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Management of regulation in the food chain - balancing costs, benefits and effects

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10 Development and drafting food legislation

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INTRODUCTION

In his book *The future of law* (Susskind, 1996) Richard Susskind has pointed out that we live in 'hyperregulated times'. According to Mr Susskind 'we are all subject in our social and working lives, to a body of legal rules and principles which is so vast, diverse and complicated that no-one can understand their full applicability and impact..... Being hyperregulated means that there is too much law for us to manage'. This experience of hyperregulation is felt in many fields of law from housing to taxation to food law. It is neither confined to food law nor to the United Kingdom (UK).

FOOD LEGISLATION IN THE UK

An essential plank of the analysis of the legal system applicable to food law which was reviewed in the 1993 report of the Food, Drink and Agriculture Task Force entitled *Proposals for deregulation* was that UK legislation is very detailed in comparison to legislation produced in other European countries. I would argue that detail is not a feature applicable to UK law only nor is it only a feature of the implementation of EC Directives. In this paper, I will examine why we have detailed regulations in the food area and whether anything can be done to alleviate the position.

It is a fact that since the 19th Century, legislation in the UK has become more detailed. The Sale of Goods Act 1893 was about 20 pages long, whereas the modern law of sale of goods fits into two sections of a loose-leaf encyclopedia. Why is this? In my opinion it is the result of the policy-makers' wish to add more certainty to the general principles of legislation as set out in the law relating to the sale

of goods, including food. No longer is it sufficient to rule that food must be fit for its purpose and conform to the descriptions issued about it, but more specific examples must be set out, explained and covered within the scope of the statutory provisions to give more certainty without the need to go to court for interpretation.

The policy-makers' wish to avoid the necessity for court-made law is one aspect of the increase in legislation applicable to consumer products. Another is the development of European legislation and the need to combine the wishes of the policy makers from various Member States into one document. As has been pointed out in the Task Force review, legislation at the European level is often drafted with intentional ambiguity in order to reach a satisfactory policy conclusion to which all can agree because all have the opportunity to interpret the ambiguity according to their requirements and wishes.

OTHER EUROPEAN COUNTRIES

Looking at the amount of law in other countries it is useful to consider perhaps German food law. According to the information I have received, German food law covers about 4000 food law texts which amount to about 20 000 pages of legal statements. In fact I have received a paper from a German lawyer who has compared the loose-leaf text of German food law to the loose-leaf text of the French publication (Dehove, 1996) and the English publication *Practical food law manual* (Rowell, 1988). He points out that these two publications comprise two loose-leaf files only, whereas his German law comprises 37 thick files. He also refers to the EU *Official Journal* which can be measured in metres of text. My colleague, Dr Feldmann of Cologne has repeatedly tried to support the simplification of German food law by publishing essays and comments on judgements but he feels this has not met with success. In Germany the law is complicated by the existence of both national government and regional states government with their own food law in each case. There are also different judicial decisions on the same facts in different regions.

In considering the complexity of food law it is necessary to bear in mind that food law is very much an applied law. One is taking pure legal principles and applying them to everyday materials and everyday functions. It is therefore not surprising that policy makers have sought to ensure that their policy is set out in detailed regulations to avoid doubt in interpretation and enforcement. However, this admirable objective is not achieved in all cases at all times in all places. This is a state of imperfection which, to some extent, has to be accepted.

FOOD, DRINK AND AGRICULTURE TASK FORCE RECOMMENDATIONS (1993)

Looking at the specific recommendations of the Task Force, I would like to make the following comments.

Liquor licensing and policy implications

The Task Force commented on the licensing requirements affecting UK grocery retailers. I would like to set that against the contribution to profit which the sale of intoxicating liquors makes for UK grocery retailers and the importance of safeguarding the public and particularly minors from alcohol abuse and unregulated access to intoxicating liquor. We have a fairly free regime in the UK as far as access to alcohol is concerned, but this could be lost if alcohol abuse is not dealt with through the system of local licensing which has worked very well in the UK. I would therefore point out that this is not simply a matter of cost but also of public policy.

Approach to enforcement

Do we have a culture which is more concerned with obeying the letter of the law than achieving it's objectives? There is no doubt that this is manifested from time to time in enforcement attitudes. It has to be remembered that regulatory law is a discretionary law in that not every regulatory offence can possibly be prosecuted. The prosecution therefore has a discretion as to which cases it chooses to prosecute. In my recent experience I find that enforcement authorities may tend to prosecute small businesses which do not have significant resources for their defence because in such a case of transgression a conviction can be obtained easily against unrepresented defendants although no damage has been incurred or even any prospect of risk complained of.

In certain cases of regulatory transgression the UK system of issuing a caution instead of prosecuting is more appropriate. I have however found that a 'Catch 22' situation can arise in such cases. I recently advised a large catering company in relation to a prosecution for a mouldy sandwich. This company exercised their right not to submit to an interview where what they said could have been used in evidence against them. The alleged offence was not part of any pattern and it appeared to me that to have cautioned the company would have been the most appropriate route. I was however told by the enforcement authorities that they would have issued a caution except for the fact that the company had not agreed to an official interview.

In another case I acted for a small trader who was accused of selling jewellery which resembled food. No one had seen any risk in the production of these stones which were wrapped in brightly coloured cellophane. To some extent they did not differ from products sold as

candles wrapped up in cellophane and presented as lollies which are sold by a major national retail firm. These clients cooperated in every way with the enforcement authorities and agreed to an interview under caution during which they admitted that the product breached the Food Imitation Regulations of which they had previously been unaware. They asked for advice on how to conform with these Regulations but received none. They were prosecuted and then came to me for advice. They had no choice but to plead guilty but were discharged by the magistrates. Again, I thought that this was a case where a caution should have been administered, but I was told by the Prosecution that, despite the cooperation of the clients in the interview with enforcement authorities, it was intended to proceed because an offence had been committed and an admission had been made.

Implementation of Deregulation (Model Appeal) Order 1996

It appears to me that in these cases the best means forward is through the Deregulation (Model Appeals) Order 1996 which will allow clients to appeal against summonses in such cases where more appropriate enforcement action is available. I believe the Model Appeals procedure is a step in the right direction and flows from the deregulation initiative. I do not know if it is intended to implement it in respect of UK food safety in the near future but it would be helpful if an announcement could be made. I do not know what the Opposition view on this is and again, it would be useful to have a policy statement on this point. The important point to note is that it is not necessary to prosecute to enforce regulations. Regulations can be enforced through caution and resort to prosecution in the case of serious persistent offenders.

Drafting of European food legislation

Legislation now originates in the food area mainly in Europe. There are strong criticisms on all fronts of the way in which European legislation is drafted and formulated. Ambiguities are often left in on purpose by the legislators. In other cases particular interest groups have a desire to see a specific set of words used. Sometimes this is for legitimate reasons, but sometimes it is also a matter of ego, commercial advantage or national pride which gets in the way of the real purpose of the legislation.

As a lawyer I would comment on the specific general recommendations of the Task Force as follows:

- *Risk assessment*
  I agree that legislation should be based on a genuine assessment of risk and should be proportionate to the problem;

- *Cooperation and consultation*
  This is an important aspect. I believe that the Government does make reasonable efforts to consult but often European time-frames do not leave sufficient time for this activity. It is to be hoped that this can be resolved at the European level;

- *Compliance cost analysis*
  Again I would support this but it does require the cooperation of industry and the working together by lawyers and their clients to properly assess the cost of compliance;

- *Consolidation and simplification*
  It is a desirable objective to adopt clear and simple language. However, it is often in the areas where technical input is required that the language becomes most convoluted and complicated. The food hygiene area is one which has been held in this respect and I would submit that it is not a question of lawyers' language but sometimes of the language required and recommended by technical advisors;

- *Pilot schemes*
  I am not entirely sure what is meant by pilot schemes and how they would work;

- *Scrutiny and review of regulations*
  I would agree with these objectives although I think they may be time consuming;

- *Litmus test*
  The Small Firm's Litmus Test appears to be a good idea and lawyers in the field are in a good position to feed back their clients' problems in these areas.

- *Language used*
  It is recommended by the Task Force that the language used should be that of the main user of the food law who they define as the small businessman, employees, pensioners and ordinary citizens. In a sense this is correct as long as the language used is 'middle-of-the-road'. However, legislation drafted in pure 'Scouse' would not be clear to the majority of the Law Lords even though it would be intelligible to a 'Scouser';

Clarity, simplicity and brevity should be the object of the draftsman in legislation, but where certainty is required in every conceivable situation, brevity and simplicity may suffer. I would agree with the

scrutiny of legislation to eliminate unnecessary and complicated details in Bills. Citizens should be informed of the intention of the legislation. Lawyers and solicitors can look at the intentions of the policy makers and the Courts recognise that it is legitimate to consult the records of the debates in Parliament to a form of conclusion as to the intention of the legislators.

Notes on statutes

Notes on statutes are helpful. However they should not usurp the role of the Courts because this would place too much power in the hands of non-accountable administrators. The position of the Courts as supreme in the interpretation of law should not be diluted. As lawyers we often see differences arising between guidelines issued and the statutes themselves and in some cases, clients find themselves in a position of not knowing whether they should comply with the guidelines, or with the statute.

CONCLUSION

The main recommendation I would make is that improvement in legislation must take place at the European level because all significant UK food law will now stem from that source. Without understandable legislation at European level, courts cannot interpret food law properly. The European Court of Justice itself has had trouble in interpreting some of the legislation coming from Europe. I have heard Judges comment that they can try to interpret law but if there is no meaning behind the law to interpret then they find it impossible to draft decisions that will make sense. The result however is that in some cases the European Court of Justice has to make law in default of any sensible way of interpreting the text provided through the European legislative system.

The task ahead of the European Union (EU) is to improve the drafting of legislation, to insist on proper scrutiny by lawyers before it is finalised and no doubt to tackle the real problems faced with a multiplicity of working languages and official language texts of legislation. The EU has already begun to tackle the problem of clear drafting of legislation. In a Council's Decision of June 1993 on the quality of drafting of Community legislation, the EC published guidelines for the making of Community legislation. These guidelines state that the words of any statutory provision should be clear, simple, concise and unambiguous.

The European Parliament passed a Regulation in July 1994 calling for transparency of Community Law and its codification. Lawyers and experts involved in food law have for many years pointed out the unnecessary complexity of the legislation and the different approaches

to different products and issues which result in uneven regulation in the food area. This is partly due to the structure of the Community Institutions and partly to political issues in the EU. It is perhaps an unavoidable aspect of the initial development of the EU and we can hope to look forward to a period of consolidation, clarification and deregulation which I can assure you will be welcomed by lawyers as well as their clients.

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