



Will the UK Sentencing Guidelines Improve Allergen Labelling?

Professor Tony Hines

A Leatherhead Food
Research white paper

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In this white paper, Tony Hines considers the industry's response to allergen labelling requirements in the EU and discusses how the new UK sentencing guidelines set to come into force on 1st February 2016 will impact allergen labelling compliance.

There is no cure for food allergies. The Food Standards Agency (FSA) states that 1-2% of UK adults and 5-8% of children have a food allergy. This equates to around two million people in the UK and this figure does not include food intolerances. For individuals with allergies, exposure to allergenic foods can bring about a reaction ranging from minor, physical discomfort to the onset of life-threatening health complications. According to the FSA, around ten people a year in the UK die from just such complications.

In April 2015, following the introduction of the EU Food Information for Consumers Regulation (FIC), the FSA published a

Technical Guidance Document detailing the allergen labelling requirements of food business operators (FBOs) in the EU for prepacked and non-prepacked food.

Two million people able to eat out with confidence

The FIC Regulation was warmly welcomed by the allergenic community. Of particular significance was the promise of a new-found freedom: eating-out with confidence. It was now reasonable for people with allergies to expect a greater degree of clarity in the labelling of non-prepacked food and food handlers who are able to answer specific questions on the 14 key allergens covered by

In brief: EU allergen labelling requirements

The Technical Guidance Document called Food Allergen Labelling and Information Requirements is published by the Food Standards Agency (FSA) under the EU Food Information to Consumers Regulation No. 1169/2011. The key aim of this guidance is to advise food business operators (FBOs), such as food manufacturers, retailers, restaurants, takeaways, institutional caterers and food importers, on allergen labelling requirements for prepacked food and allergen information provision for non-prepacked foods.

While there have always been some allergen labelling requirements for prepacked foods, the EU FIC have introduced a new requirement to emphasise 14 specific allergens in the ingredients list of prepacked foods. For non-prepacked food, such as meals sold in cafes and restaurants, there is a new requirement to provide information on allergenic ingredients in writing and / or orally.

the legislation. Key to the success of this 'freedom' was always going to be education and training to ensure accurate labelling and confident catering staff. Critically important is a chef who can give a breakdown of ingredients and confirmation that cross contamination has been avoided. Would the adrenaline pen no longer be the last line of defence for the allergenic community?

A 'bureaucratic nightmare'

The news did not receive unanimous praise. During the spring of 2015, a number of high profile chefs publicly announced that they felt as restaurateurs, hoteliers and caterers that the 'bureaucratic nightmare' of the allergen regulations would reduce spontaneity, creativity and innovation, and add costs to their businesses. Under the strapline: what will the EU cook up next?, they voiced concern that this might usher in further regulations, resulting in an even longer rulebook for the industry.

The sobering truth of inaccurate labelling

At the Anaphylaxis Campaign Technical Conference in September 2015 for food manufacturers and food service companies, I brought together the chefs' response to the new allergen labelling with another new development: UK sentencing guidelines.

At the same time as the chefs were making headlines in the spring of 2015, the UK Sentencing Council was preparing a Definitive Guideline Document covering sentencing recommendations for corporate manslaughter, health and safety offences and food safety and hygiene offences.

Failure to meet allergen labelling falls under the umbrella of offences covered in this document. The document gives companies clear guidance how an offence, like an allergen labelling offence, would be treated following a successful criminal prosecution. Fine ceilings have been removed and sentences will be based on the size of the company causing the offence and the outcome and impact of the offence.

Consider now these two developments (the chef's response and the new sentencing guidelines) in the context of two example cases from 2015. One case covers the charges for manslaughter by gross negligence following a death by anaphylaxis in a takeaway restaurant where peanut flour may have been substituted for more expensive almond flour. The other is a case where a customer with a severe nut allergy was nearly killed by eating a lemon cupcake at a cafe, after staff failed to warn her that the icing contained cashew nuts.

Any defence, in cases such as the above, will try to claim due diligence has been followed under the Food Safety Act 1990. The stark truth is that this defence may not be possible for food allergy incidents. The need to label retail prepacked food correctly and provide information on request regarding food allergens in non-prepacked foods is mandatory. A case of anaphylactic shock resulting from a failure to label allergens correctly or to provide information to consumers in a way which enables them to avoid allergenic ingredients may be viewed as a deliberate breach of, or flagrant disregard for, the law. A high culpability factor could apply, for instance, where an offender failed to put in place measures that are recognised as

'standard' by the food industry. This could be classified as creating a 'risk of harm'. As previously described, the harm that may result from exposure to allergenic ingredients varies from individual to individual on a spectrum from discomfort to death.

In brief: UK sentencing guidelines

Sentencing guidelines relating to health and safety offences, corporate manslaughter and food safety and hygiene offences have been published in accordance with section 120 of the Coroners and Justice Act 2009. These guidelines relate to the Health and Safety at Work Act 1974 and breaches of food hygiene regulations in both England and Wales. It applies to all organisations and offenders aged 18 and older, who are sentenced after 1st February 2016, regardless of the date of the offence.

Under the provisions of the EU FIC set out in regulation 10(2) of the FIR (SI 2014/1855) and corresponding regulations in Wales, Scotland and Northern Ireland, failure to meet allergen requirements on the labelling of allergenic ingredients can be a criminal offence due to the impact of non-compliance on public health and may result in a criminal prosecution.

Fines will be decided on a case-by-case basis, up to an unlimited maximum. The general principles that a court should follow in finalising an appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003 are that the fine be proportional to the size of the company and take into account the level of 'harm' caused.

New incentive to label and signpost allergens correctly

The sentencing guidelines, due to come into force on 1st February 2016, will undoubtedly silence the critics of allergen labelling. In fact, one high profile TV chef and food writer has written that she has stopped 'agitating', accepting that her fears were unfounded and that chefs have managed to label dishes containing allergens with symbols and by listing allergens on blackboards.

Sentences based on the size of the offending company and the level of 'harm' caused could see high fines levied at offenders. A court imposed fine of up to three million pounds (an example taken from the sentencing guidelines) is certainly enough to convince large organisations to pay close attention to the allergen labelling legislation. Individuals and small or micro businesses, including chefs and restaurateurs, will no doubt be eager to label and signpost allergens correctly where a fine of £450,000 is judged proportional to the overall means of the offender and the seriousness of the offence.

Substantial fines will likely bring home to both management and shareholders the need to comply with health and safety legislation. The sentencing guidelines may make observance and implementation of the labelling regulations a far more attractive option than ignoring them.

How Leatherhead can help

Significant expertise is available at Leatherhead Food Research on food allergens from due diligence requirements to labelling, auditing, HACCP, crisis management and bespoke analysis and measurement of the effects of food processing on allergen detection.

Leatherhead's [Global Regulatory Allergen Guide](#) covers allergen legislation requirements for prepacked foods and non-prepacked foods across 59 key global markets, including 27 EU member states. This is produced by our multilingual team of global regulatory experts.

Leatherhead will be holding an Executive Briefing covering the UK sentencing guidelines in July 2016. Please contact Leatherhead for more information.

Further information

[Leatherhead's Global Regulatory Allergen Guide](#)

[FSA Food Allergen Labelling and Information Requirements Technical Guidance Document](#)

[UK Sentencing Council Guidelines for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences](#)

[Anaphylaxis Campaign](#)

About the author

Professor Tony Hines, MBE, FIFST, is the Director of Global Regulatory Services and Crisis Management at Leatherhead Food Research. Tony has been involved in incident management for over 25 years. He has extensive experience of food fraud and crisis management, dealing with serious, accidental and malicious food contamination issues. He is a trustee and former chairman of the Anaphylaxis Campaign.

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About Leatherhead Food Research

Leatherhead Food Research provides expertise and support to the global food and drink sector with practical solutions that cover all stages of a product's life cycle from consumer insight, ingredient innovation and sensory testing to food safety consultancy and global regulatory advice. Leatherhead operates a membership programme which represents a who's who of the global food and drinks industry. Supporting all members and clients, large or small, Leatherhead provides consultancy and advice, as well as training, market news, published reports and bespoke projects. Alongside the Member support and project work, our world-renowned experts deliver cutting-edge research in areas that drive long term commercial benefit for the food and drink industry.

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