

Use-By Dates: is it a criminal offence to sell food after expiry of its Use-By Date even if it is microbiologically safe?

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Answering with a resounding “yes”, this precise issue was recently considered by the High Court (Hickinbottom LJ and Swift J) in *R (on the application of Tesco Stores Ltd) v Birmingham Magistrates’ Court* [2020] EWHC 799 (Admin). The effect of this important decision on Food Business Operators (‘FBOs’) is considered below.

The regulatory scheme

Like the majority of food regulation, the law on Use-By Dates is of EU-import. Regulation (EU) No. 1169/2011 (‘the Food Information Regulation’) sets out the information that must be provided on labels on pre-packaged foods. Chapter IV identifies mandatory food information, which includes “*the date of minimum durability [the best before date] or the ‘use by’ date*” (Article 9(1)(f)). A Use-By Date, rather than a Best Before Date, must be used in 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*” (Article 24). The FBO (the natural or legal person responsible for ensuring that the requirements of food law are met within the food business under their control), is responsible for determining whether a Use-By Date is required by Article 24 and what the appropriate Use-By Date is, as well as for ensuring that the food is appropriately labelled. Article 24 concludes by providing that after the expiry of 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 [‘the Food Safety Regulation’]*”.

Article 14(2) of the Food Safety Regulation provides that food is deemed to be unsafe if it is considered to be: (1) injurious to health; or, (2) unfit for human consumption. Article 14(1) provides that food shall not be placed on the market if it is unsafe. Contrary to its natural meaning, “placing on the market” is defined as “*the holding of food [...] for the purpose of sale, including offering for sale or any other form of transfer, whether free of charge or not, and the sale, distribution, and other forms of transfer themselves*” (Article 3(8)). Accordingly, food is “placed on the market” when, for example, it is held at the back of a store but not yet loaded onto the shelves ready for sale.

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On the face of it and taking the above provisions together, they deem food beyond its Use-By Date to be unsafe, so that it cannot lawfully be placed on the market.

The Food Safety and Hygiene (England) Regulations 2013 ('the 2013 Regulations'), which provide for the enforcement of inter alia the above EU Regulations, make it an offence to contravene or fail to comply with "any of the specified EU provisions" as set out in Schedule 1 (section 19). One such specified provision is Article 14 of the Food Safety Regulation (i.e. placing on the market unsafe food).

R (on the application of Tesco Stores Ltd) v Birmingham Magistrates' Court

The facts

Between 2015 and 2017, three Tesco stores in Birmingham were visited by Environmental Health Officers. Items of food were found on display past the expiry of their Use-By Dates, resulting in 22 charges under Regulation 19 of the 2013 Regulations being brought against Tesco.

Tesco accepted that the items were exposed for sale outside of their Use-By Dates but argued that they were not in fact unsafe (relying on an expert report). Because the presumption in Article 24 of the Food Information Regulation could not, on Tesco's case, be said to be irrebuttable, Tesco was entitled to rebut it by evidence, such as its expert report.

The decision of Birmingham Magistrates' Court

Birmingham Magistrates' Court directed that the admissibility of Tesco's expert report be determined as a preliminary issue. The expert report would only be relevant, and therefore admissible, if the presumption as to the safety of the food was rebuttable.

The Court held that Article 24 of the Food Information Regulation created an absolute presumption that could not be rebutted by evidence that the food item was not in fact unsafe. Accordingly, Tesco's expert report was not admissible.

Tesco applied to judicially review this decision and the matter came before the High Court.

The High Court decision

Refusing the application for review, the Court considered that the legislative provisions identified above were unambiguous: as a result of Article 24 of the Food Information Regulation, food placed on the market with an expired Use-By Date, is unsafe for the purposes of Article 14 of

the Food Safety Regulation and that cannot be rebutted by evidence. An FBO who is responsible for placing such food on the market breaches Article 14 and is thus guilty of an offence under Regulation 19 of the 2013 Regulations.

In summary, the Court reached this conclusion because:

- a) The authorities support the contention that, whilst not conclusive, “deemed” is strongly suggestive of an assumed state of affairs that cannot be rebutted by evidence.
- b) The purpose of Article 24 of the Food Information Regulation, in the context of the European food law scheme, is clear and consumer-orientated. The focus of food law is on the health and other interests of consumers and requires the prospective evaluation of risk. A bright line assists in securing the aim and purpose of the food safety and information Regulations.
- c) This interpretation avoids the need to determine, as a matter of evidence in each case, whether specific food is actually safe to eat.
- d) The construction of Article 14, including the deeming provision in Article 24, is clear.
- e) The preferred interpretation has no consequences that are unusual or unexpected. It favours legal certainty.

Consequences of the judgment

The expansive definition of “placing on the market” identified above means that the consequences of the High Court’s decision are felt wider than just offering food items for sale. Some of the ways in which the effects of the judgment can be mitigated are considered below.

Consider whether a Use-By Date is in fact required

Reassess whether a food item requires a Use-By Date (rather than a best before date) under Article 24 of the Food Information Regulation. A recent Waste and Resources Action Programme (‘WRAP’) study highlighted that 94% of chilled orange juice was labelled with a Use-By Date in 2009, whereas that figure had reduced to just 4% in 2015. As science and attitudes change, new evidence may be available to demonstrate that a Use-By Date is not required.

Consider re-labelling with a later Use-By Date

If appropriate, consider re-labelling food items with a later Use-By Date. Article 8(4) of the Food Information Regulation permits FBOs to modify Use-By Dates so long as this would not

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mislead the final consumer or otherwise reduce the level of consumer protection. Such relabelling must be supported by scientific evidence and follow established procedures. Importantly, relabelling must take place before the expiry of the Use-By Date and that if food is going to be frozen, the Use-By Date must be removed and replaced by a Best Before Date before the Use-By Date expires (see WRAP's Redistribution Labelling Guide). There is some uncertainty as to the relabelling of food that has yet to be placed on the market. Some support for relabelling after the expiry of the Use-By Date may be found at paragraphs [60] and [64] of the High Court's judgment, but the wide definition of "placing on the market" should be borne in mind.