

Use By dates

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.

This means that even though the requirement to place a minimum durability 'use by' date on food which is highly perishable and likely to constitute an immediate danger to human health is contained in 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 is considered to be in breach of Article 14 of Regulation (EC) No 178/2002 and enforcement action would be required. Regulation 19 of The Food Safety and Hygiene (England) Regulations 2013 in England or Regulation 4 of the General Food Regulations 2004¹ elsewhere in the UK make the breach of article 14 of 178/2002 (as well as other EU provisions specified in the Regulations) an offence. Note should be taken of The Food Safety Act 1990², Part 1, Section 2 extended meaning of 'sale'.

The only scenario which a product with an expired 'use by' date can be used is when caterers freeze down a product prior to the 'use by' date expiring and use it as an ingredient in another product which is intended for the final consumer. In this instance, the caterer would have to have robust documentation to demonstrate when the product was frozen. The FBO must also be able to demonstrate that the defrosted food is prepared in such a way that is safe, for example a documented procedure for a time within which the food, once defrosted is used and how it will be used, for example as an ingredient in a cooked food. There are no other scenarios when a product for which the use by date has expired can be placed on the market and under no circumstances can product with an expired 'use by' date be placed on the market in its original form.

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 is automatically 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.** Please see link to the Torfean v Douglas Willis appeal judgement.

https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0087_Judgment.pdf

If food is discovered either on the market or in a situation where it is being prepared ready to be placed on the market with an expired use by date, the enforcement officer should take the relevant action under Section 9 of the Food Safety Act 1990³, and if necessary prosecution can be pursued in accordance with Regulation 19 of The Food Safety and Hygiene (England) Regulations 2013 in England or the General Food Regulations 2004 elsewhere in the UK.

Competent Authorities/Enforcement Authorities

In England, Regulations 4 and 5 of The Food Safety and Hygiene (England) Regulations 2013⁴ set out the competent authorities and the enforcement authorities for the provisions contained in Regulation (EC) No 178/2002 which are delegated to the food authority/district council in Northern Ireland in each area or district.

¹ In Northern Ireland it is Regulation 4 of the General Food Regulations (Northern Ireland) 2004

² In Northern Ireland it is Article 2(4) and Article 3 of the Food Safety (Northern Ireland) Order 1991

³ In Northern Ireland it is Article 8 of the Food Safety (Northern Ireland) Order 1991

⁴ In Northern Ireland competent authorities and enforcement authorities are set out in Regulations 3 and 6 in the General Food Regulations (Northern Ireland) 2004

The powers are delegated to the food authorities and not specific professions; therefore it is possible for either EHOs or TSO to take appropriate action. Enforcement action should only be taken by officers who have the required authorisation to do so.

Situations to consider from a Food Officer's perspective:

- 1) **Retail display of food with expired use by dates**– if the use by date on the label has expired, that food is considered to be unsafe in accordance with Article 14 of Regulation (EC) No 178/2002. There is no requirement for the TSO or EHO to demonstrate that the food is actually unsafe nor is it a defence for the FBO to prove 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 durability indication at retail without altering FBO details on the pack** – At retail, there should be no scope to amend a 'use by date'.
- 3) **Changing durability indication AND altering FBO details on the pack (retail)** – There is no remit for a retailer to change the durability date.
- 4) **Delicatessen slicing cooked ham. Packaging relating to it carries a use by date, which has expired.** - If the use by date has expired, food is considered to be unsafe in accordance with Article 14 of Regulation (EC) No 178/2002. Delis should have systems in place in order for them to tally the product for sale at the deli counter with the mandatory information, including the durability date, which should accompany food and validated HACCP/FSMS that identifies and controls this added hazard. If there is no durability 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 deemed unsafe.
- 5) **Caterer reheating pies that had packaging stating an expired use by date** - If the use by date has expired, food is considered to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002. Reheating the food is not a defence; it is still placing food considered to be unsafe onto the market. At the time the pies are in possession for sale (extended meaning of sale) they are out of date and "sold" regardless of the subsequent heating process.
- 6) **Caterer holding foods with expired use by dates in the fridge. Claims they will be used as ingredients in cooked products** - If the use by date has expired, food is considered to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002. 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. No record of date of freezing.**- The only flexibility which has been agreed for caterers extending use by dates is when a product is frozen down prior to its expiry date and it is used once thawed as part of another food. Records must be kept to demonstrate when this was undertaken and the product is marked to provide the information. If the FBO cannot 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. This would also breach the provisions for HACCP.
- 8) **Non-retail business for example, wholesaler holding frozen products with expired use by dates who claims they were going to be stripped of packaging before being sold on Best Before Dates (BBDs) whilst still frozen** - If the use by date has expired, food is considered to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002 unless there is documentary evidence demonstrating when the product was frozen before its use by date and the product has been marked with the date of freezing. The product cannot be sold to other food businesses or the final consumer in that state, but can be used by the caterer as an ingredient to prepare other food which can be supplied to the final consumer. Please see link to SFBB on freezing:
<http://www.food.gov.uk/sites/default/files/multimedia/pdfs/publication/freezing-sfbb-0513.pdf>
- 9) **Business holding frozen ex-factory off-cuts in a dolav / palletised in 5kg boxes marked with a Use By date.**

Not capable of being supplied to consumers in that form, but can be supplied to mass caterers - If the use by date has expired, food is considered to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002. The only conditions which could lead to the life being extended would be if the product had been frozen prior to the expiry of the use by date and there being appropriate documentation and controls in place. The frozen (expired) product cannot be supplied to other food businesses or the final consumer in this state.

- 10) **Food processor holding cooked meats bearing use by date that has expired and is slicing and putting the slices into retail packs** – The sliced cooked meats would be considered to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002.
- 11) **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 the only circumstance where a product can be frozen to be used beyond its use by date. The product can only be used as an ingredient in another product intended for the final consumer.