



# DUE DILIGENCE DEFENCE:

Building a testing plan to fortify your  
food safety in the wake of crisis.

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Ashbury







# Mitigating risk in times of change, pressure and uncertainty.

The food industry is aptly referred to as one of the most dynamic; it is no surprise that businesses have displayed tremendous resilience in the face of global crisis, rapidly adapting and evolving to maintain momentum amidst the madness.

While strengths have been highlighted, the crisis has also revealed weaknesses and vulnerabilities that threaten the integrity of food supply chains. Inescapable change enveloped the industry; many manufacturers were forced to urgently source new supply channels to keep up with demand, while critical pathways pivoted to fulfil a shift in category requirements. This pressure culminated in increased risk, particularly in relation to food fraud, food safety and hygiene, and food security – risks that are expected to continue as the world fluctuates in and out of crisis mode.

In the current unpredictable climate, it is important to ensure your due diligence defence is robust. A testing plan, which is an essential facet of your food safety plan and due diligence system, is a risk-based approach to food safety analyses that targets the most relevant hazards to your business to streamline your legal compliance and minimise costs. Not only is a plan essential, but it requires continuous maintenance; particularly as new dangers arise.





## What is 'Due Diligence Defence'?

The 'due diligence defence', which we hear mentioned a lot in the food industry and which forms the basis for much of our collective work, was already established in consumer protection and trade descriptions law but was completely new to food law when introduced in the 1990 Food Safety Act. It is now, of course, a long-established principle of food safety. With the adoption of the Food Safety Act, two previously available defences were abandoned; those of food containing some extraneous material being an unavoidable consequence of the process of collection or preparation and that the person charged had been given written warranty that the food complied with legal requirements.

The due diligence defence is to prove that the defendant took all reasonable precautions and exercised all due diligence to avoid the commission of an offence by themselves or one under their control. Whilst described as 'due diligence' it is comprised of two elements:

- Reasonable precautions – precautions to ensure food safety must be taken, but the law is pragmatic as it does not expect every conceivable circumstance to be addressed but only what is reasonable. What is considered reasonable varies, of course, according to circumstances of each case, and the nature of the business is considered. For instance, the expectations of a large retailer would be different to that of a small corner shop. The test applied is an objective one which would consider the resources available. All reasonable precautions have to be taken; it is not sufficient that only some have been taken.
- Due diligence – this is the exercising of suitable management to make sure those reasonable precautions are having the desired effect. If you are supplying into a retailer under their own brand then you will be carrying out some, if not all, the precautions on their behalf in the preparation of the food, as it possible for the retailer to rely (to a greater or lesser extent) on checks carried out by their supplier.



**Protect**

## Why is testing needed?

The defence of due diligence is multifaceted relying as it does on several components such as the nature of the food itself, size of the business and its resources, confidence in the supply chain, results of hazards (HACCP), vulnerability (VACCP) and threat (TACCP) risk assessments and, of course, sampling and testing. It is no longer as simple as requesting and receiving a warranty. If a food or a raw material can pose a threat to consumer safety, it is a reasonable precaution to take samples and make random safety checks. Testing is part of the jigsaw of reasonable precautions that makes up a due diligence defence system. Away from the legal aspect product testing could well, of course, simply be a contractual requirement between businesses.



# Six steps to building a robust due diligence testing plan:

1.

Identify relevant risk/hazardous ingredients associated with that food. It is not necessary to test everything for every possible hazard; this is both expensive and impractical and is inconsistent with the need to take all reasonable precautions. Selecting targeted hazards minimises costs and saves time. Be sure to analyse your product processing and understand where unwanted by-products or contaminants may arise.

**Tip: Use EU regulations for reference, principally, regulation 1831/2003 on setting maximum levels on certain contaminants in food stuffs.**

2.

The plan should consider legal and voluntary or internal policy limits for each of the identified risks.

**Tip: Whilst you should include a lower limit and a critical maximum limit, it is important to include a buffer zone limit which triggers action prior to critical limits being reached, thus minimising potential negative impacts.**

3.

Quantify the degree of risk a particular hazard presents – what poses the highest risk therefore requires the most risk management?

**Tip: The EU's RASFF portal is a valuable resource as it contains over 40 years' worth of information on food incidents in the EU. It can easily be searched to see whether that hazard is likely to occur in a food. This, then, can highlight materials that should be given consideration when deciding on testing, either by the supplier or the business itself depending on the circumstances.**





4.

Develop a testing plan outlining what to sample, frequency of sampling and the process of sample collection.

**Tip: A retained sample should be taken alongside testing samples.**

5.

Define your corrective action: What will you do to correct the risk and prevent a full-blown food safety incident?

**Tip: Confirm (re-test to ensure your data is reliable), Communicate (inform those who need to know), Contingency (plan for the worst-case scenario.)**

6.

Keep up to date; things don't stand still and every so often a food scare emerges seemingly from nowhere: illegal Sudan dyes in spices, contamination of ready meals with horsemeat, dioxins in water, fipronil in eggs or a known yet rarely occurring hazard suddenly becoming an issue, such as mycotoxins after poor harvest conditions. For a testing programme to remain a reasonable precaution, it has to be kept under constant surveillance for change. This horizon scanning means keeping an eye on changes to legislation, your raw materials, the contents of official testing programmes and monitoring global food recalls, then making any necessary adjustments.

**Tip: Use your testing results to gain internal insights: Are there trends? Are all your identified risks still relevant? How can you optimise your testing plan?**

**A well-designed testing plan may form part of those reasonable precautions necessary for your due diligence defence system. It supports your business in times of crisis to ensure you can safely adapt to fulfil demand with complete compliance confidence.**

## About Ashbury

Ashbury is a leading provider of regulatory and technical compliance advice. We help you navigate the complex world of product information compliance and guide you from a place of uncertainty to complete reassurance.

Our experts bring decades of experience in manufacturing, retail, and enforcement, and provide skilled guidance across the entire development process, from advice on formulation and due diligence testing plans, to retail and export ready labels.

As a trusted partner we help to ensure your final product complies with the law in your intended domestic and international markets, so you can grow your business with complete compliance confidence.



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