

To: Lead Food Officers  
cc: REHIS, SOCOEHS, COSLA, SFELC

23 November 2015

FSS/ENF/15/013

Dear Colleague

### **Enforcement of breaches in relation to ‘use by’ dates**

Food Standards Scotland and the FSA is aware that the question of enforcement powers relating to food which is discovered in food businesses following the expiry of the ‘use by’ date has been raised in a number of forums. We have been working to clarify the position and to provide the framework which will help enforcement officers in these situations.

Since the introduction of Regulation (EU) No 1169/2011 on the provision of food information to consumers (“FIC”), there has been a level of uncertainty as to where the enforcement powers for the ‘use by’ provisions now sit and whether there is the legal basis for authorised officers to enforce them.

The paper at the Annex sets out that the situation has not changed with the introduction of the FIC and that authorised officers still have the relevant authority to take action in situations where a breach of the regulations is discovered. It explains that it remains an offence to place food with an expired ‘use by’ date on the market and if such food is discovered then it must automatically be deemed unsafe. This is not a rebuttable presumption.

The paper also offers some examples in order to assist enforcement officers although it should be noted that this is not a full guidance document, nor would it be possible to try and address every possible scenario.

If you have any queries on this, please contact me at the email address at the top of the first page.

Yours sincerely

A handwritten signature in black ink that reads "J Angus". The signature is written in a cursive style with a large initial 'J'.

Jacqui Angus  
Senior Enforcement Manager  
Food Standards Scotland

## Policy clarification for enforcement of breaches of FIC in relation to 'Use By' dates

The purpose of this paper is to clarify how the requirements set out in legislation regarding 'use by' dates are enforced and whether Authorised Officers are empowered to enforce breaches. This stems from queries which have been raised following the FIC coming into effect as these regulations explicitly link 'use by' dates to food safety legislation. Although we use a few examples of situations which an enforcement officer should take into consideration these are only used to illustrate the point. This paper is not intended as formal guidance as it would not be practical to comment on every scenario and enforcement officers should consider instances on a case by case basis.

### Relevant EU legislation

- Regulation (EC) No 178/2002 (laying down the general principles and requirements of food law), Article 14 (1) states 'food should not be placed on the market if it is unsafe'.
- Regulation 1169/2011 (on the provisions of food information to consumers), Article 24 (1) states '...After the 'use by' date a food shall be deemed to be unsafe in accordance with Article 14(2) to (5) of Regulation 178/2002.'

Although the requirement to place a 'use by' date on food which is highly perishable and likely after a short period to constitute an immediate danger to human health is contained in Regulation (EU) No 1169/2011, the overriding provision not to place unsafe food on the market is contained in Regulation (EC) No 178/2002. Therefore, placing food on the market, or allowing food to remain on the market following the expiry of the 'use by' date must be treated as a breach of Article 14 of Regulation (EC) No 178/2002 and should be dealt with on that basis in line with the competent authority's enforcement policy. Breach of Article 14 of 178/2002 is an offence under Regulation 4 of the General Food Regulations 2004, as amended.

A recurring question which is raised by enforcement officers and businesses relates to whether there are any situations or scenarios where food which is past its 'use by' date is able to be placed

on the market. The simple answer is no as it constitutes an offence of contravening Article 14 of Regulation (EC) 178/2002 to place food with an expired 'use by' date on the market.

'Use by' dates cannot be taken as a topic in isolation as there are a number of factors which need to be considered at the same time. Firstly, the original producer has to determine whether a 'use by' date is appropriate, by considering the question – "Is the product highly perishable from a microbiological point of view and so likely, after a relatively short period, to present a risk of food poisoning?". If the answer is no, then a 'best before' date rather than a 'use by' date is likely to be more appropriate and indicates the period for which a food can reasonably expect to retain its optimal condition and quality. If the answer is yes, and a 'use by' date is appropriate, then subsequent food business operators (FBOs) throughout the food chain must take account of this date mark in their food safety management system as it indicates the date until which the food is safe to eat in its current state, based on scientific evidence. The 'use by' date may have been determined to take into account a 'worst case scenario' in the supply chain; however, this is to take into account possible temperature fluctuations in the supply chain, and not to allow others further along the supply chain such as retailers to apply an extension to the date mark which has not been underpinned with scientific evidence.

Our interpretation of the relevant legislative provisions above, allows for FBOs preparing food for direct consumption by the final consumer (i.e. in a restaurant or catering scenario) to freeze down food prior to the expiry of the 'use by' date and later defrost and prepare the food for direct consumption by the final consumer or to use it as an ingredient for further processing for food which is intended to be served directly to the final consumer. This does not include products that require preparation by the consumer. In order for an FBO to freeze food as above, they must have robust documentation to demonstrate when the product was frozen and that this was done safely. The FBO must also be able to demonstrate that defrosting and preparation should be done safely, and does not extend the life of the product beyond the original time period applied by the manufacturer for its chilled state. An example of this might be putting in place a stock control procedure for a time within which the food, once defrosted, is to be used up and how it will be used, for example as an ingredient in a cooked food, taking into account the shelf-life left in the product before freezing.

There are also examples of FBOs, including retailers, freezing food down commercially for onward retail as a frozen product. FBOs undertaking such activity would need to have food safety management systems in place, including a HACCP, documenting how these activities are

undertaken safely as this would now be considered to be a different product. In these situations, the product would have to be re-labelled with the new FBO name and address and 'instructions for use' information provided in relation to de-frosting and cooking, including product's shelf-life once defrosted, etc.

Article 24 of Regulation (EU) No 1169/2011 concerning minimum durability date, 'use by' date and date of freezing states that *"In the case of foods which, from a microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health, the date of minimum durability shall be replaced by the 'use by' date. After the 'use by' date a food shall be deemed to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002."* The food will be deemed to be unsafe and it is not necessary for the LA to prove this. The provision means that if the 'use by' date has expired, the food must automatically be considered to be unsafe and cannot be placed on the market. This is not a rebuttable presumption, and the FBO cannot argue that the food is actually safe by reference to expert or other evidence.

Where food is either on the market after expiry of the 'use by' date or in a situation where it is being prepared to be placed on the market with an expired 'use by' date, the enforcement officer should take the relevant action in line with the authority's enforcement policy, having regard to section 9 of the Food Safety Act 1990, and if appropriate, action under Regulation 4 of the General Food Regulations 2004, as amended.

The Guidance on the application of date labels which Defra and FSA published in 2011 is still in use. Although some of the references are out of date, the general guidance is still in place and we are considering updating this document.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69316/pb132629-food-date-labelling-110915.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69316/pb132629-food-date-labelling-110915.pdf)

Situations to consider from an Enforcement Officer's perspective.

It is illegal in any circumstances for food with an expired 'use by' date to be placed on the market.

- 1) Retail display of food with expired 'use by' dates – if the 'use by' date on the label has expired, that food must be considered unsafe in accordance with Article 14 (2) to (5) of Regulation (EC) No 178/2002. There is no requirement for the Enforcement Officer to demonstrate that the food is actually unsafe nor is it a defence for the FBO to carry out

analyses with a view to suggesting that the food is safe. The Officer should follow standard procedures for dealing with food which should not have been placed on the market.

- 2) Changing 'use by' date at retail – Where a retailer amends a date mark in any way, they should change the FBO details on the pack and be able to provide appropriate evidence of how the new date mark has been validated as microbiologically safe as part of their food safety management system. However, a 'use by' date cannot be amended in isolation; instructions for use need to be provided in relation to storage, de-frosting, cooking etc. and consideration is required as to the product's name or description.
- 3) Changing 'use by' date, freezing and altering FBO details on the pack (retail) – Retailers and caterers who wish to freeze products will need to demonstrate that they have the technical knowledge to do this safely and make the necessary amendments to the label, including where appropriate, the date of first freezing (which may not be the date that this FBO froze the product, if it is a 'defrosted' product to begin with). This must be reflected in the HACCP-based food safety management system.
- 4) Delicatessen slicing cooked ham - Delis should have internal traceability systems in place in order for them to tally the product for sale at the deli counter with the mandatory information, including the 'use by' date of the original product. If there is no date marking on the food, nor a system to ensure that food is not placed on the market after its 'use by' date, then that food should be regarded as being unsafe.
- 5) Caterer reheating pies - Reheating food past its 'use by' date is not a defence; it is still placing food considered to be unsafe onto the market. At the time the pies are being held for the purpose of sale so they are being placed on the market after the 'use by' date regardless of the subsequent heating process.
- 6) Caterer holding foods with expired 'use by' dates in the fridge and claims the food will be used as ingredients in cooked products – The caterer must not use the product or extend its shelf life by freezing it down once the 'use by' date has expired.
- 7) Caterer holding foods with expired 'use by' dates in the freezer - The FBO must be able to demonstrate when freezing was undertaken as otherwise there would be no proof that this was undertaken prior to the 'use by' date expiring. One way to show this would be to date mark the product with the date it was frozen and an indication of how much of the shelf life was remaining. The FBO would be expected to have a robust system in place in order to be able to prove when the food was frozen and when the food was brought out of the freezer

to be defrosted. If the FBO cannot satisfactorily demonstrate when the product was frozen, the food will be considered unsafe in accordance with Article 14 of 178/2002, and will have to be disposed of. The inability to substantiate date of freezing etc. would also breach the provisions for a food safety management system based on HACCP principles.

- 8) Wholesaler holding frozen products with expired 'use by' dates who claims they were going to be stripped of packaging before being sold on still frozen but with best before dates -  
When the 'use by' date has expired, food must be considered as unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002 unless there is appropriate evidence that the date of freezing was prior to the expiry of the 'use by' date. Where this is demonstrated, the product cannot be sold to the final consumer in that state, but could be supplied to other FBOs with instructions on how the product can be used. Those FBOs can later defrost the food and use it as an ingredient for further processing for food which is intended to be served directly to the final consumer. The FBO should ensure instructions on how the product can be used.
- 9) Caterer holding food products with expired 'use by' dates in the freezer. The products have been marked with the date of freezing. Full records of the date of freezing and intended use as an ingredient can be provided – This is acceptable. The date mark on the food label cannot be extended but the life of the product can be extended through safe freezing and defrosting procedures.