

COVID-19 RESPONSE: TEMPORARY CHANGES TO ENFORCEMENT OF LABELLING REQUIREMENTS AND APPROACH TO MANAGING RISK

Report by Emily Miles, Chief Executive

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1. Summary

- 1.1 This paper discusses a proposal to make limited, proportionate and temporary changes to the enforcement of labelling requirements to manage the risk to food supply, protect consumer interests and meet wider government objectives to avoid food waste and minimise the short- and long-term economic impacts of the Covid-19 pandemic.
- 1.2 In England, labelling policy is a matter for Defra Ministers, and the Secretary of State for Environment, Food and Rural Affairs (Secretary of State) has approved the measures. Advice to Ministers in Wales and Northern Ireland, where labelling is a devolved matter, will be submitted in the next few days.
- 1.3 In our response to the Covid-19 pandemic, the FSA is taking a timely, proportionate and risk-based approach that seeks to maintain food supply, and protect consumer interests, whilst upholding core principles of food safety and food standards at all times. This paper sets the immediate decision about labelling enforcement in the context of the FSA risk appetite approved by the Board and explains how we are managing risk arising from the impact of Covid-19 on the operations of the FSA.
- 1.4 The day-to-day response to Covid-19 is a matter for the Executive, and individual measures would not normally require specific Board approval. However, the proposal for labelling easements brings legal risks, and is likely to place the FSA outside the risk appetite previously agreed by the Board.
- 1.5 The Board is therefore asked to:
 - i) **Endorse** the approach to managing risk in the context of the Covid-19 response, and **approve** the guiding principles for Executive decision-making;
 - ii) **Discuss** the proposals for temporary changes to labelling enforcement, and the safeguards in place to ensure that food safety and food traceability will be upheld at all times;
 - iii) **Consider** the legal risks associated with the labelling proposals, and the steps that can be taken to mitigate these, including the decision from the Secretary of State that appropriate and proportionate action is urgently required;

- iv) **Determine** whether the Board is content for the Chief Executive to proceed with implementation in England (and in Wales and Northern Ireland subject to Ministerial approval), accepting the legal risk.

2. Introduction

- 2.1 During the Covid-19 pandemic the FSA has an important role to play in maintaining food safety and standards and protecting consumer interests at a time when the food supply chain is under immense pressure. The FSA also has a supporting role to play in helping ministers to maintain food security. Our work in the food supply chain, at ports, and in food production affects every food business in England, Wales and Northern Ireland.
- 2.2 The FSA has a well-established and effective incident response capability through which to tactically manage the Covid-19 response. The Strategic Response Group (SRG), chaired by the Chief Executive, meets regularly to review the response strategy and consider strategic risks. Day to day and operational decisions are taken by the Immediate Response Group, chaired by the Incident Director, Colin Sullivan.
- 2.3 The SRG has developed draft principles that guide all of the decisions that the FSA takes in order to ensure that a safe food supply can be maintained during the Covid-19 pandemic. These are:
 - i) To protect consumers interests and support the supply of safe food by taking a proportionate risk-based approach to ensure that critical FSA and local authority/port health authority functions and their supporting services remain operational and appropriately resourced;
 - ii) To support FSA staff to protect themselves and others, following current government advice and guidance;
 - iii) To apply risk management measures within the risk appetite set by the Board, seeking Board approval if decisions alone or in combination would require a deviation from this framework
 - iv) To apply risk management measures (including any easements) for as short a time as needed to manage the impact of Covid-19;
 - v) To retain control and accountability at all times, with clear mechanisms for recording measures in place and monitoring the impact;
 - vi) To ensure consistency as far as possible between countries and regions, whilst taking into account specific local needs;
 - vii) To work in partnership with stakeholders across government, the wider public sector and food business operators and representatives to ensure that measures are integrated within the whole of government response.
- 2.4 The FSA has been engaged in urgent discussions with Defra in recent days to examine how disruption to the food supply could be mitigated by certain specific changes to the approach to labelling enforcement. The proposals, and the associated legal risks, are set out below. We believe that they are a proportionate and timely response that will enable local authorities to address the specific issues arising now, and respond flexibly to future issues and risks

during the Covid-19 pandemic. However, it is highly likely that implementing this approach would exceed the agreed risk appetite in respect of legal risk and therefore Board approval is required before going ahead.

3. The Case for Action

- 3.1 The Covid-19 pandemic has resulted in unprecedented changes to and demands on the food supply chain. This has included: the closure of the high street hospitality sector, and large parts of the catering sector, with an impact on both producers and suppliers serving these sectors; changes to shopping patterns leading to rapid and widespread shortages of food and drink; and emerging signs of changes to international trade, for example pressure on supplies of certain staple commodities such as rice.
- 3.2 The FSA has been working closely with Defra colleagues and with industry representatives to understand the issues and risks and develop a proportionate and risk-based approach that seeks to maintain food supply and protect consumer interests whilst upholding core principles of food safety and traceability at all times. In an unpredictable environment we agree that measure are needed both in response to immediate issues and to avoid the rapid build up of problems that could have a very significant impact on consumers in future.
- 3.3 Examples of disruption to the supply chain include¹:
- i) As of 30th March, suppliers reported a **70% decline in the wholesale distribution trade**, causing a build up of surplus stock. In mitigation, wholesalers have been partnering with the catering trade to use freezer capacity and some wholesalers have been working with supermarkets to provide catering-size products direct to retail.
 - ii) Closure of coffee shops and hotels causing a **sudden drop in demand for milk products**, with an immediate impact on the distribution chain. Anecdotal reports suggest that some milk buyers are dropping prices or even refusing to collect, leaving farmers with unsold product to dispose of. Conversely, milk powder plants are at full capacity.
 - iii) Changes to consumer behaviour, with **up to 30% of respondents to a survey saying that they had ‘stocked up’ or purchased more than usual** of dairy products or tinned/dried goods. In the week ending 21st March, consumer purchasing peaked at 40% above previous levels. Whilst similar numbers of people in different income groups have been buying more than usual, evidence suggests that those in lower income groups have been able to acquire significantly less extra food in practice.

¹ Evidence of disruption to the food supply chain provided by Defra. This paper summarises the evidence which includes elements that are commercial and in confidence, so specific company names have been omitted.

- 3.4 The consequence of these, and other unpredictable changes to food supply, fall on both business and on consumers. Defra has advised that the economic impact of ongoing disruption is severe (estimated losses to the foodservice industry of unused/unsold stock are in the £10bns), and the interconnected nature of the food supply chain risks these impacts being magnified as the impact cascades from production through to retail. In particular, 'just in time' supply chains mean that ingredients and other food production components such as packaging are not typically held in large quantities and so any disruption has a rapid impact.
- 3.5 Although impacts at point of sale may appear to be local and short-lived, for example the absence of just one product from within a wider product line, consumer behaviour may be influenced by a perception of shortages leading to more widespread 'panic buying'. For consumers with specific dietary needs, for example those with a Food Hypersensitivity, shortages of just one product can have a huge impact on their ability to meet these dietary needs.

4. Response and Mitigations – Labelling Flexibilities

- 4.1 Labelling flexibilities can play an important part in helping to address these issues. The proposals set out below should be seen as just one part of the overall government response to Covid-19 in relation to maintaining safe food supply. The FSA's role is to protect consumers interests and support the supply of safe food, and we believe that the proposals fulfil this role, contributing to ensuring that consumers have access to an affordable, balanced and varied diet that is suitable for their needs.
- 4.2 Flexibilities will be decided on a case by case basis by local authorities, and there will be clear 'red lines' in place to protect food safety and traceability. Examples of the main mitigations that will be open to enforcement officers to exercise, and examples of the issues they will address, include:
- i) **A minor ingredient listed on the label but temporarily unavailable.**
For example, seeded bread containing both toasted and untoasted seeds, where a shortage of one type of seed leads to a change in the proportions in the recipe;
 - ii) **No change to ingredients, but sourcing of ingredient from a different country,** for example where the label declares 100% beef from a particular country but now contains 50% beef from an alternative source;
 - iii) **Shortage of a specific additive not related to food safety,** for example vitamins in fortified foods such as breakfast cereals;
 - iv) **Changes to the proportion of ingredients that do not affect food safety,** for example, a food containing cream, butter and milk – in that order – where a shortage of one element leads to a change in proportions;

- v) **Substitution of different forms of an ingredient**, for example fresh milk for dried milk to avoid waste, or yellow rice for white rice in response to global supply disruption.
- vi) **Using generic packaging that does not include the name and address of the retailer, but does include essential traceability information**, for example egg boxes not bearing supermarket brand name and address.

5. The Proposed Approach

- 5.1 To support businesses, and in recognition of the pressures currently being placed on the food industry, we are asking local authorities and Primary Authorities to work with businesses to agree, on a case-by-case basis, some temporary flexibility to the rules on labelling. Flexibility must only be applied when other alternative measures cannot be taken. Local authorities must give due consideration to the potential risk to consumers and Food Law Code of Practice requirements.
- 5.2 Any enforcement carried out should be proportionate and risk-based and to support this the FSA encourages a pragmatic approach during this period to enable businesses to make reasonable adjustments where necessary. This approach will also enable local authorities to make best use of enforcement resources whilst they are also under pressure.
- 5.3 Working in partnership with Defra colleagues we have agreed guidance for local authorities which suggests a set of 'red lines', fundamental principles that should be observed in order for a local authority to agree to a pragmatic approach to enforcement of labelling requirements with a Food Business Operator (FBO). These are as follows:
 - Any deviations from legal requirements should only be agreed where there are exceptional circumstances, and the need to ensure the supply of food outweighs the proposed minor deviations;
 - Mandatory food information display requirements must be adhered to as far as is practicable in all cases;
 - Any requested deviations will be considered on a case-by-case basis and should only be agreed where they do not negatively impact the consumer's ability to consume the food safely;
 - When considering a request for regulatory easement, the local authority should satisfy itself that the traceability of the food can be assured to enable products to be effectively removed from the market if a food safety issue is identified;
 - Whilst food safety and traceability are the key priority considerations when assessing a requested deviation from labelling requirements, local authorities should be mindful of the potential for labelling changes to mislead the consumer as to the nature, substance or quality of a food,

and the potential for regulatory easements to be used to mask fraudulent activity or achieve unfair commercial gain by unscrupulous businesses;

- Any agreement of regulatory easement is temporary, and should be subject to ongoing review, with the expectation that the deviation will cease or be addressed by the food businesses in a matter of weeks, rather than months.

- 5.4 Where a business is having to deal with the consequence of a supply chain issue, the relevant local authority should ensure that the business has a **clear documented process in place, which specifies any deviations from current requirements** that have been agreed between the local authority and FBO, including the reason/s for and scope of the deviation/s, and any associated requirements (e.g. the provision of additional information through the use of a point of sale notice, agreed end date). The local authority must satisfy itself that this process is followed and that there is an acknowledgement that it is a temporary situation which will be regularly reviewed.
- 5.5 Defra has discussed with industry what is possible within the existing regulations and how food businesses might provide the information consumers need in a way that, although not fully compliant with labelling requirements, would ensure that consumers are not put at risk, misled or disadvantaged during these exceptional circumstances. For example, in the medium term, instore Point of Sale material could be used to better inform consumers about the measures being taken and how labels might be affected.
- 5.6 When determining the appropriate action to take, each case should be considered on its merits, however, consideration should be given as to whether the FBO can demonstrate that they have taken, or are taking, appropriate action to update their labelling to comply with legal requirements, and that any agreed discrepancy from the Regulations will be for as short a time as possible. Consumer safety is, of course, paramount and any pragmatic approach should not introduce an increased risk to safety. It is important that any such measures provide adequate assurance that consumers will not be misled or have their purchasing decisions prejudiced.
- 5.7 In each case where a local authority agrees to a pragmatic approach to enforcement **the local authority will be expected to provide the FSA with relevant details of the product concerned, the flexibility agreed (including arrangements for ensuring that consumers are provided with the required information) and the duration of the easement.**

6. The Legal Risks

- 6.1 General labelling requirements are set out primarily in EU law, in particular Regulation (EU) 1169/2011 on the provision of Food Information to Consumers, and in other Regulations addressing specific issues (e.g. hygiene, country of origin and gluten)

6.2 During the Transition Period the UK is bound to act within EU law. [REDACTED]

6.3 Whilst we are pursuing all options to reduce legal risk, it is not certain that these strategies will be successful. Delay risks issues building up in the system and, as set out above, the consequences could be significant for consumers, food businesses, food security and sustainability. **Offering a practical, clear and consistent approach to local authorities at this time will enable them to tackle issues arising now on a case by case basis, whilst anticipating the potential for further, coordinated action in future if the strain on the food system continues to increase.**

7. Recommendations

7.1 The Board is asked to:

- i) **Endorse** the approach to managing risk in the context of the Covid-19 response, and **approve** the guiding principles for Executive decision-making;
- ii) **Discuss** the proposals for temporary changes to labelling enforcement, and the safeguards in place to ensure that food safety and food traceability will be upheld at all times;
- iii) **Consider** the legal risks associated with the labelling proposals, and the steps that can be taken to mitigate these, including the decision from the Secretary of State that appropriate and proportionate action is urgently required;

- iv) **Determine** whether the Board is content for the Chief Executive to proceed with implementation in England (and in Wales and Northern Ireland subject to Ministerial approval), accepting the legal risk.