



Consultation analysis of responses – FSS Regulatory Strategy

Background

1. Development of a regulatory strategy is a key activity supporting delivery of Outcome 4 – *responsible food businesses flourish* – in the FSS strategy ‘*Shaping Scotland’s Food Future: Our Strategy to 2021*’. It will set out our vision and future direction for how we will fulfil our role as a national regulator in Scotland.
2. The draft regulatory strategy agreed by the Board in March 2016, along with the subsequent papers the Board considered in June and August 2016 on the principles of official control delivery and key elements of an effective and sustainable system of regulatory oversight, established our proposed strategic approach as a basis for further dialogue and consultation with stakeholders.
3. Since then, there has been an extensive programme of engagement with industry stakeholders, the Scottish enforcement community, other regulators, and consumers to seek their views on FSS’s proposed regulatory approach, culminating in a 12 week public consultation exercise which closed on 18 April 2017. This engagement also provided an opportunity to gauge early stakeholder views on certain aspects of the regulatory system for food and feed that may need to be reviewed or changed in the future, to inform further FSS policy development within the supporting regulatory strategy programme.

About the consultation

4. The consultation paper was made available on the FSS online consultation hub and was also sent directly to relevant stakeholder groups.
5. The consultation contained 28 questions in total. It should be noted that not all respondents answered all questions.
6. The consultation received 30 responses. 4 from Businesses, 8 from Industry Associations, 13 from Local Authorities, 4 Scottish Enforcement Bodies and 1 Other.

7. All 30 responses have been published on the FSS [Citizen Space](#) page, 5 of which are anonymised.

8. Detailed breakdown of consultation questions and response rate of published responses from the 22 online responses. This does not include the 8 responses which were received in another format.

Consultation Question	Total responses
1. Do respondents' have any comments on the key outcomes and elements of the draft FSS regulatory strategy attached at Annex B?	20 (90.9%)
2. Do respondents' have any comments on the proposed regulatory decision making framework and compliance spectrum model outlined in paragraphs 5.13 and 5.14 of the draft regulatory strategy? The views of enforcement authorities on practical implementation are particularly welcome.	18 (81.8)%
3. Respondents' views are invited on the six key elements of an effective and sustainable system of regulatory oversight attached at Annex C.	18 (81.8)%
4. Respondents' views are invited on the different ways in which FSS and enforcement authorities can support food businesses achieve sustained regulatory compliance, particularly SMEs.	19 (86.4%)
5. What are the priority areas for developing supporting technical guidance and compliance tools for the food and drink industry?	18 (81.8)%
6. Respondents' views are invited on the different ways in which FSS and enforcement authorities can gain assurance about the performance of food businesses.	19 (86.4%)
7. What are respondents' views on commercial assurance schemes or industry generated data having a more prominent role in the overall regulatory system?	19 (86.4%)
8. What are respondents' views on the current balance of legal, financial and reputational sanctions that are available to the Courts, regulators and enforcement authorities to address and deter non-compliance in the Scottish food and drink sector?	19 (86.4%)

9. Are there any other forms of penalty or sanction that should be considered or made available?	19 (86.4%)
10. What are respondents' views on the strengths and weaknesses of the existing system for food business registration?	18 (81.8%)
11. Do respondents feel there would be merit in considering further the need for a pre-trading authorisation scheme for all food businesses in Scotland? Please outline your reasons.	19 (86.4%)
12. Respondents' views are invited on the principles of official food and feed control delivery at Annex D.	18 (81.8%)
13. What do respondents feel are the main challenges and opportunities for improvement within the existing model for delivering food and feed inspections in Scotland?	17 (77.3%)
14. What are respondents' views on regulatory approaches to private certification and the possibility of using third party inspection bodies as part of the regulatory assurance system for food and feed in Scotland, verified centrally by FSS?	19 (86.4%)
15. Respondents' views are invited on the principle that the food and drink industry in Scotland should contribute to the cost of maintaining an effective and sustainable regulatory system for food.	20 (90.9%)

Headlines

9. Broad support for the **aims & objectives** and **outcome based approach** of the FSS regulatory strategy.
10. Stakeholders welcome FSS's clear commitment to meeting our **better regulation** obligations under the Regulatory Reform (Scotland) Act 2014 and associated Scottish Regulators' Strategic Code of Practice.
11. Support for a national food and feed **compliance spectrum**, including suggestion for adoption of more neutral language.
12. Strong local authority support for strengthening the current **registration system for food businesses** through some form of licensing or enhanced registration scheme.
13. Stakeholders welcome FSS's commitment to **supporting businesses**, particularly **SMEs**, through appropriate guidance, advice and online tools.
14. Local authorities are supportive of introducing additional **enforcement tools and sanctions**, i.e. Fixed Penalty and Compliance Notices.
15. Mixed stakeholder views on the further integration of systems of **private assurance/third party certification** into the food and feed regulatory framework:
 - Industry very supportive
 - Strong local authority views expressed that private assurance should complement, not substitute, official controls.
16. General industry opposition to any additional cost burdens being placed on the Scottish food and drink sector, but supportive of principle that **regulatory charges** are focused on the least compliant business in line with 'polluter pays' and 'fee for intervention' principle.
17. Local authority support for charging businesses for **non-routine official controls**, but careful consideration needed around any move towards greater cost recovery for routine controls.
18. Industry emphasis on need for appropriate and transparent business **appeals mechanisms** for regulatory decision making.

Summary of views

19. Consultation responses indicated widespread support for the aims and objectives of our regulatory strategy, which were broadly endorsed by all Scottish stakeholders who responded to the formal consultation exercise. Notably, food and drink industry representative bodies and Scottish local authorities have welcomed the flexible regulatory approach represented in the strategy, and FSS's clear commitment to meeting our better regulation obligations under the Regulatory Reform (Scotland) Act 2014 and associated Scottish Regulators' Strategic Code of Practice.
20. Stakeholders strongly supported the outcome-based approach that has been adopted in the strategy. Minor comments were received on the proposed five regulatory outcomes, with a suggestion that it is made clearer that food and feed businesses are included. Similarly, stakeholders were generally supportive of the proposed elements and principles of regulatory oversight and official control delivery previously agreed by the Board.
21. A number of respondents proposed the addition of a sixth better regulation principle – that regulation be *proportionate, consistent, accountable, transparent, targeted and timely*. The view was expressed that such a 'timely' principle is already espoused by SEPA and certain Scottish local authorities, reflecting the need for regulatory intervention and enforcement action to be considered and undertaken at the earliest practicable opportunity to minimise any risks to public health and prevent any contributing behaviour from becoming chronic, persistent or established.
22. Both the concept of a national compliance spectrum for food and feed and the regulatory decision making framework, set out at paragraphs 5.13 and 5.14 of the regulatory strategy, were well received and broadly supported. Some concerns were expressed that the language of the compliance spectrum, notably the terms 'criminal' and 'chancer', could be viewed negatively by the food and drink industry. A number of local authority respondents suggested the compliance spectrum should be more closely aligned with the language of the 'ladder' food business risk rating scheme, currently being piloted by FSS and several local authorities, to support an effective and consistent approach to food law enforcement in Scotland.

Registration & prior approval of food businesses

23. Most stakeholders acknowledged the need and rationale for food business registration, but questioned the benefits of the current system. Local authorities in particular felt it provided minimal value given the low proportion of new businesses that proactively register within 28 days of trade commencing, the lack of effective sanction for not registering, and resultant absence of any deterrent value.
24. It is clear that local authorities are strongly supportive of strengthening the existing registration system through some form of prior approval or pre-trading authorisation for all food businesses, such as licensing or enhanced

registration, that would require minimum standards to be met before a businesses can start trading. Industry respondents also acknowledged the potential benefits of prior approval of all food businesses, as it was felt this would provide a mechanism for assessing business needs and providing support before trading commences. The potential for coordinating any future scheme with existing Business Gateway and other local services was noted.

25. The likely impacts of introducing such a prior approval scheme on start-up businesses and local authorities was recognised, and a number of respondents stressed the need to carry out detailed cost/benefit assessment of any future policy proposals across different businesses sectors and sizes.

Supporting responsible food businesses

26. A common theme to emerge from the consultation was a request for clear and simple guidance on regulatory requirements, particularly to support smaller businesses, and the need for consistent regulatory interpretation by enforcement authorities. Industry feedback suggests that many food businesses value the relationship they have with their local Environmental Health and/or Trading Standards officer, which is often relied upon as a key source of business advice and support.
27. Industry stakeholders also welcomed FSS's commitment to proactively work with food businesses and associated support organisations, and there is strong support for a an open, helpful and collaborative approach between food businesses and regulators, but with a clear expectation that FSS will retain an authoritative role and ensure appropriate regulatory intervention and sanction occur where required.
28. During the consultation exercise stakeholders also provided views on priority areas for developing supporting technical guidance and compliance tools for the food and drink industry. Several respondents suggested the need for additional web based tools and further applications to assist businesses, particularly those involved in high risk manufacturing.

Dealing with poor performance

29. There is widespread recognition amongst all stakeholders of the potential for serious non-compliance with food and feed law to cause reputational damage to the Scottish food and drink industry, and that appropriate punitive fines and sanction should be enforced. A general view was expressed that sanctions need to be reasonable and proportionate, and that businesses have fair and accessible routes to challenge or appeal regulatory decisions.
30. A number of local authorities noted the difficulties involved in reporting cases of non-compliance to the Procurator Fiscal (PF), and the intensive resources this entails which removes officers from front line inspections. Local authorities endorsed the need for a dedicated specialist PF to consider food law cases, and the introduction of sentencing guidelines in Scotland for food

law offences, similar to those that have been introduced in England and Wales for food safety and health and safety breaches.

31. Local authorities were also strongly supportive of the introduction of new administrative sanctions, notably Fixed Penalty and Compliance Notices, using primary powers available in The Food (Scotland) Act 2015, as well as mandatory display of Food Hygiene Information Scheme (FHIS) certificates. A number of additional enforcement tools were proposed, such as a 'Stop Notice' linked to operating without prior approval, and the extension of Remedial Action Notices (RANs) to food standards matters.
32. Stakeholders also recognised the role of reputational sanction as a useful deterrent through effective publicising of food safety infringements, where cases were proved beyond doubt.

Regulatory assurance & future delivery

33. Industry stakeholders broadly welcomed the concept of third party certification and assurance schemes being utilised in the food regulatory system. It was felt this would support due diligence requirements, increase the value of scheme membership, minimise duplication of effort between public and private bodies, and support risk based targeting of official inspections in line with the compliance spectrum approach. The need for robust scheme standards (e.g. relevant ISO and/or UKAS accreditation) and governance systems, including appropriate recognition, management and audit processes that are consistently implemented, were recognised as important factors if third party schemes are to be a useful tool for regulators. The potential for independent data generated by these schemes to be shared with regulatory authorities was also highlighted, although the need to maintain trust and a constructive relationship between industry and regulators was stressed, and some concerns were expressed around the purpose of greater data sharing of this nature. Support was also expressed for implementing Primary Authority arrangements in Scotland, and the need for reciprocal recognition with the scheme already in place in England and Wales (note this is a Scottish Government lead policy area).
34. Detailed views have been provided by local authorities on the issue of private assurance, which will require further consideration. As noted above, it is clear the Scottish enforcement community have significant concerns in this area, where there is a perceived risk that greater integration of third party schemes within the regulatory system could dilute a robust regulatory approach to food safety. The strongly stated and consistent position that has been expressed by local authorities is that consumer protection and regulatory assurance should be maintained through appropriately funded and resourced official controls delivered at a local government level. Whilst acknowledging the role and value of third party certification schemes, it was strongly felt that these should be seen as complimentary, and not a substitution for official controls.
35. Specific issues were raised around potential conflict of interest given the commercial focus of private assurance schemes, auditor competence, audit

quality and the degree to which membership of an assurance scheme gives any greater level of public health protection, dealing with non-conformity, and the possible need for third party bodies to be designated as delegated control bodies under EU legislation if utilised as part of the official control regime. A specific suggestion was also made to explore the possibility for FSS and local authorities to provide public certification/accreditation services to the food and drink industry, as part of our regulatory oversight and verification role, clearly separated from existing enforcement functions.

36. While the resource and financial pressures on local food law enforcement services across Scotland is acknowledged, the general sense amongst local authorities is that there is significant public confidence in the current regulatory regime for delivery of official controls through local public services.

Funding

37. Industry stakeholders expressed general opposition to any significant increase in regulatory costs to the Scottish food and drink sector, or disruptive changes to charging structures, given the current challenging business environment and wider economic impacts that can be expected. One major industry association, representing over 18,000 smaller businesses, noted it was difficult to comment further on the principle that the food and drink industry should contribute to the cost of maintaining an effective and sustainable regulatory system for food and feed without a more detailed understanding of the financial model that would underpin it. The need for proportionality was emphasised in the context of financial pressures on both businesses and public services, and it was clear industry stakeholders felt that compliant food businesses should not be subject to any, or at least minimal, additional cost increases over and above existing contributions through business rates and general taxation. This reflected their overall support for the 'polluter pays' and 'fee for intervention' approach to cost recovery, aligning with the principle in the FSS regulatory strategy that non-compliance should cost more than compliance.
38. Local authorities and Scottish enforcement bodies were broadly supportive of the principle of charging businesses for food and feed official controls, with certain exceptions, and the main theme to emerge was around the need to consider any difference in approach between charging for routine and non-routine regulatory interventions. While strongly supportive of the need to charge businesses for additional official controls to deal with non-compliance over and above normal scheduled inspection work, as provided for in EU official controls legislation, reservations were expressed around charging businesses for routine official controls. It was suggested a detailed feasibility study should be undertaken in this area. The key issues raised were around economic burdens on legitimate businesses, the basis for charge calculations, existing industry contributions through business rates and taxation, and a perceived risk that direct funding could compromise regulator impartiality. Again, there was strong support for the principle that any charges should be focused on the least compliant businesses. Local authorities also expressed

widespread support for applying a fee to any food business prior approval mechanism if this was to be considered in the future.

Next Steps

39. Consultation responses were used to further inform and refine our final regulatory strategy, which was considered and agreed by the FSS Board at their open Board meeting on 17 May 2017.
40. The final regulatory strategy has now been published on the FSS website and can be found here. <http://www.foodstandards.gov.scot/business-and-industry/safety-and-regulation/regulation-legislation/fss-regulatory-strategy>
41. Consultation responses are also informing further policy development across the supporting regulatory strategy programme. This work is ongoing and will be subject to further consultation and stakeholder engagement as appropriate.