

dti

WEIGHTS AND MEASURES

Consultation on draft
regulations to replace Part V
of the Weights and
Measures Act 1985 and the
Weights and Measures
(Packaged Goods)
Regulations 1986 –
Government Response

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dti

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Consultation on new Weights and Measures (Packaged Goods) Regulations 2006

Government Response

Introduction and background

1. The consultation seeking views on draft regulations to replace Part V of the Weights and Measures Act 1985 and the Weights and Measures (Packaged Goods) Regulations 1986 closed on 7th October 2005. The objective of making new regulations is to simplify the existing legislation, rationalise its scope and remove unnecessary burdens from packers and importers of packaged goods.
2. The aim of the legislation is to protect consumers from short measure and ensure that they can rely on the accuracy of quantity indications. At the same time, the law makes certain allowances for small variations in quantity between packages that are inherent in the use of automatic packing equipment.
3. The draft regulations would make the following changes to the law:
 - The removal of the complex and lengthy requirements on the use of prescribed equipment and the introduction of a more straightforward duty for packers to use any legal equipment that is suitable for the operation for which it is being used.
 - Removal of rules on how a packer may dispose of packages that have failed a reference test, replaced by a new offence, with appropriate defences, of selling a package that was part of a failed batch.
 - Replacement of detailed requirements for checks made by packers or importers to be carried out in accordance with the statutory provisions of the Packers' Code with a new, straightforward requirement that where checks are made they must be sufficiently rigorous to ensure that packages comply with three packers' rules.
 - Reduction in the requirement for exporters of e-marked packages to give notice to local weights and measures authority for each batch of packages to be exported, to a requirement for a one off notice.
 - Removal of statutory record keeping requirements for retailers who complete the baking process for part baked bread, and who give notice that they will pack to a minimum standard.
 - Reduced period of record keeping for packages marked with a best before date.

- A consolidation of all statutory provisions into a single set of regulations - including the relevant provisions of the Quantity and Abbreviation of Units Regulations - rather than being spread out in primary legislation, secondary legislation and statutory guidance.
- The replacement of the existing duty on packers to pass a reference test with a new duty to make up packages in line with the three packers' rules.
- A more uniform application of the average system to all packages made up in a constant nominal quantity between 5 g or ml and 25 kg or L with fewer modifications or exceptions for special treatment of certain types of goods and packages.
- Simpler rules on e-marking and on outer containers.
- Simpler enforcement, including replacement of the time limit for conducting reference tests on desiccating products with a new defence; clarification that nominal quantity must include any additional quantities marked on the package; and a new liability for quantity control for a person who affixes an indication of quantity to a package.

Responses Received

4. Thirty-six substantive responses to the proposals have been received. These include a total of 14 responses from the enforcement community, including responses received from individual Local Authority Trading Standards Departments, regional Trading Standards groups, and the Local Authorities Co-ordinators of Regulatory Services (LACORS). A total of 17 responses were received from the business community, including 3 responses from individual businesses and 14 from trade associations. Four responses were received from individual consumers and one from a consumer group. A list of the organisations whose responses are publicly available and details of how to view them is at Annex A.

5. Responses were positive overall with a majority of respondents supporting the simpler regulations. There was some divergence of views on specific parts of the draft regulations and there are a number of issues, identified below, where, we have made amendments to the draft regulations to reflect comments made in the consultation responses.

Summary of issues requiring amendments to the draft regulations

6. In light of responses to the consultation, we will:
- Extend all the duties that apply to a packer to anyone labelling the package with an indication of quantity.

- Clarify that the outer container must be marked with quantity or number unless the information is visible on the inner packaging.
- Extend the transitional arrangements from six to twelve months.
- Remove the overriding requirement not to exceed two times TNE in the desiccation defence.
- Re-instate the minimum thresholds that currently apply to biscuits, shortbread, cocoa and chocolate products, chocolate and sugar confectionery, herbs and spices, snacks and crisps, sugar, individual portions of food intended as a minor accompaniment to another food/service and vending machine beverage packs.
- Amend the draft in relation to cosmetics products to exempt single application packs of cosmetics, unless e-marked and to exempt cosmetics subject to the Cosmetic Products (Safety) Regulations 2004 from the requirement for name and address marking.
- Re-instate the “small bakers’ exemption”.

7. In addition the guidance that will accompany the new regulations will be amended to provide more detail and examples on packing to the minimum, the use of systems and checks, and the suitability of equipment.

8. Two further changes not resulting from the public consultation have been made to the draft Regulations:

- Frozen or quick frozen poultry and fresh fruit and vegetables subject to Council Regulations 1906/90 or 2200/96 have been exempted from the scope of the new Regulations as they are already subject to rules that have direct effect.
- A sunset clause permitting information to be disclosed 50 years after it has been received, has been added to Regulation 21 to bring it into line with Freedom of Information best practice.

Next Steps

9. The draft regulations have been notified to the European Commission and other Member States under the terms of the Technical Standards and Regulations Directive. Subject to that process and to Parliamentary scrutiny in the UK, we intend to bring forward new regulations to come into force on 6th April 2006.

Responses by Question

Question 1

Do you support the new broad criteria for application of the average system that replaces the product specific approach in the current regulations?

10. A majority of respondents supported the move to apply the new regulations using broad criteria rather than follow the current practice of applying the rules in a product specific way.
11. However, the trade association for the cosmetics industry expressed the view that inclusion of product specific rules would avoid complexity in cases where other product specific legislation applies.
12. A number of Trading Standards officers also put forward the view that the scope of the average system should be extended up to 50 kg or L and to products sold by length, area or number to match the recommendations set out by OIML (the International Organisation of Legal Metrology).

Government Response

13. The Government intends to retain the provision as drafted.
14. Following the earlier consultation, an upper limit of 25 kg or L was agreed, taking into account comments received from business and Trading Standards concerning the difficulty of conducting checks and reference tests on packages above 25 kg or L, and the likely maximum size of packages supplied to consumers.
15. There are no plans to extend the average system to packages sold by number, area or length.

Question 2

Are there any categories of product that you think should be exempt from the average system (thus falling to the minimum requirements under Part IV of the 1985 Act)?

16. The majority of respondents supported the broad criteria without any additional exemptions. However, some business respondents were concerned that existing exemptions for the following products should not be removed – crisps and snacks, biscuits, chocolate and cocoa products, flour confectionery, rock and sugar barley products and cakes sold by number. In most cases the rationale for retaining exemptions is based upon the difficulty in ensuring accurate quantity control - for example due to variations in density of natural products.
17. The British Cement Association (BCA) expressed concern that the nature of cement and the equipment used for packing it would make it difficult for the cement industry to satisfy the tolerances permitted under the average system.

Government Response

The Government takes the view that consumers should be informed as to the quantity of a package, in order for them to make informed purchasing decisions between different products or brands. Continued exemptions from quantity labelling would not be in the interests of consumers and are hard to justify given advances in packaging technology. However, there are some products where modifications to the existing regime already exist – notably in the form of higher minimum thresholds for the application of the average rules. For those products where there is concern that the average system would be difficult to apply to small quantities, those existing modifications will be included in the new Regulations. These products are biscuits, shortbread, cocoa and chocolate products, chocolate and sugar confectionery, herbs and spices, snacks and crisps, sugar, individual portions of food intended as a minor accompaniment to another food/service and vending machine beverage packs. The longer-term need for such exemptions will be considered further in the development of a consolidated Order setting out weights and measures requirements related to food products. Proposals for such an Order are the subject of a separate consultation.

18. In addition, an exemption from quantity labelling will be included for single application packs for cosmetic use, except where they are e-marked. Such packs are exempt from quantity labelling under Article 6 of Directive 76/768/EEC.

19. We will be giving further consideration to the treatment of low-value materials customarily sold in substantial volumes, such as cement.

20. The new regulations will only apply to packages made up in a constant nominal weight or volume and not to packages made up by number.

Question 3

Do you agree with the new e-marking provisions?

21. Most respondents who commented were in favour of the new e-marking provisions. Respondents commented that they were simpler and clearer than existing rules. The view was expressed that e-marking should be extended up to 25 kg. One respondent also favoured making the e-mark compulsory for packages made up under the average system.

Government Response

22. The Government intends to make the Regulation as drafted. The rules on e-marking are subject to Directive 76/211/EEC which provides that the use of the mark is a voluntary choice of the packer or importer and limits its use to packages up to 10 kg or L.

Question 4

Do you agree with the new offence of e-marking other than as permitted by the regulations?

23. Most respondents who expressed a view were in favour of the new offence which they considered would ensure the integrity of the mark and that it is only used as envisaged by Directive 76/211/EEC. On the other hand some respondents were concerned that the new offence was not in the spirit of simpler legislation and would create an offence where there was no clear consumer benefit.

Government Response

24. We consider that it is important that the e-mark is only applied as permitted to prevent misuse or confusion.

Question 5

Are the proposed transitional arrangements appropriate for packers affected by the new limits on e-marking packages above 10 kg or L or below 5 g or ml?

25. There was a mixed response to this question. Most Trading Standards officers considered 6 months to be sufficient, but a number of business respondents were concerned that the proposed transitional period was too short to make any changes that may be required to labelling. They preferred 12 or 18 months.

Government Response

26. Taking account of the concerns of business respondents, the transitional period will be extended to 12 months from the time the regulations are made.

Question 6

Do you agree that the restriction on disposal of packages should be removed and a new offence be introduced of selling a package from a failed batch?

27. While most respondents supported the approach in general there was some concern from Trading Standards officers that the offence should be extended from “selling” a package from a failed batch to “disposal”.

Government Response

28. The Government’s takes the view that the proposal as drafted is sufficient to prevent packages from a failed batch from being sold to consumers. It will be possible for packers to dispose of packages, without selling them, but they must not end up on the market.

Question 7

Do you know of any continued need for special treatment in the cases where it is being removed?

29. No case was made for the retention of special treatment where it is being removed.

Question 8

Do you have any comments on the treatment of outer containers in the draft regulations?

30. The majority of respondents considered the new rules on outer containers to be a welcome simplification of the current position. Some from the enforcement community expressed concerns that the drafting of Regulation 6(6) could be interpreted as permitting the quantity information to be on a separate label or document.

Government Response

31. We will re-draft the provision to clarify that the outer container is not required to be labelled with the relevant information where it can be readily ascertained from marking on inner packaging which can be viewed without opening the package.

Question 9

Do you agree that the provisions of the Quantity and Abbreviation of Units Regulations 1987 that apply to packages made up under the average system should be incorporated into the draft regulations?

32. The majority of respondents welcomed the incorporation of these rules into the regulations.

33. The UK Metric Association expressed the view that the new regulations should include a provision to prohibit the use of supplementary indications after 2009 in line with Directive 80/181. They also made some comments on the written forms used in the draft, as did another respondent.

34. One business respondent expressed concern over how the equivalent provisions for the treatment of packages not subject to the average system would be enacted.

Government Response

35. UK weights and measures legislation already reflects the requirements of Directive 80/181, which permits the use of supplementary indications. No further amendment is required at this time.

36. Packages not subject to the average system – for example those not made up in a constant nominal quantity or those made up by area, length or number – will continue to be subject to the Quantity and Abbreviations of Units Regulations 1987.

37. We will amend the draft regulations to reflect some of the minor drafting changes suggested by respondents.

Question 10

Do you support the clarification that the nominal quantity that is marked on the package or outer container must include any additional quantity to which any statement on the package or outer container refers?

38. The majority of respondents supported the wording of the new provision and agreed that it would be simpler and provide greater clarity for business,

consumers and enforcement officers. However, a small minority of business respondents expressed concern that the new rules would create confusion for consumers.

Government Response

39. On reflection we are content that the new rules will provide greater certainty that the total quantity marked on a package must include any additional quantities indicated on the packaging.

Question 11

Do you agree with the new liability for labelling?

40. The majority of those responding agreed that liability for quantity control should be placed on a person who marks the quantity on the package. However, a number of respondents favoured a more comprehensive approach, whereby a person who marks or alters the quantity indication is responsible for all the duties of the packer. This, it was suggested, could be achieved by extending the definition of “packer” to include the person who placed the product in the package or the packages in the outer container or who altered the quantity of the contents or marked quantity labelling on a package or outer container.

Government Response

41. We agree that a person who alters or marks quantity information on a package should have responsibility for quantity control. However this will be achieved by amending Regulation 7 to extend all the duties that are applied to a packer under the Regulations to a person who marks a package with an indication of quantity.

Question 12

Do you have any comments on the new duty to use equipment that is suitable for the operation for which is being used?

42. A number of Trading Standards officers commented that the existing draft would lead to uncertainty and differences in interpretation because it does not prescribe any particular equipment and does not expressly require the equipment used to be “legal”. In particular it was felt that there would be uncertainty over whether equipment would need to be stamped and verified under the Non Automatic Weighing Instruments Regulations.

43. A number of business respondents welcomed the greater freedom of being able to use any equipment suitable for the operation for which it is being used.

Government Response

44. We continue to think that it is appropriate that businesses should be free to use any equipment which is suitable for the application. However, further detail will be provided in guidance as to how to judge whether particular

equipment is suitable. Where the equipment selected is subject to other legal requirements, these must of course be complied with. Information on other legal requirements that might be relevant to suitable equipment has been included in guidance.

Question 13

Do you have any comments on the requirement to use a system of sampling and tests that is sufficiently rigorous to ensure that the packages are packed in accordance with the three packers rules?

45. Some Trading Standards officers expressed concern that the wording was too vague and would impose greater burdens on packers and enforcers. They favoured a more prescriptive system. Some Trading Standards officers welcomed the approach but were concerned that more detailed guidance on specific systems should be provided. One way of doing this would be to incorporate the relevant parts of the Packers' Code into the new guidance.

Government Response

46. We will address this issue in the new guidance by including cross-referencing to the relevant examples in the Packers' Code.

Question 14

Do you have any comments on how packing to the minimum standard should be treated?

47. There was a range of views expressed in response to this question. Some respondents were in favour of keeping a provision similar to that in section 47(2) of the Weights and Measures Act 1985 which expressly provides that packing to the minimum is a way of meeting the three packers' rules, while others favoured including advice on packing to the minimum in guidance. One respondent suggested including a requirement for packages made up to the minimum standard to be labelled as such to enable Trading Standards to enforce to a minimum standard at retail level. One respondent suggested that those measuring every package should be required to ensure that the packages contained at least nominal quantity rather than benefiting from the tolerances permitted by the three packers' rules.

Government Response

48. Section 47(2) of the WMA is logically unnecessary, since products packed to the minimum system in any case exceed the requirements of the average system. Since the consumer in any case continues to be protected by the requirements of the average system, there is no need for separate enforcement requirements for minimum packing.

49. Packing to the minimum might however be an attractive option for small-volume producers, since there is no need for records to be kept, and this situation has explicitly been cited in the new guidance.

Question 15

Do you have any comments on the requirement for importers to obtain sufficient evidence?

50. A number of respondents noted that the new rule does not require the importer to verify that the information is correct. At present to rely on the defence in section 51(2) of the 1985 Act, the importer must take reasonable steps to verify the information. The removal of this requirement from the new defence is considered by some respondents to be a lessening of consumer protection.

Government Response

51. The new requirement is for an importer to obtain “sufficient evidence to give reasonable grounds for believing that the packages have been packed in accordance” with the three packers’ rules. In addition, to be able to rely on the defence in Regulation 19(2) the importer must prove that he did not know or suspect and could not reasonably have known or suspected that the packages were not packed in accordance with the three packers rules. We consider that this is sufficient protection for consumers.

Question 16

Do you agree that records should be kept for a year or for the lifespan of the product, whichever is shorter?

52. Most respondents were in favour of the new rule in principle. However, a number expressed concern that the period for which records are required to be kept, especially for products with short shelf lives, could make enforcement difficult because records may have been destroyed before Trading Standards have the opportunity to alert a packer to a potential problem. There may also be difficulty for Trading Standards in providing advice to packers because of a lack of historic records, on which to base their advice.

53. Some business respondents were concerned that the reduction in the period for which records are required might cause a conflict with the longer time limit for instigating proceedings. This might result in a prosecution being brought but no records being available for the packer to rely on to demonstrate due diligence.

Government Response

54. Although the regulations require that records must be kept for a minimum period, packers may, of course, choose to keep records for a longer period than required by the regulations, in order to demonstrate due diligence.

Question 17

Do you see a need to keep any parts of sections 56-59 or section 62?

55. Most respondents were not aware of any need to keep these provisions. However, a number of respondents commented that they believed Section 56

was still needed because it contained a statutory duty for the Secretary of State to maintain a record of the i.d. marks used by packers and importers and makers of measuring container bottles. In particular the maintenance of such a system for measuring container bottles is required by Directive 75/107/EEC.

Government Response

56. We agree that the maintenance of an i.d. mark system is still necessary. This function will be carried out, and compliance with Directive 75/107/EEC achieved, by administrative means. We do not believe it is necessary to recreate a statutory duty to carry out this function.

Question 18

Do you support the removal of the time limit for instigating proceedings within 3 months of the notice being served on the person charged with the offence?

57. The majority of respondents welcomed the extension of the time limit for instigating proceedings from 3 to 12 months, which it was felt would aid enforcement, especially in complex cases. However, some business respondents felt that there was scope for conflict between the longer time limit for instigating proceedings and the shorter period that certain records must be kept.

Government Response

58. As mentioned in response to Question 16, packers are free to keep records for a longer period than required under the regulations.

Question 19

Do you support reducing the requirement for exporters of e-marked packages to give notice to local weights and measures authority to a requirement for a one off notice?

59. Most respondents supported this change, which they felt would ensure equality of treatment between businesses in different locations. One respondent questioned whether there was a need for any notification while another suggested that Local Authorities should be required to provide written acknowledgement.

Government Response

60. We believe there is still a need for notification to ensure Trading Standards are aware of activity taking place where e-marked packages are not placed on the UK market. Most Local Authorities would probably choose to provide a written acknowledgement as best practice, but there seems no need for a legal requirement for them to do so.

Question 20

Do you have any comments on the draft defence for desiccating products, as drafted?

61. Most respondents, who express a view, welcomed the wording of the draft defence. However, trade associations responsible for desiccating products expressed concern that the inclusion of a limit of the defence to cases where no package was more than twice the tolerable negative error (TNE) below nominal quantity, would not be achievable – especially for desiccating products with long shelf lives. They also pointed out that there may be a conflict with the Cosmetics Directive 76/768/EEC which requires only that cosmetics be marked with the nominal content at the time of packaging.

62. On the other hand some respondents felt that no defence should be provided, as desiccating products should be packaged in a way to ensure that they did not lose water.

Government Response

63. Having considered the case made by the relevant trade associations, and the impact of the Cosmetics Directive, we agree that the limit of the defence to cases where no package is deficient by more than twice the TNE should be removed for all desiccating products, regardless of whether they come within the scope of the Cosmetics Directive. This will ensure that all desiccating products are subject to the same requirements under the regulations.

Question 21

Do you support the reduction in penalty for certain offences?

64. All respondents who expressed a preference were in favour of this change.

Question 22

Are you aware of any equipment that is currently permitted by Schedule 4 of the 1986 Regulations but which would not meet the new standard?

65. The only equipment that respondents felt would no longer be permitted would be Non automatic weighing instruments (NAWI) currently permitted to be used by Paragraph 7(1) of Schedule 4 to the Packaged Goods Regulations 1986.

Government Response

66. We consider that the new wording will be sufficient to allow the use of any equipment that is suitable for ensuring packages are made up in line with the three packers' rules. If equipment does not meet this requirement then it should not be in use for this purpose. Certain classes of equipment will also be subject to specific legislation dealing with measuring instruments.

Information on which measuring instrument legislation may be relevant is included in guidance.

Question 23

Do you think the transitional arrangements proposed are suitable?

67. Most respondents considered that the proposed transitional period of six months from the commencement of the new regulations would be sufficient. However, a significant minority from the business community were concerned that six months would be too little time to make any changes required to package labelling and they were in favour of a longer period of 12 or 18 months.

Government Response

68. We are keen to ensure that business has adequate time to make any changes that may be necessary as a result of the new regulations and that those changes should, wherever possible, be incorporated in the normal labelling cycle. Therefore, we will extend the transitional period from six to twelve months to allow changes to be made as labels are updated or reprinted.

Question 24

Do you have any comments on the reference test to be included in the new regulations?

69. The only comments received were minor points on drafting.

Question 25

Do you have any views on the draft regulation on part-baked bread?

70. Most respondents who expressed an opinion, welcomed the new option for retailers of bread part-baked on their premises to inform their local Trading Standards office of their intention to pack to the minimum standard. A number of Trading Standards officers advocated the inclusion of a requirement that the notice should be sought "in advance".

Government Response

71. We consider that the new provision provides an appropriate level of deregulation while providing protection for consumers through the requirement that where retailers choose not to comply with the average system they must pack to the minimum standard.

Question 26

Do you have any other comments on the draft regulations?

72. One respondent commented that in their view the regulations do not go far enough in terms of consolidation or rationalisation because they do not provide for the metric system of weights and measures to be used exclusively for all purposes. Concern was expressed that the regulations do not include a new provision analogous to section 32 of the Weights and Measures Act 1985 that would allow a packer to be prosecuted in the location where an offence is discovered at retail level. A number of Trading Standards officers also recommended that the “small bakers’ exemption” be continued.

Government Response

73. The regulations reflect the existing position with regard to the use of metric or imperial units. There are no plans to make any changes in this area.

74. Although the new offence proposed has a precedent in the WMA, it seems an unnecessary addition to the existing enforcement powers. It could also detract from the aim, following the Hampton Review, of improving consistency of regulatory practice between different local authorities.

75. We agree that there is merit in retaining the small bakers’ exemption, which allows Trading Standards discretion to give a notice disapplying the record keeping requirements for small bakers who have adequate quantity controls, and will amend the regulations accordingly.

Question 27

Do you have any comments on the draft guidance? (Annex 8)

76. Most of those who commented were in favour of greater guidance on compliance and in particular more examples to help business set up quantity control systems or choose equipment. It was suggested that one way of doing this would be to include Appendices C, D and E of the Packers’ Code.

77. Other comments included a request for greater clarity on the weight/volume rule and on the use of units of measurement.

Government Response

78. The guidance will be amended to provide more detailed advice, particularly with regard to packing to the minimum, systems and checks and suitability of equipment and better cross referencing to relevant examples in the Packers’ Code.

Annex A

The responses to the consultation, except those made in confidence, are available at the DTI headquarters and can be accessed on request by contacting Paul Cole on 0207 215 0332. A list of those respondents who were willing to have their names and responses disclosed can be found below:

Bee Farmers' Association of the UK

Birmingham City Council Trading Standards Department

British Aerosol Manufacturers' Association

British Cement Association

British Beer and Pub Association

British Cake Chocolate and Confectionery Association

British Retail Consortium

Bromley Trading Standards Service

City of Edinburgh Council Trading Standards Department

Co-operative Group

Cosmetic, Toiletry & Perfumery Association Ltd

Dairy UK

Department of Enterprise, Trade and Investment (Northern Ireland)

East Midlands Co-ordinators of Trading Standards

Eversheds

Marks & Spencer plc

Muller Dairy UK Ltd

National Association of British and Irish Millers Ltd

National Weights and Measures Laboratory

Provident Trade Federation

Sheffield Trading Standards

Snack, Nut and Crisp Manufacturers' Association

Society of Chief Trading Standards Officers in Scotland

Somerset Trading Standards Service

The Highlands Council Trading Standards Department

UK Cleaning Products Industry Association

United Kingdom Metric Association

West Sussex County Council

End