Safety, Health and Environment (SHE) Regulatory

CLYDE&CO

# Newsletter

Autumn 2015



# Welcome

## Welcome to Clyde & Co's Safety, Health and Environment (SHE) Regulatory newsletter.

Our SHE regulatory team specialises in regulatory defence work and has 'one of the largest health and safety offerings in the UK market' demonstrating 'real strength in depth' according to Chambers and Partners UK. We are ranked as a first tier firm by Legal 500 who believe that our practice is 'in the top flight of firms working in this area', with particular praise for our 'fantastic service' and 'outstanding' team.

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If you wish to subscribe to an electronic version of this newsletter, or if you have any comments or queries regarding the topics covered in this bulletin – please email SHERegulatory@clydeco.com. Follow us on Twitter @ClydeCo_SHEReg for the latest news, legal updates and insights in the sphere of regulatory law.


Chris Morrison

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Victor Rae-Reeves

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# First prosecution of Public Body for Corporate Manslaughter

The first prosecution of a Public Body for the offence of Corporate Manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) will take place early next year.

A NHS Trust will face trial, along with two doctors accused of gross negligence manslaughter, following the death of a woman giving birth by emergency Caesarean in October 2012. The trial is due to begin on 11 January 2016.

While the CMCHA specifically allows for the prosecution of public bodies, this is the first time since the Act was introduced that it has taken place.

The Prosecution will allege that:

- The Trust managed or organised its activities in a way which caused the death
- The death was the result of a gross breach of a relevant duty of care owed to the deceased
- The manner in which senior management managed or organised the activities is a substantial element of the breach

We will follow the proceedings and keep you updated.

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# HSE Fatal Injury Statistics for 2014/15

The HSE has published its Fatal Injury Statistics for 2014/15 which show a slight increase in fatal injuries to workers in the workplace, rising from 136 in 2013/14 to 142, although this is still lower than the average of 156 over the past 5 years. In addition, there were 102 members of the public fatally injured in incidents related to work (excluding railway related fatalities).

This means there were 258 fatal incident enquiries undertaken by investigators last year. Where a work related fatality occurs, the Police will investigate jointly with the regulator (whether HSE or Local Authority) under the Joint Work Related Death Protocol. The Police considers offences of Corporate Manslaughter (against the organisation) and Gross Negligence Manslaughter (against individuals). The HSE or Local Authority will consider health and safety offences.

## What are the statistics?

When we examine the statistics, the overwhelming majority of fatalities involving workers occurred in England (113), with the North West (20) and South West (19) having the highest number per region. There were 20 fatalities in Scotland and nine in Wales.

The services sector had the highest number of fatalities (156) although when that figure is compared with the number of workers in the sector this equates to 0.21 deaths per 100,000 workers. Of the 156 fatalities relating to the services sector, 105 involved members of the public.

The most dangerous industry is agriculture with 37 fatalities which averages out as just over nine deaths per 100,000 workers. Unsurprisingly, construction also figures highly in the number of incidents recorded with 39 fatalities which, when considered as an average figure, equals 1.62 deaths per 100,000 demonstrating the significant strides being taken in this sector.

## Corporate Manslaughter

The offence carries an unlimited fine if convicted. It is impossible to put a precise figure on the amount of fine because of the variables involved – size of business, turnover, level of culpability etc. – but the Sentencing Guidelines Council advise the penalty will rarely be less than GBP 500,000 and may run into the millions (although please note there will be revised guidelines issued in November 2015 which will likely suggest consistently higher penalties for large organisations in future – we will be writing with a separate update as soon as the guidelines have been issued and with details of our seminar programme on this topic).

## Gross Negligence Manslaughter

The offence carries a maximum sentence of life imprisonment.

While previously the Courts have been willing to impose suspended prison sentences on those convicted (served in the community), more recent guidance from the Court of Appeal indicates this will generally not be appropriate and a prison sentence should be imposed.

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# Three years of Fee For Intervention – Income increases for 2014/15

The Fee For Intervention Scheme (FFI) by which the Health and Safety Executive (HSE) recovers fees from businesses they deem to be in "material breach" of health and safety legislation has been with us for three years as of 1 October 2015.

FFI is the system by which the HSE recover the costs of investigations when there has been a material breach of the law, the Inspector is of the opinion there is or has been a "material breach" of health and safety law, and the Inspector notifies the business of this in writing. The business will then be billed GBP 124 per hour for the work completed by the HSE up to the point an enforcement decision is made. Invoices are issued every two months.

The amount invoiced or the Inspector's opinion that there is a "material breach" can be challenged by raising a Query with the HSE within 21 days of the invoice date. If not satisfied with the outcome of this, a Dispute can be raised in writing within 21 days of the HSE's response to the Query. Decisions on Queries are dealt with by the FFI Team at the HSE, and Disputes are decided by a panel of two HSE staff and one independent member. A business will not be charged for raising a Query but will be charged for the HSE's time if a Dispute is not upheld.

The HSE's most recent accounts (2014/15) confirm income for the year from FFI as GBP 10,150,000, up from GBP 8,706,000 the year before. The scheme is likely to remain, especially as the HSE has dropped the idea of duty holders voluntarily paying for inspections following consultation with a number of organisations.

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# Rail Regulator opens consultation – New enfORRcement principles

The Office of Rail and Road (ORR), the body responsible for enforcing health and safety legislation on the rail network, completed a consultation on a revised health and safety compliance and enforcement policy statement.

The document sets out the ORR's principles of enforcement:

- Proportionality – relating the level of enforcement to the level of risk
- Targeting – the most serious risks
- Consistency – of approach to enforcement action
- Transparency – as to what is expected of a duty holder
- Accountability – the Regulator must be accountable to the public for its actions

The new document includes a new section on "growth duty" which requires those exercising regulatory functions to have regard to economic growth when making decisions suggesting a move towards more engagement with duty holders rather than immediate enforcement action.

A new section is included providing advice on how to challenge the regulator's decisions by both duty holders and victims. Duty holders are offered an internal complaints procedure beginning with line managers in the event they are not satisfied when verbal and written advice is offered. For affected parties, an independent peer review system has been set up in line with the EU Victims Directive.

The consultation closed on 25 September 2015.

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# Self-employed to be exempt from health & safety regulation

As of 1 October 2015, certain self-employed individuals are exempt from health and safety legislation. If a self-employed individual's work does not pose a potential risk of harm to others then they will not be subject to health and safety law.

The move is introduced by the The Health and Safety at Work etc. Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015 ("the Regulations") which is a response to the 2011 independent review into health and safety legislation authored by Professor Ragnar Löfstedt (Reclaiming health and safety for all: An independent review of health and safety legislation).

The HSE estimate that this change will affect 1.7 million self-employed people.

Health and safety law will still apply if:

- You are an employer (ie. somebody works for you)
- The work activity is specifically mentioned in the Regulations
- The work activity poses a risk to the health and safety of anyone else

The Regulations specifically exclude some activities because of the risks involved so that health and safety law continues to apply to self-employed persons whose work activities cover:

- Agriculture (including all types of farming, market gardening and forestry)
- Asbestos (any work with)
- Construction (any work on a construction site – includes both commercial and domestic premises)
- Gas work
- Genetically Modified Organisms
- Railways

In respect of the final class of self-employed individual who will remain subject to health and safety law, a work activity will pose a risk to the health and safety of another if another person could be injured as a result of the activity. It is for the individual to assess whether or not this applies to them. The HSE provides some guidance on its website which advises considering both the working environment (eg work in a garage/workshop where others could have access and be at risk of harm) and the equipment and materials used (eg. risk of burns/crushing/trips, dust/noise, hazardous substances). Examples on the HSE's website include:

- Hairdresser – if bleaching agents or similar chemicals used the law will apply, if not it won't
- Dressmaker working from home – the law will not apply
- Photographer with clients occasionally visiting studio – the law will not apply
- Office work – it is activity not location which is important – eg working on accounts, the law will not apply; drafting a manual for use by another operating machinery, the law continues to apply

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# HSE challenged over Glasgow bin lorry decision

The HSE has been challenged at the Fatal Accident Inquiry (FAI) over the decision not to treat the investigation into the Glasgow incident as a health and safety matter, a decision taken the day following the incident in which six people lost their lives.

Six people were killed and fifteen injured when the driver of a bin lorry lost control in Glasgow City Centre on 22 December 2014. The FAI, known as a Coroner's Inquest in the rest of the UK, considered the driver's medical background, fitness to hold a licence and his employment and training record, the vehicle involved and the safety of the route taken.

Fatal incidents in the workplace are investigated by the Police and HSE jointly with the HSE considering health and safety offences and providing technical expertise to support the Police under the Work Related Death Protocol. In this instance, it was concluded that the investigation ought to be treated as a road traffic collision and thus investigated solely by the Police.

Whilst giving evidence to the FAI, the HSE Inspector was challenged over the decision taken in a meeting with the Police and Prosecutors to treat the matter as a road traffic investigation, before the driver's medical records had been obtained. The FAI heard the driver suffered from dizzy spells and fainting not disclosed to the DVLA or his employer.

When questioned the Inspector accepted that if a driver had medical issues such as epileptic seizures or heart attacks identifiable from his records that it may give rise to a breach of health and safety legislation.

The Crown Office (which prosecutes criminal cases in Scotland) confirmed in February that no criminal charges would be brought in relation to the incident.

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# Knock knock – The latest fire protection standard for doors is revised

A new Code of Practice, BS7273-4:2015, has been released which applies to electrical control arrangements for actuation of mechanisms that unlock, release or open doors in the event of fire.

### There's already a standard, why is there a need for a Code of Practice?

While there are British/European standards for the devices themselves, there is no Code of Practice with recommendations governing their use and, in particular, the design and installation of the interface with the fire detection and alarm system.

### So how do I know whether the new Code of Practice will apply to me?

The new standard should be used by:

- Fire alarm and manufacturers and installers
- Enforcing authorities including building control bodies and fire and rescue authorities
- Fire consultants
- Fire risk assessors

### What are the changes from the standard?

- Simplified recommendations and terminology, with some of the commentary text tabulated and moved to new informative annexes
- Revised diagrams for the siting and spacing of smoke detectors in relation to electronically held-open doors
- Categorisation of actuation – A,B and C, each of which has a set criteria for fail safe operation under defined conditions

### So is this new Code of Practice being welcomed?

Bernard Laluvein from the Fire Industry Association and Chairman of the FSH/12 BSI Committee says that "Those using the revised Code of Practice will be able to better understand the applications of the measures related to use of mechanisms that unlock, release or open doors in the event of fire and how such mechanisms interface with the fire detection and alarm fire system. This better understanding will lead to increased safety of building occupants in the UK".

Make sure your business has familiarised itself with the revised Code by clicking the following link:

http://www.fia.uk.com/news/latest-fire-protection-standard-for-doors-revised.html

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# Smokers beware!

As of 1 October 2015, new laws came into effect making it illegal to smoke in a vehicle if carrying children as passengers. Financial penalties will be imposed on those who contravene these new rules.

The move follows a similar ban imposed in Wales and aims to protect young people under 18 from the effects of passive smoking.

342 MPs voted in favour of this change with only 74 voting against it. However the issue does seem to have divided political parties and provoked some fierce debate about public health and individual freedom. Nick Clegg has previously described the ban as "profoundly illiberal". David Cameron himself has questioned the practicalities of a ban but did ultimately change his mind.

Public Health Minister, Jane Ellison, explained why these new rules are so important "Three million children are exposed to second hand smoke in cars, putting their health at risk. We know that many of them feel embarrassed or frightened to ask adults to stop smoking which is why the regulations are an important step in protecting children from the harms of second hand smoke."

Not everyone is convinced by these changes. Simon Clark, Director of the smokers' group Forest, feels the legislation is excessive. He states "The overwhelming majority of smokers know it's inconsiderate to smoke in a car with children and they don't do it. They don't need the state micro-managing their lives"

## So, what are the new changes?

As of 1 October 2015, it is an offence for a person of any age to smoke in a private 'enclosed vehicle' if they are carrying someone who is under 18. In addition, it will be an offence for a driver (including a provisional licence holder) not to stop someone smoking in these circumstances.

## What is classed as an "enclosed vehicle"?

The new legislation covers any private vehicle that is enclosed wholly or partly by a roof. A convertible vehicle with the roof completely down and stowed away is not enclosed and so would not fall foul of the legislation. However, a vehicle with the sunroof open would still be considered enclosed and would be covered by the legislation.

The rules apply to caravans, campervans and motorhomes if being used as a vehicle, but do not apply when they are being used as living accommodation.

## The penalties

Those caught committing an offence will be liable to receive a fixed penalty notice in the sum of GBP 50. Those caught committing both offences can receive two fines. Enforcement Officers (usually the Police) will use their discretion in deciding when to impose a Fixed Penalty Notice of GBP 50 and when to refer a matter to Court.

If the case is referred to Court, the passenger caught smoking in a vehicle carrying children can face a fine of up to GBP 800. However the driver convicted of failing to prevent someone smoking whilst carrying children as passengers could face a fine of up to GBP 10,000.

## Why is the law changing?

The dangers of passive smoking have been known for quite some time. What you might not have known however, is that smoke can stay in the air for up to two and a half hours, even with a window open. Exposure to this second hand smoke has been strongly linked to chest infections, asthma, ear problems and cot death in children.

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# Driverless cars to become a reality

According to the Government, the UK will be leading the way in the emergence of driverless car technology.

In fact, plans are already in place to use the UK as a central testing location and the Government is intent on attracting the largest global businesses to come to the UK to develop and test their technologies.

### What's it all about?

When considering that the average driver spends the equivalent of six working weeks a year behind the wheel, driverless technology represents a real opportunity to use this time in ways not previously thought possible. In addition, vehicles which never become tired or distracted could be influential in improving road safety.

It has even been suggested that existing laws and regulations be amended and where necessary new legislation be introduced to accommodate driverless cars becoming commonplace.

### What does this mean?

Well, in order to allow a driver to discharge from the task of driving, the current legal and regulatory framework would have to be amended. Those areas which are likely to see the biggest changes are:

- **Liability** – there needs to be greater certainty around criminal and civil liability in the event of an automated vehicle being involved in a collision
- **Vehicle regulation** – there would have to be changes to the MOT test to check roadworthiness. It has even been suggested that the Highway Code be revised to include a section on automated vehicle technologies
- **Safety** – the Government will consider whether a higher standard of driving should be demanded of vehicles operating in an automated mode, than would be expected of a conventional driver

### What impact is this likely to have?

In the short term at least, if driverless technology were to be spearheaded here in the UK, it would likely result in the creation of a large number of jobs over the coming years.

In the longer term, if shared access to driverless cars were to be embraced by UK society, the advantages could be enormous. Taking Singapore as an example, a recent study estimated that a fleet of 300,000 autonomous shared vehicles could serve the entire population of Singapore (almost six million people) with a maximum 15 minute waiting time during peak hours. Today 800,000 private cars are owned by less than 12% of the city state's population.

Of course adding driverless cars to our current, private vehicle based economy, may be counterproductive and only serve as an additional burden to our already congested, inefficient and environmentally damaging use of single occupancy transport.

Before the success of driverless vehicle technology can be measured however, there will be a number of legal and legislative questions to be answered.

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# Green light for Safer Lorry Scheme in London

As of 1 September 2015, the London Safer Lorry Scheme came into force in an attempt to protect pedestrians and cyclists in the capital.

### What is the Safer Lorry Scheme?

This Scheme uses a combination of powers to ensure that only Heavy Goods Vehicles (HGVs) fitted with basic safety equipment are allowed on London's roads.

### What does it mean?

Under the Scheme, vehicles weighing over 3.5 tonnes are required to:

- Be fitted with Class V and Class VI mirrors giving the driver a better view of cyclists and pedestrians around their vehicle
- Be fitted with side guards to protect cyclists from being dragged under the wheels in the event of a collision

### Why is this necessary?

One of the priorities for 'Traffic for London' is to reduce the number of people killed or seriously injured on London's roads by 40% by 2020. HGVs have been involved in a disproportionate number of fatal collisions involving cyclists and pedestrians in recent times. In 2013 for example, there were 14 fatal incidents involving cyclists. nine out of the 14 fatalities involved HGVs. This year, as at 1 September 2015, seven of the eight cyclist deaths in the capital have involved HGVs.

### What has been the response?

Charlie Lloyd from the London Cycling Campaign welcomed the introduction of the scheme saying "The new mirror system is really good news but most lorries already comply. What we'd like to see is a total re-design of a lorry cab." However Natalie Chapman, of the Freight Transport Association, said funds used to launch the scheme would better be spent on targeting "a small proportion of lorries that don't comply with existing regulation."

### So what does this mean in practice?

In practice, it means those drivers found to be in charge of a non-compliant vehicle may be issued with a GBP 50 Fixed Penalty Notice. If the matter proceeds to Court, the offence could carry a fine of up to GBP 1000. In addition, the Traffic Commissioner, who has the power to modify or even suspend Operator Licences, will be notified of those companies operating vehicles in breach of the scheme. Repeat offenders could risk losing their Operator's Licence.

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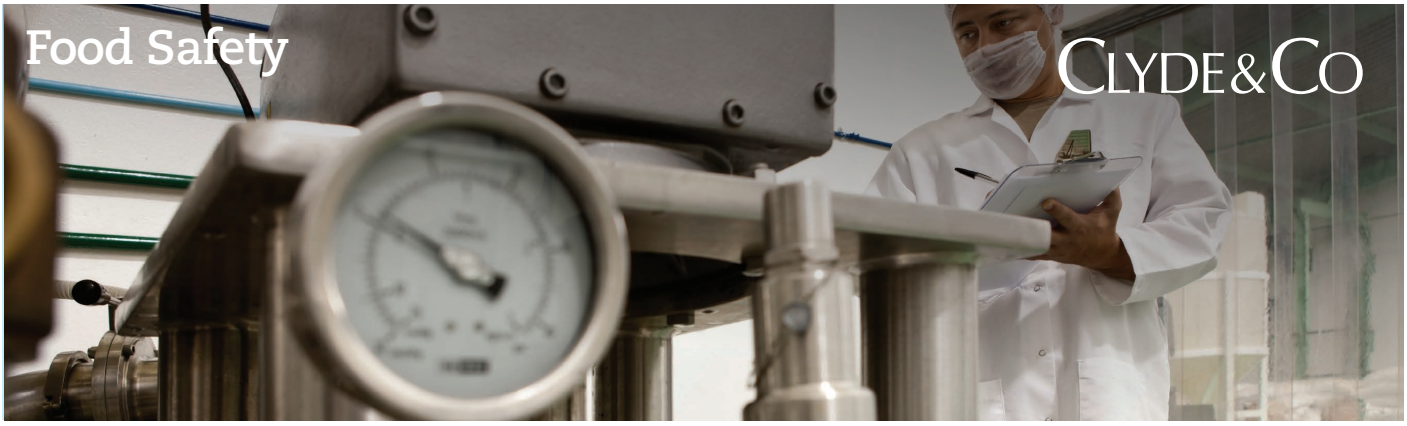


# FSA review of animal welfare standards in slaughterhouses

## The Food Standards Agency (FSA) has published its findings after a recent review of animal welfare standards in slaughterhouses.

The FSA carried out a series of unannounced inspections of slaughterhouses after footage was released earlier this year of apparent cruelty to animals in two slaughterhouses.

In relation to the effectiveness of animal welfare safeguards, businesses and FSA teams were assessed either as good, improvement required, or urgent improvement required.

### Business operator effectiveness

The results from the inspections that took place back in February and March found that the standards of 268 businesses were good, 38 businesses needed improvement; with one business in England requiring urgent improvement.

It is an EU requirement that businesses appoint suitably trained and qualified Animal Welfare Officers (AWO) to ensure that Standard Operating Procedures (SOP) are devised and implemented, and animal welfare rules are properly understood, applied and reviewed. Those areas identified as being in need of improvement were generally in relation to the appointment of these officers.

Other areas that were identified were a lack of SOP's; 73 slaughterhouses were found to have no SOPs in use, and 42 premises still required an AWO to be appointed. In addition, there were issues relating to the documentation and monitoring in that the information being captured was insufficient to assist in consumer choice when it came arriving at a decision about the animal welfare of a particular slaughterhouse.

### FSA performance effectiveness

FSA performance was considered good at 294 premises (96%). Improvements (mostly minor) were identified for 12 of the FSA official veterinarians/teams. The most commonly identified areas for improvement were records on slaughters and their licensing, and the need for increased physical checks and better recording of these checks.

Jason Feeney, the FSA's Chief Operating Officer, said "Our unannounced inspections have shown that animal welfare is a priority for the vast majority of slaughterhouse owners of and most of our staff are taking steps to check the right controls are in place". Nevertheless, these inspections have highlighted that there is room for improvement. We will continue to work with businesses and FSA staff to fix any problems as part of our zero tolerance approach to animal welfare breaches".

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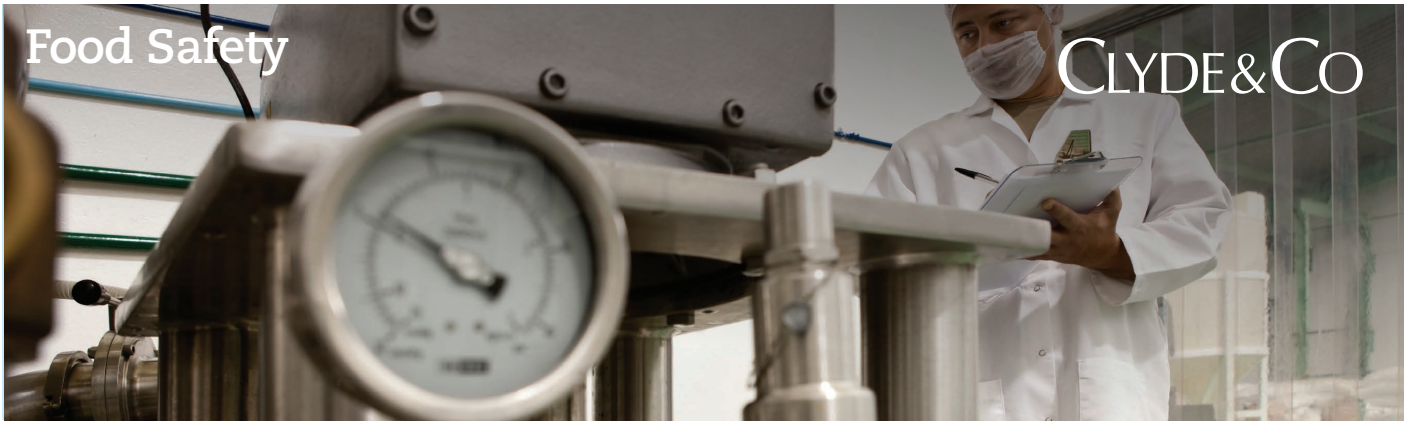

# Something to digest – FSA releases revised Meat Industry Guidance (MIG)

## On 3 August 2015, the Food Standards Agency (FSA) published a revised and improved version of its MIG.

The revised twenty chapter version has been published by the FSA to provide clarity in relation to legal requirements, provide useful tips, and aims to teach good practice principles.

The new MIG sets out:

- The legal obligations that apply to food business operators in the meat sector and provides advice on how these obligations can be met
- Whilst compliance with the law is not voluntary, operators are not obliged to follow the advice in the guide as other ways of achieving compliance with the law may be equally valid
- The guide is not an authoritative interpretation of the law as only the courts have that power

The FSA says that the guide is for businesses involved in the slaughter, cutting and processing of fresh meat. Its main target is businesses subject to veterinary control by the FSA, Food Standards Scotland and Department of Agriculture and Rural Development.

If you are a business to which the MIG will apply then you should familiarise yourself with the MIG now by clicking the following link:

https://www.food.gov.uk/business-industry/meat/guidehygienemeat

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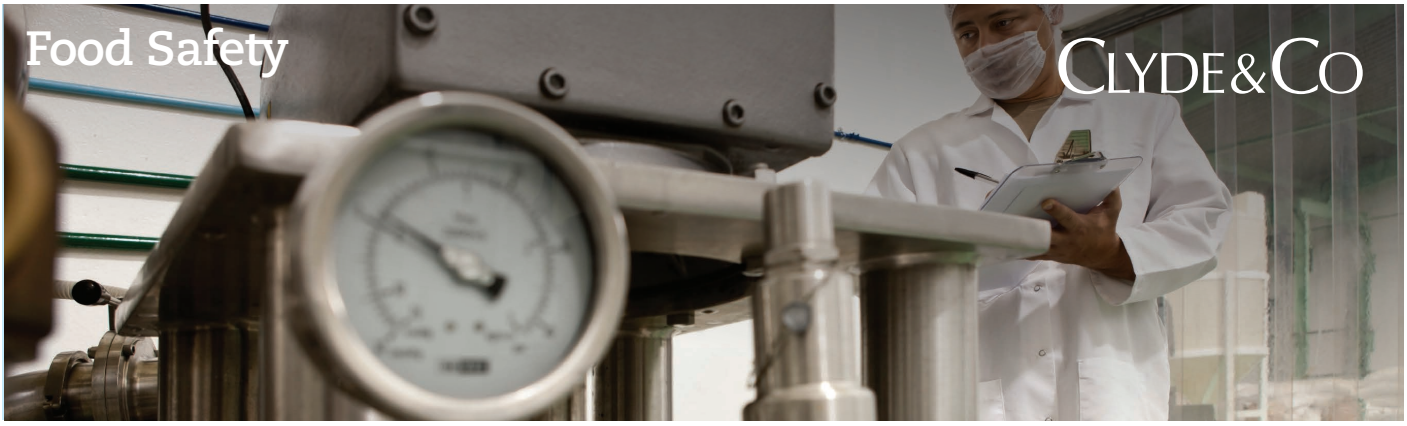

# FSA publishes tasty new proposals on serving rare burgers

On 9 September 2015, the Food Standards Agency (FSA) released details on its website confirming its recent finding that the preparation and service of rare burgers in food outlets is unacceptable unless a validated and verified food safety management plan is in place.

Due to the increased popularity of burgers being served rare, the FSA has released a range of controls that businesses should follow if serving rare burgers. The long standing advice of the FSA remains the same – that burgers should be cooked thoroughly to kill bugs that may be present.

### Will it impact upon my business?

The FSA has stated that its suggested controls should be in place throughout the supply chain of mince. Clearly the controls will be far reaching and something that all those in the food industry involved with mince will need to sit up and take note of.

### What action is required?

- Should a business wish to serve burgers rare they will need to notify their local authority in advance
- Suppliers of mince will have to provide assurances to the FSA on the controls intended for consumption rare or lightly cooked burgers
- Effective consumer advisory statements will be required on menus where rare burgers are served. The FSA proposes to take the lead on this to ensure consistency
- An FSA communications plan is implemented to explain the risks and controls to the public
- Infection rates will be closely monitored and any changes brought to the FSA's attention

### When will I need to act?

The answer is to act now – the FSA has stated that it will provide further guidance in due course but suggests businesses make enquiries with their respective local authority to discuss potential food safety management plans to ensure the controls identified by the FSA are being effectively addressed.

Businesses who wish to familiarise themselves with the FSA's decision can click on the following link to find out more:

https://www.food.gov.uk/news-updates/news/2015/14419/fsa-board-decision-on-rare-burgers.

We will continue to monitor developments in this area and will provide a further update once the FSA release its guidance.

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# MEPs vote in favour of tough new recycling targets

MEPs have voted in favour of legally binding recycling targets for member states, following a vote put to the European Parliament on 9 July, despite opposition by the UK Government.

By 2025, landfilling of recyclable materials will be banned and by 2030, EU member states will have to recycle 70% of municipal waste and 80% of packaging waste. The recommendations are likely to be included in the European Commission's circular economy package which is expected later this year.

With 394 MEPs voting in favour of the proposals, 197 against and 82 abstentions, not everyone agrees that these measures are the best method of achieving changes to attitudes and behaviours when it comes to recycling. None more so than the UK Government. A leaked paper on the UK's position stated that "greater emphasis needs to be given to other measures such as voluntary agreements with industry and incentives to reward behavioural changes."

However, with the UK population throwing away seven million tonnes of food and millions more tonnes of electrical goods each year, others have argued that the UK position is one that is counter-productive and encouraging of a "throwaway society".

Others worry that these targets could be reduced or even scrapped prior to the circular economy package being implemented. However Karmenu Vella, environment commissioner, has perhaps eased these concerns by confirming only a week before the vote that "we can't be more ambitious by lowering our targets. We have to maintain those targets. We have to be more ambitious on outlook, results and delivery by member states, and we need to identify the member states that are not achieving those targets."

EU laws currently require that all member states recycle half of all household waste by the year 2020. In 2013, England recycled 44.2% of its household waste, a 0.1% increase on the year before. Wales and Scotland are doing better; however there is clearly work to be done if the 2020 target is to be met.

The objective of the EU is to halve carbon emissions and steer Europe toward a more circular economy. According to reports, this approach could create GBP 1.3 trillion in net benefits. In commenting upon the possibility of legally binding targets, Defra expressed concerns that the stringent targeted approach (and corresponding landfill restrictions) would impose additional costs on SMEs. The conclusion, at the time, was that Defra would not support the targets unless the economic and environmental benefits exceeded the costs involved. Certainly, if this proposal is to succeed, Government support will be key as will industry and public engagement.

Although ambitious, the general consensus is that these targets are attainable with some Councils in Europe already reaching 70% recycling statistics.

There will be industry specific concerns, for example:-

- In construction, can waste be designed out at the stage of project inception?
- In the electrical goods sector, how will businesses evaluate the new impetus to encourage the reuse of products with the clear commercial advantages of selling newer models?

If these new measures are enacted, companies will have to balance their commercial aims with the need to meet this latest environmental requirement. With the targeted approach almost certain to be introduced, businesses would be wise to consider now how they will begin to modify their practices to meet the new, more stringent expectations.

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# Government consults on revised Duty of Care guidance

## Defra recently launched a consultation on a revised 'Duty of Care' code of practice applicable to all those dealing with controlled waste.

The Duty of Care is a legal requirement imposed on those dealing with certain kinds of waste, to take all reasonable steps to keep it safe as set out in the Environmental Protection Act 1990 (the EPA).

The current Code of Practice was published in 1996 and therefore does not reflect a number of important legislative changes, hence the Code of Practice has been revised and is now subject to consultation

The Duty of Care plays a central role in the responsible disposal of waste and supports the Environment Agency's well publicised "war on waste". Waste crime has been estimated by the Environmental Services Association Education Trust to cost the UK economy GBP 568 million per annum.

### What is the purpose of the proposed Code of Practice?

Defra describes the revised Code of Practice as giving simple, clear and practical guidance on how those who import, produce, carry, keep, treat or dispose of controlled waste can fulfil their legal obligations.

In revising the Code of Practice, the Government has attempted to:

- Explain the legislative requirements of the Duty of Care, clarifying who and what they apply to
- Provide guidance so that each user understands how to demonstrate compliance
- Signpost other legislative requirements that apply to the management of waste that must also be complied with alongside the Duty of Care in particular circumstances
- Publish the document in a format that meets the needs of the user

### So what has changed?

Since the current Code of Practice was published in 1996, there have been a number of changes to relevant domestic and European environmental legislation. The revised Code of Practice aims to reflect these changes including:

- **The waste hierarchy:** The Waste Framework Directive sets out five ways of dealing with waste, ranked according to environmental impact. Waste holders are required to take all reasonable measures to apply the waste hierarchy in priority order when waste is transferred to another person. A declaration of compliance is required on waste transfer documentation
- **Basic characterisation requirements:** If waste must be disposed of in a landfill site, it must be characterised in accordance with the Landfill Directive and Council Decision to ensure that waste management operators fully understand the nature of the wastes they will be receiving
- **Waste transfer information:** Those who transfer and handle waste now have the ability to record waste transfer information on alternative documents such as invoices, orders or receipts; or electronically, for example through the electronic Duty of Care system (www.edoconline.co.uk)
- **Household waste duty of care:** Section 34 of the EPA imposes a more limited Duty of Care on householders, requiring them to ensure they pass their domestic waste to someone authorised to take it (eg the municipal waste collection service) but does not require them to complete waste transfer notes

# Environmental

## Providing guidance on how to demonstrate compliance

The revised Code of Practice reflects the Government's smarter guidance policy. Defra is aiming to minimise the length of the document and remove best practice examples and duplication within and across documents. The new approach is intended to make it simpler, quicker and clearer for users to find out what they need to do.

## Publishing in a format which meets the needs of the user

With the increased use of computers, tablets and smartphones, the Government has confirmed the intention to publish the Code of Practice in web format with links to other relevant information and guidance.

The consultation sought views on:

- Whether the scope of the Duty of Care is clearly set out
- How long the Duty applies for
- Whether the law is clearly explained
- Whether the actions required to comply with the Duty are clearly set out
- Whether the signposting of other relevant legislative requirements is helpful
- How users intend to access the document once published

The consultation closed on 21 September 2015. We will keep you updated and let you know once the approved Code of Practice has been issued.


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# How much? Enforcement implications of England's new plastic bag charge

As of 5 October 2015, large retail businesses are legally required to charge for single-use plastic carrier bags. The scheme aims to reduce the use of such bags and the litter associated with them, by encouraging their re-use. With penalties being imposed for those breaching their obligations, it is vital that you are aware of the changes coming into force.

### Why are the government introducing this charge?

In 2014 over 7.6 billion single-use plastic bags were given to customers by major supermarkets in England. These types of bags, which take longer to degrade in the environment than other types of carriers, create unsightly littering and can also be dangerous to wildlife.

By introducing the charge, the Government expects to see a significant decrease in the use of plastic carrier bags with estimated reductions as high as 80% in supermarkets and 50% on the high street. It is estimated that over the next ten years the advantages of the scheme will be:

- An overall benefit of over GBP 780 million to the UK economy
- Up to GBP 730 million raised for good causes
- GBP 60 million saved in litter clean-up cost
- GBP 13 million in carbon saving cost

### When must you charge?

Businesses must charge at least 5 pence per single-use plastic carrier bag where they employ 250 or more full time equivalent employees and sell or deliver goods in England. Businesses with fewer than 250 full time equivalent employees do not have to charge. Stores that are part of a franchise or symbol group only count their own employees; not those of the franchise or symbol group as a whole.

### What types of bags must you charge for?

The new law applies to bags which have an opening, are not sealed and are:

- Unused
- Plastic
- With handles
- 70 microns thick or less

### What types of bags do not incur a charge?

There is no charge for plastic bags that are:

- For uncooked fish, fish products, uncooked meat, poultry and their products
- For unwrapped food for animal or human consumption
- For unwrapped loose seeds
- For unwrapped blades, including axes, knives and razor blades
- For prescription medicine
- For live aquatic creatures in water
- Woven plastic bags
- For goods in transport, such as at an airport or on a train, plane or ship
- Considered as sealed packaging for mail order and click-and-collect orders
- Returnable multiple use bags (bags for life)
- Used to give away free promotional material
- Used for a service but with no sale of goods, such as dry cleaning or shoe repairs

A bag can contain multiple items from this list and not incur a charge. However, if the bag contains other items then you must charge. For example, you wouldn't charge for a bag containing an unwrapped blade, but adding a box of cornflakes means you would have to charge.

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# Environmental

## What must retailers do?

Retailers must make every effort to ensure that they charge for self-checkout bags and must keep records for three years. These records must be sent to Defra on or before 31 May following the end of the reporting year. The reporting year runs from 5 October 2015 to 6 April 2016, then from 7 April to 6 April from 2016 onwards.

Retailers must also record the number of bags supplied, the gross and net proceeds of the charge, any VAT in the gross proceeds, what they did with the proceeds and any reasonable costs and how they break down.

Once the retailer has deducted reasonable costs, it is for the retailer to choose what to do with the proceeds. However, retailers must report to the Government where they invest the proceeds and these details will be published each year. It is expected that retailers will donate the proceeds of the scheme to good causes.

## Inspection and enforcement

The local authority will ensure that the law is being followed. For home deliveries, the relevant local authority will be the one where the goods were dispatched from. If delivered from outside England, the local authority will be the one in which the goods were received.

The local authority can impose a fine on a business if it:

- Does not charge at least five pence per single use carrier bag
- Does not keep records
- Does not supply records
- Misleads in respect of the steps taken to comply with the law

The local authority can also:

- Issue a non-compliance notice with steps to be taken to correct a breach
- Impose a fixed or discretionary penalty notice
- Order a business to advertise its breach of the law, the penalty imposed and how it now seeks to comply
- Recover the cost of the investigation from non-compliant businesses

## Fixed penalties

| Breach | Penalty |
|---|---|
| Not charging for bags appropriately | GBP 200 |
| Not keeping records | GBP 100 |
| Not supplying records | GBP 100 |

## Variable penalties

| Breach | Maximum Penalty |
|---|---|
| Not charging for bags appropriately | GBP 5,000 |
| Not keeping records | GBP 5,000 |
| Not supplying records | GBP 5,000 |
| Giving false or misleading information to, or otherwise obstructing or failing to assist the local authority | GBP 20,000 |

## Appeals

An appeal against a penalty notice must be made within 28 days if where the business feels it was wrong, unreasonable or based on an error. An appeal can also be brought in circumstances where the business believes the non-monetary requirement is unreasonable or the variable amount penalty too high.

## Response

The charges now in force in England are much more complex to those already in place in Scotland and Wales with the result that Defra is offering training to Local Authorities to ensure that the scheme is properly enforced. Certainly the ability of Trading Standards Officers to impose civil sanctions on errant businesses is a new stream of local authority enforcement activity and maintains the recent commitment to look beyond the criminal law to enforce legislation designed to protect our environment.


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# Enhanced enforcement powers under the Consumer Rights Act 2015

UK consumers spend GBP 90 billion a month and, as of 1 October 2015, they can now enjoy clear and enhanced consumer rights under the Consumer Rights Act 2015 ("the 2015 Act").

To ensure traders comply with the reformed consumer law, a number of 'enforcers' are granted investigatory powers to consider possible breaches. The 2015 Act looks to consolidate, modernise and simplify these investigatory powers to improve their transparency and accessibility for both traders and enforcers. Enforcers have also been afforded greater flexibility, through Enhanced Consumer Measures (ECMs), which aim to provide consumers with the best outcomes.

## What are the powers and who can enforce them?

There are four types of enforcers:

- Domestic enforcers, including Trading standards
- EU enforcers
- Public designated enforcers
- Unfair contract terms enforcers, including Ofcom and Which?

Every enforcer may use the numerous, generic enforcement powers listed in Schedule 5 of the 2015 Act. Some of these powers are reformed, including clarification of the different powers of entry and inspection, and increased safeguards to the powers. When deciding which powers to enforce, the enforcer will consider the nature and seriousness of the suspected breach.

Of most concern is an enforcer's new power to enter premises with or without notice. The 2015 Act requires an enforcer to give two days written notice, to the occupier of commercial premises, to carry out a routine inspection. However, if an enforcer "reasonably suspects a breach of consumer law" or believes notice would "defeat the purpose of entry" this requirement is waived. Unfortunately, there is little guidance on what evidence or intelligence the enforcer would need before drawing these conclusions. Once the inspector gains entry without notice, they may exercise additional powers such as the ability to seize and detain goods or require production of documents.

To provide some level of protection to traders, safeguards have been introduced and traders should ensure they are aware of their rights and duties when dealing with the regulator. For example, if requested, enforcers are required to let those persons from whom goods and documents have been seized have supervised access to them once detained.

## Criminal offences

A person will commit an obstruction offence should they:

- Intentionally obstruct an enforcer
- Intentionally fail to comply with instructions given by an enforcer
- Fail to give an enforcer assistance or information reasonably required. This includes making a statement or reckless statement which the person knows is false or misleading

Found guilty of this offence, a person may be fined up to GBP 1,000.

Under the 2015 Act it is also an offence for a person to falsely act as an officer by purporting to use the powers prescribed in Schedule 5. A person found guilty of this offence may be fined up to GBP 5,000.

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# Trading standards

## Enhanced Consumer Measures (ECMs)

Once an enforcer has utilised their powers and, if they establish a breach of consumer law, there are a number of measures or sanctions they may seek.

Prior to the 2015 Act, the main formal sanction for dealing with the most serious breaches of consumer law was criminal prosecution and the only civil redress was an injunction to stop the offending behaviour, neither of which benefitted the consumer. However, ECMs aim to achieve:

- **Redress** – giving consumers, who have suffered loss, their money back
- **Compliance** – reducing the likelihood of future breaches
- **Information** – enabling consumers to exercise greater choice in the market

There is no exhaustive list of ECMs in the 2015 Act. The measures should always be just, reasonable and proportionate and an enforcer will consider a number of factors, including the public interest, before deciding on the most suitable measure or sanction. There may be cases where it is appropriate that ECMs are used in addition to a criminal prosecution.

## Procedure

Once an enforcer has exercised powers and established a breach of consumer law, a number of factors will be considered before deciding on the most appropriate measure and/or sanction. The enforcer should then work with the trader to agree how matters should be actioned and, when the enforcer believes the solution is appropriate, they will accept undertakings from the trader specifying the ECMs that the trader will take, and the period of time in which it will take them.

Following a consultation period of 28 days, if the enforcer and trader cannot agree on suitable measures, the enforcer may apply to the civil courts for an Enforcement Order. The enforcer must present their case to the court, which will then decide if the proposed ECMs are just, reasonable and proportionate before making an appropriate enforcement order.

Civil sanctions will be initiated at the conclusion of any criminal prosecutions.

## What if a trader does not comply with the ECMs?

Individual traders and directors or officers of a company who have failed to ensure compliance with an undertaking or court order may be committed for contempt of court. This is punishable by up to two years imprisonment or an unlimited fine. Property belonging to the company and/or directors or officers may be confiscated.

## Implications on traders

As always prevention is better than cure. The 2015 Act streamlines fragmented legislation spanning almost 40 years and traders must ensure they are alive to the new rights enjoyed by consumers. Should a trader find themselves the subject of an investigation, it is essential they are aware of the scope and limitations of the enforcer's powers. A trader should also make use of the legislated safeguards in place to offer protection. By working together with the enforcer and by actioning any agreed or ordered ECM, a company can avoid criminal prosecution and ensure consumer confidence and satisfaction in the market place.


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**Further advice should be taken before relying on the contents of this Newsletter.**



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