

Background

The European horse meat investigation, which began in January 2013, uncovered that a number of products sold or labelled as beef across Europe, including in the UK, contained equine DNA (horse meat). A number of sample results 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.

In the short term, Government agencies indicated that enforcement action would be limited to those parties within the food chain who had knowingly sought to obtain a financial advantage by selling horse meat as beef. However, since that time, it has become apparent both from reviews and inquiries into this issue (including the [Elliott Report](#), the [Troop Report](#), the [National Audit Office Report on food safety and authenticity](#) in the processed meat supply chain and the [EFRA House of Commons Report into Food Contamination](#)) and from increased press/ TV coverage of food enforcement generally (for example the BBC series on food inspectors), that the focus on food authenticity and integrity is extending to other products, descriptions and label claims.

The Elliott Report

Professor Elliott was commissioned by the UK Government in the aftermath of the horsemeat scandal, to conduct a review into the integrity and assurance of food supply networks, and to make recommendations. An Interim Report was published in December 2013 and identified that the more complex the supply chains the greater the degree of vulnerability and need for careful risk management. The review was completed in July 2014 (strongly echoing the interim report) and was published at the beginning of September. DEFRA accepted all of the recommendations in the final report.

The system proposed by Elliott is based on 8 pillars of food integrity, with a recommendation of partnership working between Government, regulators and the food industry, to implement this system as a national food crime prevention framework.

The eight pillars are:

Consumers First: Need to maintain consumer confidence; prevent contamination/ adulteration/ false claims; make food crime difficult to commit; raise consumer awareness of food crime/ fraud and implications; and URGENTLY implement annual targeted testing programme based on horizon scanning/ intelligence

Zero Tolerance: information sharing amongst regulators encouraged; development of whistleblowing and reporting to be supported; industry to be urged to adopt incentive mechanisms rewarding responsible procurement and to conduct sampling, testing and supervision of supplies; regulators to be educated and advised on identification and prevention of food crime.

Intelligence Gathering: Shared focus on intelligence gathering and sharing; FSA and regulators to collect, analyse and distribute information/ intelligence; and industry to establish 'safe haven' to collect, analyse and disseminate information through a confidential source register.

Laboratory Services: Need for standardised approach to authenticity testing; 'Centres of Excellence'; surveillance programme guidance; partnership working across public sector organisations including regular comparison/ rationalisation; partnership with Public Health England and local authorities to consider integrated shared scientific service; and ensure appropriate public scrutiny

Audit: Industry development of modular auditing with core food safety/ integrity audit and individual retailer modules to allow credit but minimise duplication; focus on fewer but more effective audits - replace announced audits with unannounced and more comprehensive audits; industry to recognise risks of fraud in storage/ transport.

Government Support: to be SMART (specific, measurable, attainable, realistic, timely); need to support FSA on enforcement, guidance and training of local authority enforcement; ensure oversight of authenticity assurance by 'National Food Safety and Food Crime Committee'.

Leadership: Food crime to be included in work of Government agency intelligence network; new Food Crime Unit to be created; FSA to take lead role on national incidents in interim.

Crisis Management: Mechanisms to be put in place to deal effectively with any serious food safety and/ or food crime incident; and all incidents to be regarded as risk to public health until contrary evidence.

The Preface to the Report notes that the current industry focus on "developing shorter supply chains and on sourcing locally produced foods in long term partnerships" is of "enormous importance". However, the Professor stresses that a reality of many global food supply systems is sourcing from sometimes highly complex international markets, when a "new mentality" is required.

In fact, whether your food business relies on short, local supply chains and/ or on global food markets, the development of Elliott's eight pillars underlines the importance of all food businesses ensuring that they can reasonably demonstrate both traceability and authenticity. Six of the eight pillars relate to the active enforcement of food crime/ food fraud, either in terms of proactively identifying breaches (intelligence gathering, laboratory services and audit), or in terms of punishment / penalties (zero tolerance and leadership, including the creation of a new Food Crime unit). This would certainly seem to indicate a renewed focus on enforcement in the food industry, amidst a changing landscape, perhaps prompted, or at the least accelerated, by the horse meat crisis in 2013.

Progress/ Update

So, what is the current status of the recommendations in the Elliott Report? The Director of Policy at the FSA recently prepared a [report/ update](#) on strengthening FSA capability, systems and relationships following the horsemeat incident in readiness for their November Board meeting. That report sets out his views on progress to date in relation to: improving intelligence; the Major Incident Plan; prosecution and penalties; laboratory services; and surveillance and partnership working. Annex 1 to the Report includes a detailed summary of developments since January 2013, setting out the current position and the anticipated position by the end of the financial year in March 2015. It provides a useful overview of the changes which have happened already and those to come and further underlines the importance of food business operators ensuring they stay on top of the challenges they face in ensuring food integrity.

The report addresses/ details the following:

Intelligence Hub / Food Crime Unit

The intelligence hub was established by the FSA in December 2013 and by September 2014 had identified a total of 46 potential issues. The hub has a team of 4 national intelligence analysts and 19 investigators dealing with food fraud and incidents, together with 6 legal investigators.

The hub has identified 5 generic [priority areas](#) for further investigation: company identity theft; livestock theft and illegal slaughter; mislabelling - deliberate meat and fish substitution; counterfeit and illicit alcohol; and the sale and supply of food destined for animal feed. Any business where these areas pose a risk should consider whether they have reasonable precautions in place given that these are currently priority areas for the FSA's intelligence hub.

The report notes that the FSA have also been working with trade associations and industry to develop active channels for intelligence to be fed to the FSA. However, the details of operation of an industry 'safe haven' / 'safe spaces' to allow privilege and anonymity for organisations providing information/ intelligence are still being explored. The report notes that there will be further development of regional and local networks and clear interface with industry 'safe spaces' by March 2015.

The FSA intended phase 1 of the Food Crime unit to be operational by the end of December 2014, with links to other enforcement agencies and access to specialist expertise. The report notes that the core of that unit will be the 19 investigators and 6 legal investigators currently within the intelligence hub, plus a small number of additional staff to be recruited, including a specialist head of intelligence and a team of 4 regional intelligence analysts. Some [concerns have been expressed](#) as to whether the establishment of an effective food crime unit can be achieved in timetable proposed, given the potential lack of food-based knowledge amongst regulators/ investigators generally. However, the FSA confirmed to trade press that they were on track for the end of 2014. There is no formal confirmation on the FSA's website that the unit is now up and running: it appears they are still recruiting for the Head of the unit.

The best approach to a Food Crime Unit may well continue to evolve, as it certainly remains a topic for debate: a [Round table discussion at a Birmingham Food Council Event on 4 December](#) suggested regional units may be useful, potentially supported by partnerships with university research laboratories, although others did not agree this was workable.

Major Incident Plan

The FSA have [advice for businesses in the event of food incidents](#) on their website and have published an updated [Incident Management Plan](#), which was agreed by the Board in June 2014. They intend to complete a full scale control post exercise by March 2015 to rehearse and test the new plan.

Prosecutions and Penalties

The report notes that the FSA discussed draft sentencing guidelines under the Food Safety and Hygiene Regulations 2013 with officials from the Sentencing Council. Those draft Guidelines are currently under consultation (as part of the wider [Consultation on the guideline for health and safety offences, corporate manslaughter, food safety and hygiene offences](#)), which is open until 18 February 2015.

The current scope of the draft Guidelines does not extend beyond the Food Safety and Hygiene Regulations 2013, so the Food Information for Consumers Regulations 2014, for example, will not be covered. However, the scope of the Guidelines may conceivably be extended in future and even if they are not, it is likely in practice that they will be considered as a guide when sentencing for other offences connected to food.

The proposed process for sentencing in the draft Guidelines is to consider culpability, harm and turnover. Where harm is considerable, ensuring that culpability is low, will be very important, although it is, of course, the case that the Sentencing Guidelines will only be relevant if a due diligence defence cannot be established.

Fine levels could be considerable. The 'starting point' penalty within the draft Guidelines for a large organisation, for an offence with very high culpability and a 'category 1' harm (serious adverse effects on human health i.e. acute and/ or chronic condition; and/ or widespread impact) is £1.2 million, with a suggested range of £500,000 - £3 million. Even where there is only 'low culpability' for a category 1 harm for a large organisation, the proposed fine level is between £18,000 and £90,000. 'Low culpability' is defined as meaning that significant efforts were made to secure food safety although they were inadequate on this occasion, that there was no prior event or warning indicating food safety risks and that there is evidence that failings were minor and not systematic.

Currently, the fines in the draft Guidelines from the Sentencing Council would only apply to sentencing in the Crown Court. If an organisation, or individual, is convicted in the magistrates' court, the penalty under the relevant legislation is £5000 per offence (the statutory maximum). However, it is worth noting that if the proposed changes to fine levels under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 are implemented (see our [blog](#) on this issue) magistrates will also have the authority to impose an unlimited fine for each offence. The implementation date for this legislation is unknown, although the Government has indicated that it intends to bring the relevant section into force.

Laboratory Services and Surveillance

According to the report, the FSA has met with managers from a number of Local Authorities running official control laboratories to consider options for a more integrated laboratory service. They are also making funding available to Local Authorities to supplement their own programmes of monitoring and surveillance, with priorities being set centrally by the FSA. The report identifies that priorities for 2014/2015 testing will include manuka honey testing, water in chicken and meat and fish speciation. It also notes that samples of lamb dishes from takeaway restaurants tested for substitution by beef will also be tested for undeclared allergens.

As with the 'priority areas' identified by the intelligence hub for further investigation (see above), any food business operators where such products are used / supplied should consider whether they have reasonable precautions in place (and if appropriate consider including such products in their own testing regimes).

Working with Others

The FSA is already working to a limited extent with other bodies and the progress report makes clear that working with others will continue. The Food Crime Unit will work with a range of partners, including law enforcement agencies, the National Fraud Intelligence Bureau and the National Trading Standards Board.

In addition, the European Food Fraud Unit was established in 2013 and the FSA are engaging with this Unit. Their programme includes development of an IT system for exchange of information and more co-ordinated control plans, which is anticipated to be in place early in 2015. The FSA has also developed a paper on the introduction of Food Safety Systems in developing countries agreed by the Codex Committee on Import and Export Certification.

Wider Landscape

In addition to the progress made on the 'eight pillars' of the system proposed in the Elliott report, it seems there has been over the last few months a continuing focus on the integrity of food, both at industry and consumer level, leading perhaps to a greater willingness for transparency amongst operators. Some examples of the focus in the public arena include the [Which? food fraud campaign](#) dealing with takeaway food; press and TV coverage of food frauds such as [counterfeit alcohol](#); and TV series such as Channel 4's 'food unwrapped' and the BBC's 'food inspectors'.

The notes from [Professor Elliott's](#) recent presentation at the Birmingham Food Council Food Crime and Integrity Event (4 December 2014) highlight that a network of trade associations have now been established to share information and they talk about fraud and crime, with the [FDF \(Food and Drink Federation\)](#) taking the lead and sharing knowledge. He also notes that a "testing club" has been set up, where multiple retailers have established a fund to look at testing the food in the food chain. One supermarket in particular has reportedly pledged to be more transparent and conduct more testing of their food. Not only that, but they have published their testing programme on their [website](#), including adverse issues that have been identified.

More generally, the EU Food Information for Consumers Regulation has been in force since 13 December 2014. Whilst the legislation was passed at EU level before the horsemeat scandal had even broken, the regime reflects and reinforces a renewed focus on the availability to the consumer of accurate food information. The Elliott Report, when describing the 'Consumers First' pillar, noted that where there is contamination by allergens, adulteration or substitution can have serious consequences.

The professor reported that there have been instances where ground almonds were substituted by peanuts, which could of course have fatal consequences. This underlines why in his view, any undeclared food substitution or adulteration must be considered a potential risk to public health unless proven otherwise.

Conclusion

Given the recommendations in the Elliott Report, the progress to date on implementation and the continuing focus on food integrity by the public and increasingly by industry, a very wide range of food businesses will be expected to have reasonable precautions in place to help prevent 'food fraud' by themselves or others within the food chain now and in future.

What will amount to 'reasonable precautions' will depend on the facts, as what will be reasonable will depend on a number of variables, such as the nature and resources of the particular business and the potential for harm (for example, number of customers or type of product or risk). Whether the food is own-branded may also have an impact, for example under the EU Food Information for Consumers Regulation, the primary responsibility for information rests with the person under whose name the food is marketed. It is likely that many businesses will be unable to rely only upon certification or documentation received from their suppliers.

We anticipate that the impact of food-related crises and the responses to those incidents at a national level will create both challenges and opportunities for all food business operators, from manufacturers to caterers to retailers. The challenges will include:-

1. Ensuring that you have reasonable precautions/ due diligence procedures in place to ensure that a product is 'what it says on the box'. This might involve:
 - a. A review of your supply chains to assess the risks, with a particular focus on 'priority areas' for investigation/ testing, which have been identified by enforcement agencies and/ or other operators.
 - b. Implementation and/ or maintenance/ review of safeguards to protect against those risks.
 - c. Documenting all agreed systems and audits to check compliance.
2. Ensuring food information, including any packaging, marketing information and point of sale displays are accurate. This will include ensuring that they are compliant with labelling and advertising rules, including in relation to allergen information (even for loose, non - prepacked foods).

However, in addition to these challenges, there is in our view also a real opportunity. Current media interest in these issues may very well influence customer focus on the importance of food integrity. As such, any brand which can successfully negotiate the challenges and offer transparency to consumers may well improve customer loyalty, as well as ensuring that their business is prepared for any future food crime crisis.

If you would like advice on the legal obligations for your business, due diligence, an enforcement issue, or labelling requirements, please contact Rob Elvin or Nicola Smith for assistance.

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