Macrory Penalties Review

“Regulatory Justice: Sanctioning in a post-Hampton World”

FDF response to BRE Consultation Document – May 2006

INTRODUCTION

The Food and Drink Federation (FDF) represents the UK food and drink manufacturing industry. An outline of this representation is given at Annex I of this response.

FDF recognises the need to follow the Hampton report recommendations with consideration of an appropriate sanctions regime but is concerned that the enforcement policy advocated by Hampton should be well established in practice before changes are made to the sanctions regime, as the former will necessarily influence the requirements for the latter and bear upon the appropriateness of some of the recommendations in this present report.

FDF is fully supportive of a risk-based enforcement policy which takes account of levels of compliance by/confidence in companies in determining the use of enforcement resources (e.g. frequency and nature of inspections) thus enabling enforcement authorities to focus effort on the pursuit of those who are deliberately and persistently breaking the law.

FDF strongly welcomes reference (in the 4th paragraph of the Executive Summary) to “a renewed focus on advice and education and less on inspections.” Enforcement should take due account of companies’ third party audited QA systems in assessing confidence in management and reducing frequency of inspection, leaving local authorities more time to concentrate on advising smaller enterprises to achieve a raising of standards, which is in the interest of the whole food chain.

FDF is concerned, however, that some of the recommendations, such as imposition of administrative penalties or assessment of the gain to a business of a failure to comply with legislation, might introduce new tensions and damage the working relationships between food businesses and local enforcement authorities unless their application was very carefully thought out in practice.

To comment on some points in the Introduction of the Consultation Document:

Paragraph 2: FDF supports the approach set out here. Enforcement needs to be targeted and proportionate and there must be capacity to pursue offenders who deliberately flout the law – particularly on a wide scale, thus jeopardising public safety, threatening the integrity of ingredient supply to our members and damaging the reputation of the industry in general.

Paragraph 4: FDF supports the approach of not resorting unnecessarily to prosecutions when other routes to compliance are possible. Not only might this place less of a burden on business, and do less damage to brand reputation; but it might also reduce the burden on public funds and enforcement resources whilst achieving the same regulatory outcome.
Paragraph 5: The risk based approach to regulation is very relevant to compliance with food legislation, some aspects of which are much more significant than others in respect of public health risk.

Paragraph 8: In respect of dealing appropriately with each type of offender, including the ‘rogue’ element, several food scams in recent years emphasise the importance of being able to focus enforcement resources on, and apply heavy penalties to, those who are deliberately and persistently breaking the law.

ANSWERS TO SOME OF THE CONSULTATION QUESTIONS

Q1. Do you agree that criminal prosecution and the criminal courts should be reserved for the truly egregious offenders or where regulatory breach leads to severe actual or potential external consequences?

Yes in principle. Prosecution should be reserved for intentional and reckless breach of the law. It might also be the last resort where a company persistently re-offends even in respect of less serious matters such as food labelling offences.

Q2. Do you agree with the vision that is laid out in Figure 1.3 of a contemporary regulatory enforcement toolkit?

FDF supports the principle of risk-based enforcement and has sympathy with a graduation of enforcement activity as, for example, represented in the Figure, to provide alternative options to having recourse to court procedures for confirmation of regulatory orders or to pursue prosecutions. Regarding application of the envisaged toolkit to food law enforcement, we believe that this would need to be considered in detail by food industry and food law enforcement interest to consider the practical implications and ensure that food law enforcers at the local level have the competencies and resources to operate such a system and indeed would wish to do so. We would certainly wish to secure rapid access to a Regulatory Tribunal if a company sought to challenge a penalty imposed by an enforcement officer without court involvement.

Q3. Do you agree or disagree with the ‘Penalties Principles’ proposed in chapter one? If you disagree with one or all of the Principles listed below, please elaborate?

a. Principle 1 – Sanctions should change the behaviour of the offender to prevent regulatory non-compliance.

b. Principle 2 – Sanctions should eliminate any financial benefit or benefit which was the result of regulatory non-compliance.

c. Principle 3 – Sanctions should be responsive and take into account what is appropriate for the particular offender and the particular regulatory issue.

d. Principle 4 – Sanctions should be proportionate to the nature of the offence and the harm caused.

e. Principle 5 – Sanctions should include an element of ensuring that the harm caused by regulatory non-compliance is put right.

f. Principle 6 – Sanctions should aim to deter future non-compliance.
FDF agrees with principles 1, 3, 4 and 6 as a desirable part of a sanctions system. We are concerned, however, at the implications of enshrining 2 and 5 as principles in view of the onus upon regulatory authorities to quantify financial benefit or harm done, which they might not have the skill or resources to do (particularly when operating at local level) and which might be very difficult to accomplish in any case.

Any ‘principles’ that are adopted should be amalgamated with the Principles of Good Regulation. to avoid overlap and confusion.

Q5. Do you agree that a regulator must ensure the following characteristics to be present in order for a sanctioning regime to be most effective?

   a. The regulator should have a published enforcement policy
   b. The regulator should attempt to measure regulatory outcomes (such as compliance rates) and as well as outputs (such as the number of enforcement actions taken).
   c. The regulator should be able to justify the enforcement actions they take
   d. The regulator should follow up enforcement actions
   e. The regulator should be transparent in the enforcement actions it takes
   f. The regulator should be transparent in the methodology it uses for setting and calculating monetary administrative penalties.

In general, yes. Measurement of outcomes (b.) should not be pursued at the expense of doing the job itself. Regarding transparency (e), care must be taken to ensure that public information on enforcement actions taken (e.g. a Local Authority website register of prosecutions) is both accurate and up to date. There should be a cut-off time for the display of information relating to cases where remedial action has been taken and there is no continuing cause for public concern about a particular product or products.

Q8. What can be done to capture the rogue elements within industries?

Q9. Is there need for increased investigative powers to be afforded to regulators to better deal with rogue businesses?

8 & 9 - Food law enforcement is largely carried out through Local Authorities with very limited budgets for environmental health and trading standards activities. Organised fraud crosses boundaries, is both costly to address and can require additional legal powers. Therefore the coordinating and supportive role of the Food Standards Agency is essential to take effective action against significant rogue activity.

The key elements are: adequately resourced local enforcement knowledge; centralised intelligence where needed in respect of food movements and known rogues operating in several areas; and back-up central support for pursuit of large scale fraud.

Q10. Should due diligence defences be included in all areas of criminal offences involving regulatory breach?

Yes. The availability of a due diligence defence is a stimulus to industry to have evidently effective control systems and is a safeguard against wasting resources in pursuit of prosecutions where it is clear that such a defence is available.
It must be clarified how availability of a due diligence defence would fit with introduction of Administrative Penalties, since the defence sits in the criminal law. Would the enforcement officer/agency imposing the penalty be required to take due diligence evidence into account or would it only come into play where an appeal was made?

Q11. Would more training be appropriate for judges in the area of regulatory non-compliance and appropriate sentencing?

It would appear that magistrates and judges would benefit from improved understanding of the nature of audited control systems in the food and drink manufacturing industry as a basis for appreciating the reasonable precautions aspects of due diligence defences. How to achieve this in practice, perhaps with a limited number of judges and magistrates, should be addressed.

Q13. Should the fine maxima in criminal courts be abolished? Should a cap be set?

It seems appropriate to have fine maxima but these should be reviewed regularly to ensure that sufficiently large fines are available if appropriate.

Q15. Should profits gained from non-compliance be subject to a separate profits order which is intended to remove any economic gains from non-compliance as well as a separate fine element?

Such an order might be appropriate to the pursuit of fraud at national level but we question its appropriateness or feasibility in respect of local food law enforcement (see comment on 3 above).

Monetary Administrative Penalties (MAPs)

Q16. In general, do you agree that regulators should have Monetary Administrative Penalties available to them as an additional sanction option in their enforcement toolkits? If no, then please elaborate on your views.

FDF has the following general comments on MAPs and no specific responses to questions 17 -24.

FDF does not support the widespread use of MAPs, being concerned that they could jeopardise the relationship between local enforcement officers and businesses; undermine the Home Authority Principle; and remove the moderating influence of having to produce evidence sufficient to propose prosecution, resulting in a less rigorous approach having the potential to allow divergence of action between Local Authorities, which has been reduced significantly in recent years by application of the present system. Use of MAPs would presumably mean loss of the presumption of innocence obtaining in court-based action.

What level of proof would be required for application of a MAP, or in any consequent appeal? If any form of MAP is introduced, it should only be imposed after consultation with a company’s Home Authority and should be signed-off by the senior relevant enforcement officer for the “prosecuting” Authority. There must be timely access to the appeals system.
Enforcement Notices

Q25. Should regulators follow-up statutory notices such as Enforcement or Improvement Notices on a risk adjusted basis?

Yes.

Q26. If a statutory notice is not complied with, should regulators be able to apply a Monetary Administrative Penalty for non-compliance with an Enforcement Notice?

Given that any appeal against the notice has received due consideration, there must be means to pursue non-compliance but see above on FDF’s concerns about local enforcement officers determining penalties.

Q27. If a regulatory appeals tribunal exists, should appeals for statutory notices be heard in this venue?

Presumably – given establishment of a satisfactory tribunal process.

Enforceable Undertakings and Undertakings Plus

FDF as no comment on questions 28-34.

Restorative Justice

35. Do you agree that Restorative Justice is something that can be applied to the area of regulatory non-compliance? Please elaborate on your views.

In general, FDF does not believe that restorative justice is appropriate to specific food law regulatory non-compliance. In most cases a non-compliance would be of potential disadvantage to a sector of consumers or to consumers in general so there would be no specific recipient(s) for restorative action.

FDF has no further comment on questions 35-48

Alternative Sentencing in Criminal Courts

FDF has no comments on the remaining questions 49-58
Annex 1

The UK Food and Drink Manufacturing Industry

The Food and Drink Federation (FDF) represents the food and drink manufacturing industry, the largest manufacturing sector in the UK, employing over 500,000 people. The industry has an annual turnover of £70bn accounting for 15% of the total manufacturing sector. Exports amount to almost £10bn of which 64% goes to EU members. The Industry buys two-thirds of all UK’s agricultural produce.

The following Associations are members of the Food and Drink Federation:

ABIM Association of Bakery Ingredient Manufacturers
ACFM Association of Cereal Food Manufacturers
BCA British Coffee Association
BCCCA Biscuit, Cake, Chocolate and Confectionery Association
BOBMA British Oats and Barley Millers Association
BSIA British Starch Industry Association
CFA Chilled Food Association
CIMA Cereal Ingredient Manufacturers’ Association
EMMA European Malt Product Manufacturers’ Association
FA Food Association
FOB Federation of Bakers
FPA Food Processors’ Association
GPA General Products Association
IDFA Infant and Dietetic Foods Association
MSA Margarine and Spreads Association
NABIM National Association of British and Irish Millers
NACM National Association of Cider Makers
SB Sugar Bureau
SIBA Society of Independent Brewers
SMA Salt Manufacturers’ Association
SNACMA Snack, Nut and Crisp Manufacturers’ Association
SPA Soya Protein Association
SSA Seasoning and Spice Association
UKAMBY UK Association of Manufacturers of Bakers’ Yeast
UKTA UK Tea Association

Within FDF there are the following sectoral organisations:

FF Frozen Food Group
LDT Lifestyle and Dietary Trends Group
MG Meat Group
ORG Organic Food and Drink Manufacturers’ Group
SG Seafood Group
VEG Vegetarian and Meat Free Industry Group
YOG Yoghurt and Chilled Dessert Group