

Food Standards Agency

Review of the Food Standards Agency

Powers of entry

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Food Standards Agency Review of Food Standards Agency Powers of entry

1. The Food Standards Agency (FSA) was established in April 2000 as a non-Ministerial UK Government Department, operating at arm's length from Ministers. FSA is headed by a Chair and Board, who are appointed to act in the public interest. The FSA is an independent national regulator and the central competent authority for food and feed legislation. Section 1 of the Food Standards Act 1999 sets out that the main objective of the FSA is 'to protect public health from risks which may arise in connection with the consumption of food and otherwise to protect the interests of consumers in relation to food'. The FSA is guided by a set of core principles:
 - Putting the consumer first
 - Openness and transparency
 - Science and evidence based
 - Acting independently
 - Supporting businesses to comply with food law effectively

Executive Summary

2. The FSA has carried out a rigorous review process to consider each powers of entry (Powers of entry) under FSA responsibility. An Impact Assessment has been developed on proposals generated by the review and put to consumers, businesses and enforcement authorities in a consultation package. The results of the consultation found that stakeholders are supportive of the changes proposed.
3. The FSA review has resulted in the proposal to repeal one power of entry regarding monitoring for dioxins however this is pending the EU Commissions preliminary discussions aimed at reviewing Regulation 225/2012 on fats and oils. For the remaining 15 powers of entry, these are essential to ensure the effective enforcement of food safety legislation. Justification for the retention of the majority can be broadly separated into two areas. Firstly, to protect the food chain and ensure that detrimental impacts on consumers and businesses are minimised. Secondly, to monitor and audit the activities of the enforcement authorities to ensure that enforcement is taking place as required.
4. The FSA will be adding a warrant power to The Food Standards Act 1999. The warrant will be used where entry is refused or is likely to be refused when officials require entry for purposes of observing and monitoring the food chain.
5. The review also considered the safeguards associated with powers of entry alongside the standards set by the Government. The review found that changes were necessary to bring Powers of entry up to the Government standard in 5 areas.
6. The changes will not curtail the ability of officials to enforce food and feed law and to protect the public.

Review analysis

7. The FSA has legislative responsibility for powers of entry relating to many aspects of food and feed law which provide the legal basis for officials whether local authority (LA) officials, FSA officials or officials acting on behalf of the FSA to:
 - Enter premises to uphold food law.
 - Monitor and audit enforcement activities allowing entry to business premises, LAs and laboratories.
 - Enter premises across the food chain for the purposes of obtaining, and keeping under review, information about matters connected with food safety, such as monitoring scientific and technological developments, and conducting research.
8. FSA has 15 powers of entry that will be retained as removal would mean enforcement officers would be unable, for example, to investigate public complaints about unsafe and potentially unlawful activities. In addition unsafe food (including imported food) could continue to be placed on the market with a serious risk to public health. Unsafe food on the market can also have a serious economic impact to businesses with a loss of consumer confidence. These justifications for retention are expanded upon in broad terms below.
9. One power of entry concerning the monitoring of dioxin levels in feed will be considered for repeal pending the EU Commissions preliminary discussions aimed at reviewing regulation 225/2012 on fats and oils. The FSA will be adding a warrant power to The Food Standards Act 1999. The warrant will be used where entry is refused or is likely to be refused when officials require entry for purposes of observing and monitoring the food chain. This is in line with government requirements.
10. Powers of entry can either be authorised or require a warrant. A warrant is used where entry is refused, likely to be refused, or where the owner or occupier of a property cannot be found or where force is required.
11. Authorised powers of entry for officials cover routine powers of inspection as required under EU or UK law. Such routine inspection is often frequent and expected and the use of a warrant would be heavy-handed and disproportionate.
12. We do not have detailed statistics for the frequency with which powers of entry are used, whether authorised or warranted. Authorised powers of entry are used implicitly when FSA staff attend over 1500 approved meat premises on demand 365 days per year. Officials investigating potential breaches of food hygiene regulations will usually attend premises through consent arrangements with the Food Business Operator (FBO) but, when necessary (e.g. when they wish to raid premises) they will do so by warrant. In the period from 2008 to 2011, there were seven occasions when warrant powers were used. Feed Hygiene Powers of entry are also used implicitly whenever an enforcement officer enters business premises. The formal exercise of the Feed Hygiene Regulations warrant power is very rare.
13. Local authority officials in the financial year 2011/2012 made approximately 400,000 hygiene visits and over 127,000 visits relating to food standards. The vast majority of which would be by consent of the FBO. Information on the frequency of the exercise of warrant Powers of entry by LAs is not collected by the FSA.

Characteristics of Food Standards Agency Powers of entry

Food Hygiene

14. Food hygiene regulations establish the conditions under which food is produced to prevent pathogen contamination in food. In 2012 following a consumer complaint about a foreign body in a piece of chicken, investigative authorities uncovered an illegal non licensed cutting plant processing 20-30 tonnes of chicken per week. Utilising warrant powers in the food hygiene regulations, officials found the premises lacked any kind of safety management system, with defects such as car tyres stored in the cutting room. Without the warrant power the business could have refused entry and unsafe food could have continued to enter the market.
15. For routine inspection of premises, warrant entry alone would be a heavy-handed response to food and feed safety inspection regimes, one that would be a disproportionate and a costly response. Authorised entry powers are required to protect public health and animal health and welfare in Britain. For example verification, audit, and meat inspection services in approved fresh meat premises throughout England, Scotland and Wales are available on demand 24 hours a day, 365 days a year from FSA staff.

Food Safety

16. The Food Safety Act includes authorised and warrant entry to uphold the provisions relating to food safety requirements. These requirements cover the adding or subtracting of material making the food injurious to health and without such a power unsafe food could be placed on the market with a serious risk to public health.
17. Authorised entry allows routine inspection and covers key control points in a food processing system to check that at each stage of the process relevant safety systems are in place.
18. Warrant entry is required to ensure the safety of the food chain if there has been a dispute about whether the enforcement officer can enter a premises or if the premises is not currently occupied and where entry is required if there is an urgent food safety issue to tackle. Warrant entry has been used in for example ensuring illegal and potentially dangerous alcohol was no longer available. In June 2010 Salford City Council, as part of its pre-Football World Cup clamp down on illicit alcohol, carried out a large scale investigation that resulted in the seizure of large amounts of counterfeit product. The investigation targeted 71 shops and pubs, some of which were known to have previously sold illegal alcohol. Some of the seized vodka contained high levels of potentially harmful methanol.

Animal Feed

19. Animal feed regulations include authorised and warrant entry giving authorised officers powers of entry for the purposes of checking compliance with feed legislation. These regulations are being consolidated with a commencement date in April 2015.
20. Various high-profile unsafe or contaminated feed incidents over the past two decades have occurred. Some of these incidents have involved deliberate fraud or criminal activity (e.g. lead in milk 1989, dioxins in fats in Belgium 1999, melamine in soya bean meal 2008), which point to the potentially serious consequence of repeal of these powers. Authorised entry is available to authorised officials for routine inspections. Warrant entry is available in circumstances where it is thought that entry will be denied, or where officers have evidence that an offence has been committed, so that entry can be forced if necessary.

Imported foods

21. Warrant and authorised powers of entry are available to allow authorised officers to check that imported food is safe.
22. Many food safety problems in the UK are caused by imported food (in 2012 FSA dealt with 627 incidents relating to food imported from non-EU countries). Authorised entry will be used for routine inspections while entry by warrant allows an enforcement officer to check the safety of imported food if there has been a dispute about whether they can enter or if the premises are unoccupied.

Monitoring and audit

23. Powers of entry to monitor and audit enforcement authorities (and control bodies such as laboratories) act as a check that authorities are carrying out their duties in delivering official controls in line with EU obligations. They ensure consistency of performance across authorities therefore providing confidence in the enforcement system for consumers and businesses alike.
24. Without powers of entry, the FSA would not be able to ensure that records and systems, both at the premises of the local authority and at the premises they were inspecting, could be checked.
25. Warrant powers are available to enter a control body's premises if authorised admission has been refused, or a refusal is expected. In general however, authorised powers of entry are used for routine audit checks.

Detailed proposals for each Food Standards Agency Power of Entry

26. *Food Safety Act 1990 section 32 (1)*
<http://www.legislation.gov.uk/ukpga/1990/16/section/32>
27. These powers of entry enable entry by an authorised officer of the enforcement authority to uphold provisions relating to ensuring food safety. Entry may be required to enforce the legislation around making food injurious to health.
28. This is the primary legislation under which numerous secondary instruments are made, including secondary legislation under the remit of Defra. Defra have been consulted and agree to the retention of the Powers of entry.
29. FSA proposes to retain these powers of entry on public health grounds.
30. *Food Safety Act 1990 section 32 (2)*
<http://www.legislation.gov.uk/ukpga/1990/16/section/32>
31. This enables warrant entry, without which, unsafe food could be placed on the market with a serious risk to public health when an uncooperative business is involved.
32. FSA proposes to retain these powers of entry on public health grounds.
33. *Official Feed and Food Controls (England) Regulations 2009, regulation 9(4)*
<http://www.legislation.gov.uk/uksi/2009/3255/contents/made>
34. This regulation gives powers of entry to an individual authorised by the FSA to inspect premises as part of its function of monitoring the performance of enforcement authorities. The audits act as a check that the authorities are carrying out their duties in delivering official controls in line with EU obligations. It also helps to ensure consistency of performance across authorities which is beneficial to business. Without powers of entry, the FSA would not be able to ensure that records and systems, both at the premises of the local authority and at the premises they were inspecting, could be checked. Inspection of enforcement activity is important to maintain consumer protection.
35. FSA proposes to retain these powers of entry to allow the FSA to audit the delivery of official control as it is an important aspect of public protection.
36. *Official Feed and Food Controls (England) Regulations 2009 regulation 18(1)*
<http://www.legislation.gov.uk/uksi/2009/3255/contents/made>

37. This regulation gives powers of entry to an authorised officer of a relevant enforcement authority other than the FSA to enter a premises to ascertain whether there has been a failure by a control body (such as a laboratory) in its duties. The powers of entry ensure that a local authority can check that a contractor, such as a laboratory, is carrying out its work properly and with due regard to safety procedures and adhering to the terms of its contract. These powers of entry should be retained as the enforcement authorities should always have the legal authority to enter and inspect official control laboratories if the need arises (for example in response to a whistle-blowing incident).
38. FSA proposes to retain these powers of entry to allow control bodies to be inspected: Control bodies have an important role in public health protection.
39. *Official Feed and Food Controls (England) Regulations 2009 regulation 18 (2)*
<http://www.legislation.gov.uk/ukxi/2009/3255/contents/made>
40. This regulation gives powers of entry to an authorised officer of the FSA to enter a control body's premises to check that a contractor such as a laboratory is carrying out its work properly and with due regard to safety procedures and adhering to the terms of its contract.
41. FSA proposes to retain these powers of entry on public health grounds. The arguments for retention are the same as for OFFC 2009, regulation 18 (1).
42. *Official Feed and Food Controls (England) Regulations 2009, regulation 18 (3)*
<http://www.legislation.gov.uk/ukxi/2009/3255/contents/made>
43. A Justice of the Peace (JP) may authorise an officer to enter a control body's (e.g. a laboratory's) premises with a warrant if admission to a premises has been refused, or a refusal is expected and notice to apply for a warrant has been served, or if an application for admission would defeat the purpose of entry, or urgent action is needed, or the premises are unoccupied, or the occupier is temporarily absent.
44. This ensures that the FSA or a LA can apply to a JP to check that a contractor such as a laboratory is carrying out its work properly and with due regard to safety procedures and adhering to the terms of its contract, if there is a dispute about whether the FSA/ LA should enter in this case.
45. FSA proposes to retain these powers of entry on public health grounds. The arguments for retention are the same as for OFFC 2009, regulation 18 (1).
46. *Official Feed and Food Controls (England) Regulations 2009, regulation 39 (1)*
<http://www.legislation.gov.uk/ukxi/2009/3255/contents/made>

47. These powers give an authorised officer of a food authority the right to enter a premises to ascertain whether there is or has been a contravention of the import provisions specified in these regulations, or to see whether there is evidence of this or to exercise their functions under the import provisions. Many food safety problems in the UK are caused by imported food (in 2012 FSA dealt with 627 incidents relating to food imported from non-EU countries). This allows an authorised officer to check premises to ensure that imported food is safe.
48. FSA proposes to retain these powers of entry on public health grounds.
49. *Official Feed and Food Controls (England) Regulations 2009, regulation 39 (2)*
<http://www.legislation.gov.uk/uksi/2009/3255/contents/made>
50. This regulation gives a JP power to issue a warrant to an authorised officer to enter premises where there are reasonable grounds for entry in relation to performance of their authority under the import provisions specified in these regulations.
51. This ensures that a JP can issue a warrant so that an enforcement officer can check the safety of imported food if there has been a dispute about whether they should be able to enter, or if the premises are not currently occupied, which could be particularly useful if there is an urgent food safety issue to tackle.
52. FSA proposes to retain these powers of entry on public health grounds.
53. *Food Standards Act 1999 section 11*
<http://www.legislation.gov.uk/ukpga/1999/28/section/11>
54. Section 11 of the Food Standards Act 1999 set out specific powers to help the FSA fulfil its general function of obtaining and keeping under review any information relevant to its work. The power of entry allows the gathering of information on food safety and related matters through undertaking surveillance programmes or by other appropriate means for this purpose. The FSA can conduct such work at any point in the food production and supply chain and anywhere else where there might be implications for food safety and any other interests of consumers in relation to food.
55. The powers of entry are necessary to obtain information, either directly or through an authorised person acting on its behalf. Examples of the types of observations that the FSA might carry out are surveillance to investigate the presence of pathogens or contaminants such as lead, or surveys of hygiene practices.

56. The powers of entry relate to the gathering of information of a general and representative nature and not to the investigation of individual complaints or failures for which the enforcement powers in the Food Safety Act 1990 and other powers will continue to be used by the FSA and other enforcement authorities. Since the observations made under this section are not intended for enforcement purposes, there is no requirement that these powers be used to gather evidence in accordance with the kind of safeguards contained in the Police and Criminal Evidence Act 1984, and thus any information obtained could not in general be used directly for the purposes of food law enforcement.
57. Where apparent problems were identified in the course of a surveillance exercise, the information gathered would need to be passed on and any follow up action required would need alternative powers of entry such as through the Official Feed and Food Controls Regulations and the Food Safety Act (see above).
58. A collaborative approach with the various food businesses in the food chain is seen as an appropriate course of action before observations and surveillance under this power of entry would be utilised. Political, media, and reputational risks for businesses not complying with any requests from the FSA to monitor at any point in the food production and supply chain should deliver sufficient impetus to ensure that such functions could be carried out without the use of specific entry powers; however, this may not be the situation in all cases.
59. Potentially, repeal of these powers of entry could lead to a situation where the complicated dynamics of the food chain could not be investigated or reviewed in sufficient detail to reach sound conclusions when considering potential policy changes or possible enforcement action (using other powers) to ensure the safety of the food chain.
60. FSA proposes to retain the power on public health and other consumer grounds. In addition a warrant provision will be added to act as a backstop power in cases where entry is refused, is likely to be refused, where the owner or occupier of a property cannot be found or where force is required. This change will be made in 2015 and is in line with the government requirements.
61. *Food Standards Act 1999 section 14*
<http://www.legislation.gov.uk/ukpga/1999/28/section/14>
62. This FSA power to ensure entry into LAs and business premises is required in case of failing systems or a serious incident e.g. where a failing LA service refuses entry or following a serious national or international food incident requiring remedial measures and intervention - possibly under emergency circumstances.
63. Without the power, the FSA would not be able to fulfil its duties under national and European law to audit and monitor LA delivery of official food and feed controls, and may not be able to intervene in the event of serious failure with resulting risks to public health and international trade.

64. FSA proposes to retain the power on public health grounds. In addition the warrant provision outlined above will be available in cases where entry is refused, is likely to be refused, or where the owner or occupier of a property cannot be found or where force is required.

Consolidations

Animal Feed

- *Feed (Hygiene and Enforcement) (England) Regulations 2005 24 (1) and (2)*
 - *Feed (Hygiene and Enforcement) (England) Regulations 2006 24A (1)*
65. The Animal Feed related SIs mentioned above have been consolidated into the Animal Feed (Hygiene, Sampling etc. and Enforcement) (England) Regulations 2015 which has yet to be enacted. The consolidation will mean that there will continue to be 2 powers, warrant and authorised entry, to enforce feed law. A third power to carry out monitoring for dioxin threshold levels, will be considered for repeal pending the EU Commissions preliminary discussions aimed at reviewing Regulation 225/2012 on fats and oils. These have commenced at the Standing Committee level in Brussels.
66. The consolidated powers of entry continue to be necessary to check compliance with feed legislation. The powers of entry allow officials to inspect premises for potential illegal activities and take samples. Without these powers, where there was non-compliance, illegal activity could go undetected with potential adverse effects on the health of both animals and human consumers of animal products. There have been various high-profile unsafe or contaminated feed incidents over the past two decades, some of which involved deliberate fraud or criminal activity (e.g. lead in milk 1989, dioxins in fats in Belgium 1999, melamine in soya bean meal 2008). These point to the potential serious consequences of repeal.
67. FSA proposes to retain powers of entry relating to animal feed in order to protect public health. The authorised entry power to monitor dioxin levels will be considered for repeal pending the EU Commissions preliminary discussions aimed at reviewing Regulation 225/2012 on fats and oils.
68. It is anticipated that the consolidated powers of entry will be in place by April 2015

Food Hygiene

- *Food Hygiene (England) Regulations 2006 14 (1)*
 - *Food Hygiene (England) Regulations 2006 14 (2)*
 - *Food Hygiene (England) Regulations 2006 14 (3)*
69. The food hygiene regulations above have been consolidated in the Food Safety and Food Hygiene (England) Regulations 2013.
<http://www.legislation.gov.uk/ukxi/2013/2996/contents/made>
70. The consolidated regulations contain three powers of entry. These are; authorised entry for a food authority, authorised entry for a FSA official, and warrant powers.

71. The powers of entry remain important to protect the food chain and ensure that detrimental impacts on consumers and businesses are minimised by stopping unsafe food being placed on the market. Food hygiene regulations establish the conditions under which food is produced to prevent pathogen contamination in food. Without powers of entry, investigative authorities would not be able to uncover incidents of illegal activity such as the serious failures in hygiene practices found in 2012 at a non-licensed cutting plant for chicken.
72. FSA proposes to retain these powers of entry relating to food hygiene in order to protect public health.

Additional Safeguards

73. The Government requires that all necessary powers of entry should have as many relevant safeguards attached to them as possible in order to protect individuals and businesses from intrusion. The review has considered these safeguards alongside those associated with FSA powers of entry. We propose to add the following safeguards to all relevant¹ Powers of entry or to the FSA statutory Codes of Practice and associated Practice Guidance. This will bring FSA Powers of entry into line with the Government requirements.
74. *Safeguard: Private dwellings.* Private dwellings will be entered only with consent of owner/occupier or by court warrant. The wording of section 32 of the Food Safety Act 1990 will be amended slightly to remove the right to enter without consent, and in the absence of a court warrant, provided 24 hours' notice has been given. The FSA intends to effect this change using the new order-making power in section 41 of the Protection of Freedoms Act, which permits the amendment of powers of entry in primary legislation for the purpose of adding safeguards.
75. The same adjustment will be made to secondary legislation that does not utilise the entry powers in the Food Safety Act 1990.
76. It would take approximately six months for such a statutory instrument to be drafted, approved through the relevant legislative procedures, and come into effect.
77. *Safeguard: Reasonable notice of entry:* This is to be provided to the owner/occupier in all instances, except where notice would defeat the object of entry, would contravene EU law or in an emergency. The consultation has revealed that it is the usual practise of authorised officers to make appointments with businesses they want to inspect/enter, unless notice would defeat the object of entry, would contravene EU law or in an emergency. The addition of the safeguard will give the legal force to current practice.
78. The FSA proposes to add this safeguard through the mechanism noted above for the safeguard concerning private dwellings.

¹ The Food Standards Act 1999 section 11 power does not allow entry to private dwellings therefore the addition of the safeguard relating to private dwellings would not be applicable.

79. *Safeguards: Premises are to be left in as near as possible to the condition in which they were at the time of entry.* As above, the FSA proposes to add this safeguard through a single, general amending statutory instrument coming into force in 2015.
80. *Safeguard: Information on how long seized items can be held for or whether they are held as evidence pending court proceedings.* This will be provided by the enforcement official. The FSA proposes to add this safeguard through a single, general amending statutory instrument coming into force in 2015.
81. *Safeguard: Information about redress and a receipt for seized items to be provided by the enforcement official, and record-keeping on instances when powers of entry have been used.* The FSA considers that the appropriate way to implement these safeguards is to include them in the FSA's statutory Food and Feed Law Codes of Practice (and associated Practice Guidance). This will be undertaken in 2014/5.

