

Ingredient Labelling for Foods Prepacked for Direct Sale: Consultation Launched on New Technical Guidance for Allergen Labelling

It is estimated (perhaps conservatively) that 1 – 2% of the UK adult population and 5 – 8% of children in the UK have a food allergy (not including intolerances), and in addition, one in 100 people have coeliac disease.¹ The accuracy of information on allergens in food is, therefore, important to the overall safety of food and drink, as well as for ensuring compliance with legal requirements for this information.

Following the publication of new legislation implementing full ingredient labelling for foods that are “prepacked for direct sale” (PPDS) from 1 October 2021, many businesses have been awaiting further guidance from the Food Standards Agency (FSA) as to which products the requirements will apply to and how the laws will be applied in practice. Preliminary guidance was due to be published by the FSA on 1 October 2019, with detailed guidance on technical implementation at the end of last year. However, following stakeholder discussions as to the difficulty of applying a definition to some food and drink products, a decision was taken to consult on the guidance.

The launch of this consultation and the opportunity to respond will, therefore, be a relief for many in the sector. Responses must be submitted by 6 March 2020 and the consultation document, and the new draft technical guidance on food allergen labelling and information requirements (Draft Guidance) are now available on the FSA website.

Background

There is no definition of PPDS food in the EU Regulation governing Food Information for Consumers (EU FIC), which includes the legal requirement for food business operators to provide information on the 14 allergens that are specified under the EU FIC (including, for example, cereals containing gluten, nuts, peanuts and fish). However, the FSA previously produced technical guidance on allergen labelling, which provided an interpretation as follows:

This applies to foods that have been packed on the same premises from which they are being sold. Foods “prepacked for direct sale” are treated in the same way as non-prepacked foods in EU FIC’s labelling provisions. For a product to be considered “prepacked for direct sale”, one or more of the following can apply: (1) it is expected that the customer is able to speak with the person who made or packed the product to ask about ingredients; and/or (2) foods that fall under this category could include meat pies made on site and sandwiches made and sold from the premises in which they are made.

The overview to the 2019 consultation also went on to clarify what foods are not PPDS, namely:

- Foods that are not prepacked, such as loose items sold without packaging (e.g. fruit) and meals served in a restaurant or café
- Foods that are freshly prepared and wrapped after the consumer has placed their order, for example a sandwich or burger that is made and wrapped to order
- Preprepared but not prepacked, for example a sandwich or slice of pizza made in the morning and displayed behind a counter in anticipation of the lunchtime rush and subsequently wrapped for the consumer on ordering

Although the declaration of a specified allergen used in the manufacture or preparation of a food and still present in the finished product is mandatory for non-prepacked foods (including PPDS foods) under the EU FIC, there are currently no specific requirements in the UK on how this information must be given. Food business operators can provide the information in any way they see fit, including verbally (although if they will be relying on verbal information, they must also inform the consumer how they can obtain the information, by means of a label, notice, menu or ticket at the place where the purchaser chooses the food).

In 2018, DEFRA announced it would review the framework on allergen labelling in the UK and launched a consultation in early 2019, proposing a number of options for amending allergen information provisions, specifically for “foods prepacked for direct sale” (although the consultation also sought views on whether the government should also review allergen information for other types of food). One of those options was full ingredient labelling and the Food Standards Agency, along with others, supported this option. The Draft Guidance refers to anecdotal evidence indicating that it is often difficult for some consumers to distinguish between prepacked and PPDS foods, and that some consumers assume that the absence of allergen information on PPDS foods means food allergens are not contained in the product, whether or not this is the case. It also refers to public interest and significant media attention for individual cases. These are cited as the reasons for the amendments to the legal regime governing the way in which allergen information is provided for these foods.

¹ Figures from the FSA Technical Guidance on Food Allergen Labelling and Information Requirements

Legislation

The new legislation implementing the subsequent announcement of the government to introduce full ingredient labelling for PPDS foods was put before Parliament on 5 September 2019 and will become law on 1 October 2021. Under the regulations, the Food Information (Amendment) (England) Regulations 2019, PPDS foods must include information on each of the following:

- A list of ingredients, directly on the package or a label attached to it (complying with the requirements for the lists of ingredients for prepacked products), in a minimum font size, and which is conspicuous, visible and legible and, where appropriate, indelible (and not hidden/obscured/interrupted by other contents of the package/label).
- Any relevant ingredient/processing aid causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, in accordance with the requirements for prepacked foods i.e. in the required ingredient list of the product in a specified format (except where labels are not required to include an ingredient list, for example, in the UK, alcohol over 1.2% ABV), including being in a different typeset (commonly bold), with the derivative followed by the allergen, for example: cheese (**milk**), prawns (**crustacean**), skimmed **milk**.
- The legal name of the food.

Separate equivalent regulations are planned for Wales and Northern Ireland.

For retailers and food service businesses, of course, it is possible that they will sell both PPDS foods and other non-prepacked foods, such as unwrapped products on a delicatessen counter, or hot meals served in a canteen. Where that is the case, they will still need to retain any notices to customers (on labels or menus for example) that they can obtain allergen information for those other types of food by asking staff.

Consultation on Draft Guidance

The consultation document refers to the earlier definition of what is and is not PPDS foods, set out in the previous consultation (as summarised above). However, it also includes a suggested approach based on this position, which can be used to help determine whether or not a food is PPDS. This approach sets out three criteria, all of which must be met for a food to be PPDS, as follows:

- Is the food presented to the consumer in packaging?
- Is it packaged before the consumer selects or orders it?
- Is it packaged in the same place as it is sold?

If the answer to all three of these questions is “yes” for a particular product, then it is a PPDS food, according to this approach. The notes to the Annex confirm that in considering whether a product is packed, the relevant test is whether it is “a single item (the food and its packaging) presented to the consumer” and that “the food is completely or partially enclosed and cannot be altered without opening or changing the packaging.” This is actually part of the definition of prepacked foods within the EU FIC, so does not particularly move the discussion forward.

As part of the consultation, respondents are being asked to comment on whether this approach should also be included in the technical guidance.

The Draft Guidance itself (which will apply to England, Wales and Northern Ireland) includes a new part (Part 3) setting out guidance for businesses supplying PPDS food. Within the Draft Guidance, some further clarification is given as to what will constitute PPDS, as examples given of “non-prepacked” foods that will be unaffected by this change are “foods which are not packaged” and “those packed at the consumer’s request”. Specific practical examples of what will be covered (i.e. products that will be required to provide full ingredient labelling, with allergens and the name of the food) are given as follows:

- Sandwiches placed into packaging by the food business and sold from the same premises
- A café giving away packaged samples of a new range of cakes they have made on the same premises
- Foods packaged and then taken by the same operator to their market stall to sell
- A butcher who buys wholesale cuts of meat to make burgers or sausages that are prepacked to be sold on the same premises
- Foods produced and packed by a food business to be sold in its retail units located within the same building complex as the premises where the food was packed such as a train station, hospital, university or holiday park
- Fast food, if it has been packed by the same business in anticipation of an order, for example, a wrapped burger or boxed fried chicken placed under a hot lamp, where the contents cannot be altered without opening the packaging

For retailers, such as convenience stores and supermarkets, further relevant examples are given, but these are specified as only being relevant where they are packed on premises before they are offered for sale, (so if such products were displayed without packaging and only packed on request, they would not be considered as PPDS). This includes:

- Fresh pizzas from the deli counter
- Boxed salads
- Hot foods such as rotisserie chicken
- Foods that are preweighed and packed, such as cheese or meats from a delicatessen counter or baked goods from an in-store bakery

The Draft Guidance also includes examples of products that will not be considered as PPDS, by virtue of the fact that they are not prepacked within the definition under the EU FIC, as follows:

- Food on a non-disposable plate covered by cling film (because non-disposable tableware or crockery that remains the property of the food business is not considered to be packaging, e.g. a ceramic or china bowl, plate or cup)
- A freshly prepared sandwich or burger that is made and wrapped after taking an order
- A whole cake, sliced and presented in a box to be sold by the slice (which is not presented as a single item and is, therefore, not prepacked)

Although foods supplied by distance selling could be considered as PPDS, these are excluded from the requirements for ingredient labelling under the new legislation. This will include, for example, foods ordered online, or by telephone. However, PPDS food sold in this way must continue to have allergen information available to the customer before they buy the product and also when it is delivered to them.

If any food business operator believes that other types of products should be included within this list, or indeed specifically excluded, then responses should be submitted within the consultation period, with reasons. However, it is perhaps unlikely that the current definition of PPDS, or the legislation, will be overhauled completely at this stage.

Other Proposed Amendments

In addition to the changes for PPDS foods, the Draft Guidance includes updated information on the thresholds that must be met when labelling foods as “gluten free” and “very low gluten.” It clarifies a common misunderstanding, confirming that even where a product is labelled in this way, if the ingredients include a cereal, that cereal must still be highlighted. This is because it is the cereal that is the allergen, not the gluten. For gluten-free products, the relevant grain (such as wheat) is processed in such a way that the gluten is removed.

It also clarifies the requirements for single ingredient foods where the allergen is not in the name of the food. Although an ingredient list is not required, the allergen must be highlighted. Therefore, the product must be labelled with “Contains: [name of allergen(s)].” The example given in the Draft Guidance is gingelly oil, which is sesame oil and should, therefore, be labelled with “Contains: Sesame.”

A further amendment, in the section on PPDS foods, clarifies that foods that are packed on the same site (within a building complex, such as a shopping centre or airport terminal) and foods packed on a different site, if they are sold by the same business from moveable or temporary premises (such as a marquee or mobile vehicle), will be treated in the same way as foods packed within the same unit, i.e. as PPDS foods. This clarification is particularly helpful for operators of multiple units and, in some cases, multiple brands, within such complexes, where such foods could otherwise be considered as prepacked, rather than PPDS foods and might, therefore, have to otherwise meet additional requirements for the labelling of prepacked foods.

There are also various other “tidying up” amendments, which are summarised in an Annex to the consultation document.

What the Draft Guidance does not do, is to provide detailed guidance on how the labelling process should be undertaken for PPDS foods; and whether there are risks which are more likely to arise for PPDS foods, than for prepacked foods.

Potential Impact on Food Service Businesses, Retailers and Consumers

The requirement to accurately label ingredients in PPDS foods will likely be a challenge for many food business operators. Typically, such products will be prepared on the day of sale, the selection of PPDS foods sold may change from day to day, they will be prepared in a kitchen where other products are prepared and other ingredients are used, availability of ingredients may be subject to change and facilities for producing labels may be unsophisticated.

Some businesses, particularly smaller businesses, may decide that compliance with the requirements for their own-produced PPDS foods is too difficult, too costly, or too risky. That could lead to less consumer choice, if those businesses decide to buy in prepacked and labelled products from a third party supplier as an alternative, or even to close.

If the Draft Guidance is implemented in its current form, the exclusion of certain foods from the definition of PPDS could also lead businesses to change the way in which own-prepared products are supplied to consumers, for example by selling without packaging, or only preparing/preparing and packaging after the consumer has placed the order. This may have other implications for food safety (as well as profit margin) as packaging can help to prevent contamination and can be used to help stock rotation, for example by including a date/ time of production, and to aid traceability by identifying particular ‘batches’.

It may also lead to businesses stopping current practices of prepreparing common orders to help speed up service at busy times, for example, burgers usually made to order, but prepared in anticipation of orders before the lunch period (or at least not wrapping/sealing such orders). Therefore, this could impact customer service.

Potential Impact on Suppliers

Although suppliers of ingredients to food service businesses and retailers will not be affected directly by the changes for PPDS foods (as they do not sell directly to the consumer), there will almost certainly be a knock-on effect. Even for non-prepacked foods, suppliers are already obliged to provide information to their business customers on allergens (to enable those customers to meet their obligations to provide this information to the consumers). Where those customers supply PPDS foods, they will also need full ingredient information from suppliers, to allow them to comply with these obligations.

Food business operators are encouraged under the Draft Guidance to ensure they obtain the required information from suppliers. However, more generally, a greater awareness of the requirements for allergic customers is likely to mean a greater demand for transparency and controls around substitutions, recipe changes and new products, as well as ingredients.

Next Steps

The consultation closes on 6 March. Within three months of the consultation ending, the FSA aims to publish a summary of responses received. Interested parties should, therefore, review the Draft Guidance carefully, assess how the interpretation of the FSA could affect their business and respond about changes that they consider should be made, with reasons why. It is worth remembering that this is guidance only and cannot change the legal requirements, but will be persuasive in terms of how the new laws for ingredient labelling are applied and enforced in practice.

In the meantime, food service and retail businesses should review which of their products could fall within the definition of PPDS foods and, for those products, assess what procedures and safeguards will be required to ensure accurate labelling, not only of the 14 specified allergens under the EU FIC, but of all ingredients. The timescales required for implementation of those procedures, including staff training and the roll out of any IT/ hardware required will also need to be considered, as in real terms October 2021 will arrive fairly quickly.

In terms of alternatives to the implementation of ingredient labelling for own-prepared products, any proposal to remove packaging for the purposes of display (to ensure that own-prepared products fall outside of scope of the PPDS definition) will need to be carefully assessed to ensure that other safety considerations, such as contamination, are not compromised. Any proposal to move to third party prepacked product will also need to be implemented with a view to mitigating risks, in terms of assessing suppliers and supplier safeguards.

Of course, the responses to the consultation and any amendments to the Draft Guidance should also be monitored over coming weeks.

Author



Nicola Smith

Director

T +121 222 3230

E nicola.smith@squirepb.com