

## *Impact assessment of EU Food Information Regulation (1169/2011) on food manufacturers and retailers*

**Focus on: Foods offered for sale by distance communications**

### **Introduction**

GS1 commissioned Mason, Hayes & Curran to provide an in-depth analysis of EU Regulation 1169/2011 on the provision of food information to consumers (FIR).

This regulation introduces a new requirement for mandatory food information to be available to consumers in respect of prepacked foods offered for sale by distance communication, and such mandatory information must be provided **before** the purchase is concluded.

This impact assessment looks at the scope of the new requirement on distance sales of foodstuffs, how and when the mandatory information is to be provided, and by whom.

### **1. Summary of Legal impact**

1. The FIR requires that a significant amount of food information be available to the consumer before they purchase the prepacked food on a website or other distance sale;
2. This mandatory information must be available on or through the website (without charge to the consumer) prior to purchase;
3. If the pre-purchase information is not available, the prepacked food cannot be sold on a website;
4. If the brand owner does not make the relevant information available to the retailer in a website friendly format, it will be difficult for the retailer to sell the foodstuff on its website;
5. A system of co-operation between the brand owner and retailer will be required to ensure that accurate and complete mandatory food information is available to the consumer prior to purchase.

These conclusions arise from, and should be read in conjunction with, the legal analysis below.

**This document contains a summary of legal issues only and does not constitute legal advice. Specific legal advice should be obtained before taking any action.**

## 2. Background

Regulation No 1169/2011 repeals both the nutrition labelling directive (90/496/EEC) and the food labelling directive (2000/13/EC) and sets out a comprehensive new regime on the information that must be provided to consumers in relation to food products. The stated goal of these regulations is to ensure that consumers can make informed purchases having access to information on the products' quality, nutritional value, ingredients, and for certain products, its country of origin.

As regards distance sales, recital 27 of the FIR states that “although it is clear that any food supplied through distance selling should meet the same information requirements as food sold in shops, it is necessary to clarify that in such cases the relevant mandatory food information should also be available before the purchase is concluded.”

## 2. What is the “Mandatory Food Information”?

Chapter IV of the FIR sets out the food information that it is mandatory to provide. Article 9 has a list of mandatory particulars (see Appendix), followed by further information as stipulated in articles 10 to 35. Examples of the further information are in relation to frozen meat products or products containing sweeteners, caffeine or certain additives. There are also exceptions, such as fresh fruit and vegetables do not need to have a list of ingredients or a nutrition declaration.

For the purposes of distance sales of foodstuffs, all mandatory information except the “use by” date in Article 9(f) must be provided before the sale is concluded, as well as any other information as arises from articles 10 to 35.

## 3. What are Distance Sales?

Distance sales within the scope of the FIR clearly include sales via the internet by on-line retailers, and by any other means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties.

Experience from the EU's Distance Contracts Directive (97/7/EC) indicate that many other kinds of sale would be within scope, such as sales by catalogue, by email, by telephone, fax or any combination of such communications, without face-to-face contact.

Specifically excluded from scope are automatic vending machines and automated commercial premises.

We have focused in this Memo on sales by online retailers via a website, but the principles apply equally to all other forms of distance sale.

## 4. Responsibility to provide Food Information

Article 14 of the FIR is clear that mandatory food information is to be “available” to the consumer prior to purchase (see Appendix). By whom is it to be provided? The FIR is less clear on this point.

For starters, Article 1.3 establishes that *“this Regulation shall apply to all food business operators at all stages of the food chain, where their activities concern the provision of food information to consumers.”*

Article 8.1 states that the “food business operator responsible for the food information shall be the operator under whose name or business name the food is marketed...” It is clear that the company under whose brand a food product is sold (e.g. Marks & Spencer Shepherd’s pie, or Kellogg’s corn flakes) is responsible for placing the mandatory food particulars on the package. Note however that “food information” is broader than just the label on the pack, and includes “other accompanying material” or any other means including modern technology tools or verbal communication.” The food business operator that is the brand owner is responsible for the food information, and by virtue of article 8.2, must ensure the **presence** and **accuracy** of the food information in accordance with [EU and national] food information law.

Moving along the food chain, Article 8.3, food business operators which “do not affect food information” shall not supply food which they know or presume ... to be non-compliant with ...food information law. This is understood to mean that wholesalers, retailers and others in the supply chain who are not involved in packaging or labelling food, have a duty not to supply foodstuffs that they know do not have the correct mandatory food information.

Article 8.4 requires food business operators not to modify the information accompanying a food if that would mislead the final consumer, and the food business operator that does change any information accompanying a food will be responsible for that change.

Article 8.5 places an obligation on all food business operators of compliance in respect of the business under their control and relevant to their activities, and an obligation to verify that food law requirements are met. The EU Commission has described this article as a “safety net” against legal gaps [Answer to Parliamentary Question, E-000385/2012].

Finally, article 8.7 applies to other stages in the supply chain, including where prepacked food (intended for the final consumer) is “marketed at a stage prior to sale the final consumer”. At that stage in the supply chain, the supplier must ensure that the mandatory particulars appear on (i) the “prepackaging or (ii) on a label attached thereto, or (iii) on the commercial documents referring to the foods where it can be guaranteed that such documents either accompany the food to which they refer or were sent before or at the same time as delivery. While the exact scope of the article may need to be clarified, it appears to establish two principles:

1. that food information will need to be made available by food business operators at stages in the supply chain prior to sale to the consumer, and
2. the food information will have to be in a format other than solely printed on the pack.

A preliminary conclusion from Article 8 is that the primary duty for providing the required food information is on the brand owner. The brand owner may contend that once it has provided accurate and complete mandatory food information on the packaging of its products, it has fulfilled its duties under the FIR. However, the FIR requirements are not limited to labelling, and the availability of mandatory food information at various stages of the supply chain including for consumers prior to purchase are rules of the EU's "food information law" just as much as correct labelling is.

That said, a food business operator that is a retailer cannot supply food to consumers which the retailer knows to be non-compliant with food information law, hence they cannot sell prepacked foods to consumers via a website without the mandatory pre-purchase information being available to the consumer.

## 5. Comparison with Distance Sales requirements

Consumer protection rules in distance sales contracts also apply under Directive 97/7, to be replaced by Directive 2011/83 from 13 June 2014, and it is useful to contrast the wording of the information obligations in those Directives with the wording of the FIR.

Firstly, as regards scope, the new Distance Sales Directive (2011/83) will not apply to contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader "on frequent and regular rounds to the consumer's home, residence or workplace." While some internet sales may benefit from this exception, many will not (the UK Office of Fair Trading believes it will exempt sales by a milkman on his rounds but not most other types of distance sales).

Secondly, the relevance of the new Distance Sales Directive is that it articulates that it is the **trader** who must provide the consumer with the information. By contrast, Directive 97/7 was in the passive ("the consumer shall be provided with the following information..."), just as article 14 of the FIR is in the passive, without articulating who must make the information available.

As the new Distance Sales Directive (as implemented in each Member State) will apply to the majority of internet sales by food retailers from 13 June 2014, the food retailer as trader will be obliged to provide the consumer with the necessary Distance Sales information, including the main characteristics of the goods. It would be logical for the retailer to arrange for the mandatory food information under the FIR to be made available to the consumer when the retailer is providing the information under the new Distance Sales Directive.

## 6. How is information to be made available?

The mandatory information must appear on the material supporting the distance selling. Where the distance sale is by internet, the obvious location or means for the information is the relevant webpage. There is a permitted alternative: the information may be provided “through other appropriate means clearly identified by the food business operator”, but this cannot be at a supplementary cost to the consumer.

The Distance Sales rules refer to the pre-contract information being given in plain and intelligible language, in a way appropriate to the means of communication, and requires that the trader makes the consumer aware of certain information in a clear and prominent manner directly before the consumer places his order.

In our opinion, retailers would be complying with the FIR if they make the mandatory food information available on their retail website, either beside each product which the consumer may select to purchase, or by way of a clear and prominent link from the product page to a Food Information page [database], provided there is no charge for accessing the food information and no technical difficulties in linking to the food information.

## 7. Conclusions

Whether it is the brand owner or the retailer who must provide the pre-purchase information for the consumer, it is clear:

- that this information must be available on or through the website (without charge) prior to purchase.
- If the pre-purchase information is not available, the prepacked food cannot be sold on a website.
- If the brand owner does not make the relevant information available to the retailer in a website friendly format, it may be difficult for the retailer to sell the foodstuff on its website.
- A system of co-operation between the brand owner and retailer will be required to ensure that accurate and complete mandatory food information is available to the consumer prior to purchase.

The relevant provisions of the FIR will take effect in December 2014, which allows the food industry and those involved in the food supply chain to resolve how accurate mandatory food information will be made available to the consumer prior to an on-line sale being made.

**For more information about the regulation from a legal perspective, contact Wendy Hederman, Mason, Hayes & Curran, Solicitors, via <http://www.mhc.ie/>.**

**For more information on the impact on the food industry, contact Malcolm Bowden at [malcolm.bowden@gs1.org](mailto:malcolm.bowden@gs1.org).**

## Appendix

This appendix contains the text of Articles 9 and 14 discussed in this document.

The full EU Regulation is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:EN:PDF>.

### Article 9 - List of mandatory particulars

1. In accordance with Articles 10 to 35 and subject to the exceptions contained in this Chapter, indication of the following particulars shall be mandatory:

- a) the name of the food,
- b) the list of ingredients;
- c) any ingredient or processing aid listed in Annex II or derived from a substance or produce listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even in an altered form;
- d) the quantity of certain ingredients or categories of ingredients;
- e) the net quantity of the food,
- f) the date of minimum durability or the “use by” date;
- g) any special storage conditions and/or conditions of use
- h) the name or business name and address of the food business operator referred to in Article 8(1)<sup>1</sup>
- i) the country of origin or place of provenance where provided for in article 26<sup>2</sup>
- j) instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions
- k) with respect to beverages containing more than 1.2% by volume of alcohol, the actual alcoholic strength by volume
- l) a nutrition declaration.

### Article 14 Distance selling

1. Without prejudice to the information requirements laid down in Article 9, in the case of prepacked foods offered for sale by means of distance communication:

- (a) mandatory food information, except the particulars provided in point (f) of Article 9(1), shall be available before the purchase is concluded and shall appear on the material supporting the distance selling or be provided through other appropriate means clearly identified by the food business operator. When other appropriate means are used, the mandatory food information shall be provided without the food business operator charging consumers supplementary costs;
- (b) all mandatory particulars shall be available at the moment of delivery.

2. In the case of non-prepacked foods offered for sale by means of distance communication, the particulars required under Article 44 shall be made available in accordance with paragraph 1 of this Article.

3. Point (a) of paragraph 1 shall not apply to foods offered for sale by means of automatic vending machines or automated commercial premises.

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<sup>1</sup> Article 8(1) states that “The food business operator responsible for the food information shall be the operator under whose name or business name the food is marketed or, if that operator is not established in the Union, the importer into the Union market”