

Scottish Food Enforcement Liaison Committee Meeting 10 February 2012

FOOD STANDARDS ENFORCEMENT AND ENFORCEMENT OF CONSUMER PROTECTION LEGISLATION THAT MAY RELATE TO THE MARKETING OF FOOD.

Background

1. At the SFELC meeting of 2 December, a need was identified for a fully integrated approach to addressing wider areas of description and marketing of food that may not be solely about product labelling or composition. Some of these matters may overlap with aspects of more general consumer protection legislation.
2. This paper aims to identify potential areas where consumer protection legislation may overlap with food standards legislation and the Food Standards Agency's understanding of the current approach taken by Scottish local authorities where any potential overlap is identified. The paper is specifically intended not to advocate any particular practice but to provide information as a basis for discussion.

Enforcement

3. Food standards and food safety legislation is enforced by Environmental Health services and consumer protection legislation is enforced by Trading Standards services. The FSA's understanding is that enforcement of particular offences is agreed between the respective services on a case by case basis, depending on what is most appropriate under the circumstances.
4. The appendices below provide:

- Appendix 1. An overview of aspects of food law and consumer protection law that may be applicable
- Appendix 2. Examples of potential overlap between food legislation and consumer protection legislation
- Appendix 3. Examples of enforcement issues that might typically be involved.

Appendix 1 - Overview of aspects of food law and consumer protection law that may be applicable

Overview of Food Standards Legislation (not an exhaustive list)

➤ **Food Labelling Directive (2000/13/EC)**

Article 2 of Directive 2000/13/EC on food labelling states that the labelling and methods used must not be such as could mislead a purchaser to a material degree, particularly as to the characteristics of a food and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production.

This prohibition extends to the presentation of food (in particular, its shape, appearance or packaging, the packaging materials used, the way in which it is arranged and the setting in which it is displayed) and to advertising.

These provisions are currently implemented by the general requirements of the Food Safety Act 1990 and the Consumer Protection from Unfair Trading Regulations (described below).

➤ **Food Labelling Regulations 1996, as amended**

Regulation 44: If any person (a) sells any food which is not marked or labelled in accordance with the provisions of Part II of these Regulations,”

Regulations 5(f) and 38 are of particular relevance here:

Regulation 5(f): “particulars of the place of origin or provenance of the food if failure to give such particulars might mislead a purchaser to a material degree as to the true origin or provenance of the food; “

Regulation 38: “(1) The particulars with which a food is required to be marked or labelled by these Regulations, or which appear on a menu, notice, ticket or label pursuant to these Regulations, shall be easy to understand, clearly legible and indelible and, when a food is sold to the ultimate consumer, the said particulars shall be marked in a conspicuous place in such a way as to be easily visible.

(2) Such particulars shall not in any way be hidden, obscured or interrupted by any other written or pictorial matter.

(3) Paragraph (1) of this regulation shall not be taken to preclude the giving of such particulars at a catering establishment, in respect of foods the variety and type of which are changed regularly, by means of temporary media (including the use of chalk on a blackboard).”

➤ **EU Regulation of General Food Law (178/2002)**

Regulation (EC) 178/2002 lays down general principles and requirements of food law and is enforced in Great Britain by means of The General Food Regulations 2004.

Under the domestic General Food Regulations 2004 (as amended) it is an offence to contravene Article 16 of Regulation (EC) 178/2002. Article 16 of the EC Regulation states that the “labelling,

advertising and presentation of food”, and “the information which is made available about food through whatever medium shall not mislead consumers.” This requirement is additional to the requirements of the Food Safety Act 1990 (as amended) and the Consumer Protection from Unfair Trading Regulations 2008 (see below).

Examples may include:

- Internet information;
- Other off-label information; and
- Information provided on a notice or sign next to food sold loose (non-pre-packed) in a delicatessen, or notices, signs or labels if provided for foods pre-packed for direct sale;

➤ **Food Safety Act**

The Food Safety Act 1990 makes it an offence for anyone to:

- “Sell, to the purchaser’s prejudice, any food which is not of the nature, substance or quality demanded (section 14),
- Give or display a label with any food offered or exposed for sale, or have in their possession, or publish or be party to the publication of an advertisement, which falsely describes the food or which is likely to mislead as to the nature, substance or quality of the food (section 15),
- Sell, offer or expose for sale, or have in their possession for the purpose of sale any food the presentation of which, whether or not attached to or printed on the wrapper or container, falsely describes the food or is likely to mislead as to its nature, substance or quality (section 15).

The terms “nature”, “substance” and “quality” are not defined in the Food Safety Act 1990. It is considered that the origin of a food could, in certain circumstances, be relevant to its nature, substance or quality and will therefore be relevant to the offences described below.

These provisions apply throughout the chain of supply.

The food standards legislation described above is concerned mainly with the presentation of food. However, there are other areas of potential overlap with consumer protection legislation. These include food contact materials and the overlap with general product safety legislation and food additives / food processing aids and overlap with the CPUTR regulations. This has been highlighted by a recent issue of additive mis-description.

Overview of Consumer Protection Legislation (not an exhaustive list)

➤ Consumer Protection from Unfair Trading Regulations 2008 (CPUTR)

These domestic Regulations, which repeal much (although not all) of the Trade Descriptions Act 1968, prohibit unfair commercial practices. Such practices include misleading actions whereby false information or overall presentation is likely to deceive the average consumer into entering into a transaction when they would not otherwise have done so. Such information and presentation includes the geographical or commercial origin of the product. Additionally, an unfair commercial practice also extends to a misleading omission, whereby material information is omitted, hidden or otherwise made unclear so that, again, the average consumer enters into a transaction when they would not have done so otherwise.

➤ General Product Safety Regulations 1995

These Regulations are typically enforced by trading standards in relation to food. They apply to the commercial placing on the market and include internet/distance selling.

➤ Weights and Measures Act

The Act provides a framework for the regulation of transactions based on quantity, including the type and manner of quantity information to be provided, the quantities which may be sold and the units of measurement to be used and it provides powers to regulate measuring equipment used for trade. Orders made under Section 22 require most pre-packed food to carry on the container an indication of the net quantity of the contents. When sold other than pre-packed, most food is required to be sold either by quantity or by number. The seller has to make the quantity known to the purchaser.

➤ Trade Marks Act 1994

A registered trade mark is a property right obtained by the registration of the trade mark under the TD Act. In order to defend a trade mark against infringements, the trademark must either be registered, or have been used for a period of time so that it has acquired local distinctiveness (Prior Rights). The extent to which a trademark is defensible depends upon the similarity of the marks involved, the similarity of the products/services involved and whether the trademark has acquired distinctiveness. A trademark can be a name, word, phrase, logo, symbol, design, image, sound, shape, signature or any combination of these elements.

Appendix 2 - Examples of potential overlap between food legislation and consumer protection legislation

Legislation	Possible Overlap	Examples
Food Standards: Food Labelling Regulations 1996, as amended	The CPUTR e.g. misleading omissions (Reg 6)	Failure to declare allergens, failure to declare if meat has previously been frozen
Food Standards: General Food Regulations 2004	Inaccurate advertising of food is also a breach under the CPUTR	There are potential overlaps with consumer protection legislation e.g. counterfeit vodka
Food Standards: Food Safety Act	General Product Safety Regs	Products that are advertised as food but are not (e.g. edible glitter) or foods that are safe for consumption but pose a choking hazard during the process of eating (e.g. gobstoppers) Non-declared allergens
	CPUTR	Failure to declare allergens Substitution of one meat species with another (cheaper) species e.g .beef/lamb curries, species of fish sold in fish & chip shops "locally" caught fish
Consumer Protection: Consumer Protection from Unfair Trading Regulations 2008 (CPUTR)	There are potential overlaps with most food standards legislation	As above
Consumer Protection: General Product Safety Regulations 2005	Food Safety Act	As above
Metrology: Weights and Measures Act	Weights appear on food labels, however there is no overlap in enforcement. TS would take action as appropriate	N/A
Trade Marks Act	Food Safety Act	e.g. counterfeit vodka

Appendix 3 - Examples of enforcement issues that might typically be involved

Issue	Enforced by	Comments. Practical reality of enforcement of food products.
Co-mingling (mingling of different products on a shelf. The position of the product on the shelf may not match the shelf label. A recent example was beef of different origins which were mixed, but could be considered misleading as a result of the shelf label)	EH/TS	EH (Under Regulation 16 of the General Food Regulations) Or TS (under CPUFR)
Protected Geographical Indications (PGIs) e.g. Cornish pasty, Arbroath smokie	EH/TS	Scottish Government has confirmed there is no domestic legislation for the enforcement of the PGI scheme. Enforcement may be taken under Section 14 or 15 of the Food Safety Act (EH), or TS have powers under the Trade Descriptions Act , the Business Protection from Misleading Marketing Regulations, CPUFR and Trade Marks Act
Media advertising	TS/ASA	Could be taken by TS under the CPUFR or may be referred to the Advertising Standards Authority
Information leaflets in proximity to e.g. supplements that suggest nutritional benefits	TS	Under CPUFR
Internet sales	TS	TS have powers under the E-Commerce Regulations and the Distance Selling Regulations
Animal welfare claims e.g. dolphin friendly	TS	This is considered an environmental claim and will be monitored/ enforced by TS.
Metrology and how this interacts with food labelling	TS	No overlap as this is enforced only under metrology legislation