

Primary Authority determination summary

Date of determination: 18 June 2018

Applicant (enforcing authority): Birmingham City Council

Primary Authority: Hertfordshire County Council

Business: Tesco Stores Ltd.

Summary

Birmingham City Council (BCC) proposed enforcement action for alleged date marking offences under Regulation 19 of the Food Safety and Hygiene (England) Regulations 2013.

Hertfordshire County Council (HCC) blocked the proposed enforcement action on the basis that it considered it to be inconsistent with its assured advice.

BCC disagreed with HCC's assertion and subsequently made an application to the Office for Product Safety and Standards for consent to reference for a determination by the Secretary of State (SoS).

The reference was granted and the SoS determined on 18 June 2018 that the proposed enforcement action was not inconsistent with the assured advice and HCC's direction to BCC was therefore revoked.

Background

HCC had issued assured advice to Tesco Stores covering both its date marking and auditing procedures, and advised that both procedures, taken together, constituted 'due diligence' as defined in Regulation 12 of the Food Safety and Hygiene (England) Regulations 2013.

HCC argued that if BCC were to prosecute the alleged offences it would, by necessity, be challenging the due diligence assured advice and asserting that Tesco Stores should have done more, or something different, to that specified. For this reason, HCC argued that the proposed enforcement action was inconsistent with the assured advice they had issued.

Decision

The SoS formed the view that the assured advice did not constitute a due diligence defence because:

- the assured advice did not state that the audit process was sufficient on its own to meet the Regulation 12 statutory 'due diligence' requirement;
- the advice stated that the audit process was sufficiently comprehensive to give 'an accurate reflection of the general level of compliance' at each audited store; and
- Tesco Stores documentation asserted that the audits only formed part of a wider series of checks and controls to ensure store compliance with a range of regulatory requirements.

For these reasons the SoS determined that the proposed enforcement action was consistent with the assured advice and revoked the earlier direction, effectively allowing BCC to continue with its proposed enforcement action.