

Guidance on Identifying the Food Business Operator and Changes in Operator for FSA Approval Purposes

Part 1 – Business Entity (for the purposes of an Approval)

1. Article 3 of Regulation (EC) No 178/2002 defines “food business operator’ as the **natural** or **legal** persons responsible for ensuring that the requirements of food law are met within the food business under their control”.

- A **natural person** is a human being, (as opposed to an artificial, legal or juristic person, i.e., an organization that the law treats for some purposes as if it were a person distinct from its members or owner).
- A **legal person** has a legal name and has rights, protections, privileges, responsibilities, and liabilities under law, just as natural persons (humans) do. Legal personality allows one or more natural persons to act as a single entity (a composite person - considered under law separately from its individual members or shareholders) for legal purposes.

2. When considering an application from a food business operator (FBO) for the approval of an establishment under Regulation (EC) No 853/2004 the FSA requires the FBO to identify themselves (including the name of officers, address, type of business entity and proof of status). For the purposes of establishment approvals the FSA’s interpretation of the types of business entity are as follows:

Types of Business Entity

3. The types of business entity are defined dependent of the legal system for an individual country but may include **incorporations, partnerships, sole traders** and **other** specialised types of organisation. The regulations governing particular types of business entity may differ between countries.

Incorporation

4. A corporation is a legal entity that is created under the laws of a State designed to establish the entity as a separate legal entity. Incorporation is the forming of a new corporation, which is a legal entity that is effectively recognised as a person under the law. Early corporations were established by charter and many of these chartered companies still exist, refer to ‘Other Business Types’ section.
5. Companies House is the United Kingdom Registrar of Companies and is an Executive Agency of the United Kingdom Government Department for Business, Innovation and Skills (BIS). All forms of companies (as permitted by the United Kingdom Companies Act) are incorporated and registered with Companies House and file specific details as required by the current Companies Act 2006.
6. Company names may use any of the designated name endings, including permitted abbreviations with or without full stops or their welsh equivalents.

Partnership

7. A partnership is between two or more persons forming partners (owners) which co-labor to achieve and share profits or losses. The owners are all personally liable for any legal actions and debts the business may face.
8. In England, Wales and Northern Ireland, partners are jointly liable for debts owed by the partnership and so are equally responsible for paying off the whole debt. They are not severally liable, which would mean each partner is responsible for paying off the entire debt. Partners in Scotland are both jointly and severally liable.

Sole Trader

9. A sole trader or sole proprietorship is a type of business entity that is owned and run by one individual and in which there is no legal distinction between the owner and the business. The owner receives all profits (subject to taxation) and has unlimited responsibility for all losses and debts.

Other Business Types

10. Other specialised business types will be treated on a case by case basis to identify the natural person or legal person required to be compliant with food law within the food business under their control.

Proof of status

11. For each business entity a proof of status for the legal person or natural person/s who is/are required to be compliant with food law. This may be by the following means:

Incorporations:	The FSA will require proof of status by means of a Company registration certificate (inc. registration number) and provision of registered office address and list of Directors.
Partnerships:	The FSA will require proof of status by means of self declaration (submitting the approvals application form) including the provision of the partners' home addresses.
Sole Trader:	The FSA will require proof of status by means of self declaration (submitting the approvals application form) including the provision of the individuals' home address.
Other Business Types:	The FSA will require proof of status but will be treated on a case by case due to the divergence of the business types. A registration certificate (inc. registration number) or recognition of charitable status from the HMRC with a list of trustees and registered office address would be suitable for charities. In other cases a copy of the entities constitution / governance documents including list of trustees / corporation members may be possible.

Trading / Business Name

12. Approval documentation must identify the establishment for which approval is granted, the identity of the FBO and the legal entity of the business.
13. For the purposes of approval documentation the approval will be granted in the name of the sole trader, partners or legal entity. The food business may trade using a different name to that of the approval name, in these cases the trading / business name will be listed separately.
14. Approval documentation refers to the business name as the “Trading name”. The FSA’s interpretation of the meaning of a trading / business name is as follows:

- A "**business name**" is any name under which someone carries on business other than their own. In the case of a company or limited liability partnership, it means a name that is not its registered name; in the case of a sole trader, it means a name other than the surname with or without their forenames or initials; in the case of a partnership, it means a name other than the partners’ names.

Part 2 – What Constitutes a Change of Food Business Operator

15. The approval of an “establishment” applies to both the premises and the business operating at the premises and, therefore, it is the “enterprise” that must be approved. To gain approval, the FBO must meet all the requirements of the EC Food Hygiene Regulations¹ and other relevant legislation as required for the type of establishment.
16. In accordance with Regulation (EC) No 853/2004, establishments that make, prepare or handle food of animal origin for “placing on the market” require approval before they can operate. High Court judgment² and subsequent judicial review³ in England and Wales has determined that a fresh approval is needed where there is a new ‘owner’ of an establishment regardless of whether or not other aspects of the business remains unchanged.
17. The judgment in 2009 established that this has been law since 2006. Although the judgment is only binding in England and Wales, it interprets directly applicable EU Regulation and is considered highly persuasive in Scotland and Northern Ireland. Therefore the FSA takes the same approach to approving food establishments on change of FBO in all parts of the UK.
18. The following table shows the different situations where a change in ownership, between different business entities, requires a new approval or where the approval can be retained:

¹ Regulations (EC) No 852/2004 and Regulation (EC) No 853/2004 and all other relevant requirements of “food law” (as defined in Article 3(1) of Regulation (EC) No 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures on matter of food safety.

² <http://www.bailii.org/ew/cases/EWHC/Admin/2009/3391.html>

³ <http://www.bailii.org/ew/cases/EWHC/Admin/2010/1232.html>

	Existing FBO (as per approval documentation)	Change of FBO (in each case assuming no other changes to the business)	Approval status	Comments	New approval required
1	Sole trader, Partnership or incorporated company (<i>e.g. Ltd, PLC, etc</i>)	Different sole trader, partnership or incorporated company takes over ownership	Expires	Discontinuation of operator/s	Yes
2	Sole trader or Partnership	Company incorporated (<i>and registered</i>), Sole trader or partner/s becomes Director/s	Expires	Creation of a Company so the company is responsible not the individual/s	Yes
3	Sole trader	Creation of a partnership where the sole trader is one of the partners	Retained	Continuation of operator	No
4	Partnership	Dissolved and one of the partners takes over sole ownership and becomes a sole trader	Retained	Continuation of operator	No
5	Partnership	New partner joins or a partner leaves (<i>also refer to dissolved partnership</i>) as long as there is a continuation of at least one partner	Retained	Continuation of operator/s	No
6	Incorporated company	Company goes into administration and is being run as a going concern by the administrators.	Retained	Continuation of operator/s	No
7	Incorporated company in administration	Company taken over from administrators by a different sole trader, partnership or incorporated company	Expires	Discontinuation of operator/s	Yes
8	Sole trader, Partnership or Incorporated company	Bankruptcy, insolvency or in liquidation (<i>wound up / dissolved</i>)	Expires	Discontinuation of operator/s, approval expires	N/A

Other business types such as cooperatives, registered charities and other specialised types of organisation will be treated on a case by case basis to identify the change in natural person or legal person required to be compliant with food law within the food business under their control.

19. In the case of wholesale markets the following principles apply:

- The market overall approval (common parts) will be treated in the same way as an individual establishment FBO change but the individual units within the market do not need to be individually re-approved and can transfer over under the new market (common parts) approval.
- In the event that the common parts of a wholesale market are not granted approval, the individually approved units are not able to operate as the approval of the common parts facilities is a prerequisite to their approval. Where the units are able to become self sufficient in their own right separate approval as an individual establishment can be sought.
- If an individual unit of a wholesale market changes FBO, this will be treated in the same way as an individual establishment FBO change.

Failure of a Food Business to gain Approval following a Change of FBO

20. Where the FSA becomes aware of an establishment which has changed FBO and the new FBO continues placing food on the market without seeking a fresh approval after the change of owner the FSA's action should be risk-based and proportionate.

21. If, for example, by the time the change was identified food originating in the establishment had been placed on the market but there was no evidence that the food is a risk to public health, no action would be taken to withdraw/recall the food. This is despite the food being technically "unfit for consumption" as it has not been produced or re-wrapped in an approved establishment.

Approval Numbers

22. Where an establishment has been re-assessed for approval due to a change of FBO and approval is granted, generally a new approval number should be given. However, in order to have regard to issues of risk, cost and proportionality, a business should be able to retain its approval number where, other than for the change of FBO, the business is to continue to operate from the same premises and in essentially the same way, i.e. the type of food production by the business and the food safety control arrangements of the business will remain essentially the same.
