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The Regulatory Network

I. INTRODUCTION

INVESTIGATION, CONTROL AND enforcement following incidents of food-borne illness are carried out by a network of actors. These actors have different regulatory competences, and by combining them the network should be better able to manage the risks arising from food-borne illness. As biological risks emerge from a relational entanglement of persons, non-human actors (such as microbes) and environments,¹ they can only be managed through a similar engagement between actors with diverse but complementary competences. This chapter explores the regulatory network responsible for the management of food-borne illnesses, illuminating the regulatory competences of the network and considering the roles that each network participant plays in the response to such illness.

The importance of networks in the governance of risk is a central theme of regulatory scholarship.² A monocentric model, where a single body is responsible for the management of risks of all types, is not feasible in a system as ‘complex and dynamic’ as that which ensures that consumers receive safe food.³ Actors have different regulatory capacities, with different abilities to make rules, detect non-compliance with those rules and take action in order to change behaviour in the direction of compliance so that regulatory goals are achieved. Such capacities may flow from formal legal powers possessed by such a body, or from the factual position of the actor compared to the incident of food-borne illness.

Alongside the fragmented, polycentric governance network, centralised regulatory control through guidance and oversight by central regulatory actors is put in place in order to ensure that fast-spreading high-risk food-borne illnesses are managed appropriately.⁴

¹ Kezia Barker, Sarah L Taylor and Andrew Dobson, ‘Introduction: Interrogating bio-insecurities’ in Andrew Dobson, Kezia Barker and Sarah L Taylor (eds), *Biosecurity: the socio-politics of invasive species and infectious diseases* (Routledge 2013) 8.

² Julia Black, ‘The decentred regulatory state?’ in Peter Vass (ed), *CRI Regulatory Review 2006/2007* (Centre for the Study of Regulated Industries, University of Bath 2007), 253.

³ *Ibid.*, 259.

⁴ Julia Black, ‘Tensions in the Regulatory State’ [2007] *Public Law* 58.

No one actor can have the expertise or information to manage the risk entirely. A polycentric network of actors with differentiated capacities is necessary to ensure that the risks of food-borne illness are managed. Therefore different actors must be enrolled into a regulatory network in order that the network can function to investigate food-borne illness and control its spread. Enrolment may be formal, with a particular role intentionally allocated to a particular actor in a particular network by another actor within that network, or may be informal, with ad hoc enrolment taking place in particular circumstance in order that the enrolling actor may achieve its regulatory aims.⁵

In the management of risks resulting from food-borne illness, the governance network involves a wide variety of participants, including: the EU; national and devolved governments, in both their legislative and executive capacities; national regulatory bodies, such as the Food Standards Agency and Public Health England; local regulatory bodies, particularly local authorities and the Environmental Health Officers (EHOs) that they employ; medical professionals, particularly those who practise in the public health field; law enforcement authorities, and particularly the police; non-governmental organisations, such as the Chartered Institute of Environmental Health, which may have responsibility for setting standards for other actors within the network; advisers, such as lawyers advising other network actors about their powers; food-business operators and their employees; other market actors that provide services to food business operators, such as insurers who provide public liability and product liability insurance; consumers; and the courts. Where the incident has multi-national scope, regulatory bodies in other countries will be enrolled in a multinational governance network.⁶ In the UK the central actors in the governance of food-borne illness risks are local authorities, which have powers governing both food and public health. It is therefore with local authorities that a response to food-borne illness often begins, with other actors enrolled in the network as necessary to address the risk.

Whilst the network is often loose, there is a formal mechanism for coordinating it in circumstances where the incident rises to the level of an outbreak. An Outbreak Control Team (OCT) is formed to lead in the management of the spread of food-borne illness in such circumstances. Such OCTs involve

⁵ Eg, where an employee blows the whistle on non-compliance by his or her employer, that employee is enrolled in the regulatory network as an information-providing actor, and he or she also enrolls the regulator to achieve the aim of addressing the non-compliance notified (see Ashley Savage and Richard Hyde, 'The Response to Whistleblowing by Regulators: A Practical Perspective' (2014) *Legal Studies* (forthcoming), available at <<http://www.dx.doi.org/10.1111/lest.12066>>).

⁶ A similar list of network participants appears, in the context of the governance of financial services, in Julia Black, 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation [2003] *Public Law* 63, 70.

participants from many of the various network actors, and meet and make decisions about the management of the outbreak; decide what information needs to be collected (although the manner of collection is left to EHOs); assess such information; and take decisions on necessary control measures, although measures are formally imposed by the local authority.⁷ The OCT is also responsible for analysing the incident following successful control and making recommendations to be implemented by network actors to reduce the future risk of food-borne illness.⁸ Outbreak Control Teams play no formal role in enforcement, although the discussions and reports of an OCT may form the basis of a decision to take enforcement action.⁹ The regulatory capacity of the OCT is enhanced by the presence of each actor enrolled in the team. Where the incident is international in scope, an international ‘Crisis Unit’ will be brought together by the EU Commission, to ensure that the complementary capacities of actors within the multinational regulatory network are harnessed to investigate and control the incident.¹⁰

This chapter examines the central actors enrolled in the network, and considers the roles they play in achieving the network’s goals of investigation, control and enforcement. The next chapter takes a closer look at the powers that these actors have to respond to incidents of food-borne illness, considering the regulatory capacity of the actors in respect of investigation, control and enforcement.

II. THE EU AND THE UK GOVERNMENT

The European Union (EU) and the UK Government primarily function legislatively as standard-setting actors within the regulatory network. National and supra-national standard-setting bodies have a responsibility to design regulatory frameworks to manage the risk resulting from food-borne illness. The standards apply to the food itself and to the conditions in which it is produced. They are considered in the next chapter, but have the goal of ensuring that food is free from agents that cause food-borne illness. Given the complexity of food flows within the EU (and more broadly throughout

⁷ The terms of reference of an OCT can be found in Food Standards Agency, *Management of outbreaks of food-borne illness in England and Wales* (Food Standards Agency 2008) 15–16. Separate guidance applies in Scotland (Food Standards Agency and Scottish Health Department, *Guidance on the Investigation and Control of Outbreaks of Foodborne Disease in Scotland* (Food Standards Agency 2006)).

⁸ Food Standards Agency, *Management of outbreaks of food-borne illness in England and Wales*, above n 7, 16, terms of reference 9 and 10.

⁹ As in the *South-West Water* case, discussed in ch 6.V.A.ii.

¹⁰ Regulation 178/2002, arts 56–57. Art 57 gives the Crisis Unit the power to ‘request the assistance of any public or private person whose expertise it deems necessary to manage the crisis effectively’, providing a formal basis for enrolling actors in the network.

the world),¹¹ these standards function to manage the risk of all food circulating within the EU. As legislators, these actors also seek to ensure legal preparedness, providing the networks actors, who are limited in their competences, with the capacity to investigate, control and enforce.¹²

When functioning in an executive fashion, the UK and EU have important, although rarely used, regulatory capacities that can be used to address incidents of food-borne illness with national or international scope. The powers possessed by the UK and EU have broad geographical reach, and enable the network to control unsafe products across the UK, or across the whole of the EU.

Within the UK, the Food Safety Act 1990, section 13 gives the Secretary of State power, through an order in council (known as an Emergency Control Order), to control products of a particular type or description where there is an 'imminent risk to health'. This power has been used six times since 1990, including for controlling beef at risk of infection with BSE. Most relevantly, the Executive chose to use an Emergency Control Order to control cheese produced by a particular food business, which was found to be contaminated with *E. coli* O157.¹³ The UK Executive also has broad capacity to take action in an emergency under the Civil Contingencies Act 2004.¹⁴ Emergencies include threats to human welfare from 'human illness or injury', giving a extensive capacity to set standards and enforce them in emergency situations.

The EU Commission has a similar power, which can be found in Regulation 178/2002, article 53. This provides that the Commission may take action to manage a serious risk to human health that cannot be controlled adequately by Member States. This action may include preventing the marketing of the food product in question, or 'any other appropriate interim measure'. This broad power functions to equip the Commission with the capacity to control food and food-borne illness in limited circumstances.

III. THE FOOD STANDARDS AGENCY

The Food Standards Agency ('the Agency') is the national regulator with responsibility for food. The 'main objective' of the Agency is 'to protect public health from risks which may arise in connection with the consumption of food (including risks caused by the way in which it is produced or supplied) and otherwise to protect the interests of consumers in relation to

¹¹ Of course, the Codex Alimentarius Commission is enrolled into the network as a body that sets international standards for food.

¹² Estair Van Wagner, 'The practice of biosecurity in Canada: public health legal preparedness and Toronto's SARS crisis' (2008) 40 *Environment and Planning A* 1647.

¹³ Detailed in *R v Secretary of State for Health, ex p Eastside Cheese* [1999] 3 CMLR 123.

¹⁴ See pt 2 of that Act.

food'.¹⁵ It was created by the Food Standards Act 1999, and functions as a non-ministerial government department.¹⁶ From April 2015 the role of the Food Standards Agency in Scotland will be taken over by Food Standards Scotland.¹⁷ This body will play a similar role in the network to that currently played by the Food Standards Agency.¹⁸

The Food Standards Agency plays a key role where an incident has cross-authority scope. The capacity for the Agency to gather information about food-borne illness within different local authority areas and to coordinate the response to food-borne illness is important. The involvement of the Agency gives the network increased informational capacity, as actors (such as local authorities or food businesses) transmit information about food-borne illness risks to the Agency. It is responsible for sharing information with local authorities about risks that potentially exist within their areas, in order that they may use their powers to take the necessary action, or be aware of the possibility that action might be needed. In some cases an alert may trigger a local authority to take action to investigate and/or control a risk 'where the [Food Standards Agency's] risk assessment has identified urgent actions for local authorities (eg removal of products from sale)'.¹⁹ Such an alert is known as a 'Food Alert for Action' (FAFA).²⁰ Food Alerts for Action may be supplemented by direct contact between the Food Standards Agency and the local authorities 'most likely to be affected' by the risk.²¹ Investigations undertaken in response to a food alert may provide evidence used in an enforcement action.

In less urgent cases the Food Standards Agency may issue a Food Alert for Information (FAFI). A FAFI is issued when the local authority should take note but not action in respect of a food-borne illness. Where a 'company/manufacturer has already withdrawn/recalled a product or is in the process of withdrawing/recalling a product to the satisfaction of the [Food Standards Agency]',²² this will be noted in order that authorities may advise concerned consumers. However, these alerts will not usually trigger investigation, control or enforcement, but do add to the capacity of the Food Standards Agency to take a long-term view of trends demonstrated by the shared information, enabling it to take action to prevent future risks.

¹⁵ Food Standards Act 1999, s 1(2).

¹⁶ Explanatory Notes accompanying the Food Standards Act 1999, para 10.

¹⁷ See the Food (Scotland) Act 2015, pt 1.

¹⁸ The objectives of Food Standards Scotland include protecting 'the public from risks to health which may arise in connection with the consumption of food' (Food (Scotland) Act 2015, s 2(1)(a)).

¹⁹ PEN/JW/FSA.07245.

²⁰ For an example of a FAFA, see PEN/HL/SWP.00269.

²¹ PEN/JW/FSA.07245.

²² PEN/JW/FSA.07245.

IV. LOCAL AUTHORITIES

Local authorities are key players in the response to food-borne illness. They have the capacity to investigate, control and enforce, possessing both food and public health powers. Compared to the Food Standards Agency, they have the local manpower to carry out a resource-intensive investigation. They also have the regulatory capacity and experience to control the spread of illness, exercising formal and informal control powers. Local authorities are the proper enforcement body for breaches of food safety and/or food hygiene norms. Where a school is affected, the local authority has educational powers,²³ and enrolls members of its education departments to use their expertise and powers to manage risk within the school.²⁴ The local authorities are central to empowering the regulatory network, and often function to enrol other actors into that network where necessary. They communicate with national bodies, medical colleagues and the food businesses, enrolling them into the network with the goal of enhancing regulatory capacity. They have the capacity to communicate with the public, including on risk reduction techniques, thereby enrolling consumers into the network working to reduce the incidence of food-borne illness.

Local authority responsibilities are divided between county- and district-level authorities.²⁵ County-level councils generally cover a larger area and are responsible for higher-level functions. District-level councils are geographically smaller, and perform lower-level or more localised functions.²⁶ Some areas are served by a single unitary authority,²⁷ which is responsible for all the functions assigned to local government.²⁸ London Borough Councils are functionally equivalent to unitary authorities.²⁹ Figure 2.1 illustrates the structure of local government in the UK.

District-level authorities are responsible for food safety and food hygiene. County authorities are responsible for food standards (for example, issues relating to labelling, packaging or advertising). This means that district-level authorities are the key local authority players in the response to food-borne

²³ Eg South Wales *E. Coli*, full details available at <<http://wales.gov.uk/ecoliinquiry/?lang=en>>.

²⁴ Where an academy or free school is a site of cases of food-borne illness, the academy trust has a governance role.

²⁵ Ignoring parish and town councils, which have no role to play in food law enforcement.

²⁶ District councils and borough councils operate at the same level. For the difference, see Local Government Act 1972, s 245.

²⁷ Authority A is a unitary authority. On unitary authorities, see Andrew Arden, Christopher Baker and Jonathan Manning (eds), *Local Government Constitutional and Administrative Law* (2nd rev edn, Sweet & Maxwell 2008).

²⁸ Unitary authorities may be 'County Councils', 'Metropolitan Borough Councils', 'City Councils', 'Borough Councils', or 'District Councils'; in this book they are collectively referred to as 'unitary authorities'.

²⁹ The Greater London Authority, created by the Greater London Authority Act 1999, does not function as a second tier of local government. It is more similar to a devolved central government department.

Local Authorities with responsibility for food, as defined by section 5 of the Food Safety Act 1990, are shaded.

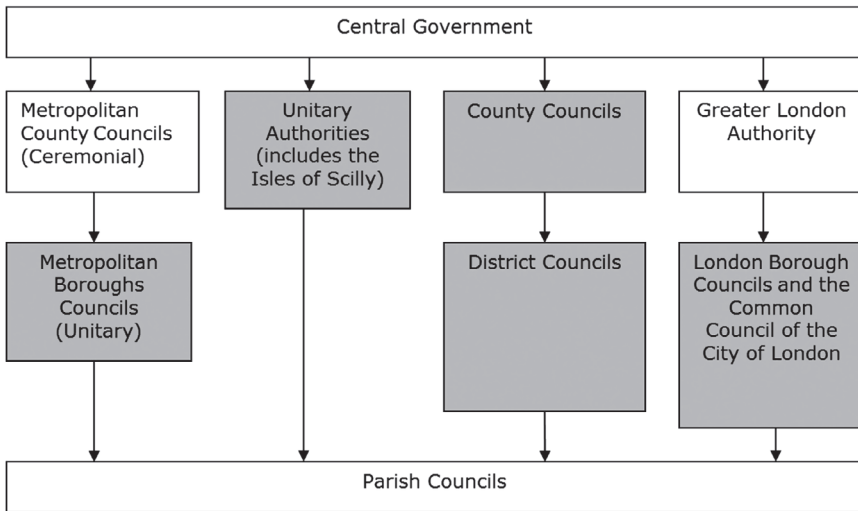


Figure 2.1: The arrangement of local government in England

illness, but county councils may be enrolled into the regulatory network on an ad hoc basis where issues of food standards arise during an investigation into an incident of food-borne illness.

Local authorities are statutory creations. This means that they must have the power to act, otherwise their actions will be quashed as being *ultra vires*. The principal provision that empowers local authorities in the area of food safety is section 6(2) of the Food Safety Act 1990. This provides:

Every food authority shall enforce and execute within their area the provisions of this Act with respect to which the duty is not imposed expressly or by necessary implication on some other authority.

‘Food authority’ is defined in section 5 as ‘the council of that borough, district or county’.³⁰ District and county councils may therefore concurrently enforce the Food Safety Act 1990.

Secondary legislation under the Food Safety Act 1990 sets out which body is responsible for enforcement.³¹ The Food Safety and Hygiene (England) Regulations 2013 provide that local authorities are responsible for enforcement of the provisions of Regulation 178/2002,³² with responsibility for

³⁰ Food Safety Act 1990, s 5(1)(a). Food authorities are shaded in Fig 2.1. This definition of food authority is incorporated by reference into the Food Safety and Hygiene (England) Regulations 2013, reg 2.

³¹ Food Safety Act 1990, s 6(4).

³² Food Safety and Hygiene (England) Regulations 2013, SI 2013/2996, reg 5(6).

execution and enforcement of the ‘hygiene regulations’³³ being shared between food authorities and the Food Standards Agency.³⁴ Local authorities are responsible for enforcement in most food businesses, except those involved in primary production and processing of food of an animal origin (where responsibility is shared with the Food Standards Agency).³⁵ In Wales and Scotland, the General Food Regulations 2004 provide that food authorities shall be responsible for enforcement in circumstances where there is a breach of Regulation 178/2002,³⁶ and the Food Hygiene (Wales) Regulations 2006 and Food Hygiene (Scotland) Regulations 2006 empower local authorities to take action in respect of breaches of hygiene regulations.³⁷

The public health powers of the local authority are primarily found in the Public Health (Control of Disease) Act 1984 (as amended) and associated regulations. These give local authorities the capacity to take control actions against persons, premises, products or environments. They are examined in more detail in chapter three.

Local authorities can only act in relation to breaches that have effects inside the boundaries of the authority.³⁸ However, when investigating breaches of food safety law committed within authority boundaries, officers may conduct inquiries, for example viewing premises and taking samples, at locations within other local authority areas.³⁹ This is useful where food suspected to be the source of food-borne illness is produced beyond the boundaries of the authority. Rather than conducting the investigation themselves, officers may enrol the EHOs employed by the local authority covering that area to undertake this task, geographically expanding the network.⁴⁰

Local authorities may also be formally enrolled into the network as the home or primary authority of a food business. When acting as home or

³³ Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs [2004] OJ L139/1; Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin [2004] OJ L139/55; Regulation (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption [2004] OJ L139/206; Commission Regulation (EC) No 2073/2005 of 15 November 2005 on microbiological criteria for foodstuffs [2005] OJ L338/1; Commission Regulation (EC) No 2075/2005 of 5 December 2005 laying down specific rules on official controls for *Trichinella* in meat [2005] OJ L338/60; and the Food Safety and Hygiene (England) Regulations 2013.

³⁴ Food Safety and Hygiene (England) Regulations 2013, reg 5(1).

³⁵ Food Safety and Hygiene (England) Regulations 2013, reg 5(1). The Food Standards Agency has exclusive responsibility for enforcement in slaughterhouses, game-handling establishments and cutting plants (Food Safety and Hygiene (England) Regulations 2013, reg 5(2)).

³⁶ General Food Regulations 2004, SI 2004/3279, reg 6(1).

³⁷ Food Hygiene (Wales) Regulations 2006, SI 2006/31, reg 5; Food Hygiene (Scotland) Regulations 2006, SI 2006/3, reg 5.

³⁸ Although in relation to Trading Standards this position is modified by the Consumer Rights Act 2015, sch 5, pt 6.

³⁹ See, eg, *Walkers Snack Foods Ltd v Coventry City Council* [1998] 3 All ER 163.

⁴⁰ B/EHO1.

primary authority, the local authority will provide advice on the law that applies to the business, when requested to do so. In the event that enforcement action is contemplated following an incident of food-borne illness, contact will be made with the home or primary authority to ensure that the action of the business was not taken on the basis of regulatory advice given by the home or primary authority. However, given the nature of an incident of food-borne illness, advice given by the primary or home authority is unlikely to be a reason not to proceed with enforcement action.⁴¹ Even so, a home or primary authority may provide important information about the business to other network actors.

Environmental Health Officers are the primary professionals through whom local authorities act in response to food-borne illness.⁴² They provide the manpower that allows the regulatory capacity of the local authority to investigate, control and enforce to be operationalised. The regulatory capacity is vested in the EHOs through the authorisation to use the powers given by the Food Safety Act 1990 and the Food Safety and Hygiene (England) Regulations 2013.⁴³ Such authorisation is achieved through a formalised and documented process.⁴⁴ Once authorised, EHOs must carry a record of their authorisations when investigating incidents of food-borne illness, and will show it when requested by food businesses.

If there is not a specific authorisation procedure, local authority powers may be delegated to EHOs. Section 101(1) of the Local Government Act 1972 allows authorities to ‘arrange for the discharge of any of their functions by a committee, a sub-committee or an officer of the authority’. Public health powers were often delegated to the ‘proper officer’ of the authority (for historical reasons often the Consultant in Communicable Disease Control (CCDC)) or to a senior EHO.⁴⁵

However, EHOs have limited regulatory capacity in certain areas. They cannot set standards and rely on the actors with legislative powers to do so. However, the central weakness of local authorities as network participants is their information-gathering capacity. They are resource limited, and therefore cannot be present on the premises observing the practices of the

⁴¹ Regulatory Enforcement and Sanctions Act 2008, s 28. The Coordination of Regulatory Enforcement (Enforcement Action) Order 2009, SI 2009/665 provides that the duty to consult does not apply where urgent action is necessary to prevent a serious risk to health.

⁴² EHOs can specialise in a number of different functions, including food, or may work in many different areas. They are degree-educated and members of the CIEH. Their work is supported by other members of environmental health teams, who may not have the qualifications of an EHO. These individuals may include technical officers, sampling officers and placement students. All staff members play an important role in responding to incidents of food-borne illness.

⁴³ The General Food Regulations 2004, reg 6; and the Food Hygiene (Wales) Regulations 2006, reg 5 and Food Hygiene (Scotland) Regulations 2006, reg 5 in Wales and Scotland.

⁴⁴ Food Standards Agency, *The Framework Agreement on Official Feed and Food Controls* (5th amended edn, Food Standards Agency 2010) para 5.1.

⁴⁵ In all authorities examined in this book, the ‘proper officer’ was the CCDC.

food-business operators at all times. Therefore they cannot function to detect all cases of regulatory non-compliance, nor can they detect all cases of food-borne illness. In order to enhance their information-gathering capacity they must enrol other actors into the network, particularly consumers, food businesses and food business employees, with these enrolled actors functioning to provide information about incidents of food-borne illness and their causes.

V. MEDICAL ACTORS

Medical practitioners, whether public health specialists, accident and emergency doctors, or general practitioners, are an essential part of the regulatory network, working to reduce the incidence and spread of food-borne illness.

Non-specialist medical professionals are enrolled on an ad hoc basis, providing advice that attempts to control the spread of food-borne illness through simple barrier techniques, hand-washing and advice to remain away from work. They may also provide important information to other members of the network, functioning to detect (and confirm) food-borne illness through their contacts with patients, which may include taking samples, and providing this information to other network participants via formal reporting procedures or informal contacts with medical colleagues specialising in public health. Further, doctors may act to encourage consumers to enrol into the regulatory network by advising them to report their illness to EHOs, which enhances the information available to those officers. This increases EHOs' capacity to detect, and therefore investigate, food-borne illness.

Specialist medical professionals with an interest in public health are enrolled into the network more formally. Each local authority is affiliated with one or more CCDCs. A CCDC is a medical professional specialising in public health. The CCDCs are trained in both microbiology and epidemiology. They work alongside local authorities in managing all incidents of food-borne illness, and will provide advice and direction about investigation and/or control, as necessary. Acting upon the public health knowledge possessed by a CCDC allows the regulatory network to target the response most appropriately when taking action in connection with an incident (or suspected incident) of food-borne illness. The CCDC will provide medical information, which influences the shape of the response to an incident, and, as noted in section IV. above, may be nominated as the proper officer for the purpose of public health powers.⁴⁶ The CCDC may also act as an expert

⁴⁶ The proper officer will receive notifications of food-borne illness under the Health Protection (Notification) Regulations 2010/659, and prior to the 2010 reforms to the Public Health (Control of Disease) Act 1984 had responsibility for the exercise of many control powers.

witness, enhancing the regulatory capacity of the court by augmenting its knowledge of food-borne illness. Such assistance is provided in all incidents, where requested by local authorities.

Once an outbreak is formally declared, a CCDC plays a particular role in the response to it. The CCDC acts as chair of the formal OCT that coordinates the efforts to respond to and manage the outbreak.⁴⁷ He or she will also be responsible for the collation and dissemination of information necessary for control, and will lead discussion on the control efforts to be taken. The CCDC becomes the central actor in the investigation and control functions exercised by the regulatory network.

In England and Wales, Public Health England, an executive agency of the Department of Health,⁴⁸ and the Public Health Wales National Health Service Trust function to support local authorities and CCDCs in their response to food-borne illness. The Secretary of State for Health has a statutory responsibility to 'protect ... the public in England from disease', and may 'provide microbiological or other technical services' and 'information and advice'.⁴⁹ These duties are performed by Public Health England. The Public Health Wales National Health Service Trust has similar functions as part of its remit.⁵⁰

Nationally, the Public Health England collates and evaluates data received from local public health units to assess whether there is a national rise in, inter alia, particular food-borne illnesses that merits a response. If such a trend is shown, appropriate local authorities will be alerted.

Public Health England is also responsible for maintaining the regional microbiological network, employing public health microbiologists who are available to provide microbiological advice and to commission microbiological analysis, where necessary. This microbiological capacity increases the capacity of the network to gain information about the food-borne illness.⁵¹ Public Health England is also responsible for national reference laboratories responsible for testing and cross-typing samples obtained during an investigation into an incident of food-borne illness.⁵² It may also coordinate (alongside the OCT) the medical response to national incidents of food-borne illness.

⁴⁷ Food Standards Agency, *Management of outbreaks of food-borne illness in England and Wales*, above n 7, para 3.4.

⁴⁸ During some of incidents examined in this book the Health Protection Agency had responsibility for many of the public health functions now carried out by Public Health England. However, the Health Protection Agency was abolished by the Health and Social Care Act 2012, s 56.

⁴⁹ National Health Service Act 2006, s 2A.

⁵⁰ See Public Health Wales National Health Service Trust (Establishment) Order 2009, SI 2009/2058.

⁵¹ Where the risk is the result of contamination by an outside substance, a Public Analyst plays a similar role, providing analytical expertise that may contribute information to underpin control and enforcement actions.

⁵² Eg Colindale is the national reference laboratory for *E. Coli*.

VI. THE POLICE

Where an incident of food-borne illness results in death,⁵³ or where there is suspicion that the contamination of food was deliberate (eg bioterrorism or extortion attempts), the police may become involved. In South Wales the police were responsible for the collection and assembly of information following the death of Mason Jones as a result of the *E. coli* outbreak in 2005. The OCT and the local authorities remained responsible for the control of illness, and collected information necessary for that purpose.

The powers the police have available during investigations are different from, and in some ways more extensive than, those possessed by EHOs.⁵⁴ The police also have greater manpower and financial resources than local authority environmental health departments. They also have greater experience collecting evidence for the purpose of prosecution, although they are not as experienced as EHOs in dealing with food-borne illness. When investigating food-borne illness, the police work alongside EHOs in order that this expertise and experience can be utilised. The expertise and powers of the police increase the enforcement capacity of the regulatory network.

VII. FOOD BUSINESSES AND THEIR EMPLOYEES

Food businesses often play a central role in the regulatory network's response to food-borne illness. Food businesses have a greater informational capacity than other actors in the network. They have information about the source and destination of food products, and about the processes undertaken by their employees. They are able to enhance the network's ability to respond to food-borne illness, both by providing information and by implementing steps to control the spread of illness. Cooperation between food businesses and other network actors can therefore be exceptionally beneficial in the response, as regulatory goals can be more easily achieved when food businesses are enrolled into the network.

However, in some cases the rational self-interest of the firm in not incurring costs (both directly and indirectly imposed) as a result of self-reporting prevents the disclosure of information to the regulator by the regulated entity.⁵⁵ Concern regarding cost may also lead to businesses' reluctance

⁵³ Where death results there will be a Coroner's Inquest, and information gathered by EHOs and the police will be forwarded.

⁵⁴ Eg, the police have a power of arrest under Police and Criminal Evidence Act 1984, s 24. However, the powers of entry, search and seizure possessed by an EHO are greater than those found in the 1984 Act.

⁵⁵ Sarah L Stafford, 'Should you turn yourself in? The consequence of environmental self-policing' (2007) 26 *The Journal of Policy Management and Analysis* 305.

as regards implementing control measures, particularly where these are voluntary.⁵⁶

Where the business itself cannot be enrolled, network actors may seek to enrol its employees into the network. Employees have informational capacity beyond that possessed by other network actors, being present in the business more frequently and for longer than any other actor (including the upper management of the business, who will respond when the business is involved). Employees are able to provide information about the handling of food within the business, which may allow a likely source to be pinpointed and controlled, and to identify regulatory non-compliance.⁵⁷ They may either act with the encouragement of their employer, or may self-enrol without their employer's knowledge, blowing the whistle on regulatory non-compliance.

Whistleblowers are encouraged to self-enrol through the provision of protections in the event that they are subjected to detriment or dismissed on account of their whistleblowing. These protections are contained in part IVA of the Employment Rights Act 1996. In particular, disclosures to regulators, including local authorities and the Food Standards Agency, may fall within section 43F of the 1996 Act, provided that the employee can demonstrate that the disclosure was in the public interest, that he or she had a reasonable belief that the regulator could deal with the subject matter of the disclosure, that the disclosure falls within one or more of the categories set out in section 43B(1) and that the employee had a reasonable belief that the matters disclosed are substantially true. A breach of food safety or food hygiene requirements will normally fall within section 43B(1)(b) as a failure to comply with a legal obligation, or within section 43B(1)(d) as an action which may result in the health of an individual being endangered.

VIII. CONSUMERS

Consumers are enrolled into the regulatory network as the primary sufferers of food-borne illness. They can therefore provide information about an incident of food-borne illness, including their symptoms and food history. Such information would not be available to the network if it was not provided by consumers. They can also provide samples, both of food products that they have retained and of faecal matter, which can be analysed in order to provide information about the micro-organism responsible for the incident of food-borne illness.

⁵⁶ One EHO suggested that such reluctance stemmed from fear that liabilities would not be covered by insurers if voluntary action was taken (B/EHO1). It therefore may be necessary to enrol insurers into the network when considering control actions.

⁵⁷ For further consideration of the role of employees in regulatory networks, see Savage and Hyde, above n 5.

Consumers self-enrol into the network by contacting their local authority regarding the incident of food-borne illness. They may be encouraged to make contact by a medical professional, or may make contact of their own accord. By making contact consumers function to provide other network actors with information about food-borne illness and regulatory non-compliance that they might not otherwise possess, enhancing the capacity to investigate, and potentially the capacity to control and enforce. However, consumers can only provide a limited amount of information to the officers, and the quality of information may be limited by difficulties of perception (consumers may not be able to see the whole of the food preparation process and, of course, cannot visually perceive micro-organisms) and recall. These challenges will be explored in chapter six.

IX. CONCLUSION

Networked governance is essential to the management of the risks resulting from food-borne illness. Without a network of regulatory actors, it is unlikely that investigation, control and enforcement following incidents of food-borne illness could be undertaken successfully. Various actors are enrolled into the network. Each plays an important role in the networked response to food-borne illness. Local authorities are the central actor, as they have the greatest capacity to gather information, manage risk and change behaviour. However, they could not utilise their capacity without contributions from the other network actors, who play important roles in the network, enhancing the standard-setting capacity, the informational capacity, the control capacity and the enforcement capacity of the network.

In the next chapter the powers of the network actors, and the ways that can be used to manage an incident of food-borne illness, are considered.