Regulation (EC) No 669/2009 (as amended)

Guidance for Enforcement Officers on increased levels of official controls on imports of certain Feed and Food of Non-Animal Origin of Known or Emerging Risk

Last Reviewed: December 2013

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Summary

Intended audience:	Enforcement Officers
Regional coverage:	This guidance is applicable in Scotland. Similar guidance has been prepared in England, Wales and Northern Ireland.
Purpose:	This guidance is related to the area of imports, and explains safeguard measures and the enforcement of Regulation (EC) No 669/2009 (as amended) concerning the increased level of official controls on imports of certain feed and food of non-animal origin (FNAO) of known or emerging risk.
Legal status:	This guidance is a combination of best practice and regulatory guidance, and is intended to explain the Regulation. Where best practice is outlined the advice is contained in shaded boxes. Officers should understand and be familiar with the Regulation and keep up-to-date with any amendments to the list of foods in Annex I to the Regulation, which is reviewed regularly.
Key words	• Food law, monitoring and controls • Imports
Review date	The guidance was reviewed in December 2013, and is reviewed on an annual basis. If however legislation is changed the guidance will be updated as required.

REVISION HISTORY

This guidance follows the Government Code of Practice on Guidance. If you believe this guidance breaches the Code for any reason, please let us know by emailing betterregulation@foodstandards.gsi.gov.uk. If you have any comments on the guidance itself, please call us using the contact number on page 2 or complete our ongoing Guidance survey: https://www.surveymonkey.com/s/55QQDCG

Revision No.	Revision date	Purpose of revision	Revised by
1	12 March 2010	Amendments to Article 19 Annexes 1 & 2	Commission Regulation (EC) No 212/2010
2	20 April 2011	Annual review	Imported Food Team
3	20 May 2012	Annual review	Imported Food Team
4	16 December 2013	Annual Review	Imported Food Branch and FSA in Scotland

CONTENTS

REGULATIONS REFERRED TO IN THIS GUIDANCE

Regulation (EC) No 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

Commission Regulation (EC) No 669/2009 (as amended) implementing Regulation (EC) No 882/2004 as regards the increased level of official controls on imports of certain feed and food of non-animal origin of known or emerging risk, and amending Decision 2006/504/EC.

Please note: throughout the document all references to Regulation (EC) No 669/2009 or parts of it (including Annex I) are to be understood as references to the Regulation as amended from time to time.

Commission Regulation (EC) No 1152/2009 (as amended) imposing special conditions governing the import of certain foodstuffs from certain third countries due to contamination risk by aflatoxins, and repealing Decision 2006/504/EC.

In terms of national legislation, separate but parallel domestic Regulations apply in all four countries of the UK – those applicable in Scotland are:

The Official Feed and Food Controls (Scotland) Regulations 2009 (SSI 2009 No 446) (as amended).

INTRODUCTION

1. This guidance covers import controls at designated points of entry (DPEs) into Scotland of specific feed and food not of animal origin (FNAO) of a known or emerging risk. Onward transmission of consignments is permitted in certain circumstances, when the “control” of the consignment will fall to another Authority.

2. Regulation 882/2004 includes requirements for the official control of feed and food of non-animal origin being imported from third countries. Article 15(5) of this regulation provides that a list of certain feed and food products be drawn up, on the basis of known or emerging risks and be subject to increased controls at points of entry into the EU, and that fees related to these controls should be established. On 25 July 2009, Regulation 669/2009 implementing Regulation 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin and amending Decision 2006/504/EC was published.

3. Regulation 669/2009, which sets out rules for the increased level of official controls for products that present a known or emerging risk, applied from 25 January 2010. Annex I of this regulation lists feed and food that are subject to an increased level of official controls and will be reviewed regularly. A link to the Regulation is available on our website at: www.food.gov.uk/foodindustry/imports/banned_restricted/highrisknonpoao

4. The Official Feed and Food Controls (Scotland) Regulations 2009, (OFFC Regulations) (as amended) provide for the execution and enforcement of Regulation 669/2009. Similar legislation has been introduced in England, Wales and Northern Ireland.

INTENDED AUDIENCE

5. This Guidance is aimed at enforcement officers.

PURPOSE OF GUIDANCE

6. This Guidance has been produced to help enforcement officers to understand and implement the Regulation.

LEGAL STATUS OF GUIDANCE

7. This Guidance has been produced to explain clearly the legal requirements of Regulation 669/2009. Advice on best practice in this area has also been included. The guidance on legal requirements cannot cover every situation and you may need to refer to the relevant legislation itself to see how it applies in specific circumstances. You are **not** required by law to follow best practice advice. **To distinguish between the two types of information, all advice on best practice is in shaded boxes, with a heading of "Best Practice".**

BACKGROUND

8. Enforcement powers for Regulation 882/2004 and Regulation 669/2009 are contained in the national OFFC Regulations; hence authorisation is required for enforcement officers under them. Article 9(2) of Regulation 669/2009 allows examinations to be deferred in exceptional cases, to the point of destination. Hence, all relevant Local Authorities (LAs) should ensure they correctly authorise their enforcement officers.

9. The OFFC Regulations allow Declarations to be issued when there is a serious and imminent risk to animal or public health and control measures need to be put in place rapidly. In particular, they may be used to ensure that Emergency Control Decisions or Regulations (safeguard measures) made at EU level may be implemented in the UK without any delay, e.g. Regulation 1152/2009 (as amended).

10. Products covered by Regulation 669/2009 are subject to Documentary, Identity and Physical checks at the DPE and, if found to be satisfactory, a Common Entry Document (CED) is completed (see Article 8(1)(a) and (b) of Regulation 669/2009. Definitions of documentary, identity and physical checks can be found at points 17, 18 and 19 of Article 2 of Regulation 882/2004.

Best Practice

Officers inspecting retailers, importers, wholesalers, distributors and manufacturers should look out for large consignments of FNAO listed under Annex I to 669/2009, and, where found, should make enquiries in relation to their origin. Officers should request to see copies of CED/official documents, which should accompany such consignments to their first destination inland. However, the CED is not legally required to be present at the point of retail where much of this feed or food may be found.

LEGISLATION ON IMPORTS OF FNAO SUBJECT TO A KNOWN OR EMERGING RISK

11. Regulation 669/2009 provides for an increased level of controls for feed and food from a number of Third Countries, subject to a known or emerging risk to public health. This may be due to the presence of contaminants/undesirable substances such as pathogens, aflatoxins, Sudan dyes, heavy metals or pesticide residues.

12. Regulation 669/2009 requires Food Business Operators (FBO) to pre-notify the relevant competent authorities (CA) of the arrival of specified products from certain third countries at a DPE, in order that the necessary official controls can be undertaken. The Commission has advised that facilities at Border Inspection Posts (BIP) may be used by DPEs. The BIP would not need to have separate facilities for imports of products of animal origin (POAO) and FNAO. However, there would need to be proper controls to prevent cross-contamination. Please refer to the Department for Environment, Food and Rural Affairs (Defra) BIP Manual at the following link:

    https://www.gov.uk/government/publications/border-inspection-post-bip-manual

13. The import of products listed in Annex I of Regulation 669/2009 will be permitted entry only through a DPE that has appropriate control facilities for different types of feed and food. A link to the current list of products under Annex I can be accessed at:

    www.food.gov.uk/foodindustry/imports/banned_restricted/highrisknonpoao

14. Regulation (EC) No 1152/2009 (as amended) on special conditions governing certain foodstuffs imported from certain third countries, due to contamination risks of these products by aflatoxins, requires that specified FNAO from third countries can only be imported into the EU via “designated points of import” (DPI). A list of DPIs in the UK can be found via the following link:

    http://www.food.gov.uk/foodindustry/imports/banned_restricted/aflatoxinreg11522009

15. The specified products in Regulation (EC) No 1152/2009 (as amended) from certain Third Countries are required to be accompanied on import by the results of sampling and analysis for aflatoxins, as well as a health certificate (in accordance with the model certificate set out in Annex I of the Regulation).

16. Regulation 1152/2009 (as amended) includes measures to align the special import conditions as regards aflatoxins with Regulation 669/2009 for different food products. The CED referred to in Article 3 (a) of Regulation 669/2009 must be used for the particular products covered by Regulation 1152/2009 (as amended).

17. The Annex I list in Regulation 669/2009 will continue to be reviewed on a regular basis. This will follow the receipt of relevant information of the results of official controls (at least quarterly) by the Commission and, from the following sources:

    - Information obtained through RASFF.
    - FVO Reports.
    - Reports and information from Third Countries.
    - Information exchanged between the Commission, Member States and the European Food Safety Authority (EFSA).
    - Scientific assessments.

    The updated version of Annex I is published in the Official Journal of the European Union. See Paragraph 13 to access a link to this annex.

MINIMUM FACILITIES AT DPE

18. DPEs must be designated by the FSA. Article 4 of Regulation 669/2009 sets out the minimum requirements for DPEs to undertake increased levels of control for Annex I listed feed and food. These requirements are to ensure a degree of uniformity in the effectiveness of the controls. Relevant authorities should work with port operators to ensure that the minimum facilities are provided:

- There shall be a sufficient number of suitably qualified and experienced staff to perform the prescribed checks and officers must be appropriately authorised.
- The facilities must be suitable for the necessary checks.
- Detailed instructions must be available regarding sampling and the dispatch of the samples to a designated laboratory.
- There should be suitable and sufficient storage facilities for a consignment(s) during detention, whilst awaiting the laboratory results. This includes cold stores, in cases where such storage is necessary owing to the nature of the consignment.
- Suitable unloading and sampling equipment, allowing unloading of the consignment and sampling for analysis in a sheltered area, if necessary.
- The designated laboratory should be situated in a location that allows samples to arrive at the laboratory with minimal delay.

19. The FSA maintains and makes publicly available an up-to-date list of DPEs for each of the products listed in Annex I and advises the Commission accordingly. When the FSA is concerned that the continuing operation of a DPE could present a serious risk to animal or public health, or there is a serious breach in respect of the above requirements, it may suspend the designation of the point of entry, either in full or part, by serving a written notice to that effect on the port operator. The list of DPEs is available at:

www.food.gov.uk/foodindustry/imports/banned_restricted/highrisknonpoao

IMPORTERS' RESPONSIBILITIES

20. The FBO (importer) or their representative has responsibility for the consignments and must give adequate prior notification to the DPE of the consignments and the time and date of arrival. The obligation to pre-notify is breached if the consignment is presented at a port that is not a DPE, i.e. an offence will have been committed under Regulation 41(1) (a) of the OFFC Regulations.

21. Notification by the importer must be undertaken by completion of Part 1 of a CED (in English) at least one working day prior to the physical arrival of the consignment at the DPE. Prior notification may be done electronically. An example CED is provided in Annex II of the Regulation. Failure of a FBO to pre-notify relevant consignments, that are subsequently revealed elsewhere, e.g. by UKBA staff in an internal temporary storage facility (formerly known as a 'transit shed'), should result in action to place the consignment(s) immediately under official detention, and to either destroy or re-dispatch them (Articles 19 and 21 of Regulation 882/2004).

22. Where a consignment has "special characteristics", e.g. highly perishable and/or specific packaging features, the FBO shall provide assistance to unload the consignment to allow official controls to take place and provide the appropriate sampling equipment/assistance if the sampling cannot be done using standard sampling equipment.

23. FBOs are responsible for the payment of fees to the relevant Authority, which shall not be greater than the costs borne by the Authority as laid down in Annex VI of Regulation 882/2004.

24. The FBO (or representative) must present the CED (in paper or electronic form), once completed by the CA, to the customs services for the consignment to be released into free circulation.

ACTIONS REQUIRED BY AUTHORISED OFFICERS

25. Application for DPE status should be made to the FSA by the port operator ensuring that appropriate facilities can be provided. Where two Authorities might be involved, e.g. one for food and the other for feed, cooperation arrangements regarding respective responsibilities should be established.

26. In order for imported FNAO to undergo proper checks, consignments must enter through DPEs that meet minimum requirements. However, for a transitional period of five years, (which ends on 13 August 2014), for DPEs that are not fully equipped, the checks may be carried out at another authorised point of control, providing that the alternative point of control meets the minimum requirements for a DPE. It is unlikely that the UK will need to use these transitional measures as current DPEs in the UK meet the minimum requirements.

27. The official controls are set out in Article 8, which refers to “consignments”. A “consignment” is defined in Article 3 (c) as “a quantity of any feed or food of non-animal origin listed in Annex I to this Regulation of the same class or description, covered by the same document(s), conveyed by the same means of transport and coming from the same third country or part of such country.” If these conditions are fulfilled, the consignment can comprise more than one container. Hence, provided the contents of the containers meet the aforementioned requirements, a single CED will cover the consignment. However, each separate “commodity” listed in Annex I is a separate “consignment” and a CED must be completed for each consignment, whether it is in the same container or not. If the consignment is split into separate “commodities”, a certified copy of the CED must accompany each part until release into free circulation.

28. Regulation 669/2009 only applies to FNAO provided it is “food” as defined in Regulation 178/2002. “Food” is defined under Article 2 of this Regulation as meaning ‘any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans’. “Feed” is defined in Article 3(4) of that Regulation as meaning ‘any substance or product, including additives, whether processed, partially processed or unprocessed, intended to be used for oral feeding to animals’. Therefore, when a product listed in Annex I of 669/2009 is imported for other

purposes, such as documented research purposes (e.g. laboratory tests) it is not considered to be subject to the control regime provided for by Regulation 669/2009 and so no CED is required.

29. Even though there is no minimum consignment size given in the Regulation, personal imports of any of the feed/food listed in Annex I are not regarded as commercial “consignments” and are not considered to be subject to the control regime provided for by 669/2009, and so no CED is required.

30. If a consignment is not unloaded from an aircraft at the first airport of landing in the EU, the consignment need not be subject to DPE controls at that first airport. The controls under Regulation 669/2009 could be applied at the DPE of the airport where the consignment is unloaded.

31. The relevant authorised officer must undertake documentary checks on all consignments within two working days from the time the consignments arrive at the DPE, unless there are exceptional and unavoidable circumstances (Article 8(1) (a)).

32. Annex I of this Regulation sets out the frequency of identity and physical checks and the particular hazards associated with different feed/food. The consignment must remain under the control of an authority until the results of the physical checks, including sampling and testing for the relevant hazard(s), are known. Such results should be made available as soon as technically possible. FBOs or their representatives should not be able to predict whether any particular consignment will be subject to such checks as laid down in Annex I.

33. However, if an authorised officer has concerns that some listed products may require more frequent checks than set out in Annex I, owing to previous samples of particular products from certain countries consistently failing to meet requirements, then action under Article 18 of Regulation 882/2004 should be considered.

Best Practice

It should be borne in mind that unless very carefully controlled, sampling large numbers of bags of product, e.g. seasonings, spices and fresh produce, may disrupt the integrity of the packaging and lead to possible food safety issues including potential:

- foreign body contamination,
- pest ingress,
- microbiological contamination,
- allergen cross-contamination.

It is possible that significant quantities of product might need to be destroyed as a result. Therefore, care should be exercised when sampling and re-sealing bags, sacks and other containers after sampling.

34. There are provisions for minimising destruction of the product for spices in Regulation 401/2006 (as amended) laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006R0401:20100313:EN:PDF

35. Reference could also be made to the European Commission's "Guidance Document for Competent Authorities for the Control of Compliance with EU Legislation on Aflatoxins" which can be found under the 'Safeguard decisions as regards aflatoxins' section at:

http://ec.europa.eu/food/food/chemicalsafety/contaminants/aflatoxins_en.htm

Best Practice

Most fruit and vegetables are subject to EU marketing standards. They must either be imported accompanied by a certificate of conformity or be inspected by Scottish Government's Rural Payment and Inspections Directorate (RPID) (Horticulture and Marketing Unit) which then issues a conformity certificate (if appropriate to do so). Where possible, authorised officers are encouraged to carry out joint examinations with SGRPID in order to reduce the burden on importers and prevent delays. The Horticulture and Marketing website can be found at:

http://www.scotland.gov.uk/Topics/farmingrural/Agriculture/grants/Inspections/HorticultureInspectionsSimilar co-operation arrangements should be in place with the Food and Environment Research Agency (FERA) with respect to inspections of plants and plant products for pests and diseases. The Plant Health section of the FERA website can be found at:

http://www.fera.defra.gov.uk/plants/plantHealth/imports/index.cfm

36. Officers should ensure that analytical results, particularly of samples of perishable products, are obtained as soon as is practicable. The FSA is aware that some laboratories are able to report the results of the analyses for pesticides on the next working day after the day the sample was submitted.

37. Where feed and food official controls are undertaken concurrently at a DPE, care should be exercised to prevent cross-contamination.

38. Following completion of the checks, which should be undertaken without undue delay (Article 8(1)) and where the consignment is found to be satisfactory, the authorised officer should complete Part II of the CED and stamp, sign and date it. The FBO should present to Customs Services the completed CED in paper or electronic form. A copy of the completed CED should be retained, whilst the original should accompany the consignment to the place of destination indicated on the CED.

39. The timeframe for undertaking documentary, identity and physical checks should be as short as possible, particularly when perishable commodities are involved. Should there be any FBO queries in relation to the official controls, please refer to Article 2 of Regulation 882/2004 regarding the definitions of "documentary check"; "identity check" and "physical check", which in this

situation includes sampling for examination or analysis and laboratory testing.

40. If the results of the checks indicate non-compliance, the authorised officer should complete Parts II and III of the CED and take action in terms of Regulation 882/2004, Article 19 – Action following official controls on feed and food from third countries; Article 20 – Special treatment; and/or Article 21 - Re-dispatch of consignments. The authorised officer should discuss with the FBO the options available. FBOs will also be liable for any costs incurred at the DPE. The appropriate authorised officer should complete boxes III.1 and III.3 of Part III to confirm that a consignment has been re-dispatched. The appropriate authorised officer should complete boxes III.2 and III.3 of Part III to confirm that a consignment has arrived for destruction or to undergo special treatment or use for other purpose

41. If laboratory analysis identifies non compliance the authority should complete and send a RASFF notification to the FSA.

42. Where a consignment is rejected by a DPE or DPI under Regulation 669/2009 or Regulation 1152/2009 (as amended) respectively, details of the rejected consignment and the final destination of the consignment should be notified to the Customs National Clearance Hub. This is set out in Article 19(3) of Regulation 882/2004.

43. Fees charged to the FBO should be in accordance with Article 27(4) of Regulation 882/2004. Hence, the fees collected for the purposes of official controls shall not be greater than the costs borne by the responsible CA in relation to the following items (Annex VI of Regulation 882/2004), i.e. the criteria to consider for the calculation of fees are:

- staff costs ;
- overhead costs, including facilities, tools, equipment, training, travel and associated costs;
- laboratory examination or analysis and sampling costs.

44. Article 8(2) of Regulation 669/2009 provides that, onward transportation of a consignment may be authorised by the CA of the DPE pending the results of physical checks of the relevant products. However, the authority at the DPE must liaise with the CA at the place of destination, so that appropriate arrangements are implemented to ensure that the consignment remains

under the control of the second (receiving) authority and cannot be tampered with pending the results of physical checks. The authority at the DPE must notify the authority at the point of destination of the results of the physical checks. If onward transportation is permitted e.g. for chilled fresh produce, a certified copy of the original CED must accompany the consignment.

45. Customs Services shall not allow the entry or handling of the relevant products in free zones or free warehouses without the agreement of the Authority.

46. When samples are taken, the Authority should notify the Customs Services and indicate whether the consignment is to be transported to another destination and under the control of another authority pending the results of the physical checks. Article 24(1) to (3) of Regulation 882/2004 requires close co-operation between Customs Services and Authorities.

Best Practice

Such onward transportation should be permitted, particularly for short shelf-life foods, whenever possible. If deemed appropriate, liaison arrangements should be arranged between relevant authorities, e.g. by way of a Memorandum of Understanding (MoU).

47. Regarding Article 9(2) of Regulation 669/2009, identity and physical controls may be undertaken at the point of destination after documentary checks have been completed at the relevant DPE, but only in exceptional cases and where Annex I provides a derogation to that effect. Examples of where this may apply are if the product is highly perishable, and when the nature of the packaging is such that the product cannot be sampled at the DPE without causing a serious risk to food safety or of damaging the product to an unacceptable extent. The premises where the identity and physical checks are undertaken must fulfil the requirements of Article 4 and the consignment(s) must remain under the control of the relevant authority.

Under Article 15 of Regulation 669/2009 there is a requirement for Member States to report to the Commission on a quarterly basis the results of the checks. The information required is as follows:

- details of each consignment, including the size in terms of net weight of the consignment and the country of origin;

- the number of consignments subjected to sampling for analysis or examination; and,

- the results of the documentary, identity and physical checks.

Officers should collate this information and forward it to the FSA on a three monthly basis. Officers should ensure that the product descriptions and CN codes are recorded correctly according to Annex 1 of the Regulation.

Best Practice

When a FBO decides to voluntarily surrender a product before physical checks are undertaken (owing to official control costs and potential delays) such consignments should not be included in the official statistics as being non-compliant.

48. Where there are specific geographical constraints, Member States may request the Commission to authorise the relevant Authority to carry out physical checks at the FBO establishment, under the control of the relevant Authority. This needs to be approved for that purpose by the Commission, provided that the efficiency of the controls undertaken at the DPE is not adversely affected and the establishment fulfils relevant requirements of an "approved" DPE as set out in Article 4 of the Regulation, e.g. suitable facilities to allow the checks to be carried out, appropriate amenities for storage, unloading equipment, etc.

49. Officers should ensure that consignments are not split until the CED is completed. Should the consignment(s) be subsequently split, an authenticated copy of the CED should accompany each part of the split consignment until it is released for free circulation. However, for mixed container loads, i.e. Annex I products, together with products that are not listed, the products not subject to additional checks may be released for free circulation.

50. When there are various products listed under Annex I, presenting the possibility of different hazards and analyses, in a container, the products may be split to allow the different parts to be subsequently released, subject to the laboratory results. This should avoid unnecessary delay with the release of any particular product(s). As indicated above (paragraph 26), each Annex I

listed product is a separate “commodity” and a CED must be completed for each consignment.

51. Once all controls have been undertaken and the results are satisfactory, the FBO should present the completed CED to Customs Services to allow the release of the consignment into free circulation.

52. Should a consignment of an Annex I listed feed or food be found to have avoided official controls at a DPE, appropriate enforcement action should be taken. The relevant authority for the particular area, where such a consignment is found should instigate action under the Official Feed and Food Controls (Scotland) Regulations 2009 (as amended), if the FBO refuses to return the consignment to a DPE or if it has been abandoned in an internal temporary storage facility.

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REFERENCES

Questions and Answers Paper *on the provisions of Commission Regulation (EC) No 669/2009 as regards the increased level of official controls on imports of certain feed and food of non-animal origin*' can now be found at:

http://ec.europa.eu/food/food/controls/increased_checks/docs/QandA_paper_en.pdf