

Report by Cath Graham, Meetings Secretary, following the meeting of Y& NE Branch of SOFHT Tuesday 27th January 2009, Asda House

PRIMARY AUTHORITIES

- An enforcement model for a brighter future?

The Regulatory Enforcement and Sanctions Act 2008 provides the Local Better Regulation Office (LBRO) with the statutory powers to promote better communication amongst local authorities, and between the LBRO and central government, providing a better basis for keeping the burdens of regulation on businesses to a minimum. A major feature of the Act is the establishment of primary authorities to oversee interests of businesses operating over more than one local authority area; it is envisaged that the primary authority partnership scheme will eventually replace the current Home Authority initiative (re food safety) and Lead Authority initiative (re Health & Safety); the new arrangements are scheduled to commence on 6 April 2009.

It is intended that the Primary Authority partnership scheme will deliver the consistency in local regulation that businesses have long sought. It should ensure that any company trading across council boundaries is guaranteed access to robust and reliable advice, provided through the creation of legal partnerships with local regulators involved with the relevant functions i.e. trading standards, environmental health and licensing.

At the SOFHT meeting Richard Parkinson of Pinsent Masons Solicitors outlined the contractual framework surrounding the arrangements between the local authorities and the traders; Stuart Wiggins, Trading Law Manager at Asda, provided the retailer's perspective on the Primary Authority.

Richard Parkinson drew attention to the Draft Primary Authority Guidance issued by LBRO in December 2008 (consultation closed at the end of February) which includes a template for a Primary Authority Agreement at Annex 2. When the final document is produced there will be a duty on local authorities to 'have regard' to this guidance when developing partnerships with businesses. The draft guidance sets out the content of the agreement - any business operating across council boundaries - regardless of its size - has the statutory right to form a partnership with a local authority in relation to regulatory compliance concerning the relevant functions. A partnership may also encompass more than one legal entity. For example, a parent company with a number of subsidiaries based in different locations may choose to have one partnership covering all of its operations, or have separate partnerships for the separate legal entities.

The meeting reviewed the key issues arising from the earlier consultation workshops with stakeholders regarding the LBRO draft guidance, these were:

- The complexity of Primary Authority arrangements with group companies, especially concerning the joint and several liabilities;
- The parties' (regulators and traders) obligations to each other, in particular the concept of a service level agreement - co-operation, information and assistance from all parties will be essential for partnership agreements;
- Consistency of approach versus flexibility to reflect particular agreements - some agreements may cover only one of the relevant functions, others may cover more -

the schedules to the agreements allow for flexibility in the specific detail to be included.

- Status of advice and guidance given by Local Authorities - the agreements could open a new possibility for local authorities to be sued for breach of contract.
- The impact of The Freedom of Information Act 2000 concerning the protection of commercial interests as partnerships are developed - there are some exemptions to disclosure of information to the regulator by the regulated company.

The relevant clauses of the LBRO draft guidance offering advice on all of the above issues were outlined at the meeting.

The scope of the legislation was considered to cause problems to retailers in that issues such as 'age related sales' were included in the scope of primary authority agreements yet 'alcohol licensing', a related activity, was not.

A major area of confusion for retailers operating across the UK is the geographic scope of primary authorities - in England and Wales they cover 17 areas of legislation, in Scotland only seven of these are covered, in Northern Ireland only two, this is due to the different legislative responsibilities of the devolved governments. If a food safety problem arose at a retailer's premises in Scotland then the Primary Authority for that retailer would not be able to advise on this issue as the Scottish Government is responsible for its own food safety and hygiene legislation, not the UK Government.

The cost of participation in primary authority agreements was an issue of concern for retailers - regulators can set a fee to cover their costs but they should not make a profit. Although retailers have a statutory right to set up a partnership with a regulator if they so wish, this is not compulsory, thus those retailers not participating could have a competitive advantage over those that do; the cost-benefits of participation have yet to be proved. The current informal Home Authority and Lead Authority initiatives, which operate without any fee to traders, could prove to be more beneficial, if indeed they continue to exist. A return on the investment of a primary authority partnership could be consistency in enforcement and prevention of unnecessary enforcement action, however, the return could take several years and the cost of the investment is not known - there may be considerable variation in the charging policy of different local authorities involved in the partnership agreements depending on the scope of the partnership and the number of companies involved.

The very limited three month trial period to April this year is considered inadequate for the considerations involved in developing a partnership particularly as budgets need to be adjusted to enable appropriate investment.

The meeting highlighted many concerns from both local authority representatives and from retailers. Varying views were expressed on the potential outcome of the primary authority partnerships - some favourable, others dismissive. As the consultation period ends for the LBRO guidance, the date approaches for implementation of the primary authority partnership scheme. Several Orders will come into force on the same day (6th April 2009) to clarify relevant terms including the definition of 'enforcement action' and the exemptions from the scheme. Time will tell if the scheme will provide the consistency in enforcement aspired to and the necessary return on investment for both the regulator and the regulated.