

# **PROTECTING CONSUMERS: THE FOOD STANDARDS AGENCY & REGULATION**

**A discussion paper for the stakeholder meeting on 16 June 2004**

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## **PROTECTING CONSUMERS: THE FOOD STANDARDS AGENCY AND REGULATION**

### **Introduction – why have this debate, and why now?**

1. There has been considerable recent debate about better regulation, and also about the use of alternatives to regulation to protect consumers. The Government has accepted all the recommendations of a recent Better Regulation Task Force report<sup>1</sup> to promote the use of alternatives to regulation. And Sir Philip Hampton has been asked to lead a review to promote more efficient approaches to regulatory inspection and enforcement without jeopardising the delivery of excellent regulatory outcomes.
2. The Food Standards Agency is joining this debate now because of its relevance to how we achieve the targets set out for consultation in our draft strategic plan for 2005-2010.
3. This paper is intended to initiate discussion between stakeholders about how the Food Standards Agency can best protect consumers in a changing world. It is by no means the last word on a complex subject. Building on this discussion, the Food Standards Agency will issue a public consultation paper towards the end of the year, leading to a discussion by the Board in open session and subsequent publication of a report on the Food Standards Agency and regulation.

### **How do the Food Standards Agency – and enforcement authorities – protect consumers and their interests?**

4. The Food Standards Agency is a UK Government department, although it operates at arm's length from Ministers and defends the independence it has been given in the Food Standards Act 1999. The Agency has as its primary objective protecting the health of consumers and their other food interests.

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<sup>1</sup> Imaginative Thinking for Better Regulation, Better Regulation Task Force, September 2003. The Better Regulation Task Force is an independent advisory group set up in 1997. Its members are from a variety of backgrounds – large and small businesses, citizen and consumer groups, trades unions, and those enforcing regulations. Its terms of reference are “To advise the government on action which improves the effectiveness and credibility of government regulation by ensuring that it is necessary, fair and affordable, and simple to understand and administer, taking particular account of the needs of small businesses and ordinary people”. The secretariat to the Task Force is provided by the Cabinet Office Regulatory Impact Unit.

5. The Food Standards Agency has a range of functions. These include its responsibilities and duties as the Government Department providing *the primary source of policy advice in relation to food safety and associated areas to the Government as a whole, and to the devolved authorities*<sup>2</sup> and providing information to the public.
6. The Food Standards Agency is also a regulator. It works within a policy area where EU law is unusually dominant – over 90% of the legislation handled by the Agency to date applies across the EU. Increasingly, this legislation takes the form of prescriptive regulations, rather than directives that allow interpretation in national legislation of how best to deliver the required outcomes.
7. The Food Standards Agency may, however, propose new direct regulations or alternative approaches in policy areas that are not “occupied fields” in EU law. In doing so, the Agency will seek to follow the five principles of good regulation: proportionality; accountability; consistency; transparency; and targeting.<sup>3</sup>
8. Direct regulation, delivered through its own agents (the Meat Hygiene Service) or others (local authority food law enforcement officers), is one tool amongst many that the Food Standards Agency uses to achieve its policy objectives. Where it uses direct regulation, the Food Standards Agency primarily regulates products (and in some cases people, processes or premises), whereas the majority of similar regulators<sup>4</sup> (for example, OFGEM or the Rail Regulator) regulate industries or markets.
9. It may be helpful to look at the range of action that the Food Standards Agency might take on any issue. Recent examples include:
  - working with industry, either through trade associations or by working directly with major companies, to encourage them to raise their own standards or to influence those of their suppliers, for example to reduce salt levels in processed foods;

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<sup>2</sup> Paragraph 24 of Explanatory Notes to Food Standards Act 1999. The Explanatory Notes have no legal status but describe the policy intention behind the legislation.

<sup>3</sup> Principles of Good Regulation (revised), Better Regulation Task Force, 2000.

<sup>4</sup> See Independent Regulators, Better Regulation Task Force, October 2003.

- using publicity and education to raise standards, for example on food hygiene; and
- encouraging public debate, for example on promotion of foods to children (although this does not preclude further actions on this issue in the future).


10. Options in any particular case may range from doing nothing to direct, prescriptive regulation:

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- Doing nothing.
  - Assembling and publishing the evidence, to inform public debate and mobilise those in civil society who share the vision.
  - Providing information to consumers, without advocating a particular course of action, so consumers may make informed choices.
  - Providing advice to consumers as a means of driving behavioural change.
  - Incentivisation by recognising or rewarding desirable behaviour by the private or voluntary sector.
  - Encouraging self-regulation through private or voluntary sector codes of practice.
  - Co-regulation through statutory or Government-backed codes of practice or action plans.
  - Licensing of products, people, processes or premises.
  - Direct regulation.

11. In its work to protect consumers and their interests, the Food Standards Agency aims to select the right measure which:

- is proportionate, risk-based and outcome-focused;
- drives improvement and rewards good performance;
- is practical and deliverable within the (largely EU-based) legal framework within which the Food Standards Agency operates;
- signals that tough action will be taken on those who deliberately or persistently fail to meet acceptable standards.

12. Effective regulation depends on effective and consistent enforcement to secure compliance. But just as there is a spectrum of possible interventions, there is a spectrum of actions for those who deliver enforcement, whether in the Meat Hygiene Service or in local authorities. The work of enforcement officers to encourage compliance begins with promoting best practice among food business operators – through education, training and advice. But if an offence is detected, enforcement officers should follow the hierarchy of enforcement, the entry point being determined by the gravity of the breach:

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1. Oral advice or instructions.
  2. Written advice in letter or informal correspondence setting out action required.
  3. Improvement notice.
  4. Prohibition notice.
  5. Formal caution.
  6. Closure of food business.
  7. Prosecution of food business operators.
  8. Disqualification of food business operators.

13. The professional judgement for the enforcement officer to make is where, on the basis of the nature and magnitude of the risk to public health, to enter the hierarchy. This is normally at the lowest point and may subsequently proceed up the scale. However, where contraventions are numerous or the risk to public health is acute, then the initial intervention is likely to be at a higher point in the hierarchy.

14. In summary, the range of actions taken by enforcement officers “should balance the need to protect the public with the requirement to act in an equitable, practical and consistent manner”.<sup>5</sup>

### **Direct regulation and the alternatives**

15. The generic questions here are:

- in what circumstances is it right for the state to intervene,

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<sup>5</sup> This principle is set out in the Cabinet Office Enforcement Concordat, March 1998. Although the Concordat is voluntary, over 96% of central and local government enforcement agencies have agreed to follow it.

- what intervention should it make, and
- how should it make it?

In relation to the Food Standards Agency, the first question is answered by its remit – to protect consumers and their interests. The question of what intervention the Agency should make and how is central to this paper.

16. Paragraph 10, above, provides a list (not necessarily exhaustive) of the interventions that the Food Standards Agency might make on an issue. Not all of these interventions are mutually exclusive for any given policy issue. Indeed, several of them may be explored in sequence for a single issue, providing a graduated and measured approach – underpinned by an evaluation of the effectiveness of each intervention – to driving change in both the supply and demand sides to achieve desired policy outcomes.

17. A range of factors may influence decisions on which intervention to make initially. For example:

- different interventions may be appropriate for different types of risk – where there is an immediate and acute threat to the health of vulnerable consumers (for example, children) such as konjac gel in jelly cup sweets, the Food Standards Agency has immediately issued public advice and Food Hazard Warnings to local authorities, and has speedily brought forward emergency legislation;
- different interventions may have different costs – whether for the Food Standards Agency in the work needed to develop and implement the intervention; for its local authority and Meat Hygiene Service delivery agents in enforcement; or for the industry in compliance; and
- different interventions may allow the achievement of policy objectives more quickly – for example, it may be quicker to propose and agree with food manufacturers and retailers a voluntary approach to improved food labelling, rather than wait for the process of changing EU legislation.

18. There are analogous issues for enforcement authorities to take into account when deciding what action they should take to secure compliance (see paragraphs 12 and 13, above). For example:

- different approaches may be selected to provide different types of outcome – where the aim is to win the “hearts and minds” of food business operators and their employees to encourage well-embedded and lasting changes to practices, local food law enforcement officers may concentrate on promoting good practice through advice and education rather than enforcement action; conversely
- the speed of action needed may drive the decision regarding the best approach in some cases – for example, where food products on sale are known to pose an acute and serious health risk, local food law enforcement officers discovering them may seek to have the foods voluntarily surrendered by the food business operators, or seize them with a view to their subsequent destruction.

19. The flexibility for enforcers to operate outside the regime set in paragraph 12 is very limited, as various enforcement codes and operations manuals require that this hierarchy should be followed. For example, the flexibility to incorporate an increased inspection frequency into a local hierarchy of enforcement is constrained by:

- Meat Hygiene Service statute, which dictates the nature and frequency of inspections; or
- the Statutory Codes of Enforcement Practice for local authority food law enforcement services, which dictate a standard risk assessment for food premises, which in turn dictates the inspection frequency.

**Question 1:**

**What factors should the Food Standards Agency take into account in deciding which intervention – whether direct regulation or an alternative approach – to follow? And when to move from one intervention to another?**

**How could better compliance by food businesses be delivered, whilst allowing enforcement authorities more local flexibility in dealing with the risks posed by those businesses?**

**How does the purpose of the proposed action (protecting health or protecting consumers' wider interests) affect the timeframe within which action should be taken and/or the favoured intervention?**

### **Transparency of decision making**

20. The Food Standards Agency is committed to operating in an open and transparent way.<sup>6</sup> Stakeholders should be able to understand how the various pieces of available evidence and information have been used by the Agency in making judgements about when to apply direct regulation, and when to pursue alternative approaches.

21. Being open and accessible is one of the Food Standards Agency's core values. It underpins the way the Agency does business, from early discussion of policy proposals with stakeholders, through the Board deciding on strategic policy directions only in public, to being frank about its performance.

22. Transparency poses more of a challenge. The Agency aimed from the outset to be able to provide an audit trail for its decision making. This commitment to explain the reasons for its decisions and advice has been re-asserted in the Agency's draft strategic plan.<sup>7</sup> However, the Agency has received feedback from some stakeholders that suggests it does not always sufficiently explain the reasons for its decisions, or how it has taken account of concerns raised during the consultation process. What more might it therefore do?

23. In reaching its decisions, the Food Standards Agency will take into account the existing evidence base (drawn for example from biological sciences or social sciences), may commission research of its own to provide further evidence, and may seek the views of its advisory committees or of other external experts. The Agency will also seek the views of stakeholders, possibly through a mixture of stakeholder groups, consultation meetings and workshops, as well as through the more traditional route of written consultations. Engagement with stakeholders in this way is important, as it allows the Agency to tease out the multiplicity of issues and to forge common understanding.

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<sup>6</sup> Food Standards Agency Statement of General Objectives and Practices (paragraphs 10 and 11).

<sup>7</sup> Draft for Consultation: Strategic Plan 2005-2010, Food Standards Agency, April 2004.

24. When the Board of the Food Standards Agency discusses and decides policy issues in open session, difficult judgements may have to be made. Often, the evidence will be incomplete; different types of evidence may point in different directions; the data may be uncertain; or the underlying science may still be developing and the issues not yet fully understood. The Agency does not aim to eliminate all risks, but to take action to reduce risks to the level that might be accepted by the reasonable consumer. The Board is appointed to act in the public interest. It should ask the questions the ordinary consumer would want asked, and weigh up sometimes conflicting and often uncertain evidence to reach a decision that reduces risks to an acceptable level. In these circumstances it may not always be easy – even for those observing the Board's discussion – to disentangle the many interacting factors that have contributed to the Board's decision.

25. Fundamentally, the Food Standards Agency exists to protect consumers and their interests, and to protect and improve consumers' confidence in the controls that are applied to the food they eat. It could be argued that it is against this standard – consumer confidence – that the Agency's performance should be judged. If so, it is doubly important that consumers, as well as other stakeholders, are able to understand the Agency's decisions and the reasons for them.

**Question 2:**

**How can the Food Standards Agency improve the transparency of the processes by which it reaches major policy decisions?**

**What should be the principal measures of the Agency's performance in protecting consumers? If the measures should relate to what consumers think, how could this be assessed? What other performance measures might be appropriate?**

**Protecting consumers' interests in relation to food**

26. The Food Standards Agency also needs to take a consistent approach to issues outside Government's traditional role in managing risk to food safety, but within its

statutory duty of *otherwise protecting the interests of consumers*.<sup>8</sup> Within this wider role the Food Standards Agency has, to date, pursued a wide range of activities including:

- action to improve labelling to make it easier for consumers to make informed choices;
- carrying out surveys to assess whether food in the shops is correctly described;
- working with local authorities on action to address fraudulent practices (which may or may not have safety implications); and
- action to protect consumers from practices which are legal but which are likely to mislead.

27. But how far should the Food Standards Agency go in *otherwise protecting the interests of consumers*, for example in delivering changes that consumers see as desirable, even if these changes go beyond safety, public health, or ensuring consumers have accurate information? When should the Agency intervene in cases of *market breakdown* – where consumers want to be able to choose but the market does not give them the opportunity to do so? Should the Agency also seek to intervene regarding practices which are distasteful or unacceptable to some consumers but which are wholly acceptable and reasonable to others?

28. What issues should the Food Standards Agency take into account to ensure that its actions to *otherwise protect the interests of consumers* are appropriate? A framework for decision-making might include issues such as:

- the evidence base required to justify Agency intervention, which might encompass advice from the Agency's Consumer Committee; the views of consumer and other NGOs on consumers needs and desires; and specific surveys of consumer opinion;
- whether the bias should be towards action (with an onus on affected stakeholders to make the contrary case and provide the evidence for retaining

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<sup>8</sup> Food Standards Act 1999. The Act further elaborates this latter expression to include '(without prejudice to the generality of that expression) interests in relation to the labelling, marking, presenting or advertising of food, and the descriptions which may be applied to food.'

the status quo) or inaction (with an onus on those who wanted new rules or controls to make the contrary case for the change); and

- the nature of the intervention that is appropriate in different cases.

29. These issues are made more complex by the fact that different groups of consumers are likely to have different views, and different expectations. More critically, interventions may have different effects on different groups of consumers and therefore raise issues of equity and ethics. For example, action to ensure allergic consumers have the widest possible choice of foods might increase costs for all consumers, including those on low incomes. How should the Agency balance the interests of different groups of consumers, or those of a minority against those of the majority?

**Question 3:**

**What does “otherwise protect the interests of consumers” mean in terms of the role of the Food Standards Agency over and above ensuring food safety?**

**What factors should the Food Standards Agency take into account when deciding whether to intervene to “otherwise protect the interests of consumers”? What sort of intervention – from the provision of information to facilitate consumer choice, through self-regulation, to direct regulation – is appropriate in what circumstances?**

**How might the Agency ensure an equitable solution where it acts to “otherwise protect the interests of consumers”, and ensure that the interests of all consumers are protected?**