

Thought Leadership | Omovefe Oghotomo

“All You Can Eat”: - Legal Regulatory Compliance Requirements for Restaurant Operators in Nigeria

Introduction

Owners and employees of food establishment must endeavour that their products are safe and unadulterated prior to selling them. They have to be equipped with the requisite knowledge of making, storing, selling, preparing and serving food otherwise they could hurt consumers which will expose them to legal actions.

The food industry is one of the best performing sectors in Nigeria, given that food is one of the three necessities of human life. The restaurant industry has grown rapidly due to its flexibility and relatively low entry barriers for operators to plug in and play at different levels – from basic to luxury. Furthermore, a fast growing overall population, increasing urbanisation and vibrancy of restaurant subsectors are other catalysts encouraging this growth.



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The restaurant subsector of the service industry is a key point in attracting tourists and also driving for example the megacity status aspirations of Lagos. The **Association of Fast Food & Confectioners of Nigerian (AFFCON)** estimates the food industry to be worth over a trillion Naira, with the fast food segment constituting over N250 billion and this number is still expected to rise in the future.¹ In 2017, this sector had a growth of 7.16% and its contribution to nominal GDP was 0.93% (*National Bureau of Statistics, 2017*). According to Professor Alfred Ihenkurye, about 200,000 people die annually from food poisoning in Nigeria.²

A major imperative for compliance with food safety standards in Nigeria is to ensure that food prepared for customers is safe to eat - from bacteria such as *Salmonella*, *E.coli*, *Listeria* and *Vibrio* infections etc. The recent food endemic in Queens College, Lagos where fifty (50) students were admitted to the School clinic after eating spaghetti and drinking water from the refectory, underlies the severity of the point being made.³

The **National Agency for Food and Drug Administration & Control (NAFDAC)'s Pre-Packaged Food (Regulation) 2005** defines 'food' as “any article manufactured, sold or advertised for use as food or drink” etc. Whilst the **Codex Alimentarius (2009)** defines 'food safety' as the “assurance that food will not cause harm to the consumer when it is prepared and/or eaten according to its intended use.”

Concerns over food poisoning is not limited to Nigeria alone. In the USA, Whole Food Market Inc. was ordered by the Food & Drug Administration to close one of its commercial kitchens that produced fresh meals for consumers due to concerns about safety lapses in its other facility which resulted in *Listeria* outbreak.⁴

This article examines the regulatory regime for restaurants in Nigeria and related commercial and risk issues. It also considers the multidimensional implications of prescribing and enforcing food hygiene and health standards through collaboration with private operators in the industry.

Health Standards for Food Handling

The recent Lagos State High Court decision in **Fijabi Adebo Holdings Limited & Anor v. Nigerian Bottling Company Plc & Anor**⁵ The Court ordered NAFDAC to, within 90 days from the date of the judgment, include on all bottles of Fanta and Sprite soft drinks manufactured by the Nigeria Bottling Company, a written warning that the content of the said bottles of Fanta and Sprite soft drinks could not be taken with Vitamin C as same becomes poisonous

¹ Tobi Awodipe, 'Nigerian Food Industry Worth Over 1trillion Naira, AFFCON', The Guardian, 22 November 2016: < <https://guardian.ng/business-services/nigerian-food-industry-worth-over-1trillion-naira-affcon/> > (accessed 12.7.2018)

² Nne Pepple, 'Environment and Food Poisoning: Food Safety Knowledge and Practice Among Food Vendors in Garki, Abuja Nigeria' Journal of Health and Education Research and Development, 2017: <<https://www.omicsonline.org/open-access/environment-and-food-vendors-in-garki-abuja-nigeria>> (accessed 12.7.2018)

³ Ujunwa Atueye, 'Parents Blame Government, Management Over Deaths at Queens College', The Guardian, 2 March 2017: < <https://guardian.ng/features/parents-blame-government-management-over-deaths-at-queens-college/> > (accessed 12.7.2018)

⁴ Frank Cavico, 'Restaurant Liability for Contaminated Food and Beverages Pursuant to Negligence, Warranty, and Strict Liability laws', Global Journal of Social Science Studies, August 2017: <www.onlinesciencepublishing.com> (accessed 3.8.2018)

⁵ (Unreported) LD/13/2008 of February 15, 2017 (Oyebanji, J)

when taken with Vitamin C. Furthermore, the Court awarded cost of N2, 000, 000 (Two Million Naira) against NAFDAC.

There are various laws regulating how restaurants can achieve food safety in Nigeria; surprisingly such laws are not adhered to, or strictly enforced. By **section 2(1)(I) National Health Act 2014**, the **Federal Ministry of Health (FMOH)** has the responsibility to promote the availability of good, quality, safe and essential drugs, medical commodities, hygienic food and water. In 2010, as part of technical assistance from its development partners, the **FMOH** conducted an assessment of Nigeria Food Safety system and a survey of the status of the industry. Both studies revealed an outdated Food Safety System and an industry willing to work with the government to improve it.⁶

Some of the bodies which have been set up to ensure food safety include the **NAFDAC**, a parastatal under the **FMOH**. **Section 5(b) NAFDAC Act**,⁷ empowers them to conduct appropriate tests and ensure compliance with standard specification designated and approved by the council for the effective control of the quality of food, drugs as well as their production processes in factories and other establishment. **Section 5(i) NAFDAC Act** gives **NAFDAC** the mandate to adjudicate on the quality and safety of food, drugs, cosmetic etc.

The **Standards Organisation of Nigeria (SON) Act**,⁸ in its **section 5(b)** makes **SON** responsible for undertaking investigation as necessary into the quality of facilities, systems, services, materials and products, whether imported or manufactured in Nigeria.

Under the **Procedural Manual of the National Codex Committee (NCC)**, the General Purpose Sub-Committee of NCC shall carry out effective deliberation and provide technical inputs on technical and related issues arising from codex and national standards, codes of practice, guidelines and other advisory text with respect to: Pesticide, Residues in Food, Labelling, Food Hygiene etc.

The **Consumer Protection Council Act (CPCA)**,⁹ in **section 2(f)** states that the Council has the function of encouraging trade, industry and professional associations to develop and enforce in their various fields, quality standards designed to safeguard the interest of consumers. According to **section 9(1) CPCA**, “it shall be the duty of the manufacturer or distributor of a product, on becoming aware after such a product has been placed on the market, of an unforeseen hazard arising from the use of such product, to notify immediately the general public of such risk or danger and cause to be withdrawn from the market such product”. Now applying this, Restaurants Operators (ROs) are mandated by law to notify the public and failure of which make the person liable on conviction to a fine of N50,000 or imprisonment for a term of five years or both.

While the States works through their Ministries of Health, the Local Government (LG) works in collaboration with the National Primary Health Care Development Agency and is responsible for regulating and monitoring street food vending and catering establishments.¹⁰

Some of the key challenges facing the enhancement of food safety in the country include: lack of awareness of the socio-economic importance of food safety, paucity of data and information on incidence of food-borne disease outbreaks, lack of understanding of food safety and quality standards as outlined in international agreements, inability to enforce compliance with international standards and global best practices, inadequate infrastructure and resources to support scientific risk analysis and upgrading of food safety regulatory systems, inefficient food supply chain and poor traceability system etc.

There are legal provisions which makes it mandatory for health officers to visit restaurants hence the need for authorities such as the Environmental Health Officers (EHOs) in charge of food hygiene to visit premises so as to inspect them for compliance with the legal requirement for selling and distribution of food, failure of which might result to prosecution or payment of fine.

Section 45, National Environmental Health Practice Regulation 2016 (NEHPR), provides that there shall be regular disinfection of every food premises, at least once every six (6) months and the current certificate of disinfection duly signed by a licensed EHO shall be displayed at conspicuous location where it can easily be sighted by patrons in the food premises. This might be a good law but how many ROs still abide by this? Hence there should be the issuance of *Food Hygiene Rating* as done in the United Kingdom which should be made available to the public and mandatorily displayed in front of their premises. The rating can be carried out by private entity in collaboration with the regulators. This will serve as a propeller to these ROs, as the potential marketing leverage will serve as an added incentive to produce food of high quality.

In addition **section 52 NEHPR** clearly states that every food handler or any other person involved in handling food for public consumption shall be medically examined and issued with Medical Certificate of fitness signed by a qualified medical practitioner



⁶ National Policy on Food Safety and its Implementation Strategy 2014

⁷ Cap. N1, LFN 2004.

⁸ Cap. S9, LFN 2004.

⁹ Cap. C25, LFN 2004.

¹⁰ Jane Omojokun, 'Regulation and Enforcement of Legislation on Food Safety in Nigeria' Intech Open Science Open Minds Journal: <<http://dx.doi.org/10.5772/54423>>(accessed 3.8.2018)



approved by the Local Health Authority. Such certificate shall be renewable every six (6) months. This is another requirement which is rarely implemented.

To make it enforceable, there should be active engagement of industry associations by regulators which will help ensure that food handlers are examined every month and also have an enforcement team to make sure the laws are followed. There should be the inclusion of at least three supervisory agents to oversee their activities from the LG. This could be a revenue spinner for the LGs if properly implemented.

The Growing Reputational Risk

Public health risks continues to evolve, so does the reputational stakes and the potential for negative financial impact. Employers have a critical role to play because they are in the best position to inspire a culture in which employees always perform the correct hygiene and sanitation behaviours. They must demand high standard, reinforce that the public health and safety must be a top priority and demonstrate zero tolerance for cutting corners. Careful attention to sanitation and hygiene clearly is a key success of any food service organisation.

One of the most important issues for businesses including ROs is risk management and a key element is to ensure that the business is insured. According to **section 65(2) Insurance Act**,¹¹ all public buildings which include tenement houses, hostels, buildings occupied by a tenant, lodger or licensee and any building to which members of the public have ingress and egress for the purpose of obtaining educational or medical

service, or for the purpose of recreation or transaction of business, must be insured against the hazards of collapse, fire, earthquake, storm and flood.¹²

Every food handler shall also undergo a food handler's training as approved by the EHA of the area: **section 54 NEHPR**. There are two food management safety procedure known as the **Principle of Hazard Analysis and Critical Control Point (HACCP) and Hazard Analysis and Risk-Based Preventive Controls (HARPC)** which should be the bed rock for any restaurant willing to start up.¹³

HACCP is a systematic approach which focuses on preventing contamination from both biological, chemical, physical and even radiological hazards using scientific principle. Strict implementation of HACCP will benefit not only consumers but also the ROs. This can have some positives effects including, increase in product quality, consistency in product preparation and also increase in employee awareness and participation in food safety.

EHO should aim to make business implement procedures to minimise risk based on scientific evidence just like HARPC. The EHO should have access to training and continuing education as needed to properly identify violation and apply the law.

It should be noted that **section 62 NEPHR** stipulates the punishment for violation of the above provision which includes payment of N50,000 for individual or six (6) months imprisonment and N250,000 for corporate bodies or six (6) months imprisonment without the option of fine. Other laws include the **Food & Drugs Act (FDA)**;¹⁴ its

section 10 also makes provision for food to be cooked in clean environment.

Criminal & Civil Liabilities

Although the issue of food poisoning is devastating, there has really not been any legal case against ROs in Nigeria who err and this is because of the evidential challenges involved. This can be attributed to different factors such as inability (or non-awareness) of victims to procure testing after the incident for purposes of ascertaining the cause. Also, when such cases happen it is not recorded in the hospitals as food poisoning hence the inability to ascertain the number of people who suffer food poisoning in Nigeria as this leads to poor surveillance.¹⁵

The consumer harmed by unsafe food does have certain avenues to seek redress for violation of their rights under contract, torts and criminal law. Under tort, the consumer may bring an action for negligence showing elements of duty of care owed, breach of duty and damage suffered. According to **Jombo-Ofo, JCA**: *"The position of the law in the case of negligence is that the claimant must be able to link the breach of duty of care which occasioned the injury to the defendant. This to my mind is to say that the cause of the injury has to be traced to the act or omission of the defendant"*.¹⁶

By virtue of **section 243, Criminal Code Act (CCA)**,¹⁷ any person who sells food or drinks that is unfit for human consumption will be liable to imprisonment for one year, without an option of a fine. **Section 53 Sales of Goods Act 1893** makes provision for consumer remedies for a defective product in terms of implied conditions and warranty. Now there are certain questions that has to be asked. For example, if a customer knows he has certain medical conditions which prohibits him from eating certain food like 'red meat' and he does, can the ROs be held liable for any reactions that occur afterwards? The answer is no, as the law states in section 19 of the **Consumer Protection Agency Law (CPAL) 2014** of Lagos state that the liability shall only occur if the damage was caused wholly or partly by a defect in a product and it shall not be limited or excluded by any contract term, notice, or any other provision.

This was considered in **Horan v. Dilbet Inc.**,¹⁸ where the Plaintiff ordered and consumed the restaurant's "Jersey Shore Sampler" which contained clams. The Plaintiff sued after consuming three raw clams that ultimately resulted in the Plaintiff being rushed to the hospital, was diagnosed with

¹¹ Cap. I17, LFN 2004.

¹² There are many insurance covers which ROs can undertake and they include Fire and Special Perils Insurance, Professional Indemnity, Burglary and House breaking Insurance and workmen compensation insurance etc.

¹³ Kemi Ajumobi, 'Zainab Akanji, The Food Safety Expert for your Protection and Wellbeing', BusinessDay online, 1 February 2017: < <https://www.businessdayonline.com/offduty/leading-woman/article/zainab-akanji-the-food-safety-expert-for-your-protection-and-wellbeing/> > (accessed 3.8.18)

¹⁴ Cap. F32, LFN 2004.

¹⁵ Chukwuma Muanya, 'Red Alert Over Rising Cases of Food Poisoning, Deaths' The Guardian, 4 March 2015: < <https://guardian.ng/sunday-magazine/living-wellbeing/red-alert-over-rising-cases-of-food-poisoning-deaths> > (accessed 3.8.18)

¹⁶ 7up Bottling Company Plc v Emmanuel (2003) LPELR-21104(CA)

¹⁷ Cap. C38, LFN 2004.

¹⁸ 2015. U.S. Dist. Lexis 112734 (D.N.G 2015)

Vibrio infection, had her left leg amputated and underwent several surgeries to her arm.

The Plaintiff suffered a pre-existing medical condition of *hemochromatosis* that predisposed her to be highly susceptible to an invasive *Vibrio* infection. She should have avoided consuming raw shellfish so as to avoid this naturally occurring bacteria (in high levels), found in oysters and clams. The Court held that the food served was reasonably fit and suitable for consumption by an ordinary consumer. This shows that ROs will not be imputed with knowledge of special conditions of any customer, unless specifically informed or ought to have been reasonably aware of such, and thereby not serve the 'offending' menu to such customer.

In *Rouse v Hormel & Co.*,¹⁹ the Court ruled that the injured Plaintiff failed to prove that the consumption of the Defendant Packer's luncheon meat, which allegedly contained a sliver of glass, was the cause of his illness principally because his illness occurred several hours after he ate the food. Similarly in *Hollinger v Shoppers Paradise of New Jersey Inc.*,²⁰ involving a consumer who contracted *trichinosis* from eating pork, the Court ruled that though there was no evidence of negligence in the handling of the meat, the case however could proceed on the theories of implied warranty.

Optimising Food Health Standard in Nigeria: Collaboration with Private Companies (PCs)?

Collaboration between all tiers of government and the private sector cannot be over emphasised. This will help create awareness as to the severity of food poisoning and the need to ensure that ROs take adequate care in the way they handle the food given to consumers. More so, it will instil in them the need for workers to have training on *HACCP* and *HARCP* as this will go a long way of ensuring food safety in Nigeria.

More elaborate food safety regulations should be introduced where all the criteria needed to ensure food safety will be expatiated in detail. With the help of Government Health Agencies, the PCs will help establish corrective actions, verification procedures, record-keeping and documentation procedures, conduct hazard analysis and establish monitoring procedures.²¹

There are different associations which have been set up over the past few years such as *AFFCON*, *National Food Safety Management*

Committee (NFSMC) etc. to ensure that the food produced for the public consumption is safe.

Conclusion

The need for a better and thoroughly revised food legislation coupled with focused enforcement to safeguard public health cannot be over-emphasized. Such legislation should leverage the most current scientific input whilst preserving the right of consumers to have access to reliable and ample information, provide for tracing of food products and for their recall in case of defects. It should also include clear provisions indicating that the primary responsibility for food safety and quality rests with the producers and vendors.

The ROs should also be aware of the importance of training their employees in line with current food safety standards towards ensuring that what the public eats is safe, and most importantly to avoid both civil, criminal and financial liability when certain incidents occur.



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¹⁹1976 339 So. 2d 1320 (Louisiana Court of Appeals)

²⁰1973. 340 A.2.d 657 (Supreme Court of New Jersey)

²¹Ojoma Akor, 'Nigeria's Food Safety Laws Outdated—UNIDO', Daily Trust, 17 December 2017: <<http://www.dailytrust.com.ng/news/general/nigerias-s-food-safety-laws-outdated-unido/182240.html>> (accessed 4.8.2018)