



Regulating Our Future: the way forward or a blind alley?

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30 April 2018

Introduction

In early March 2018 the Food Research Collaboration published a policy briefing that we wrote entitled *Weakening UK food law enforcement: a risky tactic in Brexit*, which analysed and criticised the Food Standards Agency's (FSA) policy proposals entitled *Regulating Our Future* (ROF).¹ On April 16th we published a related blog on the website known as *The Conversation*, entitled 'Brexit and food standards could get even worse'.²

The FSA has responded, but not by engaging with the substance of our analysis, critique or recommendations; instead, our critique has been misrepresented and disparaged. The FSA has alleged that we have misunderstood and misrepresented the Agency's proposals. We disagree: we maintain that we have a clear understanding, and have provided an accurate account, of the FSA's plans.

The supportive comments we have received from Environmental Health Officers, Trading Standards Officers and Public Analysts, who are employed by local authorities (LAs) on the front line of food law enforcement in the UK, reinforce our conviction that our interpretation of the FSA's plans is accurate; a key difference is that we refuse to accept the optimistic spin in terms of which the FSA wants its proposals to be viewed.

The FSA's view: Millstone & Lang got it wrong

In mid-March a senior FSA official responded on the *Food Hygiene Forum* of the *Knowledge Hub* website saying that our: "...main criticism was the transfer of food safety inspections to the private sector and the ability of food businesses to 'mark their own homework' or regulate themselves. Neither of those positions are correct."

In the latest (9th) Edition of the Food Standards Agency's *Regulating Our Future* (ROF) *Newsletter*, the Chair of the FSA Board, Heather Hancock, complained about our critique of the FSA's ROF agenda.³ She complained that the FSA has to:

"...battle against misunderstandings and misrepresentation of what we are about. I was very disappointed in a recent report by Professors Lang and Millstone, replaying the myth that we want to remove local authorities [LAs] from their place at the heart of food regulation and suggesting that in future businesses would be able to choose a sub-contractor 'to mark their homework for them.' As I said at the FSA's Board meeting last month, neither of these claims is true. We have no plans to remove local authorities from the front line of ensuring food is safe and what it says it is. What we are doing is enhancing

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the role of LAs by making available to them other sources of information that will inform the type and frequency of intervention required. Under ROF LAs will continue to have ultimate responsibility for enforcement of food safety and food standards regulation.”⁴

On 24th April she was reported, when addressing a conference, to have characterised our criticism of the FSA’s reforms as ‘nonsense’.

Our response:

While FSA alleges that we misunderstood and misrepresented its proposals, we disagree. The FSA has attributed to us claims we did not make. A careful reading of our report would have demonstrated that we explicitly asserted that the FSA was not proposing that food businesses would regulate themselves. We said: “The FSA did not propose that FBOs should mark their own homework...”⁵ We explained however that the FSA was proposing that food businesses would increasingly choose and pay commercial organisations to mark their homework for them.

We did not say that the FSA wants: “...to remove local authorities from their place at the heart of food regulation...” We recognise that they will continue to play a key role, given their statutory obligations. On the other hand, there should be no attempt to disguise the fact that the FSA proposes that, to compensate for fewer local authority inspections, private commercial inspections and audits of food business operations (FBOs) should play an increasing role, and that FBOs should take greater responsibility for paying commercial inspection and audit service providers to ‘mark their homework’, in exchange for which they may be exempted from some or all LA inspections and audits. The FSA does envisage a diminished role for LA enforcement officers, and shifts them from the front line towards a diminished role as a backstop.

The FSA is trying to portray its proposed new regime as one in which LA officials will have their tasks made easier by asking FBOs and their sub-contractors to provide the local authority officials (and the FSA) with access to up-to-date digital data. The FSA assumes that will help LA officials to discharge their responsibilities for food safety more efficiently. We are not persuaded.

Our interpretation of the FSA’s proposals

ROF was introduced, in large part, to try to cope with the consequences of years of austerity and cuts to the resources provided to the FSA and the LAs. On 30th April 2018 *The Times* reported that inspections of abattoirs and meat-cutting plants had fallen from 2,917 in 2011 to 1,725 in 2017.⁶ The FSA assumes that austerity will continue and so they expect that the ability of LAs to provide adequate inspections of premises and audits of FBOs will diminish. Nonetheless, the FSA insists that Local Authorities’ statutory responsibility for ensuring that all FBOs under their jurisdiction operate safely will remain undiminished.

The FSA’s proposals assume that the diminished ability of the LAs to conduct inspection and audits, and directly to collect relevant data, will be adequately compensated for by persuading the FBOs to purchase inspection and audit services from individuals and companies. Those service providers would, in turn, be expected to provide relevant data directly to the LAs and the FSA, which will equip the LAs more efficiently to ensure that high safety standards are consistently achieved.

That model is remarkably optimistic, but it fails to engage with several obstacles to the achievement of ‘more from less’. Firstly, the commercial inspection and audit service

providers, and the FBOs that will be expected to employ them, will not be obliged to deliver any, let alone all, of their relevant data. Neither the FSA nor LA officials are empowered to demand data routinely from FBOs. In the event that they uncover *prima facie* evidence of failures, LA and FSA officials can seize and retain data, but not otherwise. The FSA hopes that, if the LAs are voluntarily and routinely provided by FBOs with reassuring data, they won't squander their precious resources inspecting those businesses; they will concentrate instead on firms that don't provide data, or on those providing data that fail to reassure. The idea that FBOs, and their commercial inspection service providers, can all be relied upon to share all safety-relevant data, even when they reveal serious failing, is profoundly unrealistic. Just asking them nicely won't suffice. Unless and until FBOs are statutorily obliged to share all safety-relevant data with LAs and the FSA, the FSA's proposals are a recipe for failure. Sadly, the FSA has conspicuously failed to engage with or respond to that analysis, but ignoring it does not make it go away.

Shifting responsibilities and allocating blame

By imposing austerity on the FSA and the LAs, and imposing more generally a de-regulatory agenda⁷, ministers have in effect dumped on the FSA and the LAs. The FSA is not proposing giving the LAs any increased powers or budgets, merely adding large quantities of data to their burdens without ensuring they have the capabilities and personnel to handle and interpret those data in a reliable or timely fashion. The FSA portrays its ROF proposals as if they would make the task of the LAs easier, when in practice they will do nothing of the sort.

Recently a senior Environmental Health Officer articulated an even more skeptical interpretation of the FSA's proposals, arguing that the FSA is: "...still working hand in hand with food businesses to keep people like me off their premises doing good old clipboard and pen inspections (unannounced). Beats an announced audit that's predominantly paperwork based! Get on the factory floor or shop floor and have a good look!"⁸

If ROF is implemented as proposed, the most likely scenario is that evidence of serious corporate failures to ensure food safety, because of, for example, contamination with bacteria such as *campylobacter*, *salmonella* and *E.Coli 0157*, will only emerge when unexpected outbreaks of food poisoning occur. Once the premises from which unsafe product emerged have been located, the firms(s) responsible will be in trouble, but so too will be the LA(s) that should have prevented problems from occurring.

Tracing the source of, for example, outbreaks of food poisoning is also getting harder because of the increasing scale and complexity of food supply chains. Whereas ten years ago, the average British beef burger had meat from approximately 10 animals, now on average they contain meat from more than 30 animals. An average litre of retail milk contains milk from ~1,000 cows. The opportunities for contamination to spread widely have increased, and consequently the challenge of tracing the source of food safety problems has become increasingly difficult.

When outbreaks of food poisoning occur, as they surely will, the LAs will be blamed for failing to prevent the standards of FBOs declining to unacceptably dangerous levels. The FBOs and their audit service providers will also be blamed, but courts cannot fine companies that have gone bankrupt, let alone obtain compensation for the unfortunate victims of food poisoning.

Our March 2018 report on ROF also drew attention to the risk that an increased reliance on commercial inspection and audit service providers, and a diminished role for inspections by public officials, could undermining the ability of UK food producers exporting their products

into the EU's Single Market after Brexit. While Ministers have offered reassuring statements⁹, they have failed to explain how they plan to persuade the EU to accept food, the production of which has not been policed in accordance with EU rules. An internal FSA report, prepared in collaboration with the British Retail Consortium (BRC) in 2017, acknowledged that: "Under current EU legislation, it is possible for BRC Global Standards or similar bodies to assess and verify compliance of businesses...**but currently they could not provide a replacement for those controls under the EU legislative regime.**"¹⁰ (Emphasis added) The issue of the possible loss of access to the European Single Market for UK food products, after Brexit, is a very serious concern in the British food industry. The problem is not merely theoretical, as is evident from the experience of the Australian Export Meat Inspection System. "In 2013, the European Union rejected an inspection model, the Australian Export Meat Inspection System...that privatized most inspections in Australian red meat plants. The EU argued that AEMIS inspections created an inherent conflict-of-interest."¹¹ Our concerns about such conflicts of interests, and their implications for both UK food producers and consumers, have neither been acknowledged nor addressed by the FSA.

A generous interpretation of the FSA's proposals could attribute to the Agency the view that, if LAs are insufficiently resourced to conduct the required inspections and audits, it would be better for the inspections and audits to be conducted by private sector service providers than for an increasing proportion of FBOs to remain uninspected. But that fails to address concerns about conflicts of interest, access to data, or issues of resourcing. Commercial service providers are beholden to the companies with which they have contracts; their responsibility is not ensuring consumer protection or public health. The FSA's ROF proposals also ignore the fact that frequently outsourcing from the public to the private sector has failed to maintain, let alone to improve, service delivery or efficiency, but instead added layers of expensive incompetence.¹²

We have no objection to encouraging FBOs to contract with inspection and audit service providers to help them ensure that they are meeting high standards of food safety and consumer protection, but the FBOs and their service providers must not be allowed to 'cherry-pick' the reassuring indications while concealing evidence of unsafe practices or products. They must provide their LAs and the FSA with any and all safety-related data that the officials request. Commercial service providers cannot adequately replace inspections and audits by public officials with statutory responsibility for consumer protection and public health.

What should be done?

1. The main weaknesses in the FSA's plans could be at least partly remedied if Parliament first legislated to empower the FSA and LAs to require all FBOs, and their inspection and audit service providers, regularly to provide LAs and the FSA with **all safety-relevant data in standardised searchable forms**. Those data should include all measurements of safety-relevant parameters from all critical control points identified in the hazard analysis, which FBOs are already obliged to conduct.
2. New legislation should also oblige FBOs, and all commercial inspection and audit service providers, to purchase sufficient insurance to cover their liabilities in the event of food safety failures.
3. Local authorities must be provided with sufficient resources to conduct sufficient unannounced inspections and audits to prevent food safety standards from falling to unacceptable levels. Leaving under-resourced local authorities to cope with all of the challenges they currently face, plus receiving skip-fulls of data, the completeness and

reliability of which they cannot afford to check, is not a recipe for maintaining, let alone raising, food safety standards.

4. If ultimate responsibility for ensuring the safety of our food supply continues to be located with local authority officials, they need to have the resources to inspect and audit the service companies, and to do that they must also inspect and audit the FBOs to which the service providers are contracted. The LA officials cannot ensure the reliability of paper and data trails unless they can directly test the reliability and completeness of those data and documents.
5. Ministers expect the FSA and the LAs to ensure food safety on the cheap. The LAs cannot adequately comply with their statutory obligations with the available level of resources, but the FSA has not confronted ministers with the inevitable consequences of their policies. We have no inhibitions in criticising government policies when they are misguided; our disagreement is primarily with the government, rather than with the FSA.

Our recommendations

- The FSA should suspend the process of implementing its ROF proposals.
- A special **Joint Parliamentary Select Committee**, between the **Health and Environment, Food & Rural Affairs** committees, should be urgently convened to review the ROF proposals.
- The 1999 Food Safety Act should be amended to give the FSA (and counterparts in Scotland, Northern Ireland and Wales) the power to oblige FBOs to collect minimum food safety and quality monitoring data on their ingredients, processes and products, and the power to require all FBOs to share those data with their local authorities and with the FSA.
- Assurances must be provided, by the FSA and by ministers, that food-safety-related data gathered by LAs and the FSA from FBOs, and their commercial inspection and audit service providers, will not be exempted from the provisions of the Freedom of Information Act.
- Those data should be used, amongst other things, to create and publish food safety performance league tables, categorising FBOs along the lines of the Food Hygiene Rating System, rather than restricting that scheme just to restaurants and cafes.

¹ E Millstone & T Lang, *Weakening UK food law enforcement: a risky tactic in Brexit*, *Food Research Collaboration, March 2018*, available at: <http://foodresearch.org.uk/publications/weakening-uk-food-law-enforcement/>; and Food Standards Agency, *Regulating our Future: Why food regulation needs to change and how we are going to do it*, July 2017, available at <https://www.food.gov.uk/enforcement/regulation/regulating-our-future> and as <https://www.food.gov.uk/sites/default/files/rof-paper-july2017.pdf>

Food Standards Agency's (FSA) *Regulating Our Future*

² See <https://theconversation.com/brexit-and-food-standards-could-get-even-worse-94866?>

³ <https://beta.food.gov.uk/about-us/ninth-regulating-our-future-newsletter>; and <http://foodresearch.org.uk/publications/weakening-uk-food-law-enforcement/>

⁴ <https://beta.food.gov.uk/about-us/ninth-regulating-our-future-newsletter>

⁵ E Millstone & T Lang, *Weakening UK food law enforcement: a risky tactic in Brexit*, *Food Research Collaboration, March 2018*, available at: <http://foodresearch.org.uk/publications/weakening-uk-food-law-enforcement/> p. 9

⁶ H Holmes et al, 'Fears over meat quality as abattoir checks fall', *The Times*, 30 April 2018, <https://www.thetimes.co.uk/edition/news/fears-over-meat-quality-as-abattoir-checks-fall-llcx3d22j>

⁷ <https://www.gov.uk/government/publications/regulatory-futures-review>

⁸ Pers. Comm. 14 March 2017

⁹ See eg <https://hansard.parliament.uk/lords/2018-04-26/debates/A9A367F1-9CCF-45B6-9C75-B110AAB903FD/BrexitFoodStandardsAgency>

¹⁰ Y Robinson, *Summary Report of the Pilot Project on the Potential for Recognition of the BRC Global Standard for Food Safety*, p. 5 para 1.8, available at <https://www.food.gov.uk/sites/default/files/fsa-brc-report-oct17.pdf> accessed 10 October 2017

¹¹ See <https://www.foodandwaterwatch.org/news/food-water-watch-again-raises-questions-usda-regarding-australian-meat-imports>

¹² Cf Anon, 'Outsourcing of the trouble ...', *Private Eye*, No 1467, p. 37