An AO may issue to a person a compliance notice in relation to a relevant offence where they are satisfied that the person has committed the offence.

What information must a compliance notice contain?

3.2. A CN must contain the following:

- (a) a statement of the grounds for issuing the notice, including a statement of—
 - (i) the relevant offence that is alleged to have been committed, and
 - (ii) the act or omission giving rising to the offence,
- (b) details of the steps that are required to be taken to ensure that the person to whom the notice is issued ceases to commit the relevant offence,
- (c) the date of issue of the notice,
- (d) the period of time within which the required steps are to be taken as determined by the authorised officer,
- (e) information about the person to whom, and as to how and by when, any representations about the notice may be made,
- (f) information about the right of appeal, including the period of time within which an appeal may be made,
- (g) an explanation of the effect of complying with the requirements of the notice and of the consequences of failure to comply with those requirements.

What happens if there is a failure to comply with a compliance notice?

3.2. Failure to comply with a compliance notice means that the person to whom it has been issued commits an offence.

3.2. Where a person to whom a compliance notice has been issued fails to take any step required by the notice, the person does not, by reason of that failure, commit an offence if—

- (a) the person takes other steps to ensure that the person ceases to commit the relevant offence in respect of which the notice was issued, and
- (b) an authorised officer notifies the person in writing that those steps are acceptable for the purposes of complying with the notice.

3.2. A person who fails to comply with a compliance notice is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

How does a compliance notice affect criminal proceedings?

3.2. Where a compliance notice is issued to a person in relation to a relevant offence—

(a) no criminal proceedings for the relevant offence may be brought against the person in respect of the relevant act or omission before the end of the compliance period, and

(b) if the person—

(i) complies with the requirements of the notice, or

(ii) though failing to comply, takes other steps and has been notified in writing by the authorised officer that these steps are acceptable

the person may not at any time be convicted of the relevant offence in respect of the relevant act or omission.

What restrictions are there on the issuing of a compliance notice?

3.2. A compliance notice may not be issued to a person in relation to a relevant offence arising out of a particular act or omission if—

(a) a compliance notice has previously been issued to the person (and not withdrawn) in relation to the same relevant offence arising out of the same act or omission, or

(b) criminal proceedings have been brought against the person for the same relevant offence arising out of the same act or omission.

3.2. A compliance notice issued in these circumstances has no effect.

Can a compliance notice be withdrawn?

3.2. An authorised officer may withdraw a compliance notice:

at any time before completion of the steps that are to be taken to comply with the requirements of the notice, and

by the issuing of a notice in writing to that effect to the person to whom the compliance notice was issued.

3.2. Where a compliance notice is withdrawn, it is to be treated as if it had never been issued.

Is there a right of appeal against a compliance notice?

3.2. A person to whom a compliance notice has been issued may, before the expiry of the relevant period, make a summary application to a sheriff in order to appeal against the decision to issue the notice.

3.2. An appeal must be made within a period of one month beginning with the date of issue of the compliance notice, or within the compliance period, if this expires earlier.

- 3.2. In an appeal under this section, the sheriff may—
- (a) cancel the compliance notice, or
 - (b) affirm the notice, either with or without modifications.
- 3.2. Where an appeal is made under this section, the compliance period is suspended for the period during which the appeal is pending.
- 3.2. During this period, the appeal is pending until it is finally determined or is withdrawn.

3.3. Rationale for Government Intervention

- 3.3. A key driver for implementation of the CN, which was created in the Food (Scotland) Act 2015, was to reduce the imbalance between the sanctions available to AO's to enforce food standards matters and those relating to food safety and enable a more proportionate approach to support the enforcement of food law (excluding feed) in Scotland.

4. Consultation

4.1. Within Government

- 4.1. FSS has policy responsibility for all aspects of food in the Food (Scotland) Act 2015. This includes the provision of advice to the Scottish Ministers on both food hygiene and standards matters. This consultation package was discussed with Scottish Government officials from the Food and Drink Policy team and Legal Division.

4.2. Public Consultation

- 4.2. An eight-week consultation was carried out in Scotland from 21st October to 16th December 2021 to gather feedback on the proposed notice provisions. Subject to the consultation and Scottish Ministers' agreement, it was proposed that the CN should be available to AOs from Summer 2023.
- 4.2. The consultation was sent out to all 32 Local Authorities and a wide range of bodies representing the food industry. We received a total of 20 responses
- 4.2. Compliance Notices were welcomed by the majority of stakeholders with unanimous agreement across all respondents that there is a gap in current food standards enforcement and that a compliance notice is a sensible option for addressing this.

4.3. Business

- 4.3. All sectors of the food industry who are to comply with both Food Hygiene and Food Standards regulations may be impacted by the proposals. Any food businesses who are subject to regular inspections might be subject to these Notices which may be served on them for non-compliance with Food Standards regulations.

5. Options

- 5.1. **Option 1** – Do nothing.

5.1. This option would retain the existing regulatory framework for food hygiene and food standards and regulators will continue to use the current provisions of formal actions at their disposal.

5.2. Option 2 – Introduce a CN from Summer 2023 for Food Standards only.

5.3. This CN will allow for the same flexible approach (as with current existing Food Hygiene Notices) for AOs to use in dealing with breaches in Food Standards only (i.e., food information, composition standards, novel foods and food for specific groups), without having to submit a report to the PF. A PF report would still be a proportionate option in an event of a major non-compliance of regulations or risk to public safety.

5.4. Option 3 (preferred option) – Introduce a CN from Summer 2023 for Food Standards followed by exploration of inclusion of Food Hygiene.

5.5. Introduce a CN for Food Standards only, followed by consideration of extension of the scope of CN to include Food Hygiene and wider Food Law at a later date, based on further consultation. This CN will allow for the same flexible approach (as with current existing Food Hygiene Notices) for AOs to use in dealing with breaches in Food Standards (i.e., food information, composition standards, novel foods and food for specific groups) without having to submit a report to the PF.

5.6. Sectors and groups affected

The following groups will be affected by the proposed changes:

5.7. Enforcement Authorities

5.7. Service of the CN for Food Standards will ultimately be the responsibility of both LA AO's and for Food Standards and Food Hygiene, this would be the responsibility of both LA AO's and FSS Operational Delivery AO's. Introducing changes to legislation and guidance will involve familiarisation with time costs to understand new requirements and consider them when planning inspection visits.

5.8. Businesses

5.9. Business will be the main groups affected by the proposed additional powers for enforcement officers. Businesses would need to be aware of these new sanctions and penalties. They need to be aware of the impact and cost to their business from a financial and reputational perspective.

Consumers

5.9. It is envisaged that the introduction of the CN will improve business compliance with food regulations, and in turn increase consumer safety and confidence.

6. Options Appraisal: Costs, Benefits and Risks

Option 1 – Do nothing

Option 1 is the 'do nothing' scenario against which all other options are measured.

Costs

No monetary cost identified.

Benefits

There would be no benefit to regulators and consumers in continuing with the current approach, particularly for food standards matters. The only foreseeable benefit to businesses will be the low likelihood of facing formal enforcement action for non-compliance with food standards requirements.

Risks

The risks in food safety would remain the same as they are with the current framework in place. Similarly with food standards, the low likelihood of businesses facing formal enforcement action would continue and some food businesses may not feel the incentive to maintain standards or keep up to date with developments e.g., new labelling requirements for food sold prepacked for direct sale.

6.1. Option 2 – Introduce the CN from Summer 2023 for Food Standards only

Introduce the CN to deal with breaches in food information, composition standards, novel foods and food for specific groups. This option will have less of an impact on FSS Approved Establishments.

Costs

Food businesses will need to be aware of the function and purpose of the CN and how it would impact their business if served to a responsible member of staff. Food business operators and managers will need time and staff resource to familiarise themselves with the use of such a notice.

We estimate this will require 2 hours of familiarisation time by one member of staff for all registered food businesses in Scotland, with half of businesses disseminating this information further to an estimated 2.5 members of staff. This is estimated as taking 15 minutes. Managers' salaries are estimated at £9.39 per hour, and other staff as £8.29; therefore, the estimated cost is: £2,021,703 (including a 30% non-wage labour cost uplift).

The assumptions behind this estimated cost were tested as part of the consultation, please see [Annex A](#) for more details on the assumptions used. There was no information from the consultation to make any changes to the estimated business cost that we made. LAs fed back that they would require more than 2 officers to be trained on using the notice, so FSS has already delivered 2 training sessions so far on the notice and a plan to deliver more training later in 2023. Training was funded by FSS.

LAs will need time and staff resource to train AOs in the use of the CN and how to serve them.

It is expected that the food compliance officers in each of the 32 local authorities will take 2 hours each to familiarise themselves with the new protocols. The average hourly wage is assumed to be £20, therefore, the estimated cost is: £3,328 (again including a 30% uplift)

Benefits

AOs will have this additional tool to enforce food business compliance using a more proportionate, flexible and graduated approach to enforcement, ensuring reporting to the PF is reserved for serious breaches and repeated non-compliance. This is deemed a more efficient means of working with a business to address issues of non-compliance and be less time consuming for the court system. This enforcement option is intended to improve compliance with food standards regulations and in turn improve consumer safety and confidence.

Risks

The risk here would be that the CN may not be applied consistently by AOs. This can be mitigated through implementing training, to inform officers as to the appropriate use of the CN along with guidance material.

Businesses may feel reluctant to ask for advice if a notice can be served fairly easily. AOs have discretion in how they enforce food standards law and aim to take a proportionate approach taking account of FSS's spectrum of compliance model which seeks to encourage businesses to meet their obligations.

6.2. Option 3 – Introduce the CN from Summer 2023 for Food Standards matters only, followed by exploration of inclusion of Food Hygiene.

Introduce the CN to initially deal with breaches in food standards requirements followed by consideration of extension of the scope of CN to include Food Hygiene and wider Food Law by 2024.

Costs

Food businesses will need to be aware of the function and purpose of the CN and how it would impact their business if served to a responsible member of staff. Food business operators and managers will need time and staff resource to familiarise themselves with the use of such a notice.

Similarly, to the costs in Option 2, we estimate this will require 2 hours of familiarisation time by one member of staff for all registered food businesses in Scotland, with half of businesses disseminating this information further to an estimated 2.5 members of staff. This is estimated as taking 15 minutes. Managers' salaries are estimated at £9.39 per hour, and other staff as £8.29; therefore, the estimated cost is: £2,021,703 (incl. the 30% uplift mentioned above).

The assumptions behind this estimated cost were tested as part of the consultation, please see [Annex A](#) for more details on the assumptions used. There was no information from the consultation to make any changes to the estimated business cost that we made. LAs fed back that they would require more than 2 officers to be trained on using the notice, so FSS has already delivered 2 training sessions so far on the notice and a plan to deliver more training later in 2023. Training was funded by FSS.

LAs and FSS will need time and staff resource to train AOs in the use of the CN and how to serve them.

It is expected that the food compliance officers in each of the 32 local authorities will take 2 hours each to familiarise themselves with the new protocols. The average hourly wage is assumed to be £20, therefore, the estimated cost is: £3,328.00.

In relation to the proposal to consider extending the use of the CN to food hygiene law, the familiarisation time and associated costs are not anticipated to increase significantly. This is because AOs are already trained and familiar of the function and use of food hygiene notices. However, this will be explored in more detail as part of the follow up consultation.

Benefits

LA Environmental Health Departments and FSS would have this CN to support the enforcement of both Food Standards and Food Hygiene Law.

Risks

The risk here would be that the CN may not be applied consistently by AO's. This can be mitigated through implementing training to inform AOs to the appropriate use of the CN along with guidance material. Businesses may feel reluctant to ask for advice if a notice can be served easily. Officers have discretion in how they enforce food standards law and aim to take a proportionate approach taking account of FSS's spectrum of compliance model which seeks to encourage businesses to meet their obligations.

7. Scottish Firms Impact Test

7.1. Competition Assessment

7.1. These proposals are not anticipated to affect business's ability to compete since they would apply to food businesses irrespective of size.

7.2. Test run of business forms

7.2. The new Compliance Notice template will be issued to all 32 LAs ahead of the powers coming into force, which follows training sessions arranged by FSS.

8. Legal Aid Impact Test

8.1. After the consultation period the Justice Directorate was contacted to ascertain whether the new regulations will have any legal aid implications. The Scottish Legal Aid Board confirmed that these Regulations will have no impact on the legal aid fund.

9. Enforcement, sanctions and monitoring

9.1. Enforcement

9.1. Enforcement of the regulations will be the responsibility of LA Environmental Health Departments and FSS AO's. Enforcement should be risk based and proportionate, in line with the approach taken with the current Scottish legislation on Food Hygiene and Standards. AOs would not be expected to initiate separate inspections in relation to the enforcement of these new provisions, but instead to include these as part of their existing regimes.

9.2. Sanctions

9.2. The Food (Scotland) Act 2015 contains powers to bring in enforcement regimes to support the enforcement of food law. Currently, the options available to officers for the enforcement of food standards matters are limited to reporting cases to the PF and seizing non-compliant products. This consultation considers the introduction of compliance notices in respect of food standards law and hygiene law.

9.2. It is proposed that a breach of the terms of a compliance notice would be an offence, therefore for food standards requirements this would implement the offence created in the Food (Scotland) Act 2015 (See 3.2.4 - 3.2.6 on page 3).

9.3. Monitoring

9.3. The effectiveness and impact of the regulations will be monitored via feedback from stakeholders, including Enforcement Agencies, as part of the ongoing policy process. Agency mechanisms for monitoring and review include; open fora, stakeholder meetings, surveys and general enquiries.

10. Implementation and delivery plan

10.1. The publication of the Scottish Regulations will be communicated to stakeholders by email. This will be issued shortly after the Scottish Statutory Instrument has been published on the legislation.gov.uk website.

11. Post-implementation review

11.1. A review will be carried out in the future to assess if the need to modify the compliance notice to be used to enforce food hygiene matters. We will seek out local authority feedback on the use of the notice through the Food Liaison Groups that FSS attends regularly.

12. Summary and recommendation

12.1. **Option 2** is now the preferred option, following stakeholder consultation as there is already an enforcement regime available for food hygiene matters that was to be included as part of option 3.

13. Summary costs and benefits table

Option	Total benefit per annum: economic, environmental, social	Total cost per annum: economic, environmental social policy and administrative
1	None	None
2	<p>Enforcement authorities would benefit from having this enforcement tool to deal with breaches in food standards regulations.</p> <p>Consumers would benefit from having any misinformation on products to be addressed by reporting it to their local enforcement authority.</p>	<p>Businesses: an approximate one-off familiarisation cost of £2,021,703 in total across Scotland.</p> <p>Enforcement: One-off familiarisation cost estimated at approximately £3,328.00 in total across Scotland.</p>
3	<p>Enforcement authorities would benefit from having this enforcement tool to deal with breaches in food standards and food hygiene regulations.</p> <p>Consumers would benefit from having any misinformation on products to be addressed by reporting it to their local enforcement authority.</p>	<p>Businesses: an approximate one-off familiarisation cost of £2,021,703 in total across Scotland.</p> <p>Enforcement: One-off familiarisation cost estimated at approximately £3,328.00 in total across Scotland.</p>

14. Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Minister's signature Jenni Minto

Minister's title Minister for Public Health and Women's Health

Date 23/05/2023

Contact point

Raymond Pang

Enforcement Delivery Branch

Food Standards Scotland

3rd Floor, Pilgrim House, Old Ford Road, Aberdeen, AB11 5RL

Tel: 07392 318229

e-mail: raymond.pang@fss.scot

Annex A - Assumptions to accompany cost estimates

1) Assumptions related to enforcers:

- 32 local authorities, 2 officers in each.
- 120 FSS Authorised Officers (not included in cost estimates)
- Local enforcement officers, estimated hourly wage: £20.00
- FSS Authorised Officers, estimated hourly wage (average): £20
- Familiarisation time (one-off): 2 hours
- A 30% uplift is applied for non-wage labour costs.

2) Assumptions related to businesses:

- Number of businesses: 68,982, data taken from Scottish National Database plus Food Standard Scotland registered businesses
- Wage band 1: assumed to be managers with estimated hourly wage of £9.39; who will spend 2 hours familiarising themselves with the new information.
- Wage Band 2: assumed to be all other staff. Wage band 1 staff will spend 15 minutes disseminating information to wage band 2 staff. This will only happen in businesses with 1 or more employee, which is assumed to be 50% of businesses. We estimate each wage band 1 staff member will tell 2.5 wage band 2 employees. Wage band 2 staff estimated hourly wage is £8.29.
- A 30% uplift is applied for non-wage labour costs.
- The 2.5 band 2 employees were calculated by assuming small businesses disseminate to 2 people, medium to 5 people, and large to 20 people. Using the proportion of all businesses by employee size (small: 92.5%, medium: 3.6%, large: 2.1%) we arrive at 2.5 employees per business on average. Data on business proportion by employee size was obtained from the Scottish Government [Growth Sector Statistics](#), and [Businesses in Scotland: 2020](#).
- Employee descriptions found in [Office of National Statistics, Annual Survey of Hours and Earnings](#).
- Wage band 1 employee descriptions:
 - Scotland, Bakers and flour confectioners
 - Scotland, Butchers
 - Scotland, Catering and bar managers
 - Scotland, Chefs

- Scotland, Fishing and other elementary agriculture occupations n.e.c.
- Scotland, Fishmongers and poultry dressers
- Scotland, Hotel and accommodation managers and proprietors
- Scotland, Managers and directors in retail and wholesale
- Scotland, Managers and proprietors in forestry, fishing and related services
- Scotland, Production managers and directors in manufacturing
- Scotland, Restaurant and catering establishment managers and proprietors
- Scotland, Managers and directors in retail and wholesale
- Scotland, Managers and proprietors in hospitality and leisure services
- Wage band 2 employee descriptions:
 - Scotland, Bar staff
 - Scotland, Butchers
 - Scotland, Food, drink and tobacco process operatives
 - Scotland, Kitchen and catering assistants
 - Scotland, Packers, bottlers, canners and fillers
 - Scotland, Retail cashiers and check-out operators
 - Scotland, Waiters and waitresses
 - Scotland, Assemblers and routine operatives
 - Scotland, Customer service occupations
 - Scotland, Food preparation and hospitality trades
 - Scotland, Sales assistants and retail cashiers
 - Scotland, Process, plant and machine operatives