

Environment, Planning and Countryside Committee

EPC(2) 12-06 (p5) Regulatory Appraisal

Regulatory Appraisal

Agriculture

The Feeding Stuffs (Wales) (Amendment) Regulations 2006

Background

1. Since 1991, the ingredients of compound (i.e. manufactured) animal feedingstuffs have had to be declared in descending order by weight, either by category of ingredient or by the specific names of the ingredients. In 2000, the Commission introduced a proposal to delete the category option for feed for farmed livestock and to require ingredients to be declared in descending order by their percentage rate of inclusion. The Commission justified this proposal with a claim that it would improve the traceability of feed materials and transparency for feed purchasers (i.e. livestock farmers).
2. Member States, including the UK, supported the deletion of the category option. However, some Member States, again including the UK, argued against percentage declaration of the ingredients of compound feedingstuffs on the grounds that: it was not required for human food; there had been no calls for it from feed purchasers; and it would add little if anything to the other nutritional and analytical information already required under EC animal feed law. Some feed manufacturers also opposed the proposal on the grounds that by requiring them to declare the exact formulations of their products it would compromise commercially sensitive research and formulation information.
3. The Council and Commission subsequently compromised on declaration in five separate percentage bands, but full percentage declaration was favoured by the European Parliament. The proposal seemed set for formal reconciliation procedures until another compromise proposal for full percentage listing with a tolerance of +/-15% to allow for variations in declared analyses gained qualified majority support in Council. Feed manufacturers would additionally be obliged to provide customers with exact percentage information on request. This proposal was subsequently accepted by the European Parliament and adopted.
4. The UK voted against this compromise proposal, but its obligations as an EU Member State required it to implement the measure into domestic law. The Food Standards Agency therefore consulted on the relevant draft Regulations in the first half of 2003. The Feeding Stuffs, the Feeding Stuffs (Sampling and Analysis) and the Feeding Stuffs (Enforcement) (Amendment) (Wales) Regulations 2003, which also provided for the implementation of other EC feed measures, were made on 16 July 2003. Shortly thereafter, some UK feed companies made an application to the High Court in London to have the provisions of this Statutory Instrument relating to percentage ingredient

declaration suspended. They were concerned that revealing commercially sensitive feed formulations in this fashion would jeopardise the intellectual property in which they had invested and made future research and development efforts to develop new feed formulations redundant. The feed companies in question further argued that the requirement to declare percentages was not related to the protection of public health and that the Directive therefore had an invalid legal base. The deletion of the option to declare by category for farmed livestock feed was not contested.

5. On 6 October 2003, the High Court ruled in favour of the feed industry, ordering that questions concerning the validity of the relevant parts of Directive 2002/2/EC – to label compound animal feedingstuffs with the percentage inclusion rate of each ingredient, subject to a tolerance of +/-15%, and to disclose exact percentage information to customers on request - be referred to the European Court of Justice (ECJ). The High Court (and equivalent courts for Scotland and Northern Ireland) further ordered that the relevant provisions of the implementing Regulations be suspended in England and Wales pending the outcome of the reference to the ECJ.

6. The ECJ hearing took place on 30 November 2004. The Court's Advocate-General handed down a preliminary opinion on 7 April 2005, partially upholding the provisions of Directive 2002/2/EC. The full judgement was eventually handed down on 6 December 2005 and was as follows:

- the Directive was found to be validly based on the Treaty objective of safeguarding public health (Article 152(4)(b));
- the requirement to label compound feed ingredients within a tolerance of +/-15% was held to be proportionate and therefore valid; and
- the requirement to disclose exact percentage ingredient information to customers on request was found to be disproportionate and therefore invalid.

7. The Feeding Stuffs Regulations 2001 (as amended) have since been consolidated as the Feeding Stuffs (Wales) Regulations 2006, which came into force on 25 January 2006. However, the provisions on percentage ingredient declaration inserted into the Feeding Stuffs Regulations 2000 by the Feeding Stuffs, the Feeding Stuffs (Sampling and Analysis) and the Feeding Stuffs (Enforcement) (Amendment) (Wales) Regulations 2003 were omitted from the consolidation, because they were under suspension by order of the High Court. For the suspension order to continue to exist, the suspended provisions also had to remain in existence. Further amending Regulations are therefore necessary to revoke the suspended provisions and insert into the Feeding Stuffs (Wales) Regulations 2006 a requirement for the ingredients of compound feeds to be declared in descending order by weight within a tolerance of +/-15%.

Purpose and intended effect of the measure

8. These Regulations will re-introduce into law in Wales an EC measure which requires compound animal feeding stuffs to be labelled with a list of ingredients in descending order by their percentage weight of inclusion, within a tolerance of +/-15% for each declaration. The Directive containing the measure had originally been brought forward by the Commission as one of a number of pieces of

legislation, which was claimed would improve feed safety.

9. These Regulations are intended to implement in Wales one of the provisions of Council Directive 2002/2/EC, requiring compound animal feeds to be labelled to state the percentage inclusion of each ingredient ('percentage listing'). The Regulations implementing Directive 2002/2/EC came into force on 6 November 2003, but on an application by some UK feed companies, the provisions of those Regulations that concerned percentage listing were suspended by order of the High Court, pending a reference to the European Court of Justice (ECJ) for a ruling on the validity of the percentage listing provisions of the Directive. This judgement was handed down on 6 December 2006.

Risk Assessment

10. Although the UK voted against adoption of percentage ingredient declaration during the negotiation of Directive 2002/2/EC, its obligations as a Member State nevertheless require it to transpose the measure into national legislation. For the same reasons, it is now under a legal duty to give effect to the ECJ's ruling. Non-implementation in Wales could lead to application of differing standards within UK, which in turn could lead to commercial difficulties for business in Wales

Devolution

11. Separate but parallel legislation is due to come into force in England, Scotland and Northern Ireland in November 2006.

Options

12. In respect of this legislation, the 'Do Nothing' option is not an option, as it would ultimately lead to infraction proceedings against the National Assembly for Wales by the European Commission. Therefore, the 'Make the Legislation' option to implement the changes required to comply with the European legislation is being recommended.

Benefits

13. The benefits of introducing these Regulations would be:

- enhanced traceability of ingredients, through their listing in full on the label or accompanying document;
- transparency in feed formulations, giving purchasers (chiefly livestock farmers) more informed choice of the quantities which make-up of their animal rations, for example, to avoid high levels of particular ingredients or to favour others; and
- increased confidence in the quality of feeds and animal products for human consumption, through the knowledge that feed formulations are open to scrutiny.

14. One potential benefit of the EC's ruling, albeit more indirect, is that the rejection of the requirement in Directive 2002/2/EC to provide exact percentage information to customers on request means that feed manufacturers will not now need to invest in the potentially more expensive computer applications, which would have been required to maintain completely accurate records of feed mixes. However, any saving attributable to this rejection is very difficult to quantify because it is being measured against the hypothetical costs of the full implementation of Directive 2002/2/EC.

Costs

15. There are no financial implications for the Assembly arising from the making of these Regulations. Local Authorities will be responsible for the enforcement of the Regulations. The measures will have some additional implications for local authorities, which are responsible for the enforcement of animal feed legislation. However, it is not anticipated that these implications will be financial. Local Authorities will be required to check labels to ensure that the additional information is included. As enforcement officers already check labels as part of their routine assessment, these Regulations should not have any additional financial implications for Local Authorities. The Local Authority Co-ordinators of Regulatory Services (LACORS), the co-ordinating body for local authorities in England and Wales, was invited to comment on the potential impact of this legislation on local authorities as part of the consultation, but no response was received.

16. The measures will have most effect on feed manufacturers, who will have to revise their labelling and may also have to recalibrate feed production equipment in order to record the percentage inclusion rates of each ingredient. Some stakeholders have said that percentage ingredient declaration could have an impact on some feed manufacturers' future research and development expenditure and on the nutritional expertise and advice currently offered to livestock farmers as manufacturers will be unlikely to invest in research and development of new and improved products if this would not result in financial gain or commercial advantage.

17. It is difficult to assess and quantify the potential costs of percentage ingredient declaration for compound feedingstuffs. This is attributable to the absence of information on both the current costs for the labelling of compound feedingstuffs and the potential costs of any new equipment (both machinery and computer software), which may be necessary to label feed in accordance with these new requirements. In addition, some of the potential costs may be non-monetary in their nature and thus very difficult to translate into purely financial terms. These include a deterrent to investment in new feed formulations because of the need to disclose them on labels; loss of intellectual property by the feed industry; reduced performance from farmed livestock as farmers become less competitive with counterparts in third countries where feed research and development has not been similarly discouraged; and potential for increased imports from third countries of feed ingredients and animal products produced to both lower costs and lower standards.

18. The costs could include the following:

- one-off costs associated with capital expenditure on the acquisition of new plant and equipment;

- continuing costs associated with the need to produce new labels for each production run due to variations in feed formulation;
- a deterrent to investment in new feed formulations because of the need to disclose them on labels;
- negative impact on the international competitiveness of the feed industry due to copying of feed formulations by non-EU rivals, without investment in R&D of their own;
- loss of intellectual property by the feed industry;
- reduced performance for farmed livestock as farmers become less competitive with counterparts in third countries where feed research and development has not been discouraged; and
- potential for increased imports from third countries of feed ingredients and animal products produced to both lower costs and lower standards.

19. A number of areas for cost have been identified, but information from stakeholders has not enabled total costings to be estimated. One feed manufacturing company provided some financial information relating to its operations, but requested the Food Standards Agency treat this as confidential and therefore it has been omitted.

Small Firms Impact Test

20. Information on the impact on small firms was sought as part of the original consultation in 2003, although data was not forthcoming. Only two small firms responded to that consultation, and neither commented specifically on the potential financial impact on them. Nevertheless, small firm stakeholders were again invited to assess and quantify either the scale of the additional costs they may face or the potential impact of the measures on small firms as a whole. However, no response was received.

Competition Assessment

21. The UK feed industry is highly fragmented, with two large national compounders accounting for nearly 50% of market share. The remainder is divided between smaller compounders that have significant capacity in particular regions or areas of the UK, and co-operative or farmer-controlled compounders that typically have a single mill. The trend, for the past ten years or more, has been towards consolidation, with mergers reducing the number of individual firms and many of the co-operatives converting to limited companies. Reliable statistics on business numbers are difficult to obtain, but the Inter-Departmental Business Register (a database of the Office of National Statistics) for 2004 showed 260 firms with less than ten employees, 105 with less than fifty, 45 with under two hundred and fifty, and 5 with over two hundred and fifty employees. A return from the then HM Customs & Excise for the same year showed that 70 companies had a turnover of over £5million each, while 40 companies had turnovers of less than £50,000.

22. However, it is difficult to quantify the potential impact of percentage ingredient declaration on competition within the industry, or the competitive position of the industry in relation to the feed industries of other Member States or non-EC countries in the absence of data on its current financial status, in particular, on its cost structure, turnover and profit margins. In part this is because this data is not collected, either specifically or in a form which would permit the requisite comparative analysis, and in part because relevant financial data has not been provided in response to consultation exercises.

Consultation

With Stakeholders

23. In addition to the UK wide consultation, The Food Standards Agency Wales carried out a public consultation between 27 March 2006 and 19 June 2006. Forty-seven stakeholders in Wales including consumer and industry representative bodies and farming unions were invited to comment on the draft Regulations and the draft Regulatory Appraisal (A list of stakeholders is attached at Annex A). Two responses were received to the consultation exercise in Wales (one "no comment" and one from a UK organisation whose comments are reflected in the UK summary below, in paragraphs 24 & 25), and 13 substantive responses were received UK-wide.

24. In summary, concerns from some feed companies related to the loss of intellectual property rights, as competitors could copy feed recipes formulated on the basis of the former's research. The respondents maintained that this would risk stifling further innovation in the production of feeds that optimise animal performance and have a financial impact on feed manufacturers through loss of trade.

25. Several responses from agricultural organisations also indicated opposition to the measure, although one expressed support for the implementation of the legislation. One organisation representing trading standards departments of local authorities that enforce legislation indicated that enforcement would be given a priority proportionate to the relatively low contribution that percentage ingredient declaration makes to feed safety. No changes were made to the Statutory Instrument as a result of the public consultation.

With Subject Committee

26. These Regulations were notified to the Health & Social Services Committee, via the list of forthcoming legislation, on 19 January 2006, (HSS(2)-01-06 (p.3b), Item No: FS 7(06)) and have remained on the list ever since, but were not identified for detailed scrutiny.

Enforcement, Sanctions and Monitoring

27. Enforcement of animal feedingstuffs legislation is the responsibility of local authorities in Great Britain and the Department of Agriculture and Rural Development in Northern Ireland (DARDNI). Enforcement includes advice on labelling requirements and sampling and analysis of feed products to determine the accuracy of labelling declarations for protein, fibre, etc.

28. However, there are no officially recognised methods of analysis for many feed ingredients. The accuracy of percentage ingredient declarations would therefore mostly have to be confirmed via examination of manufacturers' records.

29. The penalties for non-compliance with feedingstuffs legislation are set out in the Agriculture Act 1970 and in subordinate legislation made under section 2(2) of the European Communities Act 1972, namely the Feed (Hygiene and Enforcement) (Wales) Regulations 2005. Non-compliance is to be treated as a criminal offence, and would be subject on conviction to fines and/or imprisonment determined by the courts up to the maximum of the scale (Level 5 - £5,000).

Post-implementation Review

30. Within six months of making the legislation, the Food Standards Agency will carry out a review of the effects of the measures. This will take the form of a further stakeholder consultation, including the feed and agricultural industries. The results will inform the UK's negotiating position during the Commission's forthcoming review and recasting of the feed labelling legislation.

Summary

31. There are a number of factors, which support the implementation of the measure, as follows:

- the measure will remove the requirement for feed manufacturers to disclose the exact ingredient information to customers, which the ECJ found to be disproportionate;
- the legislation is not new and was adopted in 2002. It was subject to the full co-decision procedure for the adoption of Community legislation with the Council of Agriculture Ministers and the European Parliament. Both the European Parliament and a majority of Member States (14 out of 15) supported it at that time; and
- the legislation has been subject to judicial review both in the UK courts and by the European Court of Justice. Although it was argued that percentage ingredient listing is not a significant feed safety measure, the ECJ found that the requirement to label compound feed ingredients within a tolerance of +/-15% was proportionate to its legitimate aims and therefore valid.

Annex A

Consultation List

Organisation

ADAS Wales

Agricultural Industries Confederation (AIC)

Association of Muslim Professionals

British Retail Consortium

Cardiff Scientific Services

Carmarthenshire College

Chartered Institute of Environmental Health in Wales

Chartered Institute of Environmental Health in Wales

Cig Mon Group

Coleg Llysfasi Ruthin

Country Land and Business Owners Association

Countryside Council for Wales

Denbighshire CC

Eurofins Scientific

Farm Assured Welsh Livestock

Farm Assured Welsh Livestock

Farmers' Union of Wales

Guild of Welsh Lamb and Beef Suppliers

Hybu Cig Cymru

Carmarthenshire County Council

LACORS (Welsh Officer) & WLGA

Minton, Treharne & Davies Ltd

National Farmers Union (Wales)

National Sheep Association

Pencoed College

Royal Welsh Agricultural Society

Royal Welsh Agricultural Society

State Veterinary Service

The Association of Public Analysts

Trading Standards Institute (Wales)

Vale of Glamorgan Council

Wales and Border Counties Pig Breeders Association

Wales Assembly of Women

Wales Young Farmers' Club

WDA Agri-Food Development

WDA Food Directorate

Welsh Assembly Government

Welsh Black Cattle Society

Welsh Consumer Council

Welsh Food Alliance

Welsh Food Promotions

Welsh Lamb and Beef Promotions

Women's Food & Farming Union