The Netherlands

The Duty for Food Business Operators to keep themselves informed

Rechtbank Leeuwarden 28 May 2004 – LJN – AP1271 (first instance) – Gerechtshof Leeuwarden 30 November 2006 – LJN – AZ3591 (appeal)

A criminal case heard by the District Court Leeuwarden and the Court of Appeal Leeuwarden, concerned the former Dutch equivalent to Article 14 of Regulation 178/2002: a ban on 'unsuitable' food. The provision concerned, Article 18 of the Consumer Products Safety Act, has now been changed into a provision that brings infringements of Article 14 GFL under criminal law.

The defendant was accused of selling food supplements on several dates in the second half of 2002, with levels of benz(a)pyrene of about 7.5, 9.5, 11.7, 22.5 and 28.4 micrograms per kilogram product. The defendant argued that he should not be held accountable because the producer had certified the reliability of the product. Further the legal norm 'unsuitable food' was too vague a basis for a criminal conviction.

The courts ruled that a trader in food should keep himself informed, according to his capability, on developments concerning safety and health and safety with regard to products in his line of business. Certification by the producer does not free the trader (brand holder) from the obligation to form his own opinion on the safety of the products he is selling. With regard to benzo(a)pyrene the case file showed the following:

- in 1987 the International Agency for Research on Cancer categorised it as probably carcinogenic;
- on 15 December 1999 the Dutch Minister of Public Health (VWS) in a letter to Parliament stated that the safety level is between 20 and 40 nanograms per kilogram bodyweight;
- by letter of 8 May 2000, this level was adjusted to 5 nanograms;
- in November 2001 the RIVM research institute for food safety issued a report giving a Virtually Safe Dose of 5, respectively 0.5 nanogram in combination with other polycyclic aromatic hydrocarbons (PAHs).

An expert testified that it has to be assumed that in the food supplements concerned, benzo(a)pyrene appeared in combination with other PAHs and that therefore, the level of 0.5 nanogram per kilogram bodyweight should be taken as standard. If the supplements were used according to the instructions of use, this level would be surpassed considerably. The level in the product was measured by the Dutch Food and Product Safety Authority (VWA).

The Court of Appeal rejected the argument that the defendant was only familiar with the letter of the Minister of VWS of December 1999, but not the one of May 2000. A food business operater has to heed the warnings issued by the competent authorities.

It also rejected the defendant's arguments against the validity of the methods applied by VWA, adopting observations given by the expert that VWA knows how to generate reliable results. In first instance the Court had ruled on this point that on the basis of experience it accepts the validity of measurements by VWA. The defendant had not produced counter evidence by a research institute like TNO. A report from an Italian laboratory that the defendant did bring forward did not convince the Court.

Food Safty Inspectors under administrative and criminal Law

Gerechtshof Leeuwarden – 24 February 2005 – LJN – AU1224[1]

During an inspection visit to a slaughterhouse, a VWA supervisory officer was denied the access he requested to documentation regarding the handling of high risk material. He reported this refusal on which subsequently a criminal prosecu-

1 LJN indicates the number under which case law can be found (in Dutch language) at: www.rechtspraak.nl.