

The Food Safety Sentencing Guidelines – What are they and how do they work?

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The Sentencing Guidelines

Sentencing
Council

For reference only.
Please refer to the guideline(s)
on the Sentencing Council website:
www.sentencingcouncil.org.uk

DEFINITIVE GUIDELINE

Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline

Page 30-39

[Health and Safety Offences, Corporate
Manslaughter and Food Safety and Hygiene
Offences, Definitive Guideline
\(sentencingcouncil.org.uk\)](http://www.sentencingcouncil.org.uk)

NB – Separate guidance for individuals-
page 39 onwards

Application

- Food Safety and Hygiene (England) Regulations 2013 (regulation 19(1)) – any person who contravenes or fails to comply with any of the specified EU provisions commits an offence
- Common offences
 - Rendering **food** injurious to health by adding any article or substance; using any article or substance as an ingredient; abstracting any constituent; or subjecting it to any other process or treatment, with intent that it shall be sold for human consumption ([section 7, Food Safety Act 1990](#)).
 - Selling **food** not complying with **food safety** requirements ([section 8, Food Safety Act 1990](#)).
 - It is an offence of contravening Article 14(2) to (5) of [Regulation \(EC\) 178/2002](#) to place **food** with an expired 'use by' date on the market.
- Defence - person accused took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by the accused or by a person under the control of the accused.
- Offence range: £100 fine – £3 million fine
- All courts – can impose unlimited fines
- Individual liability – where corporate offence committed with consent or connivance of, or to be attributable to any neglect on the part of, either a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity,



Case Study – Tesco

- Birmingham City Council EH officers discovered 67 out-of-date items across three stores
- First alerted by a member of the public – Tesco Express Bournville - 17 June 2015 - discovered six out-of-date-items.
- No prosecution, Tesco given an opportunity to review procedures and resolve the situation.
- Return visit on 12 April 2016 - a further 29 items were discovered to be out of date - expired for between one and 17 days.
- Another complaint by member of public - 1 June 2017 - further 25 out-of-date products at Tesco Metro Rubery.
- 2 June 2017 - 13 expired products at Tesco Express in Birmingham city centre.

Case Study

THE TESCO FOOD FOR SALE DAYS AFTER USE-BY DATE



17 DAYS



3 DAYS



4 DAYS



12 DAYS



9 DAYS



2 DAYS



3 DAYS



4 DAYS

Case study

- Items past their use-by date are presumed to be 'unsafe' according to article 24 of the Food Information Regulation
- Tesco tried to avoid prosecution, first appealing to the primary authority Hertfordshire County Council then the Office for Product Safety and Standards, re their consent for BCC to prosecute.
- Then brought judicial review proceedings in High Court.
- Expert witness - arguing out-of-date food could still be eaten, would not constitute a danger to human health, and shouldn't be an offence.
- Tesco lost judicial review – court confirmed food was unsafe is past use-by date
- Tesco then changed plea to guilty (late for 1st offence but early for 2nd and 3rd offence)

Tesco – Policies and procedures

- Tesco has a policy not to sell any foods after the date marked. There are many procedures in place to prevent an offence from occurring. For example,
 - all short life foods (shelf life of less than 10 days) should be checked every evening and any not sold should be destroyed.
 - There is also another procedure to check the shelf life about 3-4pm daily.
 - Finally a member of staff can also apply the ‘would I buy it?’ test and remove items in their discretion.
 - The store manager has the overall responsibility to ensure these checks are done by employees.
 - There are also stock reduction procedures and wastage meetings to pick these items out.

Sentencing comments

- Tesco played 'Russian Roulette' with customer's safety.
- One might even say if you can't trust Tesco with the food on display, who can you trust?
- This guilty plea must rank as probably the most reluctant guilty plea in legal history.
- No genuine contrition about these offences. Tesco are only pleading guilty because they have run out of options.

Sentencing - culpability

Culpability

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by:

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by regulators, employees or others
- allowing breaches to subsist over a long period of time

Serious and/or systemic failure within the organisation to address risks to health and safety

Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories

Systems were in place but these were not sufficiently adhered to or implemented

Low

Offender did not fall far short of the appropriate standard; for example, because:

- significant efforts were made to secure food safety although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk to food safety

Failings were minor and occurred as an isolated incident



Sentencing - harm

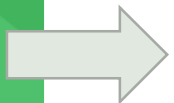
Harm

The table below contains factors relating to both actual harm and risk of harm. Dealing with a **risk of harm** involves consideration of both the likelihood of harm occurring and the extent of it if it does.

Harm	
Category 1	<ul style="list-style-type: none"> • Serious adverse effect(s) on individual(s) and/or having a widespread impact • High risk of an adverse effect on individual(s) including where supply was to groups that are vulnerable
Category 2	<ul style="list-style-type: none"> • Adverse effect on individual(s) (not amounting to Category 1) • Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect • Regulator and/or legitimate industry substantially undermined by offender's activities • Relevant authorities unable to trace products in order to investigate risks to health, or are otherwise inhibited in identifying or addressing risks to health • Consumer misled regarding food's compliance with religious or personal beliefs
Category 3	<ul style="list-style-type: none"> • Low risk of an adverse effect on individual(s) • Public misled about the specific food consumed, but little or no risk of actual adverse effect on individual(s)

Sentencing - Starting point fine and category range – Large organisation

Large Turnover or equivalent: £50 million and over		
	Starting point	Range
Very high culpability		
Harm category 1	£1,200,000	£500,000 – £3,000,000
Harm category 2	£500,000	£200,000 – £1,400,000
Harm category 3	£200,000	£90,000 – £500,000
High culpability		
Harm category 1	£500,000	£200,000 – £1,400,000
Harm category 2	£230,000	£90,000 – £600,000
Harm category 3	£90,000	£50,000 – £240,000
Medium culpability		
Harm category 1	£200,000	£80,000 – £500,000
Harm category 2	£90,000	£35,000 – £220,000
Harm category 3	£35,000	£20,000 – £100,000
Low culpability		
Harm category 1	£35,000	£18,000 – £90,000
Harm category 2	£18,000	£9,000 – £50,000
Harm category 3	£10,000	£6,000 – £25,000



Very large organisations

- “Where an offending organisation’s turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.”
- DJ
 - Sentencing Council desperately needs to introduce another table into their sentencing tables.
 - Court should not do multiply the existing figures in the tables by whatever proportion reaches the defendant company before it.
 - a matter of finding a figure which brings the message home to the defendant company and to others in the food business.

Sentencing – aggravating and mitigating features

Factors increasing seriousness

Statutory aggravating factor:

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Other aggravating factors include:

Motivated by financial gain

Deliberate concealment of illegal nature of activity

Established evidence of wider/community impact

Breach of any court order

Obstruction of justice

Poor food safety or hygiene record

Refusal of free advice or training

Factors reducing seriousness or reflecting mitigation

No previous convictions **or** no relevant/recent convictions

Steps taken voluntarily to remedy problem

High level of co-operation with the investigation, beyond that which will always be expected

Good food safety/hygiene record

Self-reporting, co-operation and acceptance of responsibility

Tesco - aggravating features

- On 25/9/20 in a different case, Tesco pleaded guilty at Reading Magistrates' Court to similar offences committed in October 2017 and were fined £160,000. That is not really a previous conviction as the date of offence post-dates these offences. However, it undermines any suggestion by the defence that this was a local problem at a few stores in Birmingham.
- No co-operation - Tesco has tried to avoid being prosecuted and avoided pleading guilty at the earliest opportunity.
- Tesco still relies upon Dr Dinsdale's opinions in court and these undermine the food regulatory system.

Tesco - aggravating features

- Tesco clearly has a policy about food safety and takes it seriously. It has about 2,900 stores. Overall good safety and hygiene record. No previous convictions. It has a very high standard in the industry and is a household name.
- Tesco has a policy not to sell any foods after the date marked. There are many procedures in place to prevent an offence from occurring.
- Tesco set up an improvement plan and shift leaders and staff were re-trained.

Other steps

- The court should 'step back', review and, if necessary, adjust the initial fine based on turnover to ensure that it fulfils the objectives of sentencing for these offences. The court may adjust the fine upwards or downwards, including outside the range.
 - Fine must reflect the seriousness of the offence
 - Should reflect the extent to which the offender fell below the required standard
 - The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.
 - The fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to operate within the law.
- Full regard should be given to the totality principle at step eight where multiple offences are involved.
- The court must take into account the financial circumstances of the offender - Check whether the proposed fine based on turnover is proportionate to the overall means of the offender – Consider time allowed for payment.

Other considerations

- The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.
- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.
- Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.
- Reduction for public or charitable bodies if fine would have a significant impact on the provision of their services.
- Wider impacts:
 - impact of the fine on offender's ability to improve conditions in the organisation to comply with the law;
 - impact of the fine on employment of staff, service users, customers and local economy (but not shareholders or directors)

Sentences

- Starting point of £10m for one offence.
- Increase that figure by 20% to reflect the number of shops involved, the number of offences, and the period of investigation time involved here from 2015 to 2017.
- Notional new point of £12m
- Make a reduction for the mitigating factors such as no previous convictions and that these are 3 shops out of 2,900, and I reduce the figure by 10% ($£12m - 10\% = £10.8m$).
- There is no question that Tesco can afford such a fine. It represents a mere 0.02% of their turnover and a small fraction of their profits.
- 30% discount for guilty pleas
- Fine £7,560,000.
- Costs - £95,500 (agreed)

Other sentences (NB –not relevant to Tesco case)

- Hygiene Prohibition Order (HPO)
 - prohibit any further operation of the business
 - If proper to do so in all circumstances of case – including:
 - Immediate risk to public health
 - Risk of some future breach of the regulations
 - Facts of any particular offence or combination of offences may alone justify the imposition
 - Court to consider:
 - History of convictions
 - Failure to heed warnings or advice
 - Whether an order is proportionate to the facts of the case.
 - Deterrence may also be an important consideration
 - Business must apply to court to get it lifted (not before 6 months)
- Compensation
 - Where the offence results in the loss or damage

Thank you

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