

# Legal framework and enforcement of food crime

Nicola Smith  
6 November 2024



# Introduction

---

Nicola Smith

Squire Patton Boggs

Regulatory Lawyer – Food and Drink Specialist

[nicola.smith@squirepb.com](mailto:nicola.smith@squirepb.com)



# About Us

Operating for **130+** years

Practicing across **140** jurisdictions

**Americas**  
**17 offices**  
Atlanta, Cincinnati, Cleveland, Columbus, Dallas, Denver, Houston, Los Angeles, Miami, New Jersey, New York, Palo Alto, Phoenix, San Francisco, Santo Domingo, Tampa and Washington DC

**Europe**  
**14 offices**  
Berlin, Birmingham, Böblingen, Bratislava, Brussels, Frankfurt, Leeds, London, Madrid, Milan, Manchester, Paris, Prague and Warsaw

**FTSE100**  
Act for a third of FTSE100 in past 3 years



**Top 45** global firm by headcount (AmLaw 100)

**40+** languages spoken

**500+** partners

**1,500+** lawyers

Regional Desks and Alliances
Africa
Brazil
Caribbean/Central America
India
Israel
Mexico

**Middle East**  
**3 offices**  
Abu Dhabi, Dubai and Riyadh

**Asia Pacific**  
**8 offices**  
Beijing, Darwin, Hong Kong, Perth, Shanghai, Singapore, Sydney and Tokyo

Over **40** offices across **four** continents

# Outline of Session

---

- Definition(s) of Food Crime
- Legal Framework of Food Law
- Benefits of Due Diligence
- Risks of Non-Compliance
- Enforcement of Food Law
- On the horizon
- What this means for FBOs

# What is Food Crime?

- Food crime is defined (FSA) as:
  - “Serious fraud and related criminality in food supply chains. This definition also includes activity impacting on drink and animal feed. It can be seriously harmful to consumers, food businesses and the wider food industry.”
- Food Crime Unit objectives

The Food Crime Unit acts as the national regulator for food crime and aims to achieve the following objectives:

  - Prevent food being rendered unsafe or inauthentic through dishonesty.
  - Disrupt offending and bring offenders to justice.
  - Build global and domestic counter food crime capability.

**FOOD BUSINESS OPERATORS  
CAN ALSO BE VICTIMS OF  
FOOD CRIME!**


News > UK > Crime

## Up to 22 tonnes of cheddar ‘stolen from cheesemongers’ in elaborate scam

The cheese - worth more than £300,000 - was allegedly stolen from a Southwark cheesemongers in a scam

Alexander Butler •



 The Guardian - UK

BUSINESS

Ben Quinn

Oct 29, 2024, 5:54 PM

### Authorities need to act over ‘high-end food fraud’, says scammed salmon firm

NEAL YARD

NEAL YARD DAIRY

ACTION FRAUD

CAMBRIDGE

# Examples of Food Crime (FSA)

1. Illegal processing
2. Misrepresentation
3. Waste Diversion
4. Substitution
5. Document fraud
6. Theft
7. Adulteration

**NO LEGISLATIVE DEFINITION  
OF 'FOOD CRIME'  
OR 'FOOD FRAUD'!**

# Food Law Offences in UK (1)

- **“Food”** : *“any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. “Food” includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment.”*
- offence.
- Criminal Liability/ Regulations:

## Food Safety Act 1990

- Rendering food injurious to health is an offence.
- Any person who sells food not of nature, substance or quality intended, is guilty of an offence.
- Falsely describing or presenting food in way likely to mislead as to nature, substance or quality.



## Food Safety and Hygiene Regulations 2013

- Any person who fails to comply with ‘specified EU provisions’ commits an offence.



# Food Law Offences in UK (2)

## EU Food Hygiene Regulation (EC) 852/2004:

- Satisfaction of hygiene requirements at all stages of production, processing and distribution of food
- To put in place, implement and maintain a permanent procedure / procedures based on HACCP
- Retention of documents and records for appropriate period

## EU General Food Law Regulation (EC) No. 178/2002:

- No placing of unsafe food on the market (food is unsafe if: injurious to health or unfit for human consumption)
- Labelling, advertising and presentation of food must not mislead
- Traceability
- Requirements to notify, recall and / or withdraw food from market

## EU Food Information for Consumers Regulation (EU) 1169/2011



# Unfit for Human Consumption: EU

- **Article 14(5) of Regulation (EC) 178/2002:**
- In determining whether food is unfit for human consumption, regard should be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of:
  - Contamination, whether by extraneous matter or otherwise
  - Or through putrefaction, deterioration or decay (unfit for human consumption).
- But also, In determining whether food is unsafe (i.e., injurious or unfit) have regards to:
  - Conditions of use by consumer and at each stage of production, processing and distribution (e.g. cooking instructions)
  - Information available to consumer (e.g. labelling)
- **FSA Rapid Risk Assessment of Risks of Seven Edible Insects in UK September 2022:**
  - High levels of aerobic counts, lactic acid bacteria, yeasts and moulds are generally associated with food spoilage and [being] unfit for consumption

# Public Interest & Due Diligence Defence (1)

## Some Good News:

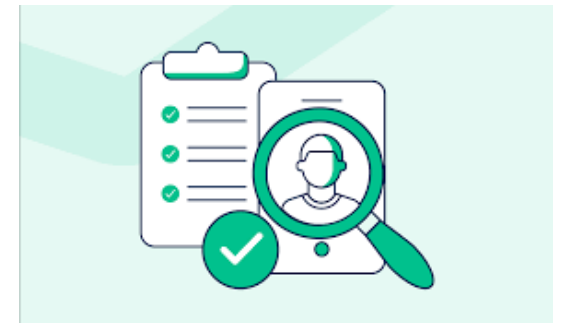
- Public Interest Test – Code for Crown Prosecutors
- Defence of Due Diligence (Food Safety Act 1990 s.21 and FSH Regs 2013 s.12)
  - **General: It shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control.**
  - **The FSA Guide on the Food Safety Act 1990 (published 2009) confirms:**
    - the burden of proof lies with the person accused (as with any due diligence defence);
    - that person need only persuade the court that they exercised due diligence on the balance of probabilities;
    - ‘reasonable care’ will take account of all the facts in the case and a small business might not be required to undertake the same precautions which would be expected of one of the major retailers.

- **Tesco Supermarkets Ltd v Nattrass (1972), Lord Diplock:**

*“What the employer or principal can reasonably be expected to do to prevent the commission of an offence would depend upon the gravity of the injury which it is sought to prevent and the nature of the business in the course of which such offences are committed..... If considerations of costs and business practicability did not play a part in determining what employers carrying on such business could reasonably be expected to do to prevent the commission of an offence under the Act, the price to the public of the protection afforded to a minority of consumers might well be an increase in the cost of goods and services to consumers generally.”*

- **Local Authority Due Diligence Defence Guidance** - Control techniques should include:

- An assessment of the risk(s);
- Establishing a system of reasonable safeguards;
- Documentation of the solution;
- Operation of the system; and
- Review of the system.



# Offences and Penalties

## Some Bad News:

- Strict Liability
- Officer Liability – consent, connivance or neglect
- Maximum fine limits removed:
  - **EU Provisions:** Liable to fine (no maximum specified) on summary conviction; or to a fine and/ or up to 2 years imprisonment on indictment
  - **Food Safety Act 1990 provisions:** Liable to a fine (no maximum in England & Wales) and, if an individual, up to 6 months' imprisonment; and/ or up to 2 years imprisonment on indictment

## Sentencing guidelines:

Culpability and risk of harm



Turnover ( starting point and category range )



Proportionality to overall means



Aggravating and mitigating factors



# Risks of Non-Compliance: Enforcement & Other

- Enforcement Action for Offences (penalties and criminal record)
- Potential Civil Liability for Negligence/ Breach of Duty of Care
- Manslaughter by gross negligence (gross failings of individuals)
- Corporate Manslaughter (generalised failing of management)
- Inquests
- Publicity / reputational risks
- Fines and Damages
- Legal Fees
- Product Recall
- Insurance Premiums



- Definitive Sentencing Guideline for Food Safety & Hygiene Offences:
  - **High Culpability:**
    - “Offender fell far short of the appropriate standard; for example, by:
      - failing to put in place measures that are recognised standards in the industry
      - ignoring concerns raised by regulators, employees or others
      - allowing breaches to subsist over a long period of time”
    - Serious and/or systemic failure within the organisation to address risks to health and safety
  - **Low culpability:**
    - Offender did not fall far short of the appropriate standard; for example, because:
      - significant efforts were made to secure food safety although they were inadequate on this occasion
      - there was no warning/circumstance indicating a risk to food safety
    - Failings were minor and occurred as an isolated incident



# Sentencing Guideline: Impact of Culpability

- Food Hygiene (Wales) Regulations 2006 (regulation 17(1)), Food Safety and Hygiene (England) Regulations 2013 (regulation 19(1)), The General Food Regulations 2004 (regulation 4)
- Large organisation (over £50m) turnover – Harm Category 1:

Culpability	Starting Point (£)	Range (£)
Low	35,000	18,000 – 90,000
Medium	200,000	80,000 – 500,000
High	500,000	200,000 – 1.4 million





- Definitive Sentencing Guideline for Food Safety & Hygiene Offences:
  - Factors increasing seriousness (aggravating factor):
    - Motivated by financial gain
    - Poor food safety or hygiene record
  - Factors reducing seriousness or reflecting mitigation:
    - Steps taken voluntarily to remedy problem
    - High level of co-operation with the investigation, beyond that which will always be expected
    - Good food safety/hygiene record
    - Self-reporting, co-operation and acceptance of responsibility



# Prosecutions, Fines and Costs Awards

Sentencing Council Impact Assessment

Some Examples:

1. Iceland, pests: 2018
2. Tesco, out of date food: 2021
3. Belfast butchers: 2023
4. McDonalds: 2023
5. Prosecution for 'food fraudsters' reported (Southwark): 2023
6. Individuals fraudulently supplying chicken: February 2024
7. Falsified salmonella testing certificates: July 2024



- Responsibilities for:
  - Food Standards Agency (England, Wales, NI) – Food Crime Unit
  - Food Standards Scotland (Scotland)
  - Local authorities (Environmental Health, Trading Standards)
- Impact of Flexible Working arrangements?
- Lack of Resources?
- New Model for Delivery of Food Standards Controls (England and Northern Ireland)

## 1. Taking into account DTI Enforcement Concordat

Must adhere to principles of proportionality and consistency of enforcement

## 2. Risk-based enforcement

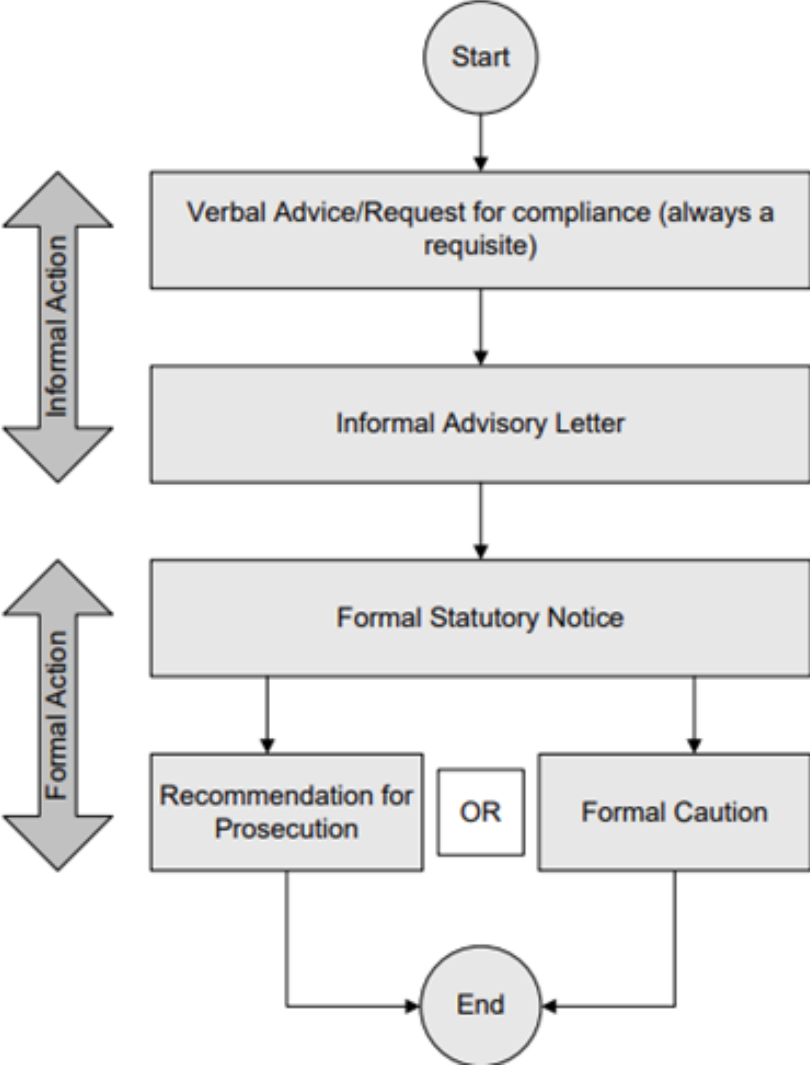
Regulation (EC) 178/2002, Article 6, Paragraphs 1 and 2 :

*‘in order to achieve the general objective of a **high level of protection** of human health and life, food law shall be based on risk analysis, except where it is **not appropriate** to the circumstances or the nature of the measure’, and that ‘Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner’.*

## 3. Hierarchy of enforcement



# Manual of Official Controls: Hierarchy of Enforcement



## Food safety inspections

- Responsibility of local authorities for food business establishments outside of meat, dairy and wine sector
  
- **Food Law Codes of Practice (England, Wales & NI) – Enforcement must be:**
  - reasonable
  - proportionate
  - risk-based
  - consistent with good practice

# Local Authority Enforcement (2)

- **Local Enforcement Policies (Legislative and Regulatory Reform Act 2006):**
  - Enforcement Options (Hierarchy of Enforcement)
  - Evidential and Public Interest Test

# On the Horizon – Divergence?

## EU / GB:

1. Continuation of local law requirements in individual Member States
2. EU legislation being revoked or 'sunset' in UK (Brexit Freedoms Bill)
3. New or amended EU legislation post-Brexit (not 'grandfathered' in UK)
4. New or amended UK legislation post-Brexit
5. Approval and authorisation processes (e.g., substances, novel foods, health claims, food and feed additives, flavourings, GMOs)
6. Food business establishment requirements
7. Devolved administrations (subject to Internal Market Act 2020), e.g., DRS

## EU / Northern Ireland:

1. Northern Ireland Protocol
2. Impact of Windsor Framework Agreement
3. Stormont Brake mechanism





# Divergence - Possible Implications

- Responsibilities on 'importer'/ food business operator/ 'producer'
- Product development
- Market access
- Marking and labelling
- Composition / ingredients
- Additional costs
- Ongoing compliance
- Contractual obligations accordingly



- What is Food Safety Culture?
  - “Shared values, beliefs and norms that affect mindset and behaviour toward food safety in, across and throughout an organisation.” [GFSI]
- EU – Amendments to Hygiene Regulation
- BRC Global Standard Food Safety Culture Module
- TSI Culture Excellence Program
- BSI PAS 320: Instilling a food safety culture in food organisations

# On the Horizon – Supply Chain Due Diligence - EU Deforestation Regulation (EUDR) (1)

EU Deforestation Regulation: [Regulation \(EU\) 2023/1115](#) aims to help stop global deforestation and forest degradation by “influencing the global market”.

## Objectives:

- Minimisation of consumption of products coming from supply chains associated with deforestation and forest degradation
- Increase the EU demand for trade in legal and ‘deforestation-free’ commodities and products

## Scope:

- Relevant Products containing, fed with or made using relevant commodities, i.e., Wood, Beef, Palm Oil, Soy, Coffee, Cocoa, Rubber
- List of Products and Derivatives (e.g. Palm Oil products, such as Crude palm kernel, Palmitic acid, Stearic acid, Oleic acid and others)



Applicable  
30  
December  
2025  
[expected]

# EU Deforestation Regulation (EUDR) (2)

EUDR contains obligations for:

## “Operators”

entities which, in the course of a commercial activity, **place relevant commodities and products on the EU market, or who export them from the EU market.**

## “Traders”

natural or legal persons in the supply chain (other than the Operator) who, in the course of a commercial activity, **make available relevant commodities and products on the EU market.**

- “Placing on the market” is the first making available on the EU market
- “Making available on the market” covers any supply

**In a nutshell: Prohibition** to place relevant goods or commodities on the EU market (or to export) **unless** they are :

- **Deforestation-free;**
- Produced **in line with relevant legislation** of Country of production; and
- Covered by a **Due Diligence Statement.**

Note: Exemptions and/or simplified obligations apply for SME operators / traders

# On the Horizon – Supply Chain Due Diligence - UK Failure to Prevent Fraud Offence (FTPFO)

- Economic Crime and Corporate Transparency Act 2023: An **organisation** will be criminally liable where an **associated person** commits a **specified fraud** offence **intending to benefit the organisation** (or its clients).
- **Defence:** organisation can show it had **reasonable prevention procedures** in place or that it was not reasonable in all the circumstances to expect the organisation to have any prevention procedures.
- It will not be necessary to prove that the company’s leadership (directors) were complicit or knew about the fraud.
- Applies to “**Large bodies corporate and partnerships**” (as defined in the Companies Act 2006).  
**TEST:** Meets 2 out of 3 of the following criteria in the year preceding the fraud offence:
  - More than 250 employees; and/or
  - More than £36 million turnover; and/or
  - More than £18 million in total assets; and/or

# Examples of FTPFO

- Dishonest sales practices – misrepresentations
- Dishonest accounting practices (including falsifying accounting documents, inflating figures)
- False statements to investors / in an M&A process
- Green/blue washing – misrepresenting environmental, human rights or other sustainability credentials to investors, consumers or authorities
- Dishonest falsification of test results, clinical trials etc
- Food fraud e.g. adulteration, substitution, counterfeiting
- Bid rigging



# On the Horizon – Supply Chain Due Diligence – Corporate Sustainability Due Diligence Directive (CS3D)

The EU Directive n° 2024/1760 of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (“CS3D”) was adopted as part of the EU Green Deal.

The CS3D lays down rules on :

- Obligations for companies to implement due diligence measures in relation to the adverse impacts of their of their operations.
- Liability for not complying the above requirements
- Obligation to adopt and put into effect a transition plan for climate change mitigation.

# Scope & Entry into Force - CS3D

- CS3D will apply to non-EU corporates operating in the EU above these thresholds:

If operations are conducted through EU entities or groups	If operations are not conducted through EU registered entities or groups
With more than 1,000 employees and a worldwide turnover above €450 million, or	With a turnover exceeding €450 million in the EU
With a worldwide turnover above €80 million, that entered into franchising or licensing agreements with independent third party in the EU in return for royalties exceeding €22,5 million	With an EU turnover above €80 million, that entered into franchising or licensing agreements with independent third party in the EU in return for royalties exceeding €22,5 million

- CS3D shall be transposed by EU Member States by 26 July 2026**, and shall be applicable as follows (subject to transposition regulation enacted by EU member states):

Companies or groups	Application date (at the latest)
EU companies with more than 5,000 employees and a worldwide turnover exceeding €1,5 billion Non-EU companies with a turnover exceeding €1,5 billion in the EU	From 26 July 2027
EU companies with more than 3,000 employees and a worldwide turnover exceeding €900 million Non-EU companies with a turnover exceeding €900 million in the EU	From 26 July 2028
All other companies and groups above the CS3D thresholds	From 26 July 2029



- Companies caught by the CS3D will be required to implement due diligence measures in relation to **potential and actual human rights and environment adverse impacts**.
- Adverse impacts are identified by reference to specific obligations and prohibitions laid down by **international treaties and conventions** that are annexed to the CS3D, such as:
  - The International Covenant on Civil and Political Rights. 1
  - The International Covenant on Economic, Social and Cultural Rights.
  - The International Labour Organization Conventions.
- Due diligence measures shall be implemented by taking into consideration the adverse impacts of the company/group's operations, as well as the operation of their chain of activities, which covers **their upstream and downstream direct and indirect business partners**.

# Conclusion:

## Where are we now? Impact on FBOs

- Unfit = deemed unsafe
- Offences for Nature, substance, quality and misleading information
- New Unit for “Food Crime”
- **BUT** risk analysis, proportionality and consistency are part of decision on what action is appropriate
- Due diligence = defence
- Evidence of increasing fines (although still variable)
- New Food Standards Delivery Model
- Importance of self-assessments, good record and due diligence growing for FBOs
- Awareness of current and future threats important

# Questions?

---

