

**Consultation on proposals to reform the Weights and Measures
(Packaged Goods) Regulations 1986 SI1986/2049 and Part V of the
Weights and Measures Act 1985.**

Government Response

Introduction and background

1. The consultation seeking views on proposals to reform weights and measures law on quantity control of packaged goods closed on 30th June 2004. The aim of the reform is to simplify the existing legislation, to remove unnecessary burdens from packers and importers of packaged goods and to rationalise the scope of the legislation.
2. The main proposals on which the consultation sought views are to:
 - Revise the existing duties on packers to express more simply the three rules set out in the directives;
 - Replace the complex and lengthy requirements on the use of prescribed equipment, with a simpler requirement for packers to use equipment of any kind that is accurate to a specified level in relation to the nominal quantity of the packages concerned;
 - Consider more uniform application of the average system in the UK with fewer exceptions for special treatment of certain types of goods and packages;
 - Simplify and clarify the rules on e-marking;
 - Restructure the Regulations and simplify them by removing the distinction between Class A and Class B packages to make it clearer which packages the legislation applies to; and
 - Remove the statutory effect of parts of the Packers' and Inspectors' Codes and update and simplify the guidance.

Responses Received

3. Forty-seven substantive responses to the proposals have been received. These include a total of 22 responses from the enforcement community, including responses received from individual Local Authority Trading Standards Departments, regional Trading Standards groups, the Local Authorities Co-ordinators of Regulatory Services (LACORS) and the Trading Standards Institute (TSI). Responses were also received from the business community, including 5 responses from individual businesses and 17 responses from trade associations. One individual consumer also

responded to the consultation and responses were received from two central Government agencies: the National Weights and Measures Laboratory and the Small Business Service. A list of the organisations whose responses are publicly available and details of how to view them is at Annex A.

4. The quality of the feedback was high with helpful and well-considered comments that will be taken into account in developing the draft regulations to implement the proposals.

5. Responses were very positive overall with a substantial majority of respondents supporting the proposed reforms in principle. There was some divergence of views on specific proposals, with the enforcement community and business taking different approaches on some issues. The area with the greatest divergence of views is in relation to the disapplication or modification of the average system in relation to specific products or packages.

6. Some important issues relating to areas not covered in the consultation were raised in response to the consultation question seeking feedback on difficulties experienced with the existing regulations. Those that come within the scope of this reform are covered under Question 19 below and those that fall outside the scope of the average system are covered towards the end of this document.

7. The responses to the questions asked in the consultation are dealt with in detail below, together with the Government's response.

8. A meeting with stakeholders to report back on the responses to the consultation and to elicit further feedback was held on 28th July 2004. Discussion took place on some of the points raised by respondents in their written replies, including clarification on the need for production records, the treatment of bread baked in-store, the treatment of cement, the treatment of desiccating products and the need for adequate guidance. As a result, a further meeting with soap industry representatives and enforcement bodies was held to discuss the treatment of desiccating products.

Responses by Question

New Freestanding Regulations

Question 1

Do you support the proposal to make a new set of freestanding Regulations to implement directives 75/106 and 76/211 and in doing so to replace the duty on packers and importers to pass a reference test

with a requirement for compliance with the three packers' rules, underpinned by the reference test?

9. Of respondents who expressed a preference, 95% supported the proposal. A number of respondents specifically welcomed bringing the regulations more in line with the directives. A number also welcomed the proposal as a means of simplifying and clarifying duties and obligations.

10. Respondents expressed concern that the proposal should not result in a reduction in powers of enforcement, the removal of enforcement from weights and measures inspectors or the loss of the reference test as an enforcement tool.

11. One respondent was concerned that taking the Regulations out of the Weights and Measures Act 1985 (i.e. by making them under the European Communities Act) would open up the possibility that enforcement would not be undertaken by weights and measures inspectors.

12. On the specific point of making the new Regulations using powers in the ECA, one respondent commented that the Regulations should be made under the 1985 Act and not the ECA, but two others welcomed the use of this power as it would result in a set of freestanding regulations and would remove the need to refer back to the main (1985) Act.

Government Response

13. The Government is pleased by the strong support for a comprehensive reform of Part V and the Packaged Goods Regulations using the powers in the European Communities Act (ECA). This would allow for a wide-ranging simplification of current legislation which could be achieved using powers in the ECA to reform both primary legislation (Part V) and secondary legislation (the Packaged Goods Regulations). Reforms using powers under the 1985 W&M Act, by contrast would be limited to changes to the Regulations. In addition the use of the ECA power will allow a single set of freestanding regulations – replacing Part V and the Packaged Goods Regulations - to be produced setting out all the requirements of the average system in one place.

14. Weights and measures inspectors will continue to be responsible for all aspects of enforcing the new Regulations with similar powers as at present. The reference test will remain as a key tool in enforcement, underpinning the three packer's rules.

Question 2

Do you agree with the introduction of a prohibition on the use of the e-mark in inappropriate cases?

15. Of respondents who expressed a preference, 94% agreed with the introduction of a prohibition on the use of the e-mark in inappropriate cases.

16. A number of respondents commented that they welcomed the removal of permission to use the e-mark on packages that fell outside what is permitted under the directives, such as packages above 10kg or L, with several commenting that they felt allowing such packages to e-mark undermined its value as an assurance over quantity.

17. One respondent commented that the precise definition of the e-mark's appearance was too detailed.

18. One respondent commented that change was not necessary as the voluntary system was working.

19. One respondent commented that e-marking should be mandatory to show that a package has been produced in line with the average system requirements.

Government's response

20. The Government's view is that it would be appropriate to regulate the use of the e-mark. It will remain a voluntary choice for the packer as to whether they wish to e-mark their packages, but they will be unable to e-mark packages that fall outside the scope of the scheme. The requirements as to the appearance of the e-mark will remain those set out in the Directive, which are designed to ensure consistency and to be easily identifiable to consumers and enforcers across Member States as the mark that denotes compliance with the scheme.

Scope of the average system

Question 3

Do you agree that the average system should remain mandatory in the UK, even for packages that do not choose to e-mark or which are not eligible for e-marking?

21. There was very strong support for the retention of mandatory application of the average system for packaged goods in the UK. Of respondents who expressed a preference, 95% believed the average system should remain mandatory in the UK. In support of the proposal, respondents commented that it was preferable for both business and consumers to have a common set of rules applicable to all automatically packed goods. It was also felt that having more than one system for pre-packages could confuse.

22. Several respondents commented on the boundary between the minimum and average system. Two put forward the view that the e-mark should be mandatory for all goods packed to the average system and one suggested that anything not e-marked should be treated under the minimum system. Two respondents suggested a requirement be introduced to indicate if packages were packed under the minimum rules. One respondent suggested that where a packer chose to pack to the minimum, that should be deemed to satisfy the average system requirements and should require less record keeping than the average system requires.

23. A further respondent noted that if packers were not subject to the average system then they would fall to the minimum rules and those packers would be at a disadvantage to those who choose to pack to the average system.

Government's response

24. The Government notes the strong support for the mandatory imposition of the average system, and will be guided accordingly. Consistently with the Directives, the use of the e-mark would however remain optional.

25. The Government's view is that where goods are packed so as to ensure that the contents equal or exceed the nominal quantity, the three packers' rules will always be met. However, the record-keeping requirements of the Directives must still be met where the packer intends to apply the e-mark to the packages. And even where the packer does not intend to use the e-mark, or intends to pack to minimum rather than average standards, some degree of sampling and recordkeeping would seem to be necessary in order for the packer to satisfy himself that he is maintaining the nominal quantity as declared. And where the packer may wish to have the option of packing to the minimum rather than the average system, it would be necessary for this choice to be declared to the appropriate enforcement authority.

26. However, in drafting the revised duty, the Government will take account of the responses to this issue and endeavour to bring forward a proposal which clarifies the requirements regarding record keeping for packers who measure every package rather than check packages by sampling.

Question 4

Do you support the introduction of a more straightforward formula to apply the average system to all pre-packages marked with a weight or volume indication above 5g or 5ml?

27. A large majority of respondents (97% of those who expressed a preference) supported the proposal and believed that simplification and clarification that would result from the change to a more straightforward formula. Two respondents welcomed how the formula would dispense with the need for the product definitions that add complexity to the rules and date quickly.

Government Response

28. The Government will bring forward Regulations, which will include a straightforward formula for applying the average system that makes it much clearer which packages are subject to the average system.

Question 5

Should there be an upper limit?

29. There were a variety of responses to this question, with most respondents favouring an upper limit. Of respondents who expressed a preference, 71% agreed that there should be an upper limit. However, a large number of respondents – 19 – were not sure or did not answer this question.

30. Respondents commented that for practical reasons, including the difficulty in measuring large packages and health and safety of enforcement, an upper limit should be set at a practical level. Suggestions for the correct level varied from 10kg or L to 50kg or L. The level of 20-25kg was considered by some respondents to match the maximum size of packages bought by consumers.

31. Some respondents were in favour of there being no limit, taking the view that the benefits of the average system should be as wide as possible. It was also identified that if there were no upper limit the tolerances would need to be reviewed.

Government's response

32. The Government's view is that, in light of responses received, an upper limit of 25kg or L would be appropriate as a first step, taking into account the likely maximum weight or volume of packages sold to consumers and the practical difficulties in enforcement above this limit. This would bring the UK into line with the recommendation of the SLIM review. The tolerances permitted for quantities between 10kg and L and 25kg and L would be set at the levels recommended by OIML R 87 on net content in packages.

Question 6

Do you agree with the removal of the distinctions between Class A and Class B packages?

33. Respondents were largely supportive with 94% of respondents who expressed a preference supporting the removal of the distinctions between class A and class B packages.

34. Comments from respondents included the view that this proposal would simplify and clarify matters, that under the current system it was difficult to understand or justify the distinctions between categories, that the removal would reduce the possibility of confusion and that the class A and B was confusing and not necessary.

35. One respondent also noted that consideration would need to be given to removing the requirement for recording of statements of quantity under 'the two-tier system'.

Government's response

36. The Government proposes to remove the different classes – relying instead on a more straightforward formula which applies to all packages made up in predetermined quantities that are contained in sealed packages that are packed other than in the presence of the purchaser and are marked with a weight or volume indication above 5g or 5ml.

Application to specific cases

Question 7

Should the average system continue to be disappplied to those products listed in section 5.38 of the consultation document?

37. There was a mixed response to this question with those responding split over whether it was still necessary to disapply the average system from these specific products. Of respondents who expressed a preference, 55% favoured continuing to disapply the average system from these products. However, less than 50% of respondents expressed a preference on this question.

38. With regard to the exemption for paint consisting of base and colouring agent when mixed by someone other than the person who made up the package of base paint, a number of respondents favoured the continued exemption of this product from the average system requirements. This was mainly on the basis that the paint is made up in a predetermined constant quantity before the colour is added, but the quantity of colour added will vary according to the colour selected by the consumer.

39. Taking a different view, many other respondents identified that as the product was packed in the presence of the consumer it would not be caught by the average system and the exemption was not needed.

40. With regard to packages not intended to be sold as separate items, again respondents were split between those who considered the exemptions should continue and those who felt that it should be removed. Those who favoured continued exemption identified examples of mixed packages which they felt should be exempt from the requirements of the average system and also that the treatment must depend on the way in which packages are assembled with responsibility placed on the packer to decide on appropriate marking.

41. Other respondents favoured removal of the exemption for packages not intended to be sold as separate items on the basis that the total weight of the packages should be shown and used for metrological control.

42. The third disapplication from the average system is for alcohol stronger than 1.2% alcohol strength by volume, where the packages were made up before, but not imported until on or after, 1/1/1980. Again views were mixed as to whether this exemption was still necessary or desirable. Some respondents considered that it was redundant as it related only to packages made up before 1980, whilst others thought that it was not necessary as packages made up before 1980 were not caught in any case. On the other hand some respondents favoured keeping the exemption on the basis that it is still relevant for the import of some vintage alcoholic products.

Government Response

43. The Government takes the view that paint consisting of base and colouring agent mixed by someone other than the person who made up the package of base paint, would not be caught by the average system where it is made up in the presence of the consumer. The definition of "pre-package" in Article 2 of Directive 76/211 requires that the product be placed in a package "without the purchaser being present" in order to be caught by the Directive. Therefore, it is proposed to remove the disapplication for such paint on the basis that it is not caught by the average system.

44. With regard to packages not intended to be sold as separate items, the Government proposes to remove the exemption, which applied only to Class A packages.

45. A removal of the disapplication would have the effect of making packages containing alcohol stronger than 1.2% alcohol strength by volume (where the packages were made up before, but not imported until on or after, 1/1/1980) subject to the average and not the minimum system. This is likely to have little practical effect for most importers of packages containing alcohol. However, importers of vintage products

made up before 1980, but not imported until after that date would need to check the quantity or to keep documentation to show that the packages are likely to comply with the average system. Therefore, the Government will give further consideration as to whether this disapplication for alcohol remains necessary.

Question 8

Should the average system continue to apply in its existing modified way to bread, milk in returnable containers and packages made up by a retailer and sold from his premises or vehicle?

46. Ninety per cent (90%) of respondents who expressed a view were in favour of continued modification of the average system to apply to these products. However, more than 50% of respondents were not sure or did not answer this question.

47. For milk made up in standard-sized returnable containers, the modifications exempt the packer from requirements on marking and don't permit it to be e-marked. Most respondents were in favour of retaining this modification, again on the basis of the practical difficulties in displaying such information on a foil cap.

48. In the case of bread, where the modifications remove requirements for quantity and name and address marking, most respondents who expressed a view considered that the nature of the product was such that it was not suitable for labelling and so the modifications should remain.

49. A third area of modification is for packages made up by a retailer and sold from his premises or vehicle. Again most respondents were in favour of retaining the modifications, which exempt the retailer from requirements on name and address and specific equipment provisions, for these packages. However two respondents noted that the modification should not be extended to temporary premises, such as market stalls.

Government Response

50. The Government's view, taking account of responses received, is that the modifications for bread, milk in returnable containers and packages made up by a retailer and sold from his premises or vehicle remain necessary for practical purposes where the products remain subject to the average system.

51. The Government proposes, as outlined in the consultation document, to remove the modifications for returnable containers first marked with embossed or fired-on markings before 1st January 1980, as no longer relevant.

Question 9

Given improvements in packaging technology, should desiccating products continue to be subject to a time limit for reference testing?

52. Respondents were split over whether the time limit for the reference testing of desiccating products should be continued. Seventy per cent (70%) of respondents who expressed a preference were against the continuation of the time limit. However, more than 50% of respondents were not sure or did not answer this question. Most responses from the enforcement side favoured removal of the time limit on the basis that they do not consider it to be permitted under the Directive, that it undermines consumer confidence in the relevance of the quantity statement when they purchase the product and that it opens up the consumer to potential fraud because the time limit restricts their ability to conduct reference tests.

53. One respondent suggested that for food products the nominal quantity should be required to be accurate for the shelf-life of the product indicated by the "best before" date.

54. However, the soap industry was strongly in favour of retaining the time limit, on the basis that the high costs of introducing sealed, impermeable packaging or the levels of over packing needed to retain nominal quantity over a product's shelf life could not be justified by benefits to consumers. Their view was that higher costs would be passed to consumers in higher prices and in reality the loss of weight or volume from products was in the form of water loss rather than loss of the active part of the product.

Government Response

55. The Government has consulted further with the soap industry in the light of the concerns expressed. This has resulted in agreement that the time limit for reference testing of packages containing desiccating goods is not necessary. The Government will however ensure that the defences relating to an offence arising from failure to meet the three packers rules include the possibility that any deficiencies in the quantity contained in the packages was a result of desiccation after packaging.

Question 10

Should the average system continue to apply to unwrapped bread and knitting and rug yarn?

56. All respondents (100%), who expressed a view, favoured the continued application of the average system in a modified form to unwrapped bread and knitting and rug yarn.

57. Three respondents noted that the average system requirements provided a safety net for small bakers in terms of the tolerances

permitted. One respondent felt that if the average system were replaced by the minimum rules there would be an increase in non-compliance and prices would increase. Several respondents favoured a system that permitted bakers to declare they were opting to pack to the minimum rules (to avoid the greater record keeping and checking requirements of the average system) and would be inspected on that basis.

Government Response

58. The Government agrees that it would be appropriate to continue the application of the average system for unwrapped bread and knitting and rug yarn, subject to appropriate modifications taking account of the open nature of the products. With regard to knitting yarn there is limited scope for reform as the UK has an obligation under Article 1(2) of Directive 80/232, as amended by Directive 1987/ 356, to apply the provisions of Directive 76/211 to knitting yarns presented in a different form of packaging.

59. In addition the consultation on a consolidated Food Order, to be published shortly, will seek views on a proposal to give retailers of bread from in-store bakeries the option of compliance with the minimum system rather than the average system.

Measuring Equipment

Question 11

Do you agree with the proposal to replace the list of specified equipment in Schedule 4 to the Packaged Goods Regulations with a more straightforward duty to use equipment of any kind, which may lawfully be used for trade and is accurate to a specified level?

60. A large majority of respondents (97% of respondents who expressed a preference) supported the proposal to reform Schedule 4, which was largely seen as overly complicated and outdated. However, there was a wide variance in views as to how a new duty should be framed, from those favouring the extension of prescription or verification and certification for all equipment, to those favouring the freedom to use any equipment.

61. Several key themes were repeated in a number of responses. Firstly there was concern that the term "lawfully used for trade" should be clearly defined to avoid uncertainty.

62. Secondly, a number of respondents were in favour of a new requirement for all equipment to be verified before use, to ensure accuracy and reliability. Such a provision would require the creation of a new verification regime for checkweighers and any other equipment where no verification regime exists at present. Some respondents also

indicated that they believed this strategy would fit in with the requirements of the Measuring Instruments Directive.

63. One respondent identified possible conflict between the proposed 1/5 tolerance and the tolerances permitted for equipment "lawfully used for trade".

64. There was also concern that the term "lawfully used for trade" would exclude some equipment currently permitted under Schedule 4.

65. A number of respondents welcomed the move away from prescribing specific equipment and the consequent availability to packers of new equipment not currently permitted under Schedule 4. Several respondents raised the question of why equipment should be subject to scrutiny at all where packers comply with the three packers' Rules.

Government's Response

66. See response to Question 12.

Question 12

Do you agree that the level of accuracy for new packing equipment should be specified as 1/5 tolerable negative error of the packages being measured or checked?

67. A majority of respondents (94% of those expressing a view) were in favour of setting the level of accuracy at 1/5 tne. Some respondents drew attention to the need to ensure it is the total uncertainty of measurement that must not exceed 1/5 tne rather than the accuracy of the equipment alone. A number of responses also favoured a proviso to allow less sensitive equipment to be used if the uncertainty of measurements was taken into account by increasing the target quantity.

68. Several respondents expressed concern that some equipment currently permitted under Schedule 4 would not meet the new accuracy criteria and would necessitate the purchase of new equipment whilst existing equipment still had a useful life.

69. Several respondents questioned whether an accuracy criterion was necessary at all. They considered it more important to demonstrate in practice that a system is capable of delivering product that conforms to the Regulations rather than to specify a particular level of accuracy.

70. One respondent identified the reliance on 1/5 tne as a simplification of what is required by the Directives that relates to the overall accuracy of equipment and the determination of quantity.

Government's Response

71. Taking account of the comments made, the Government proposes to replace the prescriptive requirements of Schedule 4 with a simpler duty that requires packers to use equipment of any kind that may be legally used for trade and that is suitable for ensuring that packages meet the three packers' rules. Further consideration is being given to how to frame the requirement for accuracy and bring this more in line with the Directive, which requires the use of "a legal measuring instrument suitable for effecting the necessary operations".

72. As to "lawfully used for trade" the intention is to allow the use in packing, measuring and checking of any equipment which complies with the measuring instrument legislation that applies to that type of equipment. So where there are specific requirements for types of equipment to be stamped and verified, any such equipment used by packers to make up packages under the average system should be stamped and verified. Where no such other legislation applies then any equipment that is suitable for purpose could be used.

Question 13

Should a certificate of accuracy be required to show that equipment complies with the required level of accuracy?

73. There was a mixed response to this proposal. Of those who expressed a preference, 69% were in favour of a certificate and 31% were against. Many of those in favour pointed out that the usefulness of such a certificate would be limited to initial set up, and there would still be a need for regular calibration to ensure continued accuracy. A number of respondents were in favour of a new legal requirement for regular testing of equipment.

74. Some respondents considered that the limited usefulness of the certificate made it pointless. Others considered that it was an unnecessary legal burden concentrating on the accuracy of equipment when what mattered more was the accuracy of packages.

75. A number of respondents pointed out that most packers already have checks carried on equipment on a regular basis.

Government's Response

76. Having considered the responses on this question, the Government does not propose to create a statutory requirement to obtain a certificate of accuracy as proof of the accuracy of the equipment at the time the certificate was issued. The Government accepts the argument put forward that the certificate would only provide limited usefulness by recording the accuracy as the time the equipment was set up. It is equally important that the equipment is regularly checked and calibrated to ensure continued accuracy; however it would be an unnecessary

burden on packers to specify the requirements for testing equipment. It will be the responsibility of the packer to ensure that the equipment used in making up or checking packages is suitable and allows him to comply with his duties.

Question 14

How should existing equipment be treated by the new Regulations? Should it continue to be subject to the existing requirements in schedule 4 of the Packaged Goods Regulations for the rest of its use or should there be a cut off date to meet the new accuracy criteria?

77. Responses were split over whether existing equipment should be subject to the new rules after a set transitional period or whether it should continue to be subject to the existing regulations for the rest of its life. Of those who expressed a view, 48% were in favour of equipment being subject to existing requirements for the rest of its use, whilst 52% favoured a cut off period.

78. Many respondents in favour of a cut off period considered that a period of 10 years after which existing equipment would become subject to the new regime should be set. However, some were concerned that additional costs for business be avoided where possible and that existing equipment, which was currently in compliance but which would not comply with the new regulations, should not be forced to be taken out of use without a good reason.

Government's Response

79. The Government favours permitting existing equipment to be subject to the current provisions in Schedule 4 for ten years after the coming into force of the new Regulations. This period will allow a reasonable time for equipment to be replaced or amended if necessary, but will also ensure that within ten years there is only one regulatory framework for equipment under the average system.

Labelling

Question 15

Do you support the intended clarification that packages consisting of a single container or enclosure should provide an indication of the total quantity contained, and that this should be the quantity for purposes of enforcement?

80. There was widespread support for this clarification. 97% of respondents expressing a preference supported the proposal. Responses from both enforcement and business communities highlighted that this had been an area of uncertainty and welcomed the proposed clarification.

One respondent noted that this was already established practice but that clarification was still welcome. Without this there was felt to be the potential for confusion for consumers and enforcers as to what the total quantity was and whether, for example, “10% free” referred to an additional 10% of product or a 10% reduction in price.

81. However, one respondent was against the proposal expressing concern that it may cause problems for industry where none previously existed. Another respondent was concerned that the proposal should not be prescriptive in terms of the size or placement of the statement as this may lead to costs for business, incurred due to label amendments or re-issue.

82. One respondent also questioned whether the requirements would apply to products with added water or ice glaze.

83. A further respondent raised the issue of products required to be sold in prescribed quantities. Packages could be in breach of those requirements if the total quantity with the “extra free” did not match the prescribed quantity.

Government Response

84. On balance, the Government believes that this clarification will have a benefit for consumers and the enforcement community. It should not have an adverse effect on industry as it is already common practice and by their nature “extra free” promotions are likely to be short term and require unique labelling.

85. The new provision will apply to all packages subject to the average system, including products with added water or ice glaze.

Question 16

Is the WELMEC guide an appropriate model for UK guidance?

86. A large majority of respondents, (87% of those expressing a view) favoured basing new guidance on the WELMEC model, with appropriate additional guidance included to reflect areas specific to UK implementation. A number of respondents commented that basing the UK guidance on the WELMEC model would aid uniformity across Member States. Some respondents were keen that the new guidance should include advice and examples of how to comply, in particular for the benefit of small packers.

Government Response

87. The Government proposes to use the WELMEC model as basis for guidance, with such additional material as is appropriate to assist users

with the specific detail of UK legislation. The guidance will as at present seek to present examples of best practice showing how a packer can comply.

Question 17

Do you consider that any part of the current statutory effect of the Packers' Code and Inspectors' Manual should be incorporated in new Regulations?

88. There was a range of responses to this question but the majority of respondents (88% of those who expressed a view) wanted to see all the statutory parts of the guidance transferred to the new Regulations. It was unclear whether this was because all the statutory provisions should be in one place or because the nature of those provisions was such that they should continue to have statutory effect.

89. A majority of respondents were in favour of a simpler structure with the Regulations containing all the statutory requirements and the guidance containing advice.

Government Response

90. The Government proposes that the statutory parts of the guidance be replaced by new, simpler requirements in the Regulations. It will not be necessary or appropriate, given the other changes to the regime, to incorporate the specific provisions in the existing codes into new Regulations. It will be up to the packer to decide how to comply with their duties under the Regulations and the guidance will be available to help the packer to understand how they may do so.

Question 18

What problems have you experienced with the implementation and enforcement of the existing Regulations which could be addressed in the follow up consultation document?

91. A number of problem areas have been identified by respondents that they would like to see addressed in the new Regulations. These fall into three categories – enforcement difficulties, practical problems of complying with the Regulations, and difficulties experienced by particular sectors.

Enforcement issues

92. A number of enforcement authorities raised the difficulty of enforcing the regulations on importers of packaged goods, many of whom appear unaware of their responsibilities and frequently do not have the required documentation. Although the current legislation requires importers to

notify the weight and measures authority where they are importing e-marked packages (or are e-marking them themselves) and exporting outside the UK, several respondents noted that this seldom happened in practice. Respondents believe that this hampers enforcement and creates an uneven playing field between UK produced and imported packages. One respondent suggested that better enforcement for imports could be achieved by placing a duty on HM Customs & Excise to inform local authorities of importers of packages located in their area.

93. The difficulty of mounting a successful prosecution for an inadequate package offence was also identified by a number of enforcement authorities as an area that usefully could be addressed. There were two particular issues that caused concern. Firstly, for an inadequate package offence to be committed the person committing the offence must know that the package is inadequate. This need to identify "mens rea" on the part of the person committing the offence is considered by some enforcement authorities to be a hindrance to effective enforcement at retail level. One respondent suggests a new offence be introduced for an act causing or permitting any other person to sell, offer or expose for sale an inadequate package.

94. Secondly, a number of enforcement authorities have identified that the placing of responsibility for enforcement action on the authority where an offence occurs can cause difficulties. When an inadequate package is discovered at retail level, responsibility for enforcement falls to the authority where the offence occurred – normally at the location of the importer or packer. This necessitates the transfer of responsibility away from the authority discovering the package to an authority that may not have the same priorities or resources to pursue the case. Some respondents were concerned that this may act as a disincentive to find inadequate packages and that either the authorities be granted powers to act across authority borders or the offence be deemed to have taken place where the package is found.

95. Clarification was sought by some respondents over whether in cases where packers choose to comply with the average system by ensuring that each of their packages contains at least the nominal quantity, they are exempt from the record keeping requirements that apply under the average system.

96. There was a request for clarification of the multipack provisions in Regulation 25, which were seen as particularly complex. In addition a number of respondents favoured clarification over appropriate treatment for multipack packages where the individual containers within the package were below the lower threshold for the average system but the total contents of the package was within it.

97. Some respondents from the enforcement community cited difficulties in identifying packages from the same production run where packages have been sold on and there were few packages left to test.

98. It was also suggested that the new Regulations should aim to cover the need for written systems setting out procedures including the maintenance of equipment and competence of staff (which are often the main causes of deficiencies) and that it should provide a means of recognising those procedures.

Government Response

99. The Government will consider the operation of the legislation with regard to importers of packaged goods and whether there is a need for amendment to the rules regarding notification.

100. The Government will need to amend the offences and defences in the new legislation to reflect changes to the main duties. It will give consideration to the need for any amendments to defences, including the retention of "mens rea" for inadequate package offences. However, full weight will need to be given to ensuring that appropriate defences are in place for persons who unwittingly infringe the legislation.

101. The Government is sympathetic to the concerns raised over cross border enforcement. The Government recognizes that there is variation in services delivered between areas and is keen to encourage more strategic prioritisation and effective joint working. These issues are taken forward in the consultation paper "Extending Competitive Markets: Empowered Consumers, Successful Business" which addresses the question of improving enforcement generally, in the context of wider changes to the UK consumer protection regime. The consultation closes on 31 October and can be viewed on the DTI website at:

<http://www.dti.gov.uk/ccp/consultpdf/consumerstrat.pdf>

102. There are limited vires for changing the operation of the reference test, which is set out in Annex II of Directive 75/211/EEC. The Directives envisage that packers will carry out production checks in accordance with procedures recognised by the enforcement bodies, and the Government will consider whether it would be desirable to provide explicitly for approval of appropriate procedures. In any case, it may be desirable to provide guidance on the appropriate content of such procedures.

Compliance Issues

103. One respondent reported that difficulties had been encountered with imports because average weight legislation has been applied

differently in different EU countries with some countries placing greater emphasis on case weights rather than individual consumer packs.

104. A number of respondents commented that the structure of the legislation is too complicated and gives rise to difficulties in identifying the relevant requirements and how to apply them when dealing with innovative and novel products.

105. One respondent identified that for their product there was a conflict between the demands of weights and measures legislation (to ensure that actual quantity is not less on average than nominal quantity) with the demands of HM Customs and Excise (to ensure that the package is not over filled).

Government Response

106. The Government is willing to look into any difficulties that companies have experienced with different implementation across other Member States, and would welcome further evidence on such issues.

107. The difficulties experienced in making up novel or innovative products should be reduced by the more uniform application of the average system under the new Regulations – which will remove the product specific definitions that added complexity to the regulations.

108. Weights and measures legislation should of course be compatible with Customs legislation and the tolerances achievable, and DTI is not aware of any inconsistencies between the requirements in weights and measures and customs legislation.

Specific Product Issues

109. A case for a more flexible compliance system for the packing of Portland cement was put forward by the British Cement Association taking account of the limitations on accuracy of packing equipment in this sector and the satisfaction of cement customers with current practices.

110. The Builders Merchants' Federation is concerned that it should not be the responsibility of the retailer to weigh bags of cement for retail sale. It supports the case made by the BCA that weighing equipment used for cement is not accurate enough to meet the requirements of the average system and proposes that cement be given an exemption from weight marking requirements for packages over 25kg.

111. The Food and Drink Federation have raised the question of the future treatment of liquid products such as soup and custard, which currently may be marked with an indication of weight or volume and whether they will be required to mark by volume in future.

112. One respondent put forward a proposal to remove the current modifications of the average system for poultry.

Government Response

113. The Government would welcome more evidence with regard to the difficulty of cement packers in meeting the tolerances required under the average system. The tolerances are intended to give the packer greater latitude in packing by recognising that automatic production lines will give rise to some variations in package quantity. However, one method of ensuring that packages do not exceed the tolerances permitted by the average system, where equipment is not accurate enough to allow for this, is to pack to the minimum rules by ensuring that all packages contain at least nominal quantity.

114. In response to the concerns over quantity marking of liquids, Article 4 of Directive 76/211/EC requires that packages containing liquids be marked with their nominal volume and packages containing other products be marked with their nominal weight – except in cases of trade practice or regulations which provide otherwise and are identical in all Member States or in the case of contrary Community rules.

115. At present the UK legislation requires Class A packages (including soup and custard) to be marked with an indication of weight or volume and class B packages to be marked by weight (in the case of packages made up for sale by weight) or by volume (in the case of packages made up for sale by volume).

116. The new Regulations are likely to reflect more closely the wording used in the Directive with the intention that products normally made up by volume should be marked with an indication of volume. If common trade practice across Member States is to mark a liquid product by weight, this should continue to be permitted under the new Regulations. If, however, specific liquid products were not normally marked by weight in other Member States, they would be required to be marked with an indication of volume. Consideration will be given to appropriate transitional arrangements to allow for packers to make any necessary adaptations.

117. The modifications relating to poultry will be revoked in the new Regulations. New provisions were introduced by EC Regulations governing the weight labelling of poultry meat that have direct effect in Member States and specific enforcement provisions will be included in the proposed new consolidated Food Order.

Question 19

Are any of the reforms canvassed in this paper of greater urgency than others; and if so, what should be the target date or timescale for these particular reforms?

118. Of those who expressed a view, 88% considered that no reforms were of greater urgency than others. Of those whom commented, the main request was for weights and measures reform to be considered in totality and for implementation dates to be unified. Some respondents considered there was a degree of urgency and some considered the reforms were overdue. However one respondent, whilst recognising that the reform was needed, was concerned that the reform should be given the time and effort necessary to produce a genuinely more appropriate result and not rushed.

Government Response

119. In the light of these responses, the Government will press ahead with the reforms to the average system as soon as reasonably achievable, and will likewise be bringing forward separate proposals to reform weights and measures legislation on food. The aim will be for the two sets of reforms to have a common implementation date, probably in Autumn 2005.

Question 20

Can you identify or quantify any types of costs or benefits for your company or more generally resulting from these proposals?

120. A number of respondents identified the simplification of the regulations as having long term cost benefits for both enforcement and business. In particular several respondents from the enforcement community identified that simplification would make the regulations easier for small and medium sized business to understand, thus reducing the time inspectors spent explaining the regulations and allowing more time to be spent advising. Respondents also noted that there would be some initial costs in training and familiarisation with the new regulations.

121. Two respondents from the business community stated there would be no cost benefits from the proposals and a further two considered that the reforms would impose costs on industry. One identified these costs as arising from the need to increase packaging for desiccating products if the time limit for the reference testing of desiccating products was removed. The other respondent did not identify the source of additional costs but did believe that consumers would benefit from the reforms.

Responses outside the scope of the average system

122. Several respondents made comments on issues that fall outside the scope of the consultation.

123. The British Cement Association put forward a proposal for the removal of section 26 of Part IX of Schedule 6 to the Weights and Measures Act 1985 which requires packages containing Portland cement to be marked with an indication of quantity by net weight.

124. The Builders' Merchants Federation made a case that Schedule 4 of the Weights and Measures Act should be amended to exempt multiple bags of ballast containing less than 1 tonne, from the requirements of selling by net weight or multiples of 0.2 cubic metres. It proposes an industry standard for the supply and sale of aggregates in bulk bags.

125. A case for the abolition of prescribed quantities for potatoes was made by the British Potato Council and supported by the British Potato Marketing Association. Prescribed quantities – the requirement to sell certain packaged products only in specified sized packages – will be considered in a separate consultation on the consolidation of weights and measures food legislation in a new Food Order. The arguments made in this response will be fed into that process.

126. A number of responses from the enforcement community highlighted the difficulty caused by the requirement in Section 83 (3) c of the Act to institute proceedings within three months of an offence coming to the attention of the person instituting proceedings. The respondents considered this time period to be unreasonably short in comparison to other Trading Standards legislation.

127. One individual consumer raised concern that incomplete metrication, and in particular, the sale of milk in whole pints and in whole litres was causing confusion for consumers.

128. One respondent raised the difficulty of the enforcement of legislation concerning frozen prawns where a de-frosted or drained weight is quoted on the package.

129. Five respondents suggested that the average system be extended to cover packages made up by area, number or length.

Government Response

130. A number of responses were made on areas that fall outside the scope of either the reform of the average system or the reform of weights and measures legislation on food. The Government intends to canvass the views of stakeholders more generally on possible simplification or

updating of the weights and measures requirements covering transactions for items other than food.

131. The Government would not regard it as acceptable to remove all requirements for quantity marking from Portland cement, as that would provide no consumer protection at all. However, evidence on how the existing requirements are working and views on how burdens might be reduced while maintaining appropriate consumer protection would be welcome.

132. The Government would also welcome evidence from consumers that any change to the legislation governing the sale of aggregates in bulk bags would not reduce consumer protection. This issue will be considered as part of the exercise to review the scope for simplification or updating of the weights and measures legislation covering transactions for items other than food (see paragraph 138).

133. The future of prescribed (or specified) quantities will be considered as part of the consolidation of legislation in the new Food Order. Comments will be fed in to that consultation process.

134. The Government is sympathetic to the difficulties for enforcement caused by the inconsistencies in having differing periods for instituting proceedings for weights and measures legislation compared to other consumer legislation. There may be scope to amend the period for instituting proceedings under the average system, but there are limited vires to make wider changes. However, the views on this issue will be fed into the consultation on proposals for more consistent enforcement in the Consumer Strategy referred to in paragraph 101.

135. With regard to drained net weight, there is not yet a European Community wide test for drained net weight of frozen products. DTI has been working together with the industry and the enforcement community to develop a robust test that is both effective and acceptable to all.

136. There are currently no plans to extend the average system to products made up by area, number or length.

Changes in light of consultation

137. In light of responses to the consultation the Government proposes to make the following changes to its proposals.

- The average system will continue to apply in modified form to unwrapped bread and knitting and rug yarn;

- A maximum weight or volume for average system of 25kg or L will be introduced;
- The equipment requirements will be drafted to reflect more closely the wording of the Directive;
- There will not be a statutory requirement for a certificate of accuracy for equipment;
- Existing equipment will continue to have the option of being subject to the existing equipment provisions for 10 years from the date of commencement; and
- A new defence will be introduced, in relation to an offence arising from failure to meet the three packers rules, that any deficiencies in the quantity contained in the packages was a result of desiccation after packaging.

138. In addition the Government will consider further the new issues raised by respondents in response to Question 18 and will be writing out to stakeholders to invite views on the scope for simplification or updating of the weights and measures legislation covering transactions for items other than food.

Next Steps

139. Taking into account the views and comments of respondents, the Government will bring forward Regulations which will be published in draft and on which views will be sought as part of a second consultation exercise on this reform in the New Year.

Annex A

Responses to the consultation were received from the following organisations. (Please note: this list excludes responses made in confidence.) Copies of responses may be viewed at the DTI's Information & Library Services Open Government collection in 1 Victoria Street, London. Please contact Ms Sheung Yee Chan on 020 7215 6618 for further information on viewing the responses.

Association of Greater Manchester Authorities	Trading Standards Institute
Bedfordshire County Council	UK Cleaning Products Industry (UKCPI)
British Aerosol Manufacturers' Association	Univar Limited
British Beer & Pub Association	West Sussex County Council
British Cement Association	Whyte & Mackay Ltd
The British Chemical Distributors & Trade Association	Yorkshire and Humber Trading Standards
British Coatings Federation Ltd	Technical Metrology Group
British Frozen Food Federation	
British Lubricants Federation Ltd	
British Potato Council	
British Potato Marketing Association	
British Retail Consortium	
The Builders' Merchants Federation	
The Cleaning & Hygiene Suppliers Association	
The Co-Operative Group	
The Cosmetic, Toiletry & Perfumery Association Ltd	
The Crossing Boundaries Partnership	
East Midlands Co-ordinators of Regulatory Services	
The City of Edinburgh Council	
The Federation of Bakers	
Food and Drink Federation	
Gloucestershire County Council	
Dr Raymond Heyworth	
Local Authorities Co-ordinators of Regulatory Services (LACORS)	
Kent County Council	
Midlands Co-ordinating Group on Trading Standards	
Milton Keynes Trading Standards	
Napier Brown & Co Ltd	
National Association of Master Bakers	
National Weights and Measures Laboratory	
Newham Trading Standard & Consumer Protection	
North East Thames Trading Standards	
Peterborough City Council Trading Standards	
Redcar & Cleveland Borough Council	
Small Business Service	
SCOTSS	
Somerset Trading Standards Service	
South Eastern Metrology Group	
South West of England Regional Coordination of Trading Standards (SWERCOTS) Metrology Liaison Panel	
Tesco plc	