Seizure and Detention
A Process Map?

Liz Street
Erewash Borough Council
Seizure and Detention:-

Removal of food intended for human consumption that fails to meet food safety requirements from food chain

Look at

• ‘food safety requirement’
• *Legislation* & Procedures

Main legislation (and abbreviations)

**FSA90**  *Food Safety Act 1990 (as amended)*

**FSHER13**  *Food Safety and Hygiene (England) Regs 2013 (Hygiene Regs)*


There are some specific powers of seizure and detention for County Council Competent Authorities *listed in PG para 6.2.4.5*
Abbreviations

AO  Authorised officer to carry out S&D
CoP  Food Law Code of Practice (England) March 2017
PG  Food Law Practice Guidance Oct 2015
CA  Competent Authority

**AO Authorised Officer** – Application of FSA90 sec9 and FSHER13 reg29 **must only** be taken by officers who are specifically authorised to seize and detain food and serve the appropriate notices and meet the competency requirements set out in Chapter 4 (CoP 7.2.10)
Powers to Inspect, Seize or Detain Food

Food Safety Act 1990 sec 9(1)

An authorised officer of a food authority may at all reasonable times inspect any food intended for human consumption which -

a) has been sold or is offered or exposed for sale; or
b) is in the possession of, or has been deposited with or consigned to, any person for the purpose of sale or of preparation for sale;

and subsections (3) to (9) below shall apply where, on such an inspection, it appears to the authorised officer that any food fails to comply with food safety requirements.

There are powers under FSA sec 9(2) powers without inspection discuss later
Food safety requirements (FSR)?

Regulation (EC) 178/2002 Article 14

Food Safety Requirements

1. Food shall not be placed on the market if it is unsafe.
2. Food shall be deemed to be unsafe if it is considered to be:
   (a) injurious to health;
   (b) unfit for human consumption.
3. In determining if food is unsafe must have regard to
   • normal conditions of use of the food by the consumer and at each stage of production, processing and distribution.
   and
   • information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods.
4. **Injurious to health** must have regard to
   - not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;
   - **To the probable cumulative toxic effects**;
   - **To the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers.**
5. **Unfit for human consumption** must have regard to -
   - 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

Concept of ‘unfit’ relates to **unacceptability** so it does not need to pose a risk to health
Food past ‘use by’ date does not meet food safety requirements

1169/2011 provision of food information to consumers  Article 24
Minimum durability date, ‘use by’ date and date of freezing

(1) In the case of foods which, from a microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health, the date of minimum durability shall be replaced by the ‘use by’ date. After the ‘use by’ date a food shall be deemed to be unsafe in accordance with Article 14(2) to (5) of Regulation (EC) No 178/2002

Further Information - FSA letter 15 Nov 2015
Process map on tables
Batch, lot or consignment? 7.2.10.6 6.2.4.10

178/2002 Art14(6) and FSHER13 reg29

It is presumed, until the contrary is proved, that all of the food in the batch, lot or consignment fails to comply with food safety requirements

AO must take into account:

- evidence available
- nature of the contamination
- nature and condition of any container holding the food
- risk to health
- quantity of food involved in relation to any sampling undertaken

Compensation provisions under FSA90 sec9(7)

- Use professional judgement.
- Appropriate expert advice should be sought if necessary.

If detaining issue separate notice for each type or batch then easier to release any found not to be affected
1. FOOD intended for human consumption? 6.2.4.2

FSHER13 reg3

- All food is intended for human consumption until it is proved to the contrary
- If there is any doubt about the food being used for human consumption, it must be presumed that it is

- FBO to prove if wants to argue for a contrary intention
- Detention powers should not be used for food clearly identified as not intended for human consumption
2. Food legally imported from 3rd country? 7.2.10

- If not legally imported deal with under the relevant legislation

POAO - Trade in Animals and Related Products Regs 2011
FNAO - Official Feed and Food Controls (Eng) Regs 2009
3. Is food produced, processed or distributed in compliance with Hygiene Regulations?

NO

FSHER13 reg29 Notice to declare food fails to meet food safety requirements

FSHER13, reg29 (178/2002 Art 14 (8)&(9))

(1) On inspection of any food an AO … may certify that it has not been produced, processed or distributed in compliance with the Hygiene Regulations.

(2) Where any food is certified as in (1) it shall be treated for the purposes of section 9 of the Act as failing to comply with food safety requirements

Model certificate in PG 6.3.6
3. Is food produced, processed or distributed in compliance with Hygiene Regulations? Continued…

“Hygiene Regulations” defined in FSHER13 reg2 are

<table>
<thead>
<tr>
<th>Regulation</th>
<th>example</th>
</tr>
</thead>
</table>
| •  Food Safety and Hygiene (England) Regulations 2013                     | • Not subject to temperature control under Schedule 4  
• Raw milk not meeting standards in Schedule 5 para 5                       |
| •  852/2004 the hygiene of foodstuffs                                     | • CCP of HACCP not achieved Art4(3b) & 5  
• Cross contamination of food Annex II Chapter IX Para 3                    |
| •  853/2004 specific hygiene rules for food of animal origin              | • Primary production Annex1 Part A                                                                                                   |
| •  854/2004 organisation of official controls on products of animal origin intended for human consumption | • Food produced in a premises that is subject to approval but not approved                                                            |
| •  854/2004 organisation of official controls on products of animal origin intended for human consumption | • Meat from animals that have not undergone post-mortem inspection (except hunted wild game)                                       |
| •  2073/2005 microbiological criteria for foodstuffs                     | • Unsatisfactory testing results                                                                                                    |
| •  2075/2005 official controls for Trichinella in meat                   | • Trichinella in carcase – no controls                                                                                              |
3. Is food produced, processed or distributed in compliance with Hygiene Regulations? Continued...

**Traceability?**

*Requirements under 178/2002 Article 18.* *(Identify who supplied / systems to provide information to CAs)*

*178/2002 is not included as a ‘Hygiene Regulation’ - cannot use a reg29 notice*

FSHER13 include 178/2002 as a ‘specified EU provision’ so non compliance with traceability requirements is an offence under FSHER13 reg19(1) - but only 178/2002 Art18(2) and (3)

Reg29 notice can be used for food that should be produced in an approved premises (853/2004 or 854/2004)
4. FSHER13 reg29 notice to declare food fails to meet food safety requirements

When food has not been produced, processed or distributed in compliance with the “Hygiene Regulations” an AO may use reg29 to seize food by FSA90 sec9. (7.2.10.1)

Is a detention notice an option once FSHER13 reg29 notice is served? Reg 29 notice means not satisfied meets FSR so need to seize food

**FSA90 sec 9(4)**

Where the authorised officer exercises the powers conferred by subsection (3)(a)*above, he shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not he is satisfied that the food complies with food safety requirements and—

(a) if he is so satisfied, shall forthwith withdraw the notice;
(b) if he is not so satisfied, **shall** seize the food and remove it in order to have it dealt with by a justice of the peace.

(3)(a) - power to detain or seize
5. Action without inspecting 6.2.4.9

FSA90 sec9 powers apply to food not been inspected (sec9(2))

- when appears to AO … that any food is likely to cause food poisoning or any other disease communicable to human beings

- or that it was otherwise so contaminated that it would not be reasonable for it to be consumed in that condition.

Information from another reliable source, e.g. another Competent Authority (CA), PHE, CCDC or FSA etc. can be sufficient to enable an AO to act without inspecting (example Food Alerts for Action)

Inspection of food is not legally necessary but recommended if only for identification purposes

FSHER13 reg29 states ‘on inspection’ so must inspect if Reg29 notice needed
6. Does food fail to meet food safety requirements?

YES - remove from food chain

NOT SURE - Detain - how detained depends on premises

- **852/2004** only premises under FSA90

- **853/2004** under FSHER13

Approved establishment producing products of animal origin not intended for the final consumer and are distributed beyond a ‘local’ area. Approved by EH / FSA – given oval ‘identification mark’
IDENTIFICATION MARK
A mark indicating a POAO has been produced in an approved establishment in accordance with legal requirements in the Hygiene Regulations (853/2004)

HEALTH MARK
A mark indicating that, when it was applied, official controls had been carried out in accordance with Reg (EC) 854/2004. Note: Health marks are only applied to meat carcases (FSA approved establishments only).

ESTABLISHMENT NUMBER
Oval mark with number applied to products of animal origin produced in a third country establishment that have been approved for import into the EU.
FSHER13 reg10 allows for detention of any food and taking samples

- Use if indications or suspicions that food at establishment is unsafe and so examination necessary
- If serve a RAN (reg9) must also consider if need a detention notice

Can a reg10 notice be used in a premises that should be approved?
Yes - FSHER13 regs 9&10 say ‘requires to be approved’

Reg10 Detention Notice
- No maximum time period for the detention specified in regulations
- No mandatory compensation for owner if detention lifted
- No provision to appeal against decision to serve it

Model form (PG 6.3.10) states ‘you may choose to voluntary surrender the food at any time’

Once satisfied food no longer needs to be detained must withdraw notice by means of a further notice in writing. (Model form PG 6.3.11)
8. 852/2004 Detain Food  7.2.10.2  6.2.4.6

FSA90 sec9(3)(a) AO may give notice to a person in charge of the food that the food may not be used for human consumption and is not to be removed except to some place specified in the notice

Unless circumstances require immediate action decision to detain must only be taken if discussed with:-

• the owner or person in charge of the food and,
• if appropriate, the manufacturer.
• Exercise careful judgement, and might need expert advice, before detaining food pending further investigation
• Consider batch, lot, or consignment before a notice is served
• Use form in Detention of Food (Prescribed Forms) Regs 90
• Notice must be signed by AO taking decision to detain 7.2.10.4
Professional judgement to detain food *where it is*, or if needs to be moved
• the nature of the food, *e.g.* special storage conditions, such as refrigeration
• the quantity
• any health hazard that it represents
• security or physical care of the food i.e. tampering
• ownership of the establishment - Generally avoid leaving at establishment owned by any person who may be prosecuted

Organise periodic monitoring of the food throughout detention period

If food moved to another CA’s area must notify them and make arrangements for food to be checked while it is being detained

*FSA90 sec9 detention notice:*-
• 21 days to action but act quickly in all cases
• *Provision for compensation to owner should detention be lifted*
9. Can food be reprocessed? 7.2.10.3

When considering whether to seize detained food AO must consider-
• If food can be treated or processed before consumption and
• if so, if after treatment or processing, food would be sound and wholesome and satisfy food safety requirements

Arrangements for the treatment or processing of food must be
• agreed by AO
• the owner or the person in control of the food
• and the subject of a signed, written undertaking

If food has to be moved to another CA area than must:-
• be accepted by receiving CA before the agreement concluded
• make arrangements for that CA to ensure processing or treatment is carried out, inc service of a Detention of Food Notice if appropriate.
• not proceed if receiving CA unable to accept responsibility for ensuring food is properly processed or treated
9. Can food be reprocessed? 7.2.10.3 Continued …

CoP that mention reprocessing - is it in FSA90?

**FSA90 sec 9(4)**

Where AO exercises the powers conferred by subsection (3)(a)*above, he shall, as soon as is reasonably practicable and in any event within 21 days, determine whether or not he is satisfied that the food complies with food safety requirements and -

- (a) if he is so satisfied, shall forthwith withdraw the notice;
- (b) if he is not so satisfied, shall seize the food and remove it in order to have it dealt with by a justice of the peace.

*Note - 3(a) is power to issue notice to detain food

Reprocessing may result in being satisfied food complies with FSRs

Not with FSHER13 reg29 – already declared does not meet FSRs
FOOD MEETS FOOD SAFETY REQUIREMENTS

10. 852/2004 Withdraw Detention Notice 7.2.10.5

When satisfied that food is safe for human consumption

- AO must act as quickly when evidence or information indicates that detained food can be released but within 21 days.
- Decision to withdraw must be taken by original AO - but could be another AO with relevant experience and competence.

Withdrawal of Detention of Food Notice must be served
- Detention of Food (Prescribed Forms) Regs 1990
- as soon as possible to prevent possible deterioration of the food
Notice can be served by any officer
11a. Food Incident? 2.2

- Need to consider if there are wider implications e.g. scale of distribution, reason for food being unsafe
- Involve relevant agencies / contact FSA

11b. 178/2002 Art19 FBO Withdrawal, recall & notification

- FBO duty to withdraw food they believe does not meet food safety requirements
- FBO must immediately inform CAs and advise of action taken (food alerts)
Voluntary Procedures to remove food from food chain can be used either at

- instigation of owner of the food or
- suggestion of AO when owner of food agrees the food is not suitable for human consumption

- Voluntary procedures might contribute to a defence in any subsequent prosecution
- Could argue food was not so contaminated it had to be seized
- Condemned by JP would be persuasive in prosecution, but not in itself establish an offence
- Still be necessary for a case to be proved beyond reasonable doubt. In this respect certificates of analysis or examination are of value
A receipt must be issued for food voluntarily surrendered

Receipt must -

• give details of the food
• be signed by AO and counter-signed by person surrendering food
• include space to record time, place and method of destruction of food - AO to complete and file

• Include agreement that food owner to pay reasonable expenses of destruction / disposal, if not CA has to pay
13. Seize Food  7.2.10.3 / 7.2.10.4

Unless further processing or voluntary procedures more appropriate

**FSA90 secs (3) to (9) shall** apply where, on such an inspection, it appears to the AO that any food fails to comply with **food safety requirements**.

Serve FSher13 reg29 notice if needed

When food is seized, written notification of seizure must:-
- be issued as soon as is reasonably practicable
- include details of the type and quantity of the food seized, inc any distinguishing marks, codes, dates etc.
- be signed by AO who takes the decision

Does it need to be issued on site?
There is no prescribed or model form for seizure of food
13. Seize Food 7.2.10.3 6.2.4.7 continued …

- Ensure continuity of evidence
- whether or not there may be a subsequent prosecution and
- must make every attempt not to leave the seized food unattended

- Might need to prove to JP food presented is that seized
- Only be left if confident :-
  - will not be moved
  - will not used for human consumption
  - evidence will not be destroyed
FSA90 sec9(5) [once AO seizes food] .., he shall inform person in charge of food of his intention to have it dealt with by JP

Must give notice i.e Food Condemnation Warning Notice with details of time and place food will be dealt with by JP

Detention of Food (Prescribed Forms) Regs 1990 (not mentioned in CoP)

• to person in charge of the food and
• where possible to the owner of the food by personal delivery, fax, telephone, e-mail, or other rapid means of communication

• Administrative notice so can be signed by any AO but need to be sufficiently competent to explain notice and deal with any obstruction
14. Food Condemnation Warning Notice 7.2.10.4 / 7.2.10.5 / 6.2.4.8 Continued ....

dealt with by JP

- as soon as is reasonably practicable, normally within 2 days
- highly perishable food at the earliest opportunity

- Person in charge of food or owner must be given opportunity of being present and represented - if they choose to do so can delay hearing

*Important - FSA90 sec 9(5) confers right on any person who might be liable to prosecution for selling or producing unsafe food to attend before a JP, to be heard and to call witnesses

- Action must not be delayed if the owner not traced or contacted
- Must have the opportunity of attending – document good service of notice to show the Court
15. Court

Seizure - civil action so ‘on the balance of probabilities’

Ensure

- Continuity of evidence
- Good service of notices on person in charge/owner of food
- Can explain why food does not meet food safety requirements
- Application for costs of destruction

**FSA90 sec 6 if it appears to JP on the evidence that food fails FSR he shall condemn it and order**-

- **Food to be destroyed or disposed of to prevent it from being used for human consumption**
- **Owner of food to pay reasonable expenses**
16. **Destruction / disposal** 7.2.10.8

CA responsible for ensuring the total destruction of food seized or voluntarily surrendered by

- incineration or
- some other appropriate method (waste disposal legislation)

If a delay then need to arrange for:-

- for supervision until dealt with in appropriate manner.
- disfigurement to prevent return to food chain

If total destruction not possible disfigurement must be such that the food could never re-enter food chain, e.g. by flattening tin cans for disposal in a suitably licensed landfill site.

Obtain a copy of the waste transfer note
In summary

• Many different aspects to consider
• At the same time and under pressure
• Actions you choose guided by ‘trust’ in FBO
• Keep in contact with legal team
• FSA – when may be wider issues contact sooner rather than later
• Ensure - document/ notes / audit trail
• Food fraud? tell NFCU
THANK YOU

Any Questions?