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FRC Food Brexit Policy Briefing

Weakening UK food law enforcement: a risky tactic in Brexit

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FOOD RESEARCH COLLABORATION

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Educating, researching & influencing for integrated and inclusive food policy

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Summary

- The UK's food supply is not as safe as it should be.
- There are serious risks that if and when the UK leaves the EU, food safety standards will decline rather than rise; this is a particular risk if the UK reaches free trade deals with countries that have lower standards than the EU, such as the USA and China.
- The Food Standards Agency (FSA) is proposing a programme of change (called Regulating Our Future - or ROF) that will destabilise the institutions responsible for enforcing food safety standards.
- Implementing ROF will make the UK's food supply even less safe; restructuring food regulation when the institutions are already stretched is doubly bad policy in the context of Brexit, when the public needs a strong vigilant and effective FSA.
- The FSA proposes transferring responsibility for food safety inspections and audits from the public sector to private commercial third-party assurance providers. When public concern is understandably high, after the collapse of outsourcing company Carillion, this entire strategy deserves rigorous scrutiny, which it is not receiving.
- The new quasi-outsourced inspection and audit system will create irreconcilable conflicts of interest; consumers will suffer.
- The 1999 Food Standards Act, which established the FSA, assumed that safety and quality standards would be enforced by adequately trained and resourced local authority Environmental Health Officers (EHOs) and Trading Standards Officers (TSOs) in collaboration with Public Analysts. ROF contradicts that expectation.
- The government cut the FSA's budget by nearly 23% in the period from 2011-12 to 2016-17, and the number of samples taken for testing by EHOs in the UK fell by 22%, and in England by almost 25%. At that rate of reduction, testing will have ceased in less than 4 years.
- Only one aspect of the ROF proposals could benefit consumers, namely the proposal to enforce the mandatory registration of all Food Business Operators (FBOs).
- Local authority EHOs want to be able to refuse to register FBOs that cannot demonstrate they can produce food that is safe and honestly labelled.
- Currently the FSA knows far too little about what food businesses are doing, but consumers know even less; to push this further at arms' length from local authorities is dangerous.
- Implementing the proposals in ROF could well harm the ability of British FBOs to sell their products into the single market of the European Union after Brexit. The EU will almost certainly refuse to accept imports of UK food products, unless all safety standards have been enforced by public sector institutions and personnel.
- The FSA hopes that FBOs and third-party assurance sub-contractors will readily share any data the FSAs request; in exchange the FSA has promised to keep all those data, and presumably all analyses of those data, entirely confidential. But you cannot 'put consumers first' by keeping them in the dark.
- ROF is nothing but a fundamental shift in the role, mode of working and public responsibilities of the FSA and local authority officers.

Recommendations

1. To protect food-related public health in the UK, almost every aspect of ROF should be discarded. At the very least, it should be halted pending the enquiries we propose.

2. The 1999 Food Standards 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.

3. Those data should be used, amongst other things, to create and publish food safety performance league tables, categorising all types of FBOs along the lines of the Food Hygiene Rating System, rather than restricting the scheme just to restaurants and cafes.

4. A special Parliamentary joint select committee, between the Health and Environment, Food & Rural Affairs committees, should be urgently convened to review the ROF proposals.

Why '*Regulating Our Future*' matters at a time of Brexit

In July 2017, the Food Standards Agency (or FSA) published a document entitled *Regulating our Future: Why food regulation needs to change and how we are going to do it.*[1] In this Briefing, that document, and the proposals it contained, will be referred to with the abbreviation: 'ROF 2017'.

In the ROF document, the FSA announced that it was: "... planning fundamental changes to how we regulate."[2] The proposed changes were less than entirely clear, partly because many details remained vague. Several of the apparent reasons for proposing the changes were also factually incorrect. This document critically assesses the substance, assumptions and implications of those proposals, with a particular focus on their relevance in the context of Brexit.

The UK's food supply is not as safe as it should be. For example, levels of infectious campylobacter on chicken carcasses and cuts of meat are so high that, in 2014, the Food Standards Agency[a] (FSA) published advice to the public and commercial caterers not to wash carcasses or cuts of meat[3].

The disclosure in September 2017 of serious problems at a 2 Sisters chicken processing plant showed that current inspection regimes were inadequate. Revelations in January 2018 of very serious shortcomings at plants owned by Russell Hume, and subsequently by DB Foods, Muscle Meats[4] and Fairfax Meadow[5] combined to reinforce that impression.

Inspections of food businesses by Local Authority officials and by the FSA are under-resourced because of the government's insistence on austerity. The regime of inspection of food businesses therefore needs to be strengthened, but the FSA's proposals

a In this document, when the abbreviation 'FSA' is used, unless otherwise specified, it refers to the London-based FSA. When referring collectively to the other counterpart agencies in Scotland, Wales and Northern Ireland the abbreviation will be 'FSAs,' though that will also be used to refer to all four agencies collectively.

are predicated on an expectation of future reductions in resources.

The FSA admitted that it knows almost nothing about the safety standards in individual food processing plants. "There is a fundamental weakness in the current model as the FSA doesn't know in real time how many food businesses actually exist or, who is operating them. We aren't able to draw a complete picture, whether in a food incident or crisis, or just to make the best decisions."[6] It does need to be far better informed, but so too do consumers.

Unfortunately the FSA's proposals in ROF 2017 were not primarily focussed on improving the flow of information to it or to consumers,[7] instead the FSA proposed a transfer of responsibility for food safety inspections and audits away from the public sector, to private commercial organisations. It proposed that food business operators (or FBOs) should contract with commercial organisations, called third-party assurance providers, to inspect and audit their compliance with food safety regulations. In effect the public sector's responsibilities for ensuring that food safety regulations and standards are complied with will be substantially out-sourced to the private sector.

The status quo is undoubtedly problematic, and policy could be changed in a variety of competing directions. The direction proposed by the FSA will however be bad news for UK consumers, and may well bring long-term reputational damage to the FSA. If and when evidence emerges showing that implementing the ROF 2017 proposals resulted in deteriorating standards of food safety, if it is likely that the FSA will be blamed, rather than the ministers who compelled the FSA to out-source food safety inspections and audits.

The latest proposals are not in the interests of the consuming publics, and they are not even in the FSA's interests. The FSA has really just offered to ministers what they have demanded, which is ironic because, when the FSA was established, the British public was told that the FSA would be independent of the food industry and of government ministers, but that pretence was always misleading.[8]

The issues and challenges raised by the FSA's proposals are not an arcane set of boring issues concerning the allocation of responsibilities for bureaucratic procedures; they go to the heart of how the public interest, in this case in relation to food safety and public health, is being undermined by a toxic combination of austerity and Brexit. In context of Brexit, the FSA's proposals are especially problematic.

Is there a need to change? If so why?

In ROF 2017, under the heading 'Reasons for Change', the FSA said:

> "We are changing the existing approach to regulating the food industry because we believe it is outdated and becoming increasingly unsustainable. It has been in place for more than 30 years and has served consumers well, but has not kept pace with technological change in the food industry, and is not flexible enough to adapt to the changing environment. The existing 'one size fits all' approach to regulating food businesses is ill-suited to the incredibly diverse nature of the industry. In recent years, we have witnessed large numbers of new players enter the global food and food safety landscape; for example, online retailers, food delivery services, private auditors, independent food safety certification schemes. These and many other developments have reduced risks, created different risks, increased risks. But the current regulatory approach doesn't allow us easily to focus our effort on changing risks. It's clunky, rather than flexible and agile"[9]

But that explanation is not convincing. Firstly, it is not correct to claim that the existing approach to regulating the food industry has been in place for more than 30 years or that it has served consumers well. During the interval since the BSE crisis of 1986 the system for regulating the UK food system has changed substantially. The Food Standards Agency was not established until April 2000, and the European Food Safety Authority was only created in 2002. Moreover there have been numerous occasions when evidence has emerged showing that food in the UK and EU is not as safe as consumers want and deserve it to be. The last 30 years have witnessed numerous changes in institutions, practices and concerns.

The Sussex Chief Environmental Health Officers (or EHOs) Group has also criticised the suggestion that little has changed over 30 years; it has argued that:

> "There have been some technological changes to food consumption, particularly the use of apps to purchase food …These apps do not link to the Food Hygiene Rating as there is no mandatory requirement in England to do so. Despite the lack of information to consumers, these on line food retailers do not pose additional risks or changed risks, they are subject to the [same] food safety legislation as all other high street businesses. It is not clear what changed risks the FSA are referring to. …The allegation that 'one size fits all' does not sit well. The FSA's own food law code specifies the time intervals between inspections/ interventions based on risk. The same food law code allows local authorities the flexibility to adopt a range of approaches to food regulation; use of alternative enforcement questionnaires, education and advise [stet], sampling as verification, part inspections for broadly compliant businesses and whole inspections where necessary. Local authority officers are free to spend longer in a business where the food business operator requires support and guidance and shorter time with those that demonstrate good controls."[10]

The main reason why the FSA has concluded that its proposals were required only emerged at the end, rather than at the beginning, of its explanation.

> "Finally, the model is financially unsustainable, with taxpayers bearing the cost of food regulation in a way that is incompatible with *wider regulatory policy*. At the same time, local authorities who deliver most of the current activity are under increasing financial pressure, such that some are struggling to fully discharge their functions."[11] (emphasis added)

There is clear evidence that the FSA's budget has been declining even in cash terms, but especially when the effects of inflation are taken into account.

Figure 1 provides a graphic representation of the changing budgets for the Food Standards Agency in London, and for the sum of the budgets of FSA London and its counterpart agencies in the devolved administrations of Scotland, Wales and Northern Ireland. The lines suggest that expenditure on the agencies increased in cash terms from 2010-11 to 2013-14, and then subsequently declined, though in 2016-17 the figures were greater than those for 2010-11.

In Figure 2, however, the cash figures have been adjusted for inflation, by reference to the Consumer Prices Index, to 2010 prices. It shows that the highest levels of investment in the FSAs occurred in 2011-12, and that they have subsequently declined. For FSA London, the 2016-17 figure was 22.8% below that for 2011-12; while for the aggregate expenditure of all the agencies the 2016-17 figure was 16.3% below that for 2011-12.

While there is clear evidence that the resources available to the FSA(s) have declined, there are far fewer figures reporting or estimating the expenditures by local authorities on eg Environmental Health Officers (EHOs), Trading Standards Officers (TSOs) and Public Analysts. But figures issued by the FSA reveal that between 2015/16 and 2016/17 the number

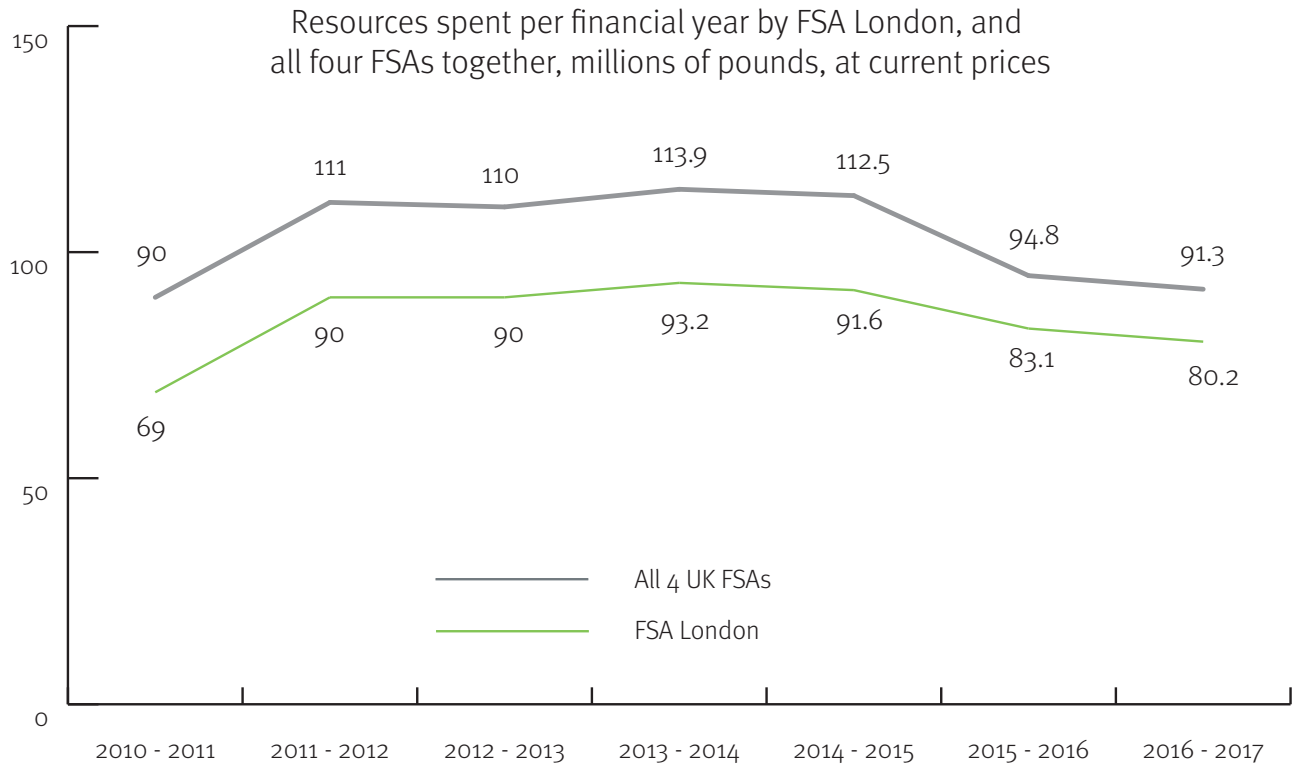

Figure 1: Budget of FSA London, and for the sum of the UK's Food standards agencies, 2010-2017, in annual cash terms. Source: FSA Annual Reports and Accounts, available at https://www.food.gov.uk/about-us/data-transparency-accounts/busreps/annualreport

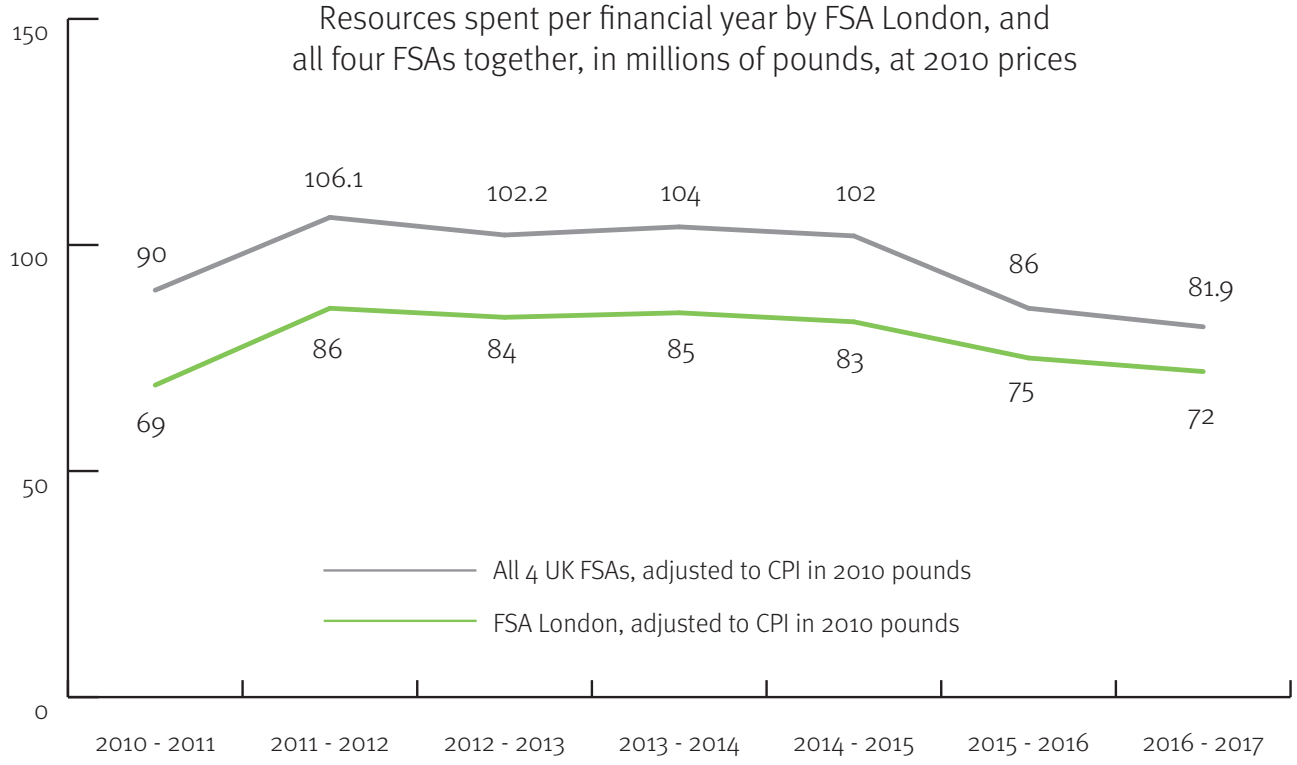

Figure 2: Budget of FSA London, and for the sum of the UK's Food standards agencies, 2010-2017, in constant 2010 prices. Sources: FSA Annual Reports and Accounts: https://www.food.gov.uk/about-us/data-transparency-accounts/busreps/annualreport and UK Office of National Statistics:https://www.ons.gov.uk/economy/inflationandpriceindices/datasets/consumerpriceinflation

of food samples collected by EHOs in the entire UK fell by 22% (from 21,563 to 16,746), while just in England they fell by 24.9% (ie almost one quarter, from 12,245 to 9,196). The FSA acknowledged that "...local authorities...are under increasing financial pressure, such that some are struggling to fully discharge their functions." What is puzzling is why, if the FSA believes that some local authorities are not fully meeting their statutory obligations, the Agency has not used its statutory powers under the Food Standards Act to deal with those 'struggling' local authorities?

In a paper prepared for the FSA's Board meeting of 17 March 2017, an excerpt of an earlier *Risk Register* was reproduced, indicating that the FSA assumed that it and local authorities may be: "Unable to draw on resources as required. Likely to manifest with regards to people (i) capacity constraint; (ii) capability constraint or (iii) financial constraint and any combination of above." It was evident that the FSA assumed that austerity had undermined, and in future would further undermine, the ability of local authorities fully to discharge their statutory responsibilities in relation to food safety.

The FSA's use of the expression 'wider regulatory policy' can best be understood by reference to the UK government's *Regulatory Futures Review* that was published by the Cabinet Office in January 2017. That document referred to 'regulated self-assurance' and 'earned recognition', by which it meant that firms (including presumably FBOs) that can demonstrate that they adopt and deliver consistently high standards, can be subject to lighter touch regulatory enforcement. The document proclaimed: "In practice this means that businesses who 'do the right thing' should be regulated with a very light touch."

The ROF 2017 proposals reflected the spirit of the *Regulatory Futures Review,* when it envisaged transferring responsibility for meeting the costs of food safety inspections, audits and enforcement activities from public bodies to the individual FBOs. The government argues that firms should pay the costs of assuring their compliance with statutory minimum requirements, rather than requiring public expenditure.

The perspectives of the proprietors and managers of most FBOs are distinctively different. Their view is that they are already paying for such services because business rates are significantly higher than rates of council tax on residential properties; they argue that the FSA's proposals imply that they would be double-charged by being made to pay twice.

The FSA's approach to ROF first emerged in February 2016. It occurred four months before the Referendum on the UK's membership of the EU, and a full 11 months ahead of the *Regulatory Futures Review*. So while the FSA could be said to have been 'ahead of the curve', it would be less convincing to argue that the FSA is independent of changing fashions in the policies of the government.

The FSA was almost certainly correct to acknowledge that some local authorities have 'struggled' (ie failed) fully to meet their statutory responsibilities; but cynics might suggest that the same was true of the FSA in London, and some of its counterparts in the devolved administrations. As evidence they could cite the revelations about shortcomings in the operations of eg 2 Sisters and Russell Hume. While it is far too soon to judge the outcome of the negotiations between the UK and the EU, let alone the outcomes of subsequent trade negotiations with current and potential trading partners, it is already clear that the budgets of the FSA, and counterpart agencies in the devolved administrations, will need to rise, and not to decline.

It will be a privatisation, but will it be self-regulation?

The FSA's proposals are for many inspection and auditing services to be privatised, though that particular term does not appear in any of the FSA's

documentation. But the FSA insisted that it was not proposing 'self-regulation'.[12] The FSA did not propose that FBOs should mark their own homework, but only that they should sub-contract with an appropriate service provider that they would choose to mark their homework for them, providing 'third-party assurance'.

The FSA proposal is for FBOs increasingly to be inspected and audited by private sector organisations, with which they will have contractual relationships. But if responsibility for much of those functions and responsibilities is transferred from the public to the private sector, it would be reasonable to expect that potential service providers will compete on price, and that FBOs will often select providers by reference to their prices. The FSA document includes what it terms a set of 'principles', one of which asserts that: "Businesses should meet the costs of regulation, which should be no more than they **need to be.**"[13] (emphasis added)

That implies that FBOs will be expected to select the cheapest available service providers, and also suggests that the FBOs will decide what they deem to be 'needed'. Some may aim fully to comply with statutory minima, while others might pursue what is termed as a 'compliance-plus' strategy.[14] That suggests that some FBOs will employ those contractors that, while satisfying the FSA's minimum requirements, will monitor the fewest parameters and least often, and that those FBOs will only wish to employ service providers that can be relied upon not to cause them any commercial difficulties. Together those considerations imply that food safety standards are more likely to fall than rise.

In an attempt to counter that possibility the FSA said:

> "...we will implement measures that mitigate against the risks of any provider, public or private, cutting compliance corners, in the interest of higher margins, or to win and retain business and revenue."[15]

However, no clarity was provided concerning what such measures might be, nor how they might be judged reliable and sufficient. The FSA's proposals seem to assume that food safety standards need not decline as public expenditure on food safety is reduced, because the private sector will meet all the requisite costs, and do a good job at lower cost. Both historical experience and knowledge of institutional behaviour, however, suggest that the FSA is being distinctly over-optimistic.

Do the FSA's proposals 'put customers first'?

The FSA asserted that: "We need to be sure that all elements of our system inspire confidence".[16] That remark was ambiguous as it failed to indicate whose confidence needs to be 'inspired' or specify in what that confidence might be warranted. The rhetoric in ROF 2017 implied that the Agency assumed that prevailing arrangements were sufficient to warrant high levels of confidence, on the part of consumers, in the safety of the UK's food supply. It optimistically assumed that high levels of regulatory compliance with food safety regulations were being achieved in the UK's food chain. Such a suggestion was, however, unconvincing. As the Commons Environment, Food and Rural Affairs Committee said in its report on the crisis in the autumn of 2017 over the 2 Sisters plant in West Bromwich: "The problems identified at the 2 Sisters plant at West Bromwich are not a one-off."[17] By which the Select Committee meant that the problems in the 2 Sisters operations were not confined just to that one plant.

The shortcomings in the operation of meat-cutting plants operated by Russell Hume, which emerged in January 2018, were so serious that the entire operation of the enterprise was shut down by the FSA, and the firm subsequently went into administration.[18] Such examples show that FBOs cannot be relied upon to act in their own best interests, let alone the best interests of their customers. Those disclosures showed that 2 Sisters was not a 'one-off', and on

1st February 2018, the FSA announced that it would conduct a 'review of cutting plants and cold stores'.[19] That constituted a tacit acceptance that high levels of confidence were not warranted.

It is also important to appreciate that, in the months preceding the disclosures about 2 Sisters, the West Bromwich plant had been inspected by the FSA and by local authority Trading Standards Officers, but neither of those parties had uncovered such failings. Furthermore, the plant and its operating company, were fully certified by the British Retail Consortium (BRC). Indeed a 2 Sisters website proclaimed that:

> "We are subject to multiple and frequent unannounced audits from the FSA, BRC, Red Tractor, independent auditors as well as our customers. By example, our facility in the West Midlands under investigation received nine audits (five unannounced) in the months of July and August alone."[20]

In November 2017 the Commons EFRA Committee confirmed that: "Both Red Tractor and BRC Global Standards had accredited the 2 Sisters plant in West Bromwich."[21] Moreover:

> "The previous audit of the plant [by FSA Operations Assurance] took place on 19 July - around the same time as the undercover footage of the plant was gathered – and nine 'minor discrepancies were found'. As a result, 'it was not showing up as a high-risk plant'. The last unannounced inspection of the plant by the FSA took place in November 2016."[22]

In a report on BBC Radio Four's *Food Programme*, in response to the 2 Sisters story, the commentator explained that:

> "Most of the scrutiny of the UK's food supply by the Food Standards Agency and certification bodies like Red Tractor come in the form of audits. Most are carried out by appointment, a small number are unannounced, but even that approach isn't fool proof, according to the industry responses given to Mike Stones [of *Food Manufacturer* magazine]. One large pig manufacturer has this tacit relationship with its staff, a tacit understanding, that when they hear over the PA system the message 'Mr Jones is in reception' that is code for: 'there is an unannounced safety audit taking place now'. And everyone knows what that means..."[23]

Nonetheless, the FSA had asserted that:

> "Many businesses invest heavily in internal processes that provide them with assurance that they are managing their food safety and standards-related risks...Where these processes are robust and where they meet the standards set by the FSA, we intend them to be the starting point in our new model...This means good, responsible, compliant businesses will face a lower burden from regulation, and free up local authority resources to target the businesses that present the greatest (residual) risk to public health... We will introduce digitally enabled technologies to enable assurance data to flow into the system, and – as far as possible – to have it in real time. As technology becomes smarter and cheaper, this should be as helpful to small businesses as it is to big firms."[24]

The FSA evidently assumes that third-party assurance schemes routinely help FBOs keep up with new requirements and good practices and provide evidence of the quality of their food processes, but the example of 2 Sisters demonstrates that that is seriously over-optimistic. Third-party schemes are mainly box-ticking exercises, and are not based on the kinds of inspection that EHOs and Trading Standards Officers (TSOs) have routinely provided.

The Commons EFRA Committee's investigation into 2 Sisters concluded that:

> "For an industry which takes pride in the quality of its produce, we were surprised to hear of the apparently patchwork nature of the

> accreditation process. It appears relatively simple for someone to game the system and hide infractions – by opting out of unannounced visits by the accreditors for example – and the lack of joined up intelligence and knowledge-sharing seemingly presents many gaps into which misdemeanours can fall…"[25]

The 'audits' currently provided by third-party organisations are consequently seriously inadequate, and cannot be expected to provide the basis for the kinds of food safety reassurances that the FSA's proposals envisage. Indeed, neither public nor third-party inspections and audits, as currently conducted, can be relied upon to uncover misbehaviour of the sort that occurs when inspection are not taking place. Nonetheless ROF 2017 was predicated on the assumption that third-party assurance schemes could provide an effective replacement for inspections by local authority officers and FSA officials. The FSA may have been indulging in optimistic wishful thinking, though in so doing they were acting in accordance with ministerial instructions.

Is UK food supply safe and will ROF make it less safe?

While the FSA Board has published documents that are predicated on the assumption that the UK food supply is suitably safe, other parts of the FSA have issued advice warning consumers, and commercial caterers, not to wash chicken carcasses or meat is (until further notice), to reduce the risks of spreading Campylobacter infectivity.[26]

That the FSA has concluded that the UK chicken supply is too contaminated with Campylobacter for it safely to be washed, entails that current levels of hygiene in poultry sheds, abattoirs and meat-cutting and processing plants are seriously deficient and that too many poultry flocks are chronically contaminated with pathogenic bacteria. Those facts collectively entail that the status quo is already unsatisfactory, and that current levels and types of inspections and enforcement actions are insufficient, and that certification by external commercial bodies cannot be relied upon to achieve the standards nominally required by legislation. If the FSA and local authorities do not currently have sufficient and competent resources to conduct the inspections that are presently required, they will not in the foreseeable future be able adequately to inspect firms providing third-party assurance services.

It is important to appreciate that, while in 2017 the FSA proposed a substantial privatisation of food inspection and control functions, inspections of two key up-stream stages of the meat chain had previously been privatised.[27] A firm of contractors, Eville & Jones, was awarded by the FSA a two-year £43.4m contract in January 2017 to recruit and provide professional veterinarians to work supervising abattoirs, and in meat cutting plants; they are supposed to inspect animals before slaughter and carcasses afterwards.[28] The majority of the vets recruited by the contractor are non-UK EU citizens, without whom the UK meat supply would be unsustainable.

The FSA was evidently aware that its proposals would be criticised.[29] It is, however not clear why the FSA expects to have sufficient resources to be able to ensure that food hygiene and safety standards will be met if and when its proposals are fully implemented.

ROF 2017 claimed that it is: "…time to improve the way we deliver regulatory controls in food…we intend to… create a modern, risk-based, proportionate, robust and resilient system." It certainly is high time that the performance of FBOs, the FSAs and of local authority inspectors was improved but, the suggestion that replacing many or most public inspections and audits with oversight by commercial third-party providers working under contracts to FBOs would raise standards is profoundly unconvincing. It is far more likely that standards will decline.

Questioning the FSA's assumptions

This section focusses on, and critically examines, four sets of assumptions that underpin the FSA's approach to the future of food safety enforcement in the UK. The discussion is not comprehensive, let alone exhaustive, but rather focusses on key problematic features of ROF 2017.

Modernisation' and safety assurance

The FSA document says:

> "We intend to improve delivery of controls across the food chain, including those for animal feed, but we are prioritising improvement where there has been no modernisation of the system in recent years and where it is most needed." (*Regulating Our Future* p. 3)

That wording suggests that the FSA assumes that 'modernisation' can be relied upon the improve food safety, where 'modernisation' is almost certainly being understood as consisting of technological and organisational innovations. Sometimes innovative changes, such as refrigeration, can reduce food-borne risks to public health, but the FSA failed to acknowledge that 'modernisation' can also increase risks rather than diminish them. In particular, in the livestock industries, and especially in poultry production, the pursuit of economies of scale, and consequently increased scale and complexity of operations, and their automation, create conditions for the rapid spread of pathogens and contaminants. The greater the numbers of animals housed together, with increasing density of animals per square metre, and in the case of poultry stacked at higher densities per cubic metre, the more likely they are to create conditions in which infective pathogens can readily colonise the premises and their inhabitants.

It is therefore not surprising that most chicken carcasses are highly contaminated with bacteria, from their faeces, which are known to cause food poisoning. Furthermore, the most 'modern' slaughter houses and meat cutting and processing plants kill, eviscerate, de-feather and cut carcasses at higher rates than ever before, and provide remarkably suitable conditions for microbial pathogens to grow and spread, increasing the numbers of infected products. Those considerations suggest that focussing mainly on facilities that are not the most 'modern' and paying less attention to the most 'modern', is an unwise tactic. After all, the 2 Sisters poultry processing plant highlighted by ITN and the Guardian was one of the most 'modern' in the UK.

The FSA's proposals also imply that it assumes that large food processors and retail chains already have sufficient knowledge and control of their supply chains to ensure that they only sell safe and honestly labelled foods and beverages. The lessons of the 'horsegate' saga and the scandals at 2 Sisters in 2017 and Russell Hume and others in 2018 reveal that such assumptions are over-optimistic. After all, the remit of the FSA's Food Crime Unit is limited to 'intelligence gathering'; it has no investigative function, and lacks the resources to take on such responsibilities.[30]

Modernisation cannot be relied upon to ensure food safety; on the contrary it can contribute significantly to undermining food safety. When in the UK in the late 1970s and early 1980s, the renderers of abattoir wastes introduced flow process technologies to replace batch processing they presented it as technological modernisation. In the event those changes contributed to the development of Bovine Spongiform Encephalopathy (or Mad Cow Disease), which devastated the UK cattle industry and understandably undermined domestic and overseas confidence in the safety of British beef and in the UK food safety policy-making system. The first Chair of the FSA Board, John Krebs, correctly portrayed the FSA as a child of the BSE crisis.[31] It would be remarkably ironic if the FSA were to be undermined by mistakenly adopting an assumption, the falsity of

which had previously contributed to the FSA's creation.

Facilitating exports?

ROF 2017 acknowledged, in effect, that its proposals were intended not just to keep the UK food supply safe, but also to help FBOs that want to export their products, especially to the EU. The document states that:

> "We need to be sure that all elements of our system inspire confidence in those who are deciding whether we provide adequate control of the feed and food chains."[32]

That implied that the FSA wants to be able to persuade the European Food Safety Authority (or EFSA) and the European Commission to continue to allow UK FBOs to sell their products into the EU after Brexit. That aspiration seems distinctly over-optimistic, as was clear from a report issued by the FSA, following a collaborative study between the FSA and the British Retail Consortium (which represents the major retailers), published in September 2017, which said:

> "Under current EU legislation, it is possible for BRC Global Standards or similar bodies to assess and verify compliance of businesses so that the outcome of their audits can inform the nature, frequency and intensity of a programme of official controls, **but currently they could not provide a replacement for those controls under the EU legislative regime.** At present the legal position that will follow EU Exit is uncertain, and if there is any change in the current requirements post EU exit, any effect on the recognition of assurance schemes will require further consideration. This could include new controls relating to the export of goods which would be of relevance to a number of BRC Global Standards certificated establishments."[33] (Emphasis added)

The FSA-BRC report also explained that:

> "Although the [BRC] Standard has been developed to assist businesses to meet legal requirements, it was the view of the CAs [Competent Authorities] and FSA assessors that this is not the primary focus of the audit assessment. **This perceived fundamental difference raised a number of concerns about the Standard being used as the basis for a full replacement of CA interventions by BRC Global Standards audits,** however there was general acceptance that the audits could be used to help inform the frequency and/or focus of CA interventions of certificated businesses."[34] (Emphasis added)

In other words, the FSA's aspiration to replace local authority and FSA inspections with those of auditing and monitoring programmes such as those run by the BRC, would not be sufficient to satisfy EFSA and/or the European Commission to continue to allow UK firms to sell their food products in the EU. In its 15 March 2017 paper to the FSA Board there was a recognition that: "…new and different trading relationships with other countries will demand a robust system of controls."[35] It is therefore unwise for the FSA to propose dismantling a relatively robust system in favour of what is likely to be a less robust one.

Reading across for regulatory compliance?

ROF 2017 innovatively suggested that evidence of compliance with non-food safety regulations could be relevant to judging food safety. The report states:

> "We will introduce a new risk management framework that will determine the nature, frequency and intensity of the controls that a food business will be subject to… For example, we will explore the potential to take into account compliance performance by a business in other regulatory areas beyond food to judge

> the behaviour and culture within the business and the impact this may have on food safety compliance." (*Regulating our Future* p. 8)

The FSA also suggests that:

> "We'll be able to analyse the factors most closely correlated with poor food hygiene outcomes – some of these might not be about food itself, but might indicate poor management culture which is linked to generally low levels of compliance with any regulation or legal requirement. This, combined with available compliance information (including that made available to us by food businesses themselves and third parties), will help us develop a more sophisticated framework to define the intervention frequency and type for each business." (ibid)

In response to that suggestion the Sussex Chief EHOs said:

> "The current food business inspection model is based on a risk assessment. It is proposed that this risk assessment will take into account information of compliance with other regulatory regimes…The significance [of the relationship] between [compliance with food safety rules and] compliance with different regulator regimes is not that simple. For example, does this assume that if a business completes its VAT returns on time, its premises must therefore be clean?"[36]

The Sussex EHOs' criticisms are devastating but, at the time of writing, the FSA had yet to respond to the substantive criticisms.

The FSA needs performance data, but so do consumers

The FSA has also acknowledged that:

> "[t]here is a fundamental weakness in the current model as the FSA doesn't know in real time how many food businesses actually exist or, who is operating them. We aren't able to draw a complete picture, whether in a food incident or crisis, or just to make the best decisions. We need to address this by ensuring that we have an overview of all food businesses rather than this important data just being held by individual local authorities as at present."[37]

The FSA's ROF document also states that:

> "[i]n the new regime, the FSA will set standards so that food businesses of all types understand what is required of them."[38]

But that is a curious comment; it suggests that the FSA is well aware that some or many food businesses do not know what is expected of them. If FBOs do not understand what is required of them, then the *status quo* is seriously problematic. On the other hand, if they do not know what is required of them, they may not realise that they are expected to contract third-party assurance providers, and even if they do, their chosen sub-contractor may not provide the most appropriate guidance.

Those facts suggest that it would be a very good idea to enforce the registration of all FBOs, before they can operate, but it is clearly not happening. Registration of commercial food businesses has been compulsory in the UK and all other EU Member States since 2004, under the provisions of a European Regulation.[39] Compliance with the Regulation is however incomplete. Registration is currently unconditional; it cannot be refused. In the paper to the 15 March 2017 meeting of the FSA Board, there was an acknowledgement that:

> "…the current approach to registration, within which many businesses do not fulfil their obligations to register with the relevant LA [Local Authority] in advance of trading and rarely inform them of significant changes to their business activities, was no longer fit for

purpose."[40]

In response, the FSA hopes to establish a system that they refer to as 'enhanced registration', which the FSA has characterised as:

> "[a]n enhanced system of registration for businesses, which will mean securing better information on all businesses so that we can better identify and manage risk across the food chain."[41]

Enhanced registration of all FBOs will mean that the Agency will:

> "...have better information on which to identify and manage risk across the food chain. It will mean we, our delivery partners in local authorities, and others, can respond more quickly and effectively to food incidents, and improve consumer protection. Knowing more about a food business will enable us to make better judgments about regulating it."[42]

To achieve that outcome, however, the FSA will also need adequate information about the FBOs' sources of supplies and about their customers, though ROF 2017 failed to acknowledge that fact, although it had previously been acknowledged in the report, providing an update on the ROF Programme, to the FSA's Board meeting on 15 March 2017.[43] The FSA also assumed that it will have full access to all the necessary data, and that all the data the Agency receives will be reliable and comprehensive.

The paper from the FSA's ROF team to the FSA's Board meeting on 15 March 2017 referred to a 'Permit to Trade' approach, which implied that the FSA was then proposing to make registration not just compulsory, but also conditional. Registration would only be granted if the applicant could show that they could operate safely. It said:

> "We have developed a 2nd iteration...which reflects our thinking on development of a digitally enabled and *enhanced approach to registration of food businesses with an associated permissioning process requiring businesses to demonstrate compliance with elements of food safety and food standards* ***before*** *they start to trade.*"[44] (emphases added)

That aspect of the proposals was absent from the July 2017 ROF document. The March 2017 document had acknowledged that making a Permit To Trade mandatory and conditional on demonstrating: "...that certain food safety requirements have been met..."[45] would require legislative change in Parliament, which ministers might not be willing to endorse.

The FSA acknowledged that it would be better equipped to meet its responsibilities in relation to food safety if it was far better informed about what FBOs were operating, where and how. ROF 2017 however failed to provide any indication as to how, and from whom, it expects to be able to learn that particular FBOs weren't meeting their responsibilities, but were failing to comply with statutory requirements.

One unattractive scenario is that such learning on the part of the FSA would be achieved only once an outbreak of food poisoning had occurred, and only if that outbreak was on a sufficiently large scale that epidemiological investigators, by eg Public Health England (PHE), had been able to identify the pathogen concerned and traced it to the outbreak's source. The FSA needs to have sufficient information to know when and where full compliance with food safety requirements is not being achieved, in order to take the necessary actions, to avoid outbreaks of food poisoning.

The FSA wants to receive lots of data from firms, local authority officers and third-party assurance providers but one problem with that scenario is that PHE's investigators have to rely on local authority inspectors to identify the FBOs that might be responsible, and for collecting samples for testing. Therefore, if implementing ROF 2017 proposals results in reductions in the number of EHOs and

TSOs, then PHE investigators and the FSA will struggle to gain the information that they require to discharge their responsibilities.

How and when the FSA will obtain the information it needs will be a function of who will be entrusted by the FBOs and their third-party service providers, to gain access to vital data, and the conditions under which those data will be shared. Inevitably the FBOs know more about what they are doing, and not doing, than anyone else. Implementing the ROF 2017 proposals will imply that the next best informed group should be the third-party assurance service providers; they should have access to a sub-set of the data possessed by the FBOs with which they have contracts. Those third-party assurance businesses should, in turn, be inspected and audited by local authority EHOs and TSOs, who correspondingly will have access to a sub-set of the data possessed by the third-party assurance provider. But that leaves unresolved the conditions under which any of those data might become available to the FSA, and there is even less clarity about the conditions under which any of that information might be made available to customers and the general public.

Currently, local authority EHOs and TSOs do not routinely provide the FSA with all the information about problems that they uncover. If a problem is confined to one locality, and if the local officials deem the problem to have been resolved, no information about those problems need reach the FSA. Local authority officials only inform the FSA if they have evidence that problems may not be confined to their jurisdiction. In the normal course of events, detailed information gathered by local authority and FSA officials about serious failures of food safety only enter the public domain as and when the offending companies, and their senior managers, are prosecuted and brought to court; in those conditions the information is disclosed in open court. If some of that information had been released at an earlier stage, lawyers representing the company concerned would argue that public disclosure of evidence could have compromised their clients' chances of receiving a fair trial.

On the issue of public access to information, the ROF 2017 proposals were couched in distinctly problematic terms:

> "Of course, there is a balance for us to strike between providing consumers with information that gives them confidence about the food they are buying, and respecting business concerns around sharing commercially sensitive data…**We believe that the interests of the consumer will be better served by an effective regulatory regime in which food businesses feel confident to share data with us in confidence,** rather than by the routine publication of all and any data we are able to access. **Under no circumstances will we share any data without the express permission of its owner**, and we will be working closely with food businesses, their lawyers and ours to establish protocols that are compliant with relevant legislation (e.g. on data protection) and will satisfy the needs of everyone [but not consumers] involved. We hope that, alongside these steps, food businesses can become more directly open with their own customers about how they ensure that food is safe and trustworthy."[46] (emphases added)

The script writers of *Yes Minister* would be proud if they had drafted that wording. The pretence is that the interests of consumers are best served by the FSA promising FBOs that no information whatsoever about their failures to operate safe and hygienic production systems would ever be shared with consumers or with the general public. But that would hardly enable shoppers and consumers to make informed choices about what to buy and what to eat. Public access to food safety information is not just about 'giving them confidence about the food they are buying', it is about allowing them to tell when confidence is, and is not, warranted. Consumers deserve to, and should always, be informed if the food industry's processes or products are less than safe. Promising FBOs to keep consumers in the dark

is antithetical to the interests of consumers and the protection of public health.

ROF 2017 stated that: "We [the FSA] want to build a new relationship with the food industry based on mutual trust."[47] But that wording fails to make clear what the FSA is trusting the food industry to do, and with what information, or the conditions under which the food industry will be expected to trust the FSA with some or all of its data.

When the FSA was established, we were told that the FSA's job would be to 'put consumers first'[48], but that requires ***not*** trusting the food industry; rather it requires that FBOs are effectively and thoroughly regulated, inspected and audited by organisations with which they have neither contractual relations, nor relations of trust. Remarkably enough, the report of the joint FSA-BRC study expressed concern that the FSA's proposals had the: "...[P]otential for public trust in food hygiene inspection being damaged if a commercial company was to take the lead role."[49]

It is entirely understandable that the FSAs want to have access to data that companies collect on their own standards of hygiene and food safety, but that access should be achieved, not by the FSA promising FBOs to keep all their dirty secrets out of the public domain, but by asking ministers to change the law so as to empower the FSAs to oblige FBOs, local authority officers and third part providers to provide the FSAs with all the data they require to ensure that they put consumers first and protect public health.

In the 17 March 2017 paper to the Board updating it on the progress of the ROF project, the FSA proposed: "...to develop arrangements for central oversight of all businesses by the FSA and to make the data available to those organisations providing assurance in the model." (p 7 para 4.22) That implies that the FSA is potentially willing to share data with private sector sub-contractors, but unwilling to share those data with UK consumers.

The manner in which the FSA responded to the results of its unannounced inspection of the operations of a Russell Hume facility on 12th January 2018 is also revealing. While the FSA stopped Russell Hume from distributing meat from its plants on 19th January, and initiated a recall of Russell Hume products on the 23rd January, it only provided information to the public on 24th January when it issued a press release. Moreover that press release was almost certainly provoked by the fact that the FSA learnt that ITV *News at 10* was about to put the story into the public domain. In other words, the FSA was very slow about sharing the information it had gained, and was gaining, with the British public, and if *News at 10* had not been on the case, we do not know what information, if any, the FSA would have disclosed.

The FSA recognised that:

> "One of the most important areas of focus will be how we – the FSA – audit, inspect and assure the authorities and organisations that are themselves inspecting, verifying, and assuring the data that our new model depends upon. This will require us to develop and implement new arrangements to verify that all assurance providers, both in the private and public sectors, are meeting the standards that we will set and we will take timely and firm action when the evidence shows that they are not. This is an additional important area for openness and transparency."[50]

Quite how the FSA thinks it can openly and transparently verify that all assurance providers, in the private and public sectors, are meeting the required standards, while guaranteeing that the FBO's dirty secrets will all be kept out of the public domain, is entirely unclear.

The 1999 Food Standards Act should be amended to give the FSAs 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. Those data should be used, amongst other things, to create and publish food safety performance league tables, categorising all types of FBOs along the lines of the Food Hygiene Rating System, rather than restricting the scheme just to restaurants and cafes.

Conclusions

The ROF programme has been met with serious concerns in private. It is time this important food 'infrastructure' was properly debated and that the public is informed about what is being rolled through in its name. This briefing concludes:

ROF is risky public policy

The Food Standards Agency has failed to show that its proposals in *Regulating Our Future* will ensure that the premises and operations of all FBOs will be adequately inspected to ensure the proper protection of consumers and high standards of public health. On the contrary, the policy that it articulated is based on a set of false assumptions. If it is implemented, food safety standards in the UK can be expected to decline. Public health will deteriorate; consumers will suffer. Presumed savings from reductions in expenditures by the FSAs and local authorities are likely to be more than offset by increased costs to the NHS, individual households and the UK economy in aggregate. Furthermore, the blame for those problems is likely to fall on the FSA. The ministers responsible for forcing this foolish policy onto the FSA will have moved on, while those in ministerial office when the adverse consequences emerge will disclaim responsibility and blame the FSA. From the perspective of the sceptics on the FSA's staff, ROF 2017 looks like a draft institutional suicide note, just when the UK public desperately needs a strong body fiercely protecting the public health and the public interest.

There is one aspect of the FSA's proposals which does deserve some welcome by consumers, however. This is the proposal to insist on enforcing the mandatory registration of all FBOs, and to implement an 'enhanced registration' procedure. Local authority Environmental Health Officers want to be lawfully empowered to refuse to register food businesses that cannot demonstrate their ability to produce food that is safe or what it says it is. Moreover, many EHOs would welcome higher penalties for food businesses that do not register before they start trading.

Conflicts of interest

The FSA's proposal effectively to privatise food safety inspections and audits will unavoidably create conflicts of interest, in particular between the commercial interests of the FBOs and the interests of consumers. The FSA's document neither acknowledges that problem, nor does it provide any solution to diminish consequent harm.

A key conflict is cost. The FSA developed the *Regulating Our Future* proposals under pressure from the government to drive down the costs of its activities and those of local authority Environmental Health Officers, Trading Standards Officers and Public Analysts. The FSA evidently did not have the political courage that would have been required to tell the Government that food safety cannot be achieved on the cheap. A document articulating that fact could have been an institutional suicide note, but it would have compelled ministers to take responsibility for their own follies, rather than hiding behind the FSA.

Implementing the proposals in ROF 2017 will most probably harm public health in the UK, and damage the FSA's reputation. But it would almost certainly harm the ability of UK FBOs to sell their products in the single market of the European Union.

Only rarely have ministers clarified their overall strategy for the future of farming and the food industry in the UK, but one exception is that they have explicitly proclaimed a future, post-Brexit in which exports of UK food and agricultural products will boom. Implementing the ROF 2017 policies will almost certainly make it far harder for UK producers to have access to EU markets, and the EU is far and away the largest export market for UK food products. But then, ministerial teams and the sum of their policies are not always consistent.

Bad timing, wrong policy

The ROF proposals predate the Brexit referendum, but the result transformed the context within the FSA will have to work, especially after the UK leaves the EU. When the UK ceases to be a member of the EU, the workloads and responsibilities of the FSAs will increase substantially. They will be expected not just to keep UK consumers safe but also to enable UK FBOs to export their products, especially to EU Member States. That will almost certainly require specific official UK certification, which is not currently required. The UK government has yet to acknowledge that Brexit will entail a substantial increase in the responsibilities and workloads of the FSAs, and therefore that their budgets, staffing and competence levels will have to increase.

As and when the UK 'takes back control' of its own food safety standards, the FSAs will need to be in a position to advise the government on the extent to which they do or do not endorse the numerous diverse food standards that will then prevail in all the international markets from which the UK will import its food. Those responsibilities will be substantially greater than those currently borne by UK institutions. In effect, the UK has been out-sourcing most of its food standards to the European Food Safety Authority and to EU's Regulations and Directives. After Brexit the FSAs will be far busier, and need to be far better resourced, than is currently the case, or currently envisaged for the future.

A stronger not weaker FSA is needed

If the FSA, and its counterparts in the devolved administrations, are to ensure food safety in the UK, especially once the UK has left the EU, then they will need greater resources of money and personnel to enhance their capabilities, but far more than that will be needed.

If the FSAs and their local authority food safety counterparts, are to ensure that FBOs only sell products that are safe, and what they say they are, then they will need significantly enhanced powers to require Food Business Operators to provide their data on food safety, as requested. Those enhanced powers are solely in the gift of Parliament and the government. If they fail to enact the legislation necessary to provide public officials with the power to obtain unrestricted access to the data the FSAs deem essential, from FBOs and their third-party assurance providers, then responsibility (and blame) for outbreaks of food poisoning and food safety scares will be theirs.

Data ownership is a key issue

The idea that FBOs and their third-party assurance sub-contractors will readily share any data the FSAs request, in exchange for a promise to keep all those data, and presumably all analyses of those data, entirely confidential is profoundly misconceived.

Firstly, it will fundamentally undermine public confidence in the FSAs and their local authority counterparts. You cannot 'put consumers first' by keeping them in the dark.

Secondly, if those data are being gathered by the FSAs to enable them to implement their responsibilities to 'put consumers first', one of the most effective ways of using those data to improve public safety and to raise food safety standards would be to analyse the data in a way that will

enable them to construct league tables of the relative performance of the FBOs, and/or to categorise them into groups such as those used for the Food Hygiene Rating system. When the FSAs publish league tables of the safety performance of FBOs, consumers, retailers and caterers will know far more about standards in different parts of the food industry than they currently do. Giving consumers that information, will empower them to make more well-informed decisions about what they buy and consume.

The FSA was created to put consumers first; ROF does not do this

Putting consumers first, which is precisely what the FSA was set up to do[51], requires that the public are well-informed about which food companies' safety standards are high and which are low. If League Tables can raise standards in schools, they could have an even more rapid beneficial effect in raising industrial and commercial food safety standards. Instead of guaranteeing to keep consumers well-informed, ROF 2017 proposed, in effect, to exempt information about the safety standards of FBOs from the provisions of the Freedom of Information Act.

If the UK government, and the FSAs, are to protect food-related public health, almost every aspect of RoF 2017 should be discarded. Instead the FSAs should concentrate on setting and enforcing higher standards, especially for microbiological food safety. For example, chicken carcasses and cuts of meat should be clean enough that they can safely be washed. The instruction just to cook them thoroughly is tantamount to advising the public to eat well cooked chicken faeces. That is not what the British public want or deserve.

Recommendations

1. If the UK government, and the FSAs, are to protect food-related public health, almost every aspect of ROF 2017 should be discarded.

2. The 1999 Food Standards 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.

3. Those data should be used, amongst other things, to create and publish food safety performance league tables, categorising all types of FBOs along the lines of the Food Hygiene Rating System, rather than restricting the scheme just to restaurants and cafes.

4. A special Parliamentary joint select committee, between the Health and Environment, Food & Rural Affairs committees, should be urgently convened to review the ROF proposals.

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17 Commons Environment, Food and Rural Affairs Committee, 2 Sisters and Standards in Poultry Processing: First Report of Session 2017-19, HC 490, 17 November 2017, para 17, p 8, available as https://publications.parliament.uk/pa/cm201719/cmselect/cmenvfru/490/490.pdf

18 NB On 5th February 2018 the FSA announced that it had decided to permit one Russell Hume plant to resume production. The FSA statement said: "The business will be allowed to resume production and distribution of products to customers but only from their Liverpool site. The other sites cannot restart production until the same assurances are met." See https://www.food.gov.uk/news-updates/news/2018/16887/production-allowed-to-resume-at-one-russell-hume-site accessed 5 February 2018

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42 Regulating our Future p. 7

43 REGULATING OUR FUTURE PROGRAMME UPDATE, Report by Director of Regulatory Delivery and Wales, FSA 17/03/04, para 4.3

44 REGULATING OUR FUTURE PROGRAMME UPDATE, Report by Nina Purcell, Director of Regulatory Delivery and Wales, FSA 17/03/04 para 3.3, emphasis added cf page 10 Annex 1: "If a business is unable to demonstrate they can operate safely, we will reject their application."

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