Department for Environment, Food and Rural Affairs

Food supply networks: integrity and assurance review

Note of roundtable meeting with lawyers

Venue: Eversheds, 1 Wood Street, London

Date: 16 September 2013

Attendees:

Jessica Burt – CMS Cameron McKenna LLP

Kerina Cheesman – Food and Drink Federation

Professor Chris Elliott – Reviewer - Review into the Integrity and Assurance of Food Supply Networks

Kathryn Gilbertson – Greenwoods

Mary Newman – Secretary - Review into the Integrity and Assurance of Food Supply Networks

Nick Hughes – Review into the Integrity and Assurance of Food Supply Networks

Hilary Ross – DWF

Mike Steel – Subject Matter Expert - Review into the Integrity and Assurance of Food Supply Networks

David Travers QC – 6 Pump Court

David Young – Eversheds

1. Chris Elliott (CE) introduction

CE explained that although the Review was commissioned as a direct consequence of the horsemeat incident, his brief was to look at the integrity of food supply networks as a whole and advise on how they can be made more secure. The horsemeat incident was – allegedly - a matter of fraud in meat procured in grey markets which by their nature lack the transparency of other procurement routes. Food safety (in terms of microbial pharmaceutical or toxin contamination) was not an issue, although this was not clear in the early stages of investigations. Part of the reason fraudsters had had such success was that the attentions of both industry and regulators were focused primarily on “safety” rather than authenticity.

A key objective of the Review is to make recommendations about what would make it more difficult for fraudsters to operate within the UK. CE is seeking as wide an engagement with stakeholders as possible to try to better understand the complexity of 21st Century supply networks. He noted that there had been more than 70 responses to the call for evidence following which a number of key themes had emerged. These included the need for better horizon scanning and intelligence and more information sharing between industry and regulators.

2. Information sharing between industry and regulators

CE said it was becoming clear from discussions with industry that a lack of trust between businesses and regulators continues to be a major barrier to information sharing. It had been suggested that one cause of this breakdown in trust was the FSA tendency to be fully transparent about the identity of companies who report food safety/fraud concerns; and that the public interest would be better served if, when information reaches the FSA, it would habitually carry out a robust assessment of the need to publish before moving straight to “name and shame”.

If publication was based on risk then there was more likely to be a free-flow of information coming into the FSA. As it is, if a business is not in breach of the Food Safety Act 1990 it will choose not to share information with the FSA.

In discussion, the following points were made:

- Businesses spend significant resource on brand reputation and as such a lack of trust between businesses and regulators is a major issue.

- If businesses are reluctant to inform the FSA of instances where they have identified a potential risk, then the FSA by its existence is not supporting its own objectives.

- More detail is needed about specific barriers to sharing intelligence or information. ‘Anti competitive’ tends to be used as a blanket justification for refusal to share intelligence without much attempt to avoid the behaviours that are legally prohibited.

- If food businesses are not comfortable sharing test results, the Review needed to understand other models for sharing information on potential risks that protect brand identity where there is no cause to allege impropriety by that brand has occurred.

- If businesses are reluctant to disclose information for data protection reasons one option might be for industry to make it a contractual obligation on their suppliers to disclose “confidential” information if an appropriate (and defined) case were met.

- Another option is to find a way to support an “honest broker” arrangement which could allow information to be collected, anonymised and redistributed to industry and regulators except when fuller disclosure met a tightly drawn public interest test. A safe space was crucial, and would mean regulatory bodies would not usually need to use powers direct to require access to this ‘safe’ information. There would need to be a memorandum of understanding (MoU) between the FSA and the broker.

- If the intermediary were a public body it would be liable to Freedom of Information Act (FOI) requests.

- Some companies might prefer to use legal firms as an intermediary because lawyers are covered by professional privilege.

- The broker could potentially be a trade association/body such as the FDF or BRC, although trade bodies are constrained by competition law as much as are their members.

- Companies are cautious about not wanting to share information that might compromise their market position. They would not, for example, be comfortable discussing pricing information.

- Businesses could feed in their information to primary authorities, although primary authorities are public bodies and the issue of FOI still remains.

- There is a model in the financial sector for disclosing information under 'protected disclosure' (whereby if companies willingly make disclosures they can avoid prosecution or at least limit their exposure to punitive action by the regulator). It would be worth investigating whether a similar device could be used in the food sector.

- One option was to impose a legal obligation on food businesses to share information with regulators about possible food fraud (in the same way as they already have with food safety); but it was suggested that imposing a general duty of this kind might do little more than create false confidence in a system that would inevitably be full of avoidance and non-compliance. In addition such a requirement would not have prevented the horsemeat incident (industry was not concealing knowledge or suspicion; it did not have either).

- Where meat is concerned companies were far more likely to be testing for breed than species, or for meat that was out of date.

There was said to have been a mixed response by food businesses to the horsemeat incident. Industry did not speak with one voice. Some companies wanted to share information while others went quiet deliberately to avoid being mentioned in press coverage. It was suggested that unbalanced media reporting had much to do with food businesses' reluctance to speak out in the wake of the incident.

Whilst "naming and shaming" brought context and colour to journalism about the incident, it engendered a reluctance among industry to speak publicly about the incident. The FSA's readiness to name names among companies also discouraged industry from communicating with the public until the picture became clearer.

3. FSA

It was suggested that Parliamentary discussions had revealed that MPs had little real knowledge about how the food system works. The FSA, in particular, had been used by MPs as a political football. Any regulator needed to be confident if its relationship with industry is likely to be strong. It was suggested that the FSA is now so afraid of being criticised that it will be even tougher with industry; if so direct sharing of information is unlikely to happen for the foreseeable future.

It was suggested that some of the FSA's past decisions on food safety/adulteration have lacked perspective. Sudan 1 was offered as an example of where it seemed to have done little analysis of the risk before going public with draconian recalls. The relationship between industry and the FSA has been strained ever since Sudan 1.

4. Risk identification and management

Reliance on a risk matrix is a commonly accepted means of identifying and managing emerging risks. CE described such a risk matrix for food fraud. Of greatest concern is fraud that has a direct effect on human health; of least is fraud that has no impact on the consumer other than the fact they paid a premium without receiving the associated premium goods.

It was suggested that one problem is that any risk matrix is only defined by what individuals want to see as a risk. Another is variety in descriptors, standards and weightings. As a starting point, agreement around the science – e.g. contamination thresholds, testing methods – would help create a more robust approach.

It was generally accepted that the Review is likely to include recommendations about the need to operate according to uniform standards, especially in analysis work. Uniformity is needed not just within the UK but across EU Member States.

5. Labelling

It was suggested that the single most important thing customers want to know about their food is where it comes from, although country of origin (COO) labelling will not tell you much about the quality of the product and the EU continued to have difficulty with the concept. CE noted that most retailers already provide COO information. He added that it is easy to provide this information for a sirloin steak but extremely difficult to do so for a pizza.

The view was expressed that UK consumers have a preference for UK products because they believe common food standards are not universally applied. It would be absurd to say that adherence to food safety standards are uniform across EU Member States. Companies have built their reputations with those who decide whether or not to stock their brands by meeting standards of compliance when competitors might not. It is also in their interests to build consumer confidence in UK products by publicising their compliance records.

6. Enforcement

CE commented that it seemed commonly agreed that it is unrewarding to pursue people who have committed food fraud through the criminal justice process and the penalties for food fraud are small. He asked whether authorities need greater powers to prosecute for fraud, or whether a different approach was needed?

It was agreed in discussion that the legal infrastructure for prosecutions is already fairly complete: it is the exercise of powers that is currently inadequate. It was suggested:

- the main deficiency was overreliance in prosecutions on Environmental Health Officers (EHO) and Trading Standards Officers (TSO) who, in the main, are not well

resourced or equipped to do the job. Local businesses and local authorities needed to be able to rely on good people with the right expertise to drive such things through. But EHOs and TSOs are under intense pressure as headcounts continue to fall due to local authority budgetary constraints

- Few TSOs or prosecutors are specialists in food. The country needed specialists who know the full range of powers and options available and is able to use these effectively.

- Food fraud is not seen as a priority for local government investment and the situation is only likely to get worse.

- the CPS is not the right body to prosecute offences considered to be regulatory by nature

- the complexity of food fraud investigations also discourage prosecution.

Enforcement officers needed to have the mindset that they will use the full raft of legislation available to them. It was suggested that there is a tendency for enforcement officers to stick with what they know which, invariably, is the Food Safety Act 1990; however there is no power of arrest under this Act. They should be encouraged to make better use of the Proceeds of Crime Act 2002 (POCA) which provides for the confiscation or civil recovery of the proceeds from crime. There is also a power to disqualify directors which is potentially a very effective way to discourage fraud albeit one that is rarely, if ever, used.

It was also pointed out that offences would most likely be taken more seriously in a Crown Court; however you have to have lawyers who are prepared to take seriously the nature of the offence in drafting indictments.

Even so, it was noted that compared with other Member States the UK is a prolific prosecutor and also has one of the most rigorous inspection regimes.

In answer to a question on whether definitions of due diligence are clear enough it was argued that the point about due diligence is that it is not meant to be clear; a fact established by repeated courts. Due diligence is a means of risk management and discovery but it cannot be relied on as a sure way to discover criminality. It would almost certainly have worked as a defence in the case of the horsemeat incident if charges had been brought against the major retailers or brands, unless retailers had received prior warning of the risk of specific substitutions or adulterations. There was some surprise expressed that no prosecution of a food business had been attempted in the wake of the horsemeat incident even though the chances of successful prosecution were considered negligible. It could have been argued that the public interest demanded it.

It was suggested that there absolutely should not be new technical offences created as this would devalue the importance placed upon fraud and make it easier for criminals to claim a genuine crime was merely a technical breach. It was argued that less is more where the definition of offences is concerned, although fraud is much harder to establish than technical breaches.

There was some discussion of having central or regional units (flying squads) – potentially located within local authorities - which specialise in different areas of enforcement. It was

open to a local authority to delegate responsibility for investigation prosecution to another authority with expertise in, for example, food fraud.

7. Further action

CE and the Review secretariat agreed they should investigate further potential models of what a safe haven for sharing information might look like and test them with the group.

25 November 2013