
Food Information Regulation

Improvement Notice Drafting

Andrew Gilden



Aims

- This course will
 - Show how improvement notices (INs) fit into your current work
 - Provide an opportunity to discuss approaches to enforcement.
 - Include practical notice drafting sessions
 - Promote confidence when using notices



Objectives

- On completion of the course delegates will be:
 - Able to identify non compliance where IN use appropriate.
 - Aware of the available enforcement options.
 - Able to draft out Improvement Notices.
 - Aware of the appeals procedure



Introduction



Approach to enforcement

- Graduated approach
- Food law enforcement policy
- Food Law Code of Practice
 - Practice guide
 - New FSA guidance for issuing INs
- Regulator's code



Regulator's Code

- Statutory Code
 - Approved by both Houses of Parliament
 - In force from April 2014



Regulators should:

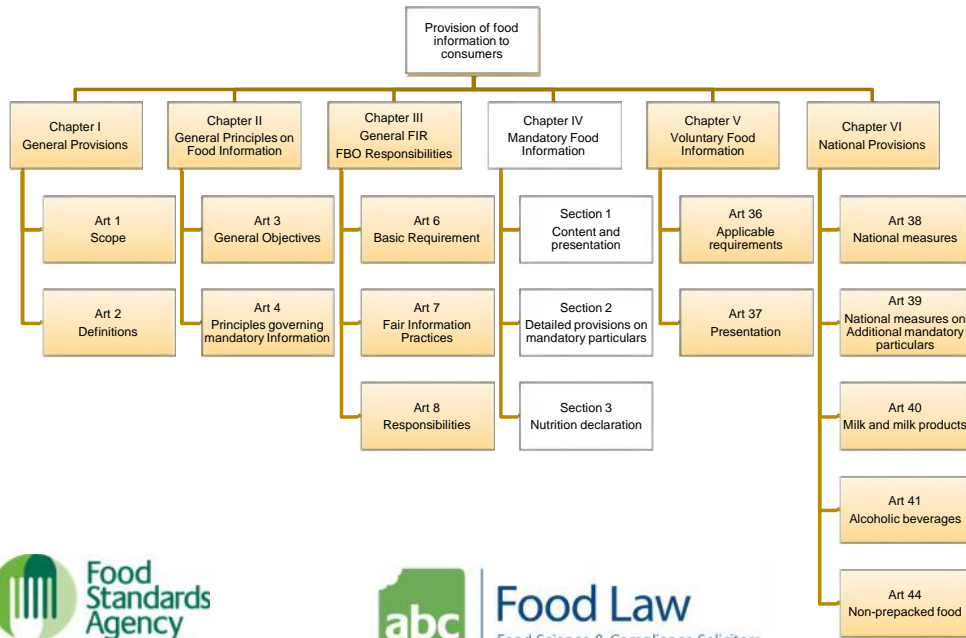
- Carry out their activities in a way that supports those they regulate to comply and grow
- Provide simple and straightforward ways to engage with those they regulate and hear their views
- Base their regulatory activities on risk
- Share information about compliance and risk
- Ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply
- Ensure that their approach to their regulatory activities is transparent



The Food Information Regulation

Regulation (EC) 1169/2011





Fair information practices

Article 7

- Food information shall be:
 - Accurate
 - Clear
 - Easy to understand
- Shall not claim to
 - Prevent, treat or cure human disease
- Food information should not be misleading



Responsibilities of Food Business Operator

Article 8 -

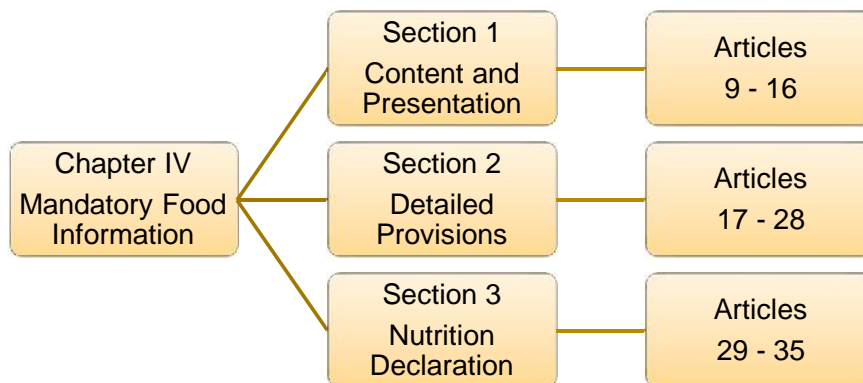
‘food business operator’

Art 3 Regulation (EC) 178/2002

“the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control”



Mandatory requirements



‘mandatory food information’ means the particulars that are required to be provided to the final consumer by Union provisions;

Mandatory particulars

Art 9(1)

- a. Name of food
- b. Ingredients
- c. Allergens
- d. Quid
- e. Net quantity
- f. Minimum durability
- g. Special storage conditions, conditions of use.
- h. Name or business name and address of FBO
- i. Country of origin/place of provenance
- j. Instructions for use
- k. Alcoholic strength
- l. Nutrition declaration



National measures

- Must be authorised by Union law.
 - Must not give rise to obstacles to single market
- May include origin/provenance



Allergen labelling: non-prepacked food

Article 44

- Non-prepacked foods
 - To final consumer or
 - Mass caterers
 - Including pre-packed for direct sale
- Allergen labelling in Art 9(1)(c) mandatory
- Additional national rules
 - Food Information (Wales) Regulations 2014



Food Information (Wales) Regulations 2014



Food Information Regulation 2014

■ Main provisions:

- Allergen information requirements
 - for non-prepacked foods (Regulation 5)
- Foods that are not prepacked etc.
 - general requirement to name them (Regulation 6)
- Foods that are not prepacked etc.
 - containing meat and other ingredients (Regulation 7)
- Offences (Regulation 10)
- Improvement Notices (Regulation 12)



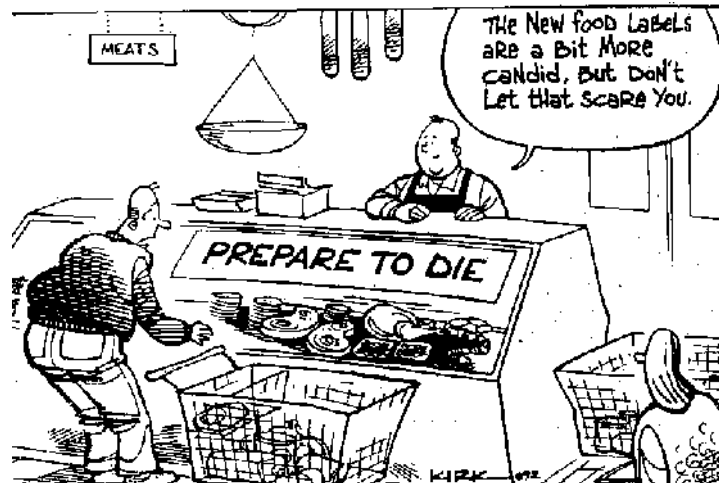
Allergen Information

- Information in accordance with Article 9(1)(c)
 - In manner of Food Business Operator's choice
 - May be in writing or verbally



Allergen Information

- Should be
 - Specific to food
 - Complete
 - Accurate
 - Article 7 1169



Allergen Information

- In writing
 - Menu, chalk board, ticket etc
 - Clear
 - Conspicuous
 - Easily visible
 - Legible



Verbal allergen information

- **Indication** can be given either on:
 - Label attached to the food, or
 - Notice, menu, ticket or label that is readily discernible by an intending purchaser at the place where the intending purchaser chooses that food.

FOOD ALLERGENS
For information about allergens
in our food, please ask a
member of staff.



Verbal allergen information

- **Information**

- **Must**

- Be provided
 - Refer to legal name of allergen

- **Doesn't have to be provided by person asked**

- Staff can refer to manager/chef etc



FIR Improvement Notices



Improvement Notices

- Regulation 12 (1)
 - Applies Food Safety Act 1990
 - Schedule 4 part 1
 - Modifies Section 10 Improvement Notice
 - Used for breaches of
 - EU FIC specified in Schedule 5
 - Regulation 5, 6, 7 or 8 FIR



- FSA Guidance for Food Enforcement Officers issuing IN
- Food Law Code of Practice (Wales)



Improvement Notice

- (1) If an **authorised officer** of an enforcement authority
 - has **reasonable grounds** for believing that **a person** is failing to comply with a **provision specified in subsection (1A)**,
 - the authorised officer may, by a notice **served on that person** (in this Act referred to as an “improvement notice”)—



Improvement Notice

- (a) state the **officer's grounds** for believing that the person is failing to comply with the relevant provision;
- (b) specify the **matters which constitute the person's failure** so to comply;
- (c) specify the measures which, **in the officer's opinion**, the person must take in order to secure compliance; and
- (d) require the person to take those measures, or measures that are at **least equivalent** to them, **within such period as may be specified in the notice**.



Key terms

- Authorised officer
- Reasonable grounds
- A “person”
- provision specified in subsection (1A)
- served on that person



Authorised officer

- Authority to Act
 - Code of Practice - **“The Food Safety Act 1990 allows for the authorisation of Officers, in writing, either generally or specifically...”**
- Competency
 - Code of Practice – Food Authorities should ensure Authorised Officers are -
 - Suitably Qualified
 - Experienced
 - Competent to carry out a range of tasks and duties they are required to perform



Reasonable grounds

- Evidence of breach required

- Improvement Notices are Civil Sanctions
 - Evidence need not be collected in accordance with rules of criminal evidence.

 - However
 - Breach of Notice is summary offence.



A “person”

- Food Business Operator is responsible for food information.

“the natural or legal persons responsible for ensuring that the requirements of food law are met within the food business under their control”

Art 3 Regulation (EC) 178/2002



Who is the Food Business Operator?

- R. (on the application of Rasool) v Tower Bridge Magistrates' Court
 - Supermarket operated by limited company
 - HINs served on company
 - Hygiene offences
 - Defendant prosecuted in personal capacity as FBO
- Judicial review of Mags decision to convict
 - Dismissed
 - Could be more than one FBO
 - Three Rivers DC v Chowdhury [2009] EWHC 2683 (Admin), [2009]



Who is the Food Business Operator?

- “The evidential picture was that R had been in control of the business and he was therefore capable of being a food business operator within the definition in Regulation 178/2002 art.3”
- No reason why there could not be a legal person and a natural person as FBOs of the same premises at the same time.



Provision specified in subsection (1A)

(1A) The provisions are—

- (a) any provision of Regulation (EU) No 1169/2011 specified in Schedule 5 to the Food Information Regulations 2014 except to the extent that the provision applies to the mandatory particular relating to net quantity

- (b) the following provisions of the Food Information Regulations 2014—
 - (i) regulation 5(3), (4) or (5);
 - (ii) regulation 6(1) or (4);
 - (iii) regulation 7(1), (4) or (5); or
 - (iv) regulation 8(1) or (3)..



Served on that person

Method of service

- Section 50 Food Safety Act 1990
- Delivering it to the person;
- Limited company
 - Delivery to secretary or clerk at registered or principal office, or
 - by sending it in a prepaid letter addressed to him at that office
- In the case of any other person,
 - by leaving it, or sending it in a prepaid letter addressed to him, at his usual or last known residence.



Use of Improvement Notices

- Not usually first response to non-compliance
 - Graduated approach to enforcement

- Improvement notices not suitable for:
 - Continuing offences
 - Breaches of guidance or good practice
 - Potential or imminent risk to health



Annex 2 Guidance on IN: Model Template / Form

The Food Information Regulations 2014

Improvement Notice

Authority:

(Name & Address of the issuing Authority):

Reference Number:.....

Section 10 of the Food Safety Act 1990 as applied and modified by regulation 12(1) of, and paragraph 1 of Schedule 4 to, the Food Information Regulations 2014 (SI 2014/1855)

1. To:

.....

.....

.....(Name and address of the business on which the notice is being served)

2. I have reasonable grounds for believing that you are failing to comply with [Authorised officer to insert relevant provision of Regulation (EU) No 1169/2011 (as specified by Schedule 5 of the Food Information Regulations 2014) or the Food Information Regulations 2014]

because:.....

.....

Improvement Notices

- Key elements of Improvement Notice:
 - Grounds for officer believing that person has failed to comply with FIR
 - Matters which constitute the person's failure
 - Measures to be taken to secure compliance
 - Date of compliance
 - Details of appeal mechanism

Key elements of Improvement Notice

- In summary:

- What is wrong?
- Why is it wrong?
- What, in the officer's opinion, does the FBO have to do?
- When should the remedial work be completed by?



Grounds for officer believing that person has failed to comply with FIR

- Should include specific reference to:
 - Food business
 - Subject matter of notice



Matters which constitute the person's failure

- Specific legal reference should be included



Measures to be taken to secure compliance

- Officer should ensure:
 - Notice provides details of officer's opinion
 - Should point out that alternatives may be acceptable.
 - Notice does not require action beyond legal requirement

- Avoid
 - Merely re-stating wording of FIC/FIR
 - Using vague terms “adequate” “suitable” etc
 - On-going requirement
 - “and ensure maintained in future...”

Date of compliance

■ Improvement Notices

- ❑ Needs to be appropriate and reasonable in circumstances
- ❑ Good practice to discuss with FBO or person who is in a position to agree a time period
- ❑ Can set without agreement
- ❑ How long?



Compliance

- Key issues:
 - Timely check on compliance with notice
 - Extension of time requests
 - No provision within Act
 - Should take into account
 - Nature of breach
 - Complexity of solution
 - Attitude of business
 - If appropriate
 - Cancel original notice and issue new one



Non-compliance

- Breach of notice: Criminal offence
- Follow up action in accordance with enforcement policy (EP)
 - EP should be updated to include breach of Improvement Notices

- Note: Defences available
 - Offence due to fault of another person
 - Due diligence



Home Authority / Primary Authority

- Home Authority.....
- An improvement notice constitutes enforcement action under the Regulation Enforcement Sanctions Act 2008.
- Must be notification to PA prior to issue or
- In exceptional cases, where appropriate
 - Reason for lack of notification ahead of enforcement action
 - E.g. urgent to avoid a risk to health or where pre-notification would be disproportionate.



Appeals

- Magistrates Court
- May (s.39 (1) Food Safety Act 1990)
 - Cancel
 - Alter
 - Affirm



Practical Considerations

- Timescale given in FIR-IN v appeal period
- Low cost delaying tactic?
- Can the differences be resolved by discussion & negotiation?
- Is the FIR-IN proportionate & necessary?
- Resources
 - A barrister may be instructed by the FBO to argue their case.



Appropriate use of Improvement Notices



Exercise - Could you and would you serve an IN?

1. Order of nutritional panel on a pre-packed product
Protein, Energy, Carbohydrates, Fat
2. Omega 3 amount located within nutritional information
3. Wholesaler selling unlabelled, unpackaged meat
4. Importer of American food supplements containing an unapproved additive
5. Beer manufacturer not declaring Fish as an allergen when using Isinglass
6. Baby food with instructions for use labelled in Polish only
7. Failure to have allergen awareness box on pre-packed food
8. Health claim without statement
“Enjoy as part of a varied & balanced diet & a healthy lifestyle”

Drafting Improvement Notices



Preparation of Notice

- Each notice should have unique reference number
- Notice should contain concise description of non compliance and remedy
- Different notices for each contravention or a schedule of contraventions acceptable.



Notices v Schedule

- Remember if schedule used:
 - Appeal against one item suspends whole notice
 - Breach of one item is one offence
 - Breach of several items is one offence
 - One outstanding item = non-compliance
 - Avoid different compliance dates.

- Note: Schedules can be used to provide more space on notice



Drafting Improvement Notices

- Notice divided into sections:

1. To
2. I have reasonable grounds for believing that you are failing to comply with ...
 1. Because
 2. in connection with where the contravention took place
3. The matters which constitute your failure to comply are:
4. In order to comply with the provision specified above, you must take the following measure(s) (or measures that are at least equivalent to them)
5. You are required to take these measures by..

Drafting Notices

- **To**
 - Notice must be served on food business operator
 - Full name must be given
 - If unknown: "The Food Business Operator"
 - Full address of food business operator
 - If food business operator is a limited company:
 - Full name of Limited Company stated on notice
 - Registered or Principal Office Address
 - Where several food business operators:
 - One notice served on each
 - Accompanying letter



Drafting Notices

- I have reasonable grounds for believing that you are failing to comply with

- Insert relevant provision of Regulation (EU) No 1169/2011
 - as specified by Schedule 5 of the Food Information Regulations 2014 or
 - the Food Information Regulations 2014

- Insert precise description of contravention



Drafting Notices

- **because:**.....
- Insert grounds for believing that the Food Information Regulation 2014 are being breached



Drafting Notices

- in connection with where the contravention took place
- Name & Address of Food Business if different to that in 1 above



Drafting Notices

- The matters which constitute your failure to comply are
- Authorised officer to insert why there is a failure to comply
- A description of the breach in plain English is necessary.
 - Identify the product specifically the label the durability date/ lot code and what exactly was wrong with the label.
 - You may wish to attach copy of the label as supporting evidence.



Drafting Notices

- In order to comply with the provision specified above, you must take the following measure(s) (or measures that are at least equivalent to them)
 - Provide opinion on remedial works
 - Ensure standard paragraphs are completely relevant
 - Do not go beyond legal requirements
 - Avoid vague terms such as “suitable” “adequate”
 - Cannot require on-going compliance ie “Review” “Maintain



Drafting Notices

- You are required to take these measures by..... (date)
 - Insert date of compliance dd/mm/year.
 - Timescale must be reasonable
 - Time period for compliance should be discussed with food business operator
 - Should consider,
 - Nature of problem
 - Risk
 - Availability of solutions



Remember.....

- The notice should clearly state:
 - What is wrong?
 - Why it is wrong?
 - What, in the officer's opinion, does the FBO have to do?
 - When should the remedial work be completed by?



Drafting Notices

- Notices must be signed by
 - Authorised Officer
 - Who witnessed contravention
- Recipient provided with
 - Details of right of appeal
- Officer should inform food business operator
 - that he may request to carry out works of at least equivalent effect



Workshops



Questions/summary



www.abcfoodlaw.co.uk

andrew.gilden@abcfoodlaw.co.uk

01603 274486