

Background

The recent horse meat investigation by the Food Standards Agency (FSA) and other bodies across Europe has uncovered that a number of products sold or labelled as beef contain equine DNA (horse meat). A number of sample results have also indicated the presence of porcine DNA (pork meat) in beef and chicken products, which can have particular relevance to faith groups where products are marketed as halal or kosher.

Legal Obligations

There are a number of legal obligations on food businesses under various pieces of EU and UK legislation which are potentially relevant in light of this investigation.

These include prohibitions on:

- a) Food being placed on the market if it is injurious to health (with the horse meat scandal, the prime concern initially was whether horse meat in the food chain contained bute);
- b) Selling food which is not of the nature, substance or quality demanded (FSA Guidance notes that this specifically includes a product sold as one thing which is in fact another, or which contains additional ingredients);
- c) Falsely describing or presenting food;
- d) Failing to comply with traceability requirements;
- e) Using a particular name for a particular product unless it complies with specified minimum meat contents; and
- f) Misleading actions and omissions which cause or are likely to cause the average consumer to take a different decision.

Failure to comply with any of these requirements is a criminal offence. For the more serious offences, the penalties are severe, with unlimited fines and up to two years' imprisonment for convictions on indictment. These are, of course, in addition to any reputational damage to the brand, which could be even more damaging to a business long term.

In the short term, it is likely, that any enforcement action will be aimed at those parties within the food chain who have knowingly sought to obtain a financial advantage by selling horse meat as beef.

However, in future, enforcement officers may well look more closely at the integrity of supply chains, labelling and descriptions of food generally across a range of food businesses including producers, packagers, retailers and caterers.

Reasonable Precautions – Horses for Courses

The offences for failure to comply with the legal requirements set out above are strict liability. This means that you do not have to intend to breach the requirements to be found guilty.

However, a due diligence defence is available. Therefore, to minimise risks, food businesses should consider implementing procedures and reasonable precautions aimed at ensuring these obligations are complied with.

To rely on a due diligence defence for offences under the Food Safety Act, the burden of proof lies with the person or company accused. However, that person need only persuade the court that they exercised due diligence on the balance of probabilities.

What will amount to "reasonable precautions" will take account of all the facts in the case. Due diligence in reality is "horses for courses" as what will be reasonable will depend on a number of factors, such as the nature and resources of the particular business, the potential for harm (for example, number of customers or type of product) and whether the food is own-branded.

A small business might not be required to undertake the same precautions which would be expected of one of the major retailers. However, many businesses will not be able to rely only upon certification or documentation received from suppliers.

Your business should act now to:

- 1 Assess the risks – identify as a starting point weak links in your supply chain/the information provided to you by your suppliers and how that can impact on your liability, in particular in relation to contamination of food and accurate labelling/descriptions.
- 2 Consider and implement safeguards to protect you against any risks identified. This may include safeguards such as supplier warranties, random sampling and third party verification.
- 3 Document all systems and due diligence measures agreed including any training records.
- 4 Operate systems introduced on an on-going basis including audits to check compliance and post-audit support to deal with non-compliances.
- 5 Consider working with your Local Authority to develop your system of safeguards, particularly if you have the benefit of a Primary Authority Partnership.

Labelling Requirements

It should be noted that in addition to any due diligence measures introduced at company level, the new Food Information for Consumers Regulations coming into force in December 2014 may have implications for all food businesses in terms of whether/how products will need to be labelled in future, separately and in addition to existing legal obligations under the Food Safety Act and Consumer Protection from Unfair Trading Regulations.

If you require advice on the legal obligations for your food business, due diligence, or labelling requirements, please contact Rob Elvin or Nicola Smith for assistance.

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