

The Food Safety And Standards (Amendment) Bill, 2020

– *A summary of significant changes*

By Dr Shatadru Sengupta

Senior Director – Legal, Hardcastle Restaurants Pvt Ltd

Vice-Chairman, PFNDAI

10th November, 2020

Disclaimer

- Views are personal
- Not each and every amendment proposed in the Bill is analysed here; only the ones considered very significant
- The analysis is limited to the changes proposed by the Bill itself, and not extending to additional or unrelated suggestions by FBOs

Preamble to the Act, on page 2 ... *feed* and *export* added

Change : The preamble has the words *feed* and *export* now included i.e.

An Act to consolidate the laws relating to food and feed and to establish the Food Safety and Standards Authority of India for laying down science-based standards for articles of food and to regulate their manufacture, storage, distribution, sale, export and import, to ensure availability of safe and wholesome food for human consumption and animal feed and for matters connected therewith or incidental thereto.

Impact : We can now expect regulation of animal feed and food exports by FSSAI.

Recommendation or View Taken : As to animal feed, this is over-reach of sorts (may clash with the Ministry of Agriculture and/or other Ministries) and is analogous to making regulations in relation to agricultural soil, irrigation water and fertilizers. This change must be opposed. And as to exports, this has international trade ramifications, including the involvement of the domestic regulations of the overseas country of export, and the change ought not to be made

Sec 3(1)(oa) on page 3 ... new definition of "food contact material"

Change : A new definition, being of "food contact material" is being introduced, as 'Food Contact Material' means any material in contact with food or intended or reasonably expected to come into contact with food'.

Impact : This is a wide term and can include packaging and toys and even cooking equipment

Recommendation or View Taken : Such material may be covered by other laws and other standards, like BIS, and so there may be duplication or multiplicity of regulation. As it is, there are already FSSAI Regulations on packaging, being the Food Safety and Standards (Packaging and Labelling) Regulations, 2011, so one wonders about the real need for this change

Sec 3(1)(r) on page 3 ... amended definition of "food safety audit"

Change : the word 'manufacturing units' shall be substituted by the words 'food business'.

"food safety audit" means a systematic and functionally independent examination of food safety measures adopted by ~~manufacturing units~~ food business to determine whether such measures and related results meet with objectives of food safety and the claims made in that behalf;

Impact : Food safety audit will go beyond manufacture and into non-food matters such as office work, advertising, administration, employment matters, finance, marketing, and so on

Recommendation or View Taken : This is over-reach, is likely to impose an unnecessary burden on FBOs, and the change should be opposed; alternately, there ought to be a refinement in the proposed amendment whereby only activities physically involving food will be subject to audit

Sec 3(1)(zd) on page 3 ... definition of "manufacturer" expanded

Change : The definition of "manufacturer" is being expanded to include the brand owner.

Impact : The brand owner may be simply a franchisor or owner of a trade mark which he has licensed out to the actual FBO actually making the food. But this change makes the brand owner liable.

Recommendation or View Taken : Since the brand owner may not have any control on the manufacturing process, he ought not to have any liability for the same. This change should not be made

Sec 5(1) (iii) on page 4 ... composition of FSSAI amended

Change :The Department of Legislative Affairs is being replaced by the one for Women and Child Development

Impact : The Women and Child Development Ministry has been very vocal about so-called HFSS food. There is a risk of much regulatory activism in the HFSS area if this change were to be implemented

Recommendation or View Taken : This change will make things more difficult for the industry

Sec 18(2)(d) on page 6 as to FSSAI making regulations

Change :The regulations are being made without prior approval of the Central Government.

Impact :While emergency exigencies may not enable a prior approval, there ought to be at least a post-facto approval, else there will not be any oversight or supervision by the Central Government in the area of regulation. This is excessive delegation of powers to FSSAI

Recommendation or View Taken : This needs to be modified to at least post-facto approval by the Central Government.

Sec 22(4) point 1 on page 6 ... amendment of the definition of Proprietary Food

Change : The definition of “Proprietary Food” is being changed from allowing ingredients and additives that are not prohibited (i.e. not on a negative list) to ingredients and additives that are instead permitted (i.e. are on a positive list).

Impact : A positive list is inherently limited in scope. A move from a non-negative list to a positive list will thus stifle food innovation, hamper food manufacturing and restrict food business

Recommendation or View Taken : This change should not be made.

Sec 34 on page 8 ... closure or ban by the FSO

Change : The Food Safety Officer is now being empowered to recommend a ban or closure of the food business based on habitual default or because of ostensible health risk conditions.

Impact : This power to ban or close has the effect of bypassing the mechanism of improvement notices and so on in the Act. It is a draconian power and may likely be misused at the ground level to pressurize FBOs

Recommendation or View Taken : This change should not be made

Sec 35 on page 8 ... empowering FSSAI to issue orders as to Food Safety Incidents

Change : This empowers the FSSAI by an order to prescribe a wide mechanism for Food Safety Incidents.

Impact : The necessary provisions in the Act already exist, such as Improvement Notices. This change will result in excessive delegation of legislative powers through a mere order by the FSSAI, without the safeguards of the lawmaking process such as Parliamentary procedures and oversight for the making of Rules and Regulations.

Recommendation or View Taken : This change should not be made

Sec 38(1)(d) on page 8 ... new power of the FSO for seizure of vehicles, equipment, packaging, labelling and advertising

Change : This enables the following action by the Food Safety Officer :

(d) Seize any **vehicle, equipment, packaging, labelling or advertising material** linked with food article which may be required as evidence in proceedings under the Act or rules & regulations made thereunder and may keep in the safe custody of the food business operator or placed in the custody of the Authority

Impact : This is an expansion of powers beyond articles of food and can be misused by the FSO on the ground

Recommendation or View Taken : This change is unnecessary, can stop the business of the FBO altogether, is unconstitutional, and should not be made

Sec 40(3) on page 9 ... new requirement for sharing with the Authority the findings of testing

Change : This new provision requires testing in FSSAI-recognized labs only

(3) In the event food industry association, consumer association, or any individual needs to entrust a food testing for the purpose of data generation or to create information for general public on food safety it shall carry out the same **in the laboratories that are recognized by Food Authority**. The information so collected shall be shared with Food Authority before releasing the same to general public

Impact : This is welcome to the extent of using FSSAI-recognized labs. However, this also seems to legitimize attacks by NGOs on food and to enable them to sensationalize food safety matters where there is no justification for the same. This includes meaningless, irrelevant and unwarranted comparison with other countries' regulations and practices

Recommendation or View Taken : This change ought to be enhanced to 1) share the information with the FBO as well and to give the FBO an opportunity to respond on the test results and 2) bar the data generated or information created from being untruthful, disparaging, distorted or misleading as to the true nature or safety of the food

Sec 41 on page 9 ... deletion of Section 41 altogether as to search and seizure

Change : This Section is being deleted wholesale. At present, it reads thus :

41. Power of search, seizure, investigation, prosecution and procedure thereof

(1) Notwithstanding anything contained in sub-section (2) of section 31, **the Food Safety Officer may search any place, seize any article of food or adulterant, if there is a reasonable doubt about them being involved in commission of any offence relating to food,** and shall thereafter inform the Designated Officer of the actions taken by him in writing:

Provided that no search shall be deemed to be irregular by reason only of the fact that witnesses for the search are not inhabitants of the locality in which the place searched is situated.

(2) Save as in this Act otherwise expressly provided, provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search, seizure, summon, investigation and prosecution, shall apply, as far as may be, to all action taken by the Food Safety Officer under this Act.

Impact : It appears that the powers itself are taken away. However, there is a risk of a free-for-all exercise of powers in relation to search and seizure, since the CrPC provisions will no longer apply.

Recommendation or View Taken : This section ought to be diluted and not deleted

Sec 92(2)(e) on page 14 ... deletion of the word guidelines and therefore coming out of Parliamentary supervision

Change : Deletion of the word “guidelines” is proposed.

Impact : The proposed change has the effect of taking out the making of guidelines from the coverage of safeguards of the lawmaking process such as Parliamentary procedures and oversight for the making of Regulations.

It means that the FSSAI will be empowered to freely issue “guidelines” with the force of law but without any safeguards of the law-making process. This amounts to excessive delegation of law-making powers to FSSAI

Recommendation or View Taken : This change should not be made

Sec 92A (1) on page 15 ... Stakeholders' consultation made synonymous with mere notification

Change : Stakeholders' consultation has been reduced to a mere notification.

Impact : Stakeholders' consultation means consultation with stakeholders, not just publishing a notification. In fact, Sec 18(2)(d) of the Act clearly says : (d) FSSAI while making regulations, shall ensure that there is open and transparent public consultation, directly or through representative bodies including all levels of panchayats, during the preparation, evaluation and revision of regulations...

This amendment by bringing in Sec 92A will undo, bypass and eliminate the requirement under Sec 18(2)(d) for proper stakeholder consultation

Recommendation or View Taken : This change should not be made, and should be vehemently opposed

Sec 92A (2)(g) on page 15 ... FSSAI empowered to make regulations about making regulations in an emergency under Sec 18(2)(d)

Change : The FSSAI is taking on the power to make regulations about making regulations.

Impact : This is clearly excessive delegation, and has the effect of FSSAI usurping the powers of Parliament itself, as also of the Central Government

Recommendation or View Taken : This change should not be made, and should be vehemently opposed

Sec 92A (2) (w) on pages 15 and 16 ... relating to emergency prohibition orders and notices

Change : The FSSAI is taking on the power to make regulations about health risk conditions due to “habitual default” of the FBO.

Impact : This is clearly excessive delegation, and has the effect of FSSAI usurping the powers of Parliament itself, as also of the Central Government

Recommendation or View Taken : This change should not be made, and should be vehemently opposed

Various provisions – breach of the Allocation of Business Rules, 1961

The excessive delegation to FSSAI or to a given Ministry is a breach of the Allocation of Business Rules, 1961, framed under Article 77(3) of the Constitution of India.

For the text of these Rules, please see :

https://cabsec.gov.in/writereaddata/allocationbusinessrule/completeallocationrules/english/1_Upload_1187.pdf

Various provisions ... the use of the seemingly innocent word “fine”

Change : The word “fine” has been used, retained or added at various places.

Impact : The word fine implies criminal proceedings, presupposes criminal intent and so on. This is excessive, as there may well have been no such intent to begin with. It also involves the use of the Magistrate’s courts under the criminal justice system, which includes summonses, warrants and so on. This has the effect of **tainting** the individuals and FBOs involved

Recommendation or View Taken : The word ***fine*** should be replaced by ***penalty***, and thus the provisions be decriminalized, as has been rightly done under other economic laws, like the Companies Act, 2013

Q&A

Questions are welcome

THANK YOU !