

FOOD HYGIENE RATING SCHEME – LEGAL ISSUES

Introduction

1. It is critical that the Food Hygiene Rating Scheme (FHRS) is legally robust and fair to businesses. The scheme has been designed so that the highest rating of the FHRS equates to a 'very good' level of compliance with the legal requirements on food hygiene such that any business, irrespective of the nature or size of its operation, can attain this. The various legal questions relating to the implementation and operation of food hygiene rating schemes, together with the Agency's views on these, are outlined below.

Does the Agency have powers to propose and endorse these food hygiene rating schemes?

2. The Agency's powers are set out in the [Food Standards Act 1999](#) and the following provisions are considered to give the Agency the power to propose and endorse these food hygiene rating schemes, because the main aim of the schemes is to inform consumer choice:
 - section 1(2) - this defines the main objective of the Agency as protecting public health from risks which may arise in connection with the consumption of food and otherwise protecting the interests of consumers in relation to food;
 - section 6 - this gives the Agency the function of developing policies (or assisting in the development by any public authority of policies) relating to matters connected with food safety or other interests of consumers in relation to food, and of providing advice, information or assistance in respect of such matters to any public authority;
 - section 7 - this gives the Agency the function of providing advice and information to the general public in respect of matters connected with food safety or other interests of consumers in relation to food, and of providing advice, information or assistance in respect of such matters to persons who are not public authorities;
 - section 21 - this provides a very broad supplementary power which further supports the view that the Agency is able to propose and endorse a national food hygiene rating scheme.

Do local authorities have powers to operate a good hygiene rating scheme and to put the results in the public domain under the existing legal framework?

3. As the operation of a food hygiene rating scheme requires the involvement of local authorities, the Agency could not reasonably promote such a scheme if local authorities themselves had no power to implement this. The Agency's view is that such powers are available to local authorities in England within the existing legal framework.
4. The food hygiene regime applicable across the UK effectively imposes duties on local authorities to enforce the legal requirements but does not contain powers to promote food safety beyond that. This legislation does not, therefore, provide legal powers for operating a food hygiene rating scheme or for publishing the ratings. Consequently, if local authorities have the power to operate a food hygiene rating scheme it is not contained in the food hygiene regime and must be provided elsewhere. Section 2 of the [Local Government Act 2000](#) (which covers England and Wales) gives local authorities powers to do anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental well-being of their area. A food hygiene rating initiative could seek to achieve any one or more of those objectives.
5. The initial inspection at which a rating is given must be undertaken as a lawful exercise of the power of entry for usual inspection purposes. The powers of entry and inspection for such inspections are included in the [Food Safety and Hygiene \(England\) Regulations 2013](#), and the parallel legislation in Wales and Northern Ireland, and we consider that the repackaging of inspection findings following the exercise of these powers for a legitimate purpose is permissible across the UK. These powers could not be used for inspections specifically for the purposes of the food hygiene rating scheme but if a business voluntarily asks for an inspection then that invitation provides the necessary authority to permit entry.

What is the position in Wales and Northern Ireland?

6. The [Food Hygiene Rating \(Wales\) Act 2013](#) and the [Food Hygiene Rating Act \(Northern Ireland\) 2016 as amended by The Food Hygiene Ratings Act \(Amendment\) Regulations \(Northern Ireland\) 2020](#) set out the powers underpinning the operation of FHRS in Wales and Northern Ireland respectively.

What elements of a food hygiene rating scheme are necessary to ensure against issues of defamation or malicious falsehood?

7. The Agency considers that there are at least six elements that are critical in this respect:
 - a mechanism must be in place to provide business with an opportunity to request re-visit or re-inspection for the purposes of re-scoring where they have undertaken action to rectify any non-compliances;
 - an appeal mechanism must be available to those that perceive an injustice in the way the scheme is being administered - the appeal should be determined by a person who did not make the original decision;

- consideration needs to be given as to how quickly after inspection the results are published on any website and care needs to be taken as to how the scheme is advertised on that website, particularly if there is a re-inspection opportunity;
- a clear articulation of what the scheme is (including that it is a snapshot in time) should be available on any website or other material available about the scheme;
- information about the scheme and marketing type information (for example reviews or other evaluative information relating to businesses such as tourism information) should be kept distinctly separate; and
- the use of symbols or descriptors that might have negative connotations should be avoided as questions of defamation could arise - the use of neutral symbols would be preferable.

Are local authorities able to change for re-inspections/re-visits requested by food business operators for the purpose of reassessing the food hygiene rating

8. Local authorities may only impose charges for such re-inspections/re-visits if they have the statutory powers to do so.
9. The powers to charge for re-ratings are available to local authorities in England under the [Localism Act \(2011\)](#). In Wales under [The Food Hygiene Rating \(Wales\) Act 2013](#) and in Northern Ireland under [The Food Hygiene Rating \(Fee and Fixed Penalty\) Order \(Northern Ireland\) 2016](#).
10. The Localism Act 2011 contains a range of measures which devolve more powers to local authorities in England and Wales. One of these measures – a new general power of competence for local authorities - is relevant to the operation of the FHRS.
11. The power, conferred by section 1 of the Act, means that local authorities may do anything an individual generally could do and, in certain circumstances, may charge for what is done.
12. The Agency's view is that the adoption and implementation of the FHRS by local authorities falls within the general power. The Agency considers that providing a re-inspection upon request by a food business operator, in circumstances where there is no statutory requirement to provide that re-inspection, falls within the general power, too.
13. It is necessary, therefore, to consider whether the circumstances in which the Act allows local authorities to charge for things done under the general power are satisfied. Broadly speaking, the circumstances are that:
 - a service is provided on a non-commercial basis by the local authority to a person who has agreed to the service being provided;
 - that service is or could be done using the new general power;
 - the local authority is not under any statutory duty to provide the service;
 and

- the local authority does not have any other power to charge for the service.
14. The Agency considers that each of these circumstances apply to re-inspections because:
- a re-inspection can be properly described as a service which a local authority provides on a non-commercial basis to a food business operator with that food business operator's agreement;
 - the FHRIS is a non-statutory scheme in England, meaning that the local authority is under no statutory duty to perform a re-inspection; and
 - for the reasons set out in the Agency's [publication of September 2010](#), the local authority does not have any other power to charge a food business operator for a re-inspection.
15. The question of whether to charge for re-inspections is, of course, entirely a matter for the local authority. The Localism Act 2011 sets out further obligations for local authorities in respect of the imposition of charges, and local authorities will need to satisfy themselves that all relevant obligations are met so that any charge they make in connection with an FHRIS re-inspection is lawful.
16. Regulation (EC) 882/2004 on official feed and food controls requires Member States to impose fees for certain 'official controls' (such as in approved meat plants) and provides the option for Member States to charge for other 'official controls' if they wish. Re-inspections/re-visits for the purposes of the FHRIS, however, are not considered to be 'official controls' as they are undertaken at the request of the food business operator rather than as part of the local authority's statutory duties. Consequently, it is the Agency's view that this Regulation does not provide a basis for introducing statutory powers for charging into domestic law.
17. It is recognised that in some cases when a local authority responds to a request from a food business operator for a re-inspection/re-visit as part of the FHRIS, it will be appropriate to revise the intervention rating for the establishment (as well as the food hygiene rating which could remain the same or go up or down). In order to do this, the authorised officer will be required to use his/her statutory powers to carry out an 'official control' i.e. an inspection/partial inspection or audit. Although Regulation 882/2004 does provide a basis for introducing domestic legislation on charging for food hygiene controls undertaken by local authorities, the UK has not opted to do so.
18. The potential to use the powers at section 93 of the Local Government Act 2003 (which covers England and Wales) has also been considered in relation to operation of the FHRIS. It is the Agency's view that these powers cannot be used - the rationale is set out below.¹

¹ Please note that in cases other than the operation of the Food Hygiene Rating Scheme it is up to the local authority concerned to decide if the service they seek to provide is a "discretionary service" for the purpose of section 93.

- Section 93 provides powers for local authorities to charge for 'discretionary' services so the question to be considered is whether or not the re-inspection/re-visit is truly discretionary.
- Once a local authority is participating in the FHRs, the scheme will apply to all food establishments falling within the scope of the scheme in that local authority's area i.e. those that supply food direct to the consumer. Food business operators responsible for these establishments cannot opt out of the scheme.
- The mechanism allowing food business operators to request a re-inspection/re-visit has been incorporated into the FHRs to ensure that it is procedurally fair and local authorities that agree to participate in the scheme will be *required* to provide this essential safeguard.
- As the re-inspection/re-visit on request is something which local authorities are *required* to offer as part of the FHRs in order to ensure that it is procedurally fair, it would be difficult to describe such visits as 'discretionary'.

It is, therefore, the Agency's view that any requested re-inspection/re-visit cannot be considered as discretionary and, as such, section 93 does not apply.

What is the relationship with Article 6 of the European Convention on Human Rights?

19. Article 6 of the European Convention on Human Rights is broadly described as the right to a fair hearing 'in determination of civil rights and obligations'. It is broad enough to cover reputation and good name. It is not certain whether this Article is engaged by food hygiene rating schemes so it is considered that it is best to assume that it is and accept that operating such a scheme involves a determination of the food business operator's civil rights and obligations since the rating affects his reputation and good name. In view of this, it is considered that any food hygiene rating scheme should avoid the use of negative symbols and descriptors, and that mechanisms are put in place to ensure a fair hearing in the event of a dispute.

What is the relationship with the Freedom of Information Act?

20. The Agency considers that it is not possible to use the Freedom of Information (Fol) Act 2000 as the source of the power to publicise food hygiene ratings. As the Information Commissioner has indicated that this type of information ought to be in the public domain, proactive disclosure is consistent with the Act.² Operation of a food hygiene rating scheme is in the nature of a voluntary release of information rather than being prompted by a Fol request. The Agency's view is that it would be an improper use of the Fol Act to require people to make a purported Fol request before they were given access to food hygiene rating information. This is not least because the nature of the request (the submitter is required to search a website stating that he is making a request when he clicks

² Information Commissioner secures release of restaurant reports [Information Commissioner's Office, Annual Report 2005-2006](#)

the relevant button) is not considered to be a request in accordance with the Act since the formalities required by section 8 of the Act (request to be in writing, to state the name and address of the applicant and to describe the information requested) are not complied with. In the Agency's view, the FoI Act cannot be the source of the power to publish food hygiene ratings information.

What is the relationship with the Environmental Information Regulations?

21. As with the FoI Act, the Agency considers that it is not possible to use the Environmental Information Regulations (EIRs) as the source of the power to publicise food hygiene ratings. Regulation 4(1) of the EIRs does create a duty to disseminate information but the Regulations do not provide the powers to create information for the purpose of dissemination.

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