Studying consistency in regulatory work: concepts and options

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December 2015

Cite as: Etienne J (2015) Studying consistency in regulatory work: concepts and options. Food Standards Agency, London.

Introduction

The Food Standards Agency (FSA) is the competent authority for the implementation of food hygiene and food standards regulations in the United Kingdom (UK). Over the years, the FSA has worked to ensure the consistent performance of its duties and of those which others perform on its behalf. For that purpose, it has elaborated and updated guidance, and provided or helped provide training. More recently, as this paper and three study reports¹ outline, the FSA has aimed to better measure and explain (in)consistency by approaching it from an analytical perspective.

Very few studies had previously been undertaken and published on the theme of regulatory consistency and even workable definitions of consistency are hard to come by. This work has also pioneered a combination of well-trodden and highly innovative approaches: statistical analysis and modelling, qualitative controlled comparisons, and behavioural experiments. Together, these approaches have shed light on the multifaceted nature of (in)consistency.

This paper is meant to provide readers with an introduction to the three pieces published in 2015 by the FSA. The paper first discusses the overall rationale for these investigations, then the particular context of food controls in the UK. It then discusses issues with definitions of consistency and inconsistency, and various factors that may be considered when trying to explain (in)consistency. Finally it introduces the three studies.

¹ Nieboer J, Reader T (2015) <u>Consistency and cognitive influences on the expert judgement of</u> <u>Environmental Health Officers: An experimental study</u>; Shah H (2015) <u>Analysis of LAEMS data to</u> <u>inform a study on inconsistencies in the delivery of official food safety controls</u>; Lee-Woolf C, Bain J & Fell D (2015) <u>Consistency in the delivery of official food safety controls</u>: the role of organisational-level <u>factors</u>.

Consistency matters

Consistent regulatory activity is one way of ensuring that individuals and organisations are treated fairly and equally. In turn, equal treatment before the law is one of the expressions of the fundamental principle of 'the rule of law' (Bingham 2010). Hence, efforts made to achieve consistency contribute to the actualization of the rule of law and the fundamental rights it is meant to protect.

Consistency in regulatory practice also has a functional value. The successful rolling out of any regulatory strategy depends, in part, on its consistent delivery at the street level, across the territory on which the policy is meant to be implemented.

In other words, consistency is a matter of both principle and operational effectiveness.

Consistency also merits investigation as it is inherently difficult to achieve. This is partly because of the considerable diversity of situations found among the regulated, which a responsive regulator cannot ignore: businesses have different resources, activities, interests, and motives. In addition, the individuals and the organisations that a regulatory body may rely on to implement regulations have differing personal strengths and weaknesses, which are revealed in the discretion they exercise when implementing regulations. This adds to the overall complexity of the task of delivering controls consistently. As a result, a degree of inconsistency is inevitable.

Hence, rather than aiming to completely eliminate inconsistency, the important question for regulators is whether levels of inconsistency are actually as low as they *should* be and *could* be.

Establishing how low inconsistency levels *should* be is essentially a political matter of what is tolerable, and this may vary depending on area and context. Establishing how low inconsistency levels *could* be is rather an operational issue, which analytical work may help address. The aim of the research programme on consistency at the FSA has been to help the Agency answer the latter.

The context of food control consistency in the UK

The baseline inconsistency and how it may be reduced further is not clearly established and past efforts in this area have also not been evaluated. Indeed, there have been only few and partial attempts to assess inconsistency levels in food safety controls. Therefore, one of the aims of the research programme was to strengthen understanding of current inconsistency levels, and how they have been influenced by guidance and training. In the absence of a detailed picture, there is anecdotal and indirect evidence of inconsistency in risk rating, in enforcement responses to non-compliance (Ipsos Mori 2012; Creative research 2010; Hutter 1988), and in sampling (Greenstreet Berman 2014: 29-30).

The discussion around consistency in food controls is inseparable from the two-tier institutional structure through which they are delivered in the UK. EU legislation distinguishes between 'approved' and 'non-approved' premises, approved premises consist principally of meat plants and cutting plants, and dairy processing premises, and are overseen directly by the FSA's own inspectors (official veterinarians, meat hygiene inspectors, dairy hygiene

inspectors). All other premises are non-approved, and fall under the remit of Local Authorities' regulatory services, rather than that of FSA inspectors (with a few exceptions, such as dairy farms).

Within the latter tier of the regulatory regime, there is also variation. Historically inherited differences and the combined forces of localism and devolution mean that the institutions framing regulatory work (for example, enforcement powers, Local Authority (LA) structures, or the procedures to follow in order to prosecute a non-compliant business) vary between England, Wales, Northern Ireland and Scotland. In England, there is a notable variety of Local Authority types, which have different duties and remits: county councils, district councils, unitary authorities, metropolitan districts and London boroughs.

Following the financial crisis, resource constraints have led to numerous changes in delivery system structures and approaches, particularly in England. Changes have included service outsourcing, mergers between services or whole LAs, greater targeting of activity, changes in the roles and profiles of staff (including de-specialization), under-staffing, new approaches to non-compliant businesses, extension of the Primary Authority Scheme. Whilst some of these reforms have been innovative, the overall result has arguably been increased differentiation across the service delivery landscape across the UK, and particularly in England. This could be conducive to even greater inconsistency than might have been observable five or ten years earlier.

Such contextual observations add to the more long-standing considerations outlined earlier, to justify the work undertaken at the FSA on consistency.

Defining consistency and inconsistency

Although consistency is a common concept for regulators, its precise meaning can be elusive.

Tom Bingham's discussion on the rule of law provides a starting point to define consistency. Bingham writes that equality before the law (as a component or an expression of the 'rule of law'), implies that the application of the law should be similar or comparable for all, 'save the extent that objective differences justify differentiation' (2010: 55).

There are extensive, 'objective differences' within the population of businesses subject to food controls: it includes family-owned micro-businesses, middle sized premises, and major sites, some of which belong to multinationals. Besides, there is also a considerable variety of products and processes involved, which pose different kinds of risks. In a regulatory regime where regulatory agents have the discretion to be 'responsive' (Ayres and Braithwaite 1997) to the particular situations they encounter in the field (the regime for food hygiene is such a regime), one may expect ample variation in the implementation of food law, reflecting 'objective differences' between the businesses being regulated. In other words, the absence of variation – a 'one size fits all' picture – would not be evidence of consistency. But the opposite is not true: variations could be either consistencies, or inconsistencies.

How then can we ascertain that variations in regulatory practices indeed represent 'consistency' rather than 'inconsistency'? In other words, when does variation mean inconsistency, and when does it not?

To answer that question, standards are the logical reference to go to: the legislation, the Code of Practice, or the Brand Standard for the Food Hygiene Rating Scheme (FHRS) are references against which one may evaluate observed regulatory practices. There is, however, an inherent difficulty in relying on published standards for analytical purposes. Standards for the implementation of food law are, by necessity, written in relatively general terms. They could not specify what the 'right' response would be for every situation officers might encounter on the ground. Rather, they rely to a large extent on the professional judgment of officers to adapt general rules to particular situations.

Besides, standards, such as the Food law Code of Practice, and more generally FSA's policy, acknowledge, and to an extent, welcome, alternative and innovative approaches to delivering controls, within certain boundaries. Hence, although some LAs undertaking controls on behalf of the FSA might do so in ways that make them stand apart from the majority of LAs, that would not necessarily mean that their practices are 'inconsistent' with the norm, since the norm leaves some space for innovation. These are what Sparrow calls 'rational inconsistencies': variations that arise from 'special projects, targeting schemes, symbolic actions, leveraging of scare resource, and optimization of behavioural impacts' (2000: 251). As any regulator, the FSA and LAs may use their discretion in ways that will generate 'rational', intentional, and, ideally, controlled variations.

As a result, a revised definition for inconsistency may be:

variations that cannot be justified by objective differences between regulated businesses, nor by any other rational use of discretion to achieve regulatory goals.

This definition may fit the day to day practice of regulators well, but it can be hard to operationalize for analytical purposes. Indeed, without any prior and detailed knowledge of what inspectors or local authorities have been doing, 'rational' and 'irrational' inconsistencies could not be separated as they may look similar in terms of outputs. For instance, one might find higher compliance levels or lower enforcement responses than one might expect from 'objective' factors (i.e. characteristics of the population of businesses) but they could be evidence of either excessive leniency, or particularly effective, informal approaches to non-compliances.

Thus, ascertaining the nature of variations in regulatory practices has been a common problem for analysts handling large datasets of regulatory activity. The latter would rarely if ever record how different local authorities or inspectors would use their discretion. On this basis, analysts would generally find it difficult to decide whether the variations they observe are what Sparrow called 'rational' or 'irrational' inconsistencies (e.g. Haviland et al. 2012).

Additional checks would be necessary to make such distinctions, which would generally imply collecting additional information directly from enforcement staff, and/or from regulated businesses, for interpretation side by side with other datasets.

The above shows that, far from being straightforward concepts, consistency and inconsistency have unclear boundaries, which present numerous implications for analysts.

Explaining inconsistency

Beyond measuring inconsistency, analysts also want to know what is causing it.

Among the very few studies on consistency in regulatory work published, one can find hypotheses as to which factors might be causing 'true', irrational inconsistency (Jin and Lee 2014; Schott et al. 2015). Additional hypotheses may be drawn from studies on 'expert judgment' (of political analysts, auditors, judges, or doctors), which, although not dealing directly with regulatory work, identify factors that could also be found there (Croskerry et al. 2013a, b; Perez 2015; Raine and Dunstan 2009; Short et al. 2015; Tetlock 2005). Finally, a number of hypotheses can be drawn from previous studies undertaken on behalf of the FSA (e.g. Creative Research 2010), and on practices in local government in the UK (e.g. Raine and Dunstan 2011).

Possible factors are either at the level of the individual, the organisation, or the region/nation. This is not an exhaustive categorisation, but it provides an idea of the range of factors that might be causing inconsistencies.

Individual factors

Inconsistencies may occur as a result of individual factors. For example, experience and training play a role in officer performance (ability to detect problems, ability to solve them), which is well documented (Haviland et al. 2012; Macher et al. 2011).

Officers may also vary from one another in terms of their values, beliefs, or perceptions, which may lead to inconsistent responses to similar issues. Thus, Schott et al. (2015) report how veterinary inspectors performing controls in slaughterhouses in the Netherlands differ in terms of the relative importance they give to their professional principles as veterinarians and the guidelines emphasized by the organisation they belong to (the NVWA). As a result, they may sometimes respond in radically different ways to issues arising in their work as inspectors. Kwak (2014) has also argued that regulatory behaviours might be biased by how they identify with certain groups, including the industry they regulate.

Kwak and others have also emphasised that regulatory behaviours could be biased by relationships developing between officers and their contact persons in regulated businesses. Thus, according to research undertaken on food hygiene inspectors in the United States (Jin and Lee 2014) and auditors (Short et al. 2015), non-compliances are less likely to be identified and responded to formally when the individual performing the inspection or audit is the same as the one who performed the previous inspection or audit at the same business. In other words, businesses might be dealt with differently depending on whether a 'relationship' has developed with their inspector or not (also Ipsos Mori 2012). Conversely, a business might experience a wholly different response from a new officer compared to that which they used to get from an officer they have previously interacted with regularly, even though their circumstances and levels of compliance might not have changed in between.

The above as well as other, well documented tendencies to err systematically and, to a large extent, unconsciously² indicate numerous potential biases that could cause inconsistencies in the delivery of official controls.

Organisational factors

Organisation level factors can come into play in various ways. A well discussed aspect is how officers may be influenced by their managers and by politicians (Hutter 1988; May and Winter 2009). In other words, two LAs with similar populations of businesses could have significantly different outputs in terms of regulatory work if they were governed from opposite ends of the political spectrum, or if their teams of officers were being given different levels of discretion by their respective managers, or if the managers held different visions on when to escalate response to non-compliances.

Other factors that could matter at the organisational level are the way food teams may interact with other teams, how performance is being measured and rewarded, how information circulates between members of food teams, or the level of resources that are allocated to the delivery of food controls. These factors are known to vary in sometimes significant ways between LAs, which could possibly lead to inconsistencies between them.

More generally, officers might be subject to multiple and possibly conflicting expectations originating from the organisation they belong to, the organisation they work on behalf of, and the organisations they work with, all of which may generate biases that could tip the balance of judgment in one direction or another, leading to inconsistent responses overall (Kwak 2014; Schott et al 2015).

Regional/National factors

In the UK regional differences can be important. This is generally a function of institutional variations, such as those of the judicial process between England, Northern Ireland, Wales, and Scotland, which may affect officers' ability to prosecute in one nation as opposed to another (Creative Research 2010). But there are also different sensitivities towards food safety in different nations: a greater sensitivity to the aim of preserving the public's health may be linked with the trauma experienced from significant food poisoning outbreaks (such as the E.Coli outbreak in Wales in 2005; Ipsos Mori 2012).

There are also different forms of coordination between LAs at the regional level, but less so at the inter-regional level. As a result, practices may be consistent within a given region but not across regions.

In sum, there are multiple dimensions to the phenomenon of inconsistency, which are distributed on multiple levels. The study of those factors calls for different approaches, the contribution from different disciplines, and, arguably, a coordinated effort overall, to better understand how multiple factors of inconsistency may contribute together to undesirable variations in regulatory work.

² For example, experts, including inspectors, might differ in their vulnerability to 'confirmation bias', namely the tendency to discount any information that contradicts one's views (e.g. Tetlock 2005).

Analytical options

As outlined earlier, this is a complex object to study. The 'fuzziness' of the concepts of consistency and inconsistency is a significant hurdle, and the range of factors to assess is also large. In such conditions, it is sensible to approach the topic of consistency from several angles at once, and with different methodologies and disciplines. That was the strategy developed at the FSA, combining three different studies running more or less in parallel to each other.

The first study (Nieboer and Reader 2015) employed an experimental approach as in the real world officers encounter natural situations that are never perfectly similar to one another. It would take considerable time and effort for an analyst to ascertain whether variations observed could be justified and therefore considered consistent, or not. Instead, the experimental design enables studying how different inspectors might assess and respond to the same situation, in a controlled environment. The experimental design also enabled exploring the role of individual 'biases' in shaping practices.

The second study (Shah 2015) employed statistical analysis and modelling, based on data submitted by LAs to the FSA, and summarizing their activity each year. This study's main objective was to assist in the selection of 'outliers', namely LAs that differed markedly from what the statistical model would predict, for further investigation. The variations the study was focusing on were in terms of scoring of businesses (confidence in management) and the use of enforcement powers. The study also provided an indication of the range of variations observable across LAs.

Finally, the third study (Lee-Wolf et al. 2015) directly built from the previous one by directly approaching 'outlier' LAs and collecting evidence on their ways of working. Because it effectively looked in detail at the practices of each LA studied, this last piece of work dealt the most directly with the conceptual fuzziness of inconsistency. This study, along with the statistical analysis, focused on organisational factors that could explain inconsistencies between LAs, in contrast with the individual-level focus of the experimental study.

Whilst these studies have provided numerous insights they have only explored a few of the questions that need answering. Other approaches could be beneficial in the future, notably in-depth analysis of inspection databases. This is a relatively better used approach than others (Haviland et al. 2012; Feinstein 1989; Macher et al. 2011; Short et al. 2015), and it could be combined with a qualitative study (interviews and/or observations in the field) comparing outliers ('hawks' and 'doves') and average inspectors. This could advance understanding of inconsistencies between inspectors, even within the same organisation / LA, and thus, of individual factors of inconsistency. Another option could be the development of surveys to measure enforcement styles, as reported by officers themselves and as experienced by the businesses they interact. This could build on an existing literature on enforcement styles (Hutter 1988; May and Winter 2011).

Conclusion

Consistency matters. Whilst perfect consistency in regulatory work is an ideal, it is reasonable to assume that there will always be some level of inconsistency in regulatory practices. The important questions, I have argued, are therefore: how far regulators could, and should, go to reduce inconsistencies in the implementation of regulations? Analysts can contribute to answering these questions, yet to do so they must find ways around the conceptual 'fuzziness' of inconsistency. There are acceptable, even desirable inconsistencies, at least from the perspective of regulators. That means analysts need to find ways of ascertaining whether variations they may observe in regulatory work are indeed inconsistencies. Combining different approaches and disciplines is a useful way of answering this challenge.

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