



The Society of
Food Hygiene
and Technology



Food Law and Due Diligence Defence

INTRODUCTION

This document explains the general requirements of food law and covers the main EC and UK legislation on food imports and exports, safety, traceability, labelling and product withdrawals and recalls.

The also explains the concept of due diligence defence: No person or company should be guilty of a criminal offence for an act or omission which could not be reasonably avoided. When offences of strict liability were introduced into trading legislation about 150 years ago, Parliament recognised that a failure to comply with the law, which was not intended but which resulted in automatic conviction, would be too harsh.

A way of reducing the impact of the absolute offence and of bringing some natural justice into the enforcement of criminal trading law was required. Honest traders, who made an innocent mistake or who had a bit of bad luck, should not be convicted provided they could show that they had done all that a competent person in their trade could do to avoid the offence.

Food Law and Due Diligence Defence



THE LAW

The main food laws which apply in the UK are:

- **The Food Safety Act 1990 (as amended)** provides the framework for all food legislation in Great Britain – similar legislation applies in Northern Ireland. See the guidance for food businesses on the Food Safety Act 1990.
- **The General Food Law Regulation (EC) 178/2002** is EC legislation on general food safety. See the guidance on General Food Law Regulation (EC) 178/2002.
- **The General Food Regulations 2004 (as amended)** provides for the enforcement of certain provisions of Regulation (EC) 178/2002 (including imposing penalties) and amends the Food Safety Act 1990 to bring it in line with Regulation (EC) 178/2002. Similar legislation applies in Northern Ireland.

Main food safety and consumer protection offences created by the Food Safety Act 1990:

- Section 7: rendering food injurious to health by:
 - adding an article or substance to the food
 - using an article or substance as an ingredient in the preparation of the food
 - abstracting any constituent from the food
 - subjecting the food to any process or treatment with the intention that it shall be sold for human consumption.
- Section 14: selling to the purchaser's prejudice any food which is not of the nature or substance or quality demanded by the purchaser.
- Section 15: falsely describing or presenting food.
- Under section 20, if the commission of an offence is due to the act or default of another person, the other person is guilty of the offence.
- Under section 21 in any proceedings for a relevant offence it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control.



MAIN PROVISIONS OF THE GENERAL FOOD LAW REGULATION (EC) 178/2002 THAT APPLY TO FOOD BUSINESS OPERATORS:

Imports

Article 11 states that food imported into the European Union (EU) for placing on the market shall comply with the requirements of food law recognised by the EU, or if there is a specific agreement between the EU and the exporting country, those requirements.

Exports

Article 12 states that food exported (or re-exported) from the EU shall comply with the requirements of food law, unless the authorities of the importing country have requested otherwise, or it complies with the laws, regulations and other legal and administrative procedures of the importing country.

In the case of exporting or re-exporting food, provided the food is not injurious to health or unsafe, the competent authorities of the destination country must have expressly agreed for the food to be exported or re-exported, after having been fully informed as to why the food could not be placed on the market in the Community.

Where there is a bilateral agreement between the EU or one of its Member States and a third country, food exported from the EU needs to comply with its provisions.

Safety

Article 14 states that food shall not be placed on the market if it is unsafe. Food is deemed to be unsafe if it is considered to be:

- injurious to health
- unfit for human consumption

The article also indicates what factors need to be taken into account when determining whether food is injurious to health or unfit.

Food Law and Due Diligence Defence

Presentation

Article 16 states that labelling, advertising and presentation, including the setting in which the food is displayed, of food shall not mislead consumers.

Traceability

Article 18 requires food business operators to keep records of food, food substances and food-producing animals supplied to their business, and also other businesses to which their products have been supplied. In each case, the information shall be made available to competent authorities on demand.

Withdrawal, recall and notification

Article 19 requires food business operators to withdraw food which is not in compliance with food safety requirements, if it has left their control and to recall the food if it has reached the consumer.

Withdrawal is when a food is removed from the market up to and including when it is sold to the consumer, recall is when customers are asked to return or destroy the product.

Food businesses must also notify the competent authorities (their local authority and the Food Standards Agency). Retailers and distributors must help with the withdrawal of unsafe food and pass on information necessary to trace it.

Where food business operators have placed a food on the market that is injurious to health, they must immediately notify the competent authorities. There are also similar provisions for animal feed.

Offences and penalties laid down by the General Food Regulations 2004

Regulation 4 creates criminal offences for breaches of Articles 12, 14(1), 16, 18(2) or (3) and 19 of the General Food Law Regulation (EC) 178/2002.

Food Law and Due Diligence Defence



Regulation 5 lays down the penalties for the breaches of the articles listed above:

- on conviction in a Crown Court, a fine or imprisonment for a term not exceeding two years or both
- on conviction in a Magistrates' Court, a fine or imprisonment for a term not exceeding six months or both

The defences under sections 20 and 21 of the Food Safety Act also apply to these regulations.

Food hygiene legislation

Food hygiene legislation is closely related to the legislation on the general requirements and principles of food law.

The legislation lays down the food hygiene rules for all food businesses, applying effective and proportionate controls throughout the food chain, from primary production to sale or supply to the food consumer.

THE DUE DILIGENCE DEFENCE

Where a relevant offence has been committed (relevant being where one of the principal offences against the Act or offences against regulations to which the defence, in whole or in part, has been applied). there then follows a series of what have become known as deemed provisions.

1. A person charged with an offence against s 8 of the Act (the food safety requirement), s 14 (food not of the nature, substance or quality demanded) or s 15 (false or misleading description or presentation of food) who neither prepared the food nor imported it into Great Britain, is taken to have established the defence if he proves that:

- a. the commission of the offence was due to an act or default of another person (eg a supplier) who was not under his control, or to reliance on information supplied by such a person;

Food Law and Due Diligence Defence

- b. he carried out all such checks of the food in question as were reasonable in all the circumstances, or that it was reasonable in all the circumstances for him to rely on checks carried out by the supplier; and
- c. he did not know and had no reason to suspect at the time of the commission of the offence that his act or omission would amount to an offence.

2. The defence is deemed to have been satisfied if the accused proves:

- a. that the commission of the offence was due to an act or default of another person who was not under his control, or to reliance on information supplied by such a person;
- b. that the sale or intended sale of which the alleged offence consisted was not a sale or intended sale under his name and mark; and
- c. that he did not know, and could not have been reasonably expected to know, at the time of the commission of the alleged offence that his act or omission would amount to an offence under the relevant provision.

RELEVANT PROVISION

In addition to offences against the Food Safety Act 1990, s 8, 14 and 15, the defence has been applied to a wide range of regulations made under the Food Safety Act 1990. In some instances the deemed provisions are omitted or changed and in others, the defence is applied in modified form or not at all.

In all cases it is necessary to check the regulations to see what defences are applicable to them.



PROOF

In criminal cases the burden of proof of guilt lies with the prosecution. They must prove beyond reasonable doubt that the accused committed the offence. The defence of due diligence reverses the burden of proof. It is for the accused person to prove that on balance of probability he has fulfilled the requirements of the defence and ought to be acquitted.

Proof requires, in some cases, more than just verbal evidence of the precautions taken by the defendants. There must be a system which is written down and documentary proof that the checks, tests, inspections and supervision necessary to avoid the commission of the offence have been regularly carried out.

However, it has been held that the extent and level of checks carried out depends on the size and resources of a company. The system that would be expected from a large national company would not be expected from a small business. Each case must be judged on its merits, that is, what is reasonable in all the circumstances.

ALL REASONABLE PRECAUTIONS AND ALL DUE DILIGENCE

All reasonable precautions means that everything that could be anticipated by a person skilled in the trade or profession and which might lead to the commission of an offence must be identified and adequate controls put in place. The word all is important. The need for precautions does not just cover those things that may have gone wrong in the past but those which might be reasonably anticipated. Thus each stage of the mixing, production, preparation, packaging, handling and distribution of food must be identified and control systems for them written down. Consumer complaints, for example, would be an important part of the system for they would, where justified, indicate where things were going wrong.

Food Law and Due Diligence Defence

All due diligence means that the control system must be seen to be operating, must be checked and, where necessary, rectified. The checks must be recorded so that they can be used in evidence if necessary.

THE DEEMED PROVISIONS

The part of the due diligence defence described at (a) above is, in the main, directed at retailers and caterers. The thinking behind this provision is that where a retailer, for example, is buying food for resale from another company over which he has no control, then it would be reasonable for him to rely on assurances given by the supplier, by reasonable checks as required, or by reliance on the checks carried out by the supplier and that there was no reason to believe that an offence was being committed in respect of the food concerned. To put the retailer in the position where he was obliged to carry out a full due diligence system in respect of every product purchased for resale knowing that the supplier himself had carried out all the checks would be clearly absurd. The law takes the commonsense path and steers a middle course so that both the supplier and the retailer take a fair share of responsibility.

The deemed provisions in (b) above apply to branded goods, that is, own label products are excluded. The part of (a) which requires the carrying out of checks by the retailer or reliance on the checks carried out by the supplier is omitted because the supplier is expected to take full responsibility for his own branded products. Note, however, that the retailer must still be able to prove that he did not know and could not have been expected to know that the food might give rise to an offence.

The position of a caterer is that if he is buying packaged and branded foods which he opens and uses in the preparation of meals then he could probably rely on the deemed provisions of the defence. Such, however, would not

Food Law and Due Diligence Defence



apply to raw foods that he subsequently cuts up and cooks. In that capacity he has prepared the food and the deemed provisions do not apply. In other words, he must have and prove a full due diligence defence.

PRECEDENTS

Defences similar to that in the Food Safety Act, s 21 appear in a number of statutes controlling trading activities. They are usually of the single limbed type and do not include the deemed provisions discussed above. It is not surprising that they have been the subject of much litigation following which the superior courts have created certain precedents which must be followed in similar cases arising in the future. Most of them were from cases brought under trade descriptions law, consumer safety (non-food) law and weights and measures law. The principles laid down in these cases are likely to be followed in food cases but the variety and uniqueness of food related problems are such that the precedents should be considered with caution. The following is a brief summary of some of the most relevant judgements.

Control of the due diligence system

The system must be controlled by the directing mind and will of the company but the principal of the company may delegate responsibility for the system to superior servants under their contracts of employment with him. The company may also employ consultants or agents to operate the system.

The extent of the due diligence system

The precautions and checks to be taken depend on the size and resources of the company, the risk imposed by the products concerned and all other relevant circumstances of the case.

Food Law and Due Diligence Defence

Warranties and Assurances

Reliance cannot be placed on warranties and general assurance from suppliers alone, but may form part of the defence for persons who have not prepared the food nor imported it. The due diligence system requires active participation by the company.

Records and Instructions

The due diligence system must be written down with adequate instructions and training being given to staff. Records must be kept of the checks made to ensure that the system is working properly.

Taking Precautions

Any reasonable precautions which can be taken, must be taken and the system must be proactive and reactive, i.e., it must be capable of detecting faults and correcting them.

Consumer Complaints

Complaints from consumers should be recorded and analysed to detect any trends which may indicate a fault in the system.

Responsibilities

The responsibilities of directors, managers and employees should be stated in writing and acknowledged by them.

Modification

The due diligence system must be reviewed, modified, adjusted and amended as required.

Food Law and Due Diligence Defence



Codes of Practice

Internal or external Codes of Practice may contribute to a due diligence system but are not sufficient in themselves. (See, however, the special status of guides of good hygiene practice in the Food Safety (General Food Hygiene) Regulations 1995).

The System

The system must cover all aspects of the business which is subject to the Act or to regulations made thereunder including:

- hygiene and safety of premises and equipment;
- quality, composition and safety of food products;
- labelling, presentation and advertising;
- staff training;
- registration and licensing as appropriate;
- improvement notices, prohibition or control orders as may be applicable.

Food Law and Due Diligence Defence



THE SYSTEM IN OPERATION

There have been very few points of law referred to the higher courts for interpretation under the Food Safety Act 1990.

This is due in part to the fact that most of the fundamental points had already been settled by cases pre-dating the Act, and that the statutory codes of practice issued to enforcement authorities under section 40 of the Act laid down the parameters of what was expected of food businesses and the manner of enforcement to be adopted.

It is now clear that most food enforcement officers understand very well what constitutes a good due diligence system and do not prosecute in cases where that system is likely to succeed in court.

This fact, together with the administrative sanctions available to enforcement officers such as the power to issue improvement notices, has resulted in a constructive and generally harmonious relationship between enforcement officers and the food industry to the benefit of all concerned.

Thus the due diligence defence should not be viewed solely in a context of legal proceedings but as an integral and essential part of good food production and distribution practice.