Food Fraud: An ‘unsafe’ or ‘unfair’ case?

An analysis of the Dutch enforcement on food fraud laid down in legislation

Master Thesis

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“In many ways, the history of food fraud is the history of the modern world.”

- Bee Wilson

Abbreviations

ACM	Authority for Consumers and Markets
CA	Netherlands Consumers Authority
DCA	Dutch Consumers Organization
EA	Ministry of Economic Affairs
EPRS	European Parliament Research Service
EU	European Union
FBO	Food Business Operator
FSAI	Food Safety Authority Ireland
GFL	'General Food Law'; Regulation (EC) no. 178/2002
MS	Member States
NVWA	Dutch National Food and Consumer Product Safety Authority
RASFF	Rapid Alert System for Food and Feed
RCPC	'the Regulation on consumer protection cooperation'; Regulation (EC) no. 2006/2004
UCPD	'Unfair Commercial Practices Directive'; Directive 2005/29/EC
VWA	Food- and Consumer goods Authority
VWS	Ministry of Health, Welfare and Sport
WEL	Dutch Commodities Act on food labeling
Whc	Dutch Act on enforcement consumer protection

Preface

First and foremost, I would like to thank my supervisors Kai Purnhagen PhD and Prof. Dr. Mr. Bernd van der Meulen of the Wageningen University Law and Governance group for giving me the opportunity to conduct this research, following a discussion in between them on this subject matter. I firmly believe this was meant to be. Thank you Kai for giving me a solid framework to work from while giving me the freedom on the interpretation of the main research question. Thank you for putting your trust in me. This has been quite a journey for me from start to finish. I hope this report will be as interesting for the reader as it has been for me conducting this research.

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Abstract

This study is conducted in a form of a legal analysis where we will be interpreting the General Food Law (GFL) and the Unfair Commercial Practices Directive (UCPD) with the concept of food fraud. The concept of food fraud has been analyzed within the framework of the GFL, within the concept of 'unsafe food', and the UCPD, within the concept of 'unfair commercial business conduct', and which competent authority, either the NVWA (Dutch National Food and Consumer Product Safety Authority) through the GFL or the ACM (Authority for Consumers and Markets) through the UCPD, is responsible for the enforcement of food fraud.

Both the GFL and the UCPD have grounds to interfere with food fraud. On one side, food fraud is mentioned in the GFL in article 8 where it prohibits this practice. However, not much is said in the GFL on the prevention or enforcement against food fraud nor does it give an explanation on how to interpret food fraud as a practice. On the other hand, food fraud can be interpreted as an unfair business practice: an act that distorts the consumers' economic interest and relates to competitors who are harming legitimate businesses by unfair competition for their own financial gain.

Currently, there is no legislative definition or legal description in the EU or in the Netherlands on the term 'food fraud'. People do use the term food fraud, but the concept of food fraud is ambiguous as it is not clear what it truly means (according to law). It is, however, generally accepted that food fraud is an intentional act for financial gain with different types of manifestations such as adulteration, counterfeiting, and substitution, and deliberate mislabeling of goods. Although food fraud has been with us since the beginning of modern history, it is a relatively new issue on the agenda of the EU.

Looking at the GFL and UCPD we cannot pick one of the legislations as the solution for the enforcement of food fraud as we see a gap on how to cover food fraud as a genuine problem as well as how the competent authority should be dealing with food fraud in both legislations. The GFL and the UCPD seem to touch upon this as a subject but do not indicate much on how food fraud (in particular) must be managed and dealt with by the competent authorities.

While the GFL has a science-based risk assessment approach, the UCPD is more of an administrative and legal assessment approach. When we look at food fraud as a practice, we see a complex practice that involves food and the possibility that the food is harmful but it also involves an economic (fraudulent) dimension to it which science alone cannot provide the answer to.

Keywords: Food Fraud, General Food Law, GFL, Unfair Commercial Practice Directive, UCPD, consumer protection, public health welfare, NVWA, Dutch National Food and Consumer Product Safety Authority, ACM, Authority for Consumers and Markets.

Table of Contents

I. The scenarios

Food fraud is a current issue but an old problem. Not much attention is paid towards this issue as the European food legislation is mostly based on food safety and the prevention of (unintended) unfitness and potentially harmful food for human consumption through contamination. In short, food fraud is not clearly recognized (yet) in legislative form. Neither in food policy nor in criminology (Croall 2007;2012).

Since the melamine scandal of 2008 broke out in China, it was clear that food fraud could have global consequences, affecting consumers' trust and the economy. Companies went bankrupt and the Chinese milk industry is still suffering from the scandal as consumers still shun their products, even now, six years later. The consumers' trust in their domestic products is so low that they prefer to import infant milk powder from Western countries, causing shortages of infant milk powder in those countries.[1] However, food fraud comes in many shapes and forms as seen in the recent horsemeat scandal of 2013 (with the Netherlands being at the centre of the scandal), which was not a threat to public health but it did make an impact on policy makers and on the consumers' trust and interests. Through these types of scandals, people got more aware of the fact that food is a sensitive and widely used item for the deliberate creation of unfit and potentially harmful food for human consumption.

The question now stands which authority/legal system is responsible for dealing with food fraud in the Netherlands, as the government can be facilitators in establishing (global) standards and sharing intelligence in order to prevent such threats. Currently, food fraud can be seen from different kinds of perspectives[2]:

- From a food safety point of view ('unsafe food');
- From an unfair competition/business practice in between food business operators' point of view.

In each case, food fraud is placed in a different type of context, which also means eventually a different type of legal system and approach from the authorities:

The concept of 'unsafe' food

In regard of the concept of 'unsafe' food, we will be using Regulation (EC) no. 178/2002 (General Food Law; hereby, GFL) as our focus point. The preamble of the GFL describes the following: the free movement of safe and wholesome food is an essential aspect of the internal market.

Moreover, the GFL states that a high level of protection of human life and health should be assured. All aspects of the food chain therefore shall be seen as a continuum from (and including) primary production and the production of animal feed up to and including sale or supply of food to the consumer. Each element of the food chain may have a potential impact

[1] NRC newspaper, news: infant milk powder shortage due to Chinese. Taken on 27 June 2014. Available via: http://www.nrc.nl/nieuws/2013/03/05/chinezen-zorgen-voor-tekort-aan-babymelkpoeder/

[2] We will leave out the judicial and criminal approach for this research, as the scope of this research is not directed on penal and/or criminal approaches.

on the safety of the food. The GFL emphasizes the general obligation of (economic) food operators to only market food that is safe for human consumption.

The term 'unsafe' deals with food fraud as a food[3] product, which is harmful for human consumption and health by means of its production or documentation by the supplier/manufacturer/food business. Food fraud therefore violates the basic principle of the GFL, which states that the food safety and the consumer's interest should be secured by providing/market only food which is safe for human consumption.

It is, however, not mentioned in the GFL on how to protect consumers from fraudulent practices, and how the prevention of these practices from happening. Although food fraud has been with humankind since the beginning of modern history (Wilson, 2008), it is a relatively new issue on the agenda of the European Union (hereby; EU) as it has never been a key priority for the European and national legislation. The focus has mainly been around the concept of food safety and the accidental happening of food safety issues instead of deliberate actions by manufacturers/suppliers/producers/operators/importers.

There is a way within the GFL, to protect the consumers if the concept of food fraud is being linked to the concept of the product being 'unsafe' though reasoning within the principles of food law procedures in matters of food safety and the acceptability of the food for human consumption (GFL, Article 14). The concept of 'unsafe' food is somewhat a broad and general term through reasoning conducted within the GFL. But how much and how well is food fraud covered in terms of food safety and being 'unsafe' within the principles of the GFL and is this enough?

As the NVWA is the competent authority (GFL, Article 17(2)) for the enforcement on food safety, monitoring and verification, it is necessary for the organization to be enabled to exert its controlling role. The NVWA is currently (as for December 2013) gearing up to be more proactive when it comes to the control on 'food fraud' through the action- and intervention plan of the Dutch government (with the support of the Dutch food industry). The 'Action plan NVWA' was presented by the Minister of Health, Welfare and Sport (VWS) and the State secretary of Economic Affairs (EA) on December 19th, 2013, which laid out the plan to increase the budget and manpower of the NVWA for the coming four years to improve its efficiency, quality and capability. However, the NVWA can only act on 'food fraud' if there is a connection made between the practice/situation and the jeopardy of the public health on terms of 'unsafe' food (GFL, Article 14(2)). This means they have to use reasoning throughout the GFL to support their claim of being the competent authority in dealing with food fraud.

The concept of 'unfair competition in-between businesses'

The concept of unfair competition not only refers to business ethics, but also consumer protection. For the concept of 'unfair competition', we will be using Directive 2005/29/EC as the focus point (Unfair Commercial Practices Directive; hereby UCPD). This directive concerns the approximation of the laws of Member States on unfair commercial practices,

[3] Regulation (EC) no. 178/2002, article 2: 'food' (or 'foodstuff') means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. 'Food' includes water, chewing gum and any substance, including water, intentionally incorporated into the food during it's manufacture, preparation or treatment […].

including unfair advertising, which directly harm consumers' economic interests of legitimate competitors (UCPD; sixth recital preamble). This directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules (UCPD; eight recital preamble).

Here, the Authority for Consumer and Markets (hereby ACM) is the competent authority for the enforcement, monitoring and verification on unfair commercial practices [4]. This organization can also lay down penalties for businesses that are not abiding the rules on fair business practices and misleading the consumers. The directive 2005/29/EC (Unfair Commercial Practices Directive; UCPD) relates to:

- The existence or nature of the product;
- The main characteristics of the product (for example: it's composition, geographical origin);
- The price, the trader's commitments and the nature of the sales procedures;
- The need for a service or repair;
- The trader (for example: their identity, Code of conduct);
- Consumer rights on the sale of consumer goods.

The directive also prohibits businesses from comparative marketing and advertising with products from (direct) competition of the business, which influences the consumers' economic behaviour. Omission of necessary information in order to make informed choices shall be regarded as misleading as well, by misleading practice by omission.

Consumer organizations (such as the Dutch Consumers Association and Food Watch) can also act and take legal actions based on the UCPD, giving them a platform and basis to act on the behalf of the average consumer against these practices. It must be noted that they do not have authority to enforce the UCPD. However, they can use the UCPD as an incentive to direct and stimulate the government in taking action on behalf of the consumer. In this research we will not focus on these parties, as they are not positioned to act as a competent authority but rather as non-profit organization on the protection of consumers' interests.

Which way to go?

From here, different possibilities on Dutch authority bodies arise to deal with food fraud, based on the two different points of views:

1. National Food and Consumer Product Safety Authority (NVWA) though reasoning on food safety by classifying food fraud as 'unsafe' food;
2. Authority of Consumer and Markets (ACM) though reasoning on unfair business practices;
3. Both authorities due to overlap in legislation;
4. Something else.

To determine which authority body and legal system should deal with food fraud, it is necessary to look at not only food fraud as a norm on itself, but also to the current enforcement practice and how it should be conducted according to legislation.

[4] Commercial practice as described in Directive 2005/29/EC, article 2 (d): "any act, omission, code of conduct of representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

Materials and Methods

This research will be conducted as a legal analysis where we will be interpreting the existing legislation with the concept of food fraud. We will be analyzing the concept of food fraud within the frames of the GFL (within the concept of 'unsafe food') and the UCPD (within the concept of 'unfair commercial business conduct') as mentioned in the previous section. This will mainly be a desk/literature research where we will try to find the answers to the questions through available legal (regulations and directives), public information of the NVWA and ACM (the operations, business conduct and management of both public authorities), public documents (letters to the House of Representatives, case-law) and (scientific) literature.

Research breakdown and framework

The main question of the paper is how food fraud should be dealt with within the Netherlands (either through the GFL or UCPD) and which public authority should act as the competent authority against this practice.

To answer the main question the following sub-questions will be asked and answered:

- What is food fraud?
- Does the 'unsafe' food concept of the GFL give enough reason for the NVWA to act as the competent authority against food fraud?
    - The NVWA as competent authority.
- Does the concept of 'unfair business practices' of the UCPD give enough reason for the ACM as the competent authority against food fraud?
    - The ACM as competent authority.

First of all, it is important to establish what food fraud is by looking at its current description, and also how the Dutch authorities have dealt with food fraud in the past in order to establish a clear view and understanding of the concept of food fraud not only on paper, but also in practice.

Second, the concept of food fraud will then not only be put next to the GFL and UCPD for interpretation as 'unsafe food' and as 'unfair commercial business conduct', but also within the work frame of the NVWA and ACM as these are the competent authorities of the GFL (NVWA) and UCPD (AC). Their competence and potential as the designated public authority to deal with food fraud will be analyzed but also their limitations within these frames.

From here we can establish a conclusion whether the GFL or the UCPD should be reason for either the NVWA or the ACM to interfere in case of food fraud, taking into account their respective capacities in dealing with such a case.

II. What is food fraud?

Currently, there is no legislative definition or legal description in the EU or in the Netherlands on the term 'food fraud'. People do use the term food fraud, but the concept of food fraud is vague as it is not clear what it truly means (according to law). It is, however, generally accepted (EPRS; 2014) that food fraud is an intentional act for financial gain with different types of manifestations such as adulteration, counterfeiting and substitution and deliberate mislabeling of goods.

Food fraud has never been a key priority for the European and national food legislators as food legislation in the EU has mostly been focused on food safety and the prevention of unintentional acts in regards on food safety hazards[5]. (EPRS 2014)

According to the 2014 report of The European Parliament Research Service (EPRS) and the report of Spink and Moyer (2011), food fraud is an intentional act for economic and financial gain, whereas a food safety incident is an unintentional act (with unintentional harm). However, factors contributing why food fraud occurs differ. Several factors contributing towards the occurrence of food fraud include (EPRS; 2014 and Spink & Moyer; 2011):

- Increase of food prices, but demand for cheap(er) food;
- Food supply chain is getting more complex, longer and international/intercontinental (making it more difficult to retrace information);
- Control services/authorities/bodies are put under pressure (cq. lower budget and staffing but more tasks);
- A lack of focus on food fraud, in stead the focus is more on food safety;
- The financial crisis;
- Low risk of detection;
- Benefits outweighing the penalties (if perpetrator is caught).

Due to a lack of definition, a gray area is created in which there is still have some free interpretation on what food fraud actually is. This also means that there is not a clear view on how widespread this problem is and how to prevent these practices from happening. Do people commit food fraud because our food chains are getting more international and complex? Are the benefits of food fraud outweighing the disadvantages (the punitive sanctions)? Or is food fraud a consequence of the growing power of retailers who want to buy their products in on the cheapest price?

The horsemeat scandal of 2013

We will use the horsemeat scandal of last year as an example as this scandal is deemed as 'food fraud'. This case shall serve as a working example to determine how food fraud is interpreted and dealt with in the Netherlands. The scandal is an example of the interpretation of "being unsafe" in action, as the measures on the horsemeat fraud was taken based on the concept of 'unsafe' food. But is this the correct way to deal with food fraud in the Dutch legal system?

When the horsemeat scandal first emerged at the beginning of 2013, the Dutch National Food and Consumer Product Safety Authority (hereby, NVWA) only acted on the reasoning of 'possible food safety issues' with beef and beef products containing horsemeat. As stated

[5] Regulation (EC) no. 178/2002, article 3 (14): 'hazard' means a biological, chemical or physical agent in, or condition of, food or feed with the potential to cause an adverse health effect.

in Article 18(2) and (3) of the GFL, all FBO should be able to identify the FBO whom has supplied them and whom they are supplying (one step back and one step forward principle) in order to verify requirements on food safety are met. The reasoning was that the products were pulled off the market due to the requirements of the food safety of the meat could not be guaranteed, as the origins of the horsemeat were unclear and/or unknown.

The beginnings

On 16 January 2013, the first notification (on this case) for the European Community came in from the Food Safety Authority Ireland (FSAI). They found horse DNA in beef burger patties were sold in the United Kingdom and Ireland. Three weeks later, on the 8th of February the United Kingdom alerted the Community via the Rapid Alert System for Food and Feed (hereby RASFF) that they had discovered that the beef lasagna from the Swedish 'Findus Beef' contained more than 60% horsemeat, which was not mentioned on the food label. After this alert the Netherlands immediately pulled these products from the Dutch market (through a silent recall) on reasoning of incorrect labeling.

Horsemeat scandal in the Netherlands

On 14 February 2013, the Secretary of State for Economic Affairs and the Minister of Public Health, Welfare and Sports wrote a letter to the chairman of the House of Representatives informing on the measures that the NVWA shall be taking (overview of recalls and the sampling of products), based on the information gathered from other countries as well as their own information on the horsemeat issue (NVWA/2013/1352).

The preliminary classification of the horsemeat scandal

At that point in time, it was not clear how big the impact of the scandal was and what the results were from the samples taken from the products. Although horsemeat does not differ much from other meat products, the origin of the meat (legally slaughtered or illegally slaughtered) mattered in case of food safety:

- If the horsemeat comes from a legally slaughtered horse (cq. a competent authority approves it): There is no risk on the food safety as the meat can be traced back to its source. These horses are raised and slaughtered in accordance to relevant Community provisions. The mislabeling can then be classified as a violation of the Commodities Act on food labeling, article 20 and 29(1) (Warenwetbesluit Etikettering van Levensmiddelen. Hereby WEL).
- If the horsemeat comes from a illegally slaughtered horse: The could be a possibility of a health risk as there is no certainty the animals are raised and slaughtered according to Community provisions on for example: residues of veterinary medications and transmittable diseases. From this standpoint, this violation can be classified as a violation on the GFL, article 14(8) on food safety requirements, article 18(2), article 18(4) on traceability and article 11[6] on food and feed imported to the Community.

[6] Regulation (EC) no. 178/2002, article 11: Food and feed imported into the Community for placing on the market within the Community shall comply with the relevant requirements of food law or conditions recognized by the Community to be at least equivalent thereto, or where a specific agreement exists between the Community and the exporting country, with requirements contained therein.

Role of the NVWA and the reasoning of dealing with food fraud from the term 'unsafe' as mentioned in the GFL

The mislabeled products were pulled off the market by the NVWA due to 'misleading', as there was no mention of horsemeat on the food information label, based on article 16, 18(4) and 19(1). Article 18(4) of the GFL states that food placed on the market shall be adequately labeled or identified to facilitate its traceability by relevant documentation or information in accordance with the relevant requirements of more specific provisions. Article 16 of the GFL also mentions that the information of food and feed, made available through labeling, advertising and presentation (including its shape, appearance, packaging, packaging material, arrangement and display setting) shall not mislead the consumer.

Upon further investigation of the NVWA, it was discovered that the relevant documentation on the origins of the meat was incomplete and/or falsified. Due to this, it became hard to identify the source and the origins of the horsemeat. This is in turn also a violation of article 18(2) of the GFL, which states that a food business operator (hereby, FBO) should be able to identify any person from whom they have been supplied from.

On the 12th of February, a second RASFF notification came in concerning stored frozen horsemeat from Romania, with origins from Cyprus and the Netherlands. The NVWA contacted the respective company and visited its storage the day after, taking samples of the stored frozen horsemeat and blocked the lot of horsemeat[7] up until further notice and test results. Following this case, the NVWA started an investigation within the whole supply chain of the meat, by taking randomly based samples of the horsemeat and testing these on residues of veterinary drugs as well as intensified inspections depending on the type of business.

The NVWA took measures by setting up a large scale monitoring study by taking samples of meat and meat products, based on article 18 and 19 of the GFL on traceability[8] and responsibilities for FBOs (as for December 2013, more than 500 samples were taken and tested up until that point) in order to identify the origins of the meat and for the presence of residues of veterinary drugs. If the test results showed that (traces of) horsemeat was found in the product but the origins could not be traced back in the administrative papers of the FBO, the origin of the horsemeat was deemed unclear or unknown due to (possible) false/incorrect labeling/documentation. The requirements on the (food) safety of the meat could not be guaranteed from that point and therefore the product has to be removed from the market under the 'precautionary principle' (GFL, article 7)[9] as it could potentially be 'unsafe' for human consumption due to unknown origins.

[7] The blockage was enforced by the NVWA using their executive authority through the Administrative Law. Source: NVWA/2013/1352.

[8] Regulation (EC) no. 178/2002, article 3(15): 'traceability means the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution.

[9] Regulation (EC) no. 178/2002, article 7: (1) In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment. (2) Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen within the Community, regard being had to

The act of pulling off the products from the market was based upon Article 18(4) of the GFL, which states that the food which is placed on the market shall be adequately labeled or identified to facilitate its traceability by relevant documentation or information in accordance with the relevant requirements of more specific provisions. Article 16 of the GFL also mentions that the information, made available through labeling, advertising and presentation (including its shape, appearance, packaging, packaging material, arrangement and display setting) of food and feed may not mislead the consumer.

The risk-assessment

The independent Office of Risk Assessment and Research program (hereby, BuRo), which is an associate party of the NVWA, launched a scientific risk analysis investigation on the possibility of harmful effects on public health through microbiological risks and the presence of veterinary drugs.

The investigation on the presence of veterinary drugs focused in particular on phenylbutazon[10], a prostaglandin synthetase inhibitor, which is a forbidden drug in horsemeat intended for human consumption. If a horse is treated with phenylbutazon in some point in its life, it cannot enter the food chain (Commission Regulation (EC) 37/2010, article 20). In humans, a 'therapeutic dose' of phenylbutazon would cause harmful effects in approximately 1 in 30.000 patients as phenylbutazon and the metabolite oxyphenbutazone can have a toxic effect on the bone marrow. It must be mentioned that it is not yet known what kind of dosage this effects triggers.[11]

BuRo concluded in their risk assessment that in regards with the microbiological risks, it was advisable to ensure that the raw horsemeat should be adequately and hygienically prepared and heated before consumption, just like 'regular' raw meat. As for the phenylbutazon, BuRo has estimated that the risk of adverse (toxic) effects in humans from consuming horsemeat would be very small, even with occasional consumption, as the dosage phenylbutazon from the horsemeat consumption is a lot lower than the prescribed dosages through medication.[11] The research conducted by the NVWA from the beginning of 2013 on the samples taken from various meat products has shown that no traces of phenylbutazon or any other medication, that were allowed in horses (intended for human consumption), was found.[12]

However, due to the fact that the drug is forbidden in horsemeat intended for consumption, BuRo has advised to maintain a strict zero-tolerance policy (which is in line with GFL, article 14(4)(c) and Commission Regulation (EC) 37/2010, article 20) and advises to remove all

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technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.

[10] Taken from the pharmacotherapeutic compass on 9 January 2013, available in Dutch text: http://www.fk.cvz.nl/preparaatteksten/f/fenylbutazon.asp: phenylbutazon is a prostaglandin synthetase inhibitor. This drug is used as a painkiller and an anti-inflammatory agent.

[11] Taken from the Advice to the Minister of Health, Welfare and Sport and the Minister of Agriculture on the risks to public health from horsemeat from unknown origin.

[12] Taken on 22 January 2014 from the NVWA website. Available via: http://www.nvwa.nl/onderwerpen/verontreinigingen/dossier/fenylbutazon/hoe-vaak-is-fenylbutazon-in-paardenvlees-aangetroffen

phenylbutazon contaminated horsemeat from the market if discovered as it is not known if the meat complies with food safety regulations and standards of the Community provisions.[13]

In 2014, the EPRS states in their Fighting food fraud report that the test results of the horsemeat scandal revealed that public health was not at risk and that this was a case of food fraud rather than food safety (EPRS, 2014), these conclusions were also backed up by DG Sanco.[14] In the Netherlands, there was no differentiation made between food fraud and food safety by neither NVWA nor BuRo during the scandal. Treating the scandal as a (potential) food safety issue by deciding to maintain a strict zero-tolerance policy.

The case of Willy Selten

The horsemeat scandal of 2013 went together with the (criminal) investigation of Willy Selten, the owner of a large meat processor company in the Netherlands. In February 2013, the NVWA halted the processing of meat at the company as the NVWA suspects that the company is mixing horsemeat with beef and afterwards sells it as 'pure' beef. It also seized the available inventory of the company (around 2 million kg of meat) and effectively blocked its trade by putting it into a safe hold.

The NVWA ordered all costumers and purchasers of the meat of Willy Selten to trace back about 50.000 tons of meat and to remove them from the market as it was unclear where the source of the meat is as the administration of Selten on the source of the meat was falsified and incomplete. The identity, origins and traceability of the meat could not be determined.

In May the source of the horsemeat was traced back by the media. Contrary what was believed that the meat have come from dubious slaughterhouses from East Europe, the meat was actually delivered to Selten through Irish and British criminal gangs whom have illegally slaughtered ten thousands of horses. The meat mixed with regular beef after arrival at Selten and sold as 'pure' beef by the company. In the same month, the owner Willy Selten was arrested and held for three days on suspicion of forgery and fraud as it was suspected he has processed 300.000 kilos of illegal horsemeat.

By the end of the year, the company was declared bankrupt. The curator of the company started a preliminary injunction against the NVWA as the latter refused to release to the seized meat back onto the market. The plaintiff claimed that the meat was safe as it was part of a large batch, which was already sold/consumed for 70% without problems before the seizure. However, the judge rebuffed the claim of the plaintiff, stating that the administration of the company is not reliable as it had inconsistencies. The data showed that there was more meat sold than was purchased. It was also not possible to determine the origins of the meat nor which batch/lot/consignment the unregistered meat has gone into. The seized meat was therefor not guaranteed to be safe for human consumption according to the judge and therefore the judge ruled in favour of the defendant by upholding the decision of the NVWA to keep the meat in the holding-cell.

[13] Taken on 5 January 2014 from the Dutch governmental website: Available http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/02/25/vervolgbrief-paardenvlees.html

[14] The gathered evidence did not point to a food safety or public health issue, but rather an issue of fraudulent labeling. Retrieved 1 august 2014, Available via: http://ec.europa.eu/food/food/horsemeat/index_en.htm

Although the case of Willy Selten was upheld due to administrative inconstancies, subjective observations are more difficult to interpret. The judgment of foodstuff being unsafe or unfit for human consumption must be considered well, as the following actions and decisions can have serious consequences on, for example, the consumers' interest and confidence, as well for businesses (as invoking such measures gives rise to barriers to the free movement of goods). Another example on the dispute of interpretation of 'food being unsafe' between a public authority and a FBO can be found in Case-C636/11 from the Court of Justice of the European Union; Karl Berger v Freistaat Bayern where the dispute lies between the precautionary measures taken by the competent authority and the validity of their decisions against the protection of the business and its position.

Karl Berger v Freistaat Bayern

The company Berger Wild GmbH (now Höchlander Wild GmbH) sued the Free State of Bavaria for the 'disproportionate' actions taken by the competent minister on the public recall and 'malicious information giving' on their wild meat and game meat products. The dispute mainly focused on taking the responsibility of informing the consumer and in what extent to inform the consumers together with the interpretation of Article 10 of the GFL:

> *"Without prejudice to applicable provisions of Community and national law on access to documents, where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or food, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk."*

The case is a dispute between the company and the Bavarian Ministry on the question of unfit for human consumption and the informing of the public. In 2006, the Passau Veterinary Office conducted official inspection at several establishments of the company, taking nine samples of five products to test as the establishments was deemed to be in a unhygienic condition with the food products giving off a rancid/nauseous/musty/smell. The test results on the food deemed the food unfit for human consumption, with six out of the nine samples already showed signs of decomposition.

The competent Bavarian Ministry deemed the food unsafe for human consumption (following Article 14 of GFL on the criteria of unfit food) and ordered the company to inform the public immediately and effectively about the products. If the company would not comply with the given orders, then the public authorities would take over the task of informing the public themselves. The company disagreed and rejected the order, arguing that the decision was disproportionate and proposed for a 'product warning' on the products instead as an appropriate measure. The products were, in the view of the company, fit and safe to human health, even though some products could give off an unpleasant smell.

Following this, the competent Bavarian Ministry issued several press releases announcing that the products of Berger Wild were to be recalled, citing the poor hygienic conditions and test results of the products as reasons to do so as well as temporarily halting the business for manufacturing and marketing their products by declaring the company insolvent. Furthermore, the Commission issued a RASFF alert following the information form the

Bavarian Ministry.[15] Wilder Berg GmbH proceeded to sue the Free State of Bavaria as a result of considerable losses due to the press releases of the authority by stating that Article 10 of the GFL should only be used to warn the public if there was an actual threat to human health and not when a foodstuff was deemed as 'only unfit' for human consumption.

The Court of Justice however, concluded after an analysis of the GFL that the Free State of Bavaria was justified as it refers to Article 17(2) of the GFL, which states that a MS shall enforce food law, and monitory and verify that relevant requirements are fulfilled by all FBO. Therefore, a competent authority shall maintain a system of official controls and measures (appropriate to circumstances), including public communication. The requirement on the safety of the food is not fulfilled and deemed unfit for human consumption through analysis of several samples of the food, with six of the nine samples showing signs of putrefaction and decomposition (GFL, Article 14(5)). Food unfit for human consumption shall be deemed unsafe according to GFL, Article 14(2) and in order to reach a high level of human life and health protection (GFL, Article 5) it was therefore deemed that public information and communication as done by the Free State of Bavaria was not disproportionate in the eyes of the Court of Justice of the European Union.

Whereas one case clearly deals with food fraud due to the nature of the operation by deliberately mixing in horsemeat in the product and selling it as 'pure' beef without a real threat to the human health. The other case deals with a food safety incident and deeming the products unfit for human consumption due to unhygienic practices. Both cases evoked the competent authorities to react with 'bold' measures. However, both cases are treated much in the same manner by the competent authorities on the classification of both cases by deeming the products in both cases unsafe for human consumption but on different grounds of reasons. However, is this also the correct way to deal with food fraud as a competent authority or is there another way?

[15] RASFF Alert, week 4 2006. Available via: https://webgate.ec.europa.eu/rasff-window/portal/?event=notificationDetail&NOTIF_REFERENCE=2006.0071

III. Legal Analysis

As there is no legal description of food fraud, we need to find legislation which follows-up on the subject. Looking at the horsemeat scandal of 2013, we can see that the GFL was the main legislation, which was put in to practice in order to deal with food fraud. Along the way, the focus from inadequate labeling shifted towards '(potential) unsafe food' as mentioned in Article 14(6) of the GFL, which was followed, by the implementation of 'precautionary measures'[16] (mentioned in Article 7 of GFL) in dealing with the case.

We will also look at Directive 2005/29/EC, the Unfair Commercial Practices Directive (hereby UCPD) as the generally accepted description of food fraud describes food fraud as an intentional act for financial gain by using food as a tool for their goal. Not only do these businesses dupe the consumers by their misleading practices. They also conduct unfair commercial practices by benefiting from these practices more than their competition do, by creating an unfair competition between them and their direct competitors.

We will look at these regulations in order to establish which authority should take the lead on the enforcement against food fraud. Here we can take two points of view, one from the consumer protection view and the other from the verification of compliance with food legislation view.

Food fraud interpreted as "unsafe" food as a reason to interfere for the National Food and Consumer Product Safety Authority (NVWA)

For this theory, we assume that Regulation (EC) no. 178/2002 (General Food Law; GFL) has to deal with the concept of food fraud, making the NVWA in charge of dealing with the emerging food fraud cases as competent body of the authorities (Article 17(2)).

The question regarding to this matter is: "How much and how well food fraud is covered in terms of food safety as being 'unsafe' within the principles of the GFL and if this is enough for the NVWA to act on as the competent body in food fraud cases."

The horsemeat scandal of 2013 is an example of the interpretation of 'being unsafe' in action as the measures on the horsemeat scandal was taken based on the concept of 'unsafe' food. But were these actions justified and the correct way in dealing with food fraud?

Scope of the GFL

Article 1(1) and (2) of the GFL states that the aim and scope of the regulation is to provide a basis for the assurance of a high level of protection of human health and consumers' interest in relation to food[17] and to lay down procedures for matters with a direct or indirect impact on

[16] Regulation (EC) no. 178/2002, article 7: 'precautionary principle': in specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment. The measures taken shall be proportionate and no more restrictive of trade than required.

[17] Regulation (EC) no. 178/2002, article 2: 'food' (or 'foodstuff) means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans. 'Food' includes drink, chewing gum and any substance, including water, intentionally incorporated

the food and feed safety. By having general requirements on the placement of safe food on the market, the EU can maintain the free movement of food and a effectively functioning of the internal market.

Article 5 lays down the general objectives of what food law should pursue:

> *"Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and environment."*

According to the GFL, the inadvertent or deliberate contamination and adulteration or fraudulent or other bad practices related to food products may give rise to a (in)direct impact on food safety. It is therefore necessary to take all aspects of food production chain as a continuum in consideration, as each element may have a potential impact on the safety of food (thirteenth and fourteenth recital preamble GFL). Article 14 of the GFL describes the classification qualifications of such cases.

'Unsafe food as a concept'

Article 14(1) and (2) of the GFL states: food shall not be placed on the market[18] if it is deemed unsafe. But when is something called 'unsafe' and what is the meaning of being 'unsafe' according to article 14 of the GFL?

The food shall be deemed unsafe if it is injurious to health or/and unfit for human consumption and when there is reason to believe or to suspect the food is unsafe. Article 14(3), (4), (5) and (6) distinguish the terms of being unsafe, injurious to health and unfit for human consumption:

- Unsafe: if injurious to health or unfit for human consumption;
- Injurious to health: unacceptability of the food due to (for example): contamination, the presence of foreign object, (foul) odor/taste and deterioration;
- Unfit for human consumption: potential harm to human health including specific persons considering specific types of foods (allergens).

Every foodstuff in the same batch, lot or consignment of the same class or description of an unsafe food shall be classified as unsafe, unless proven otherwise through detailed assessment. (See table 1 for overview of the particulars of Article 14 (3-6)).

A food shall be deemed safe if the food complies with specific Union provisions (and if none than the food must comply with the national food law provisions of the marketed territory)

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into the food during its manufacture, preparation or treatment. […] 'Food' shall not include: (a) feed; (b) live animals unless they are prepared for placing on the market as human consumption; (c) plants prior to harvesting; (d) medicinal products within the meaning of Council Directives 65/65/EEC and 92/73/EEC; (e) cosmetics within the meaning of Council Directive 76/768/EEC; (f) tobacco and tobacco within the meaning of Council Directive 89/622/EEC; (g) narcotics or psychotropic substances within the meaning of the United Nations Single Convention on Narcotic Drugs, 1961, and the United Nations Convention on Psychotropic Substances, 1971; (h) residues and contaminants.

[18] Regulation (EC) no. 178/2002, article 3(8): 'placing on the market' means the holding of food or feed for the purpose of sale, including offering for sale in any other form of transfer, whether free of charge or not, and the sale, distribution, and other forms of transfer themselves.

governing food safety in as so far the aspects are covered. However, when there is a reason to suspect that the food, despite the conformity, is unsafe, the competent authorities may take measures to remove the product from the market or impose restrictions (GFL, article 14(7)(8)(9)).

Unsafe	Injurious to health	Unfit for human consumption
• Differentiation in regards to the normal conditions of the use by the consumer. • Differentiation in regards to all stages of production, processing and distribution in regards to the normal conditions. • Differentiation in regards to (the normal condition in which) information towards the consumer, including label information or other generally available information towards the consumer in regards to the avoidance of specific adverse health effects from a particular food or category of food is given.	• Probable immediate and/or short-term/long-term effects of that food in the health of a person consuming it, but also on subsequent generations. • Probable cumulative toxic effects. • Particular health sensitivities of a specific health category of consumers where the food is intended for that category of people.	• Unacceptable for human consumption according to its intended use, for reasons of contamination (whether by extraneous matter or otherwise), or through putrefaction, deterioration or decay. • Part of a batch, lot or consignment of food of the same class or description of any food that is unsafe. It shall be presumed that all the food in that batch, lot or consignment is also unsafe, unless following a detailed assessment there is no evidence that the rest of the batch, lot or consignment is unsafe.

Table 1: Overview of the differences in between 'unsafe', 'injurious to health', 'unfit for human consumption', taken from Regulation (EC) no. 178/2002, article 14.

To ensure that the withdrawal of potential unsafe food from the market is targeted and accurate, it is necessary to have a comprehensive system of traceability.[19] The FBO must at least identify one step back and one step forward (the supplier as well as the clients to whom the FBO had distributed its products to). The information on traceability of the products must be placed in such procedures and systems that the information can be presented and made available to the competent authorities on demand (GFL, Article 18). Experience has shown that where and when it is impossible to trace food, the functioning of the internal market can be jeopardized through unnecessary wider disruption of the food safety issue (GFL, twenty-eighth recital preamble).

A FBO is best placed to devise a safe system for the supply of food and the safety of the food, thus the primary legal responsibility on safe food should lie there (GFL, thirtieth recital

[19] Regulation (EC) no. 178/2002, article 3(15): 'traceability' means the ability to trace and follow a food, feed, food-producing animal or substance intended to be, or expected to be incorporated into a food or feed, through all stages of production, processing and distribution.

preamble), while the competent authorities should control and verify that the legal requirements are met through a system of official controls (GFL, Article 17(2)).

When a FBO has any reason to believe that a food, which they have imported, exported, produced, processed, manufactured or distributed, is not in compliance with food safety requirements, the food shall be immediately be withdrawn from the market and the competent authorities shall be informed about their findings. If the product has reached the consumers, the FBO shall accurately and effectively inform the consumers of the reason(s) of the withdrawal or recall if necessary (GFL, Article 19(1)). However, when a FBO suspects it has placed a product on the market that is injurious to health, it must contact the competent authorities immediately and inform them about the actions which shall be taken to prevent risks to the final consumers (GFL, Article 19(3)). A FBO is obliged to collaborate with the competent authorities on actions to reduce the risks and to be compliant in order to contribute to the safety by passing on relevant information necessary to trace a food (GFL, Article 19(4)(2)).

When there is doubt on the possibility of harmful effects, precautionary measures can be invoked in which measures can be taken to restrict the flow of free movement in the Community (GFL, Article 7), which is necessary to ensure the high level of health protection until further scientific information of a comprehensive risk assessment is completed to identify the risk to life or health (GFL, Article 6(1)).

In short, the safety of the food is being assessed on the following measures:

- The identity of the food;
- The ability to identify and trace the food through the chain;
- The information of the food given though the chain;
- The depiction of the food towards the final consumer;
- The relationship of the identified food in its final stage with the public health.

If one of these measures is assessed as negative the food shall be deemed unsafe, unless a comprehensive scientific research concludes otherwise. It must be noted that the GFL requires measures relating to food safety must be strongly underlined with scientific evidence. However, not everything within food law can or has to be science based, such as the prevention of misleading practices and consumer information.

Food fraud as mentioned in the General Food Law

The GFL is aiming to assure a high level of human health and consumers' interest in relation to food, applying these measures to all stages of production, processing and distribution of food and feed (GFL, Article 1(1) and (3)). Food fraud is mentioned as an individual term in Article 8 on the protection of consumers' interests:

> *"Food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume. It shall aim at the prevention of:*
> *(a) fraudulent or deceptive practices;*
> *(b) the adulteration of food; and*
> *(c) any other practices which may mislead the consumer."*

However, it is not mentioned in the GFL on how to protect consumers from fraudulent practices and about the prevention from them to happen specifically. The term misleading is mentioned again in Article 16, but does not further elaborate/explain the preventive measures:

> *"Without prejudice to more specific provisions of food law, the labeling, advertising, and presentation of food or feed, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed, and the information which is made available about them through whatever medium, shall not mislead consumers."*

In Article 8 and 16 the GFL places prohibitions as well as responsibilities on the legislator and the FBO in regards to fraudulent/deceptive/misleading practices. In Article 17, this is more generally elaborated by stating that all FBOs of all stages of the supply chain are responsible to ensure that the food safety requirements are verified and meet the requirements (GFL, Article 17(1)). The MS shall enforce food law and monitor and verify that the FBOs fulfill their requirements by maintaining a system of official controls, including public communication on food safety and risks (Article 17(2)). Article 16 and 17 can be linked to Article 14(3) and 14(8), which holds regards to the following criteria:

- The normal conditions of production, processing and distribution;
- The given information of the product towards the consumer;
- Conformity with (specific) provisions of the food.

Placement of food fraud within the GFL

So how can food fraud be placed within the GFL? Except for a brief mention in Article 8 and Article 16 on the prohibition of such practices, there is no explanation in the GFL what falls under fraudulent, deceptive and misleading practices as well as adulteration of food nor does it further explain on how to prevent these practices. However, provisions on prevention are given in Article 7(1) on precautionary measures:

> *"In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment."*

The precautionary measure has to be based on a comprehensive scientific risk assessment. The measures taken must be based on the assessment and be proportionate and no more restrictive of trade than is required. These measures must be reviewed within a reasonable period of time, depending on the nature of the risk (GFL, Article 6 and 7(2)) as invoking the precautionary principle give rise to barriers of free movement of food within the Community.

As for informing the public on the information surrounding such measures, Article 10 of the GFL lays down the rules by stating that depending on the nature, seriousness and extent of that risk when there is any reasonable grounds to suspect that a food may present a risk for human health, the public authorities should take appropriate steps to inform the general public. The given information will regard the type of food (identifying it to the fullest extent possible), the nature of the risk to health, and the measures that are (about) to be taken to prevent, reduce or eliminate that risk.

When looking at the pointers on unsafe food, food fraud can be put into one or several categories. A FBO is legally obliged to ensure the safety of their food they put onto the market (Article 14(1)). They are also legally obliged to provide accurate information of their products towards the consumers (Article 14(3)(b)). If the food does not comply with these criteria, it shall be deemed unsafe and removed from the market. Food fraud has issues with several of the criteria given in the GFL in order to be deemed as 'safe food':

- The identity of the food;
- The ability to identify and trace the food;
- The information/depiction given of the food towards the consumer;
- Possible harmful to human life and health.

From this point of view, food fraud can be seen as unsafe food. Which makes the preventive measures available for disposal that are applicable for 'unsafe' food. However, food fraud does not necessarily have to pose a direct or indirect negative impact on food safety, as there is a huge difference between potential risk and actual risk. The key factor for food safety lies in the exposure to the harmful product/substance. (Smit; 2013)

The NVWA as competent authority

The NVWA is an independent agency within the Ministry of Economic affairs (Ministry of AE) and a delivery agency to the Ministry of Health, Welfare and Sport (Ministry of VWS). It is tasked to protect the human- and animal health by monitoring food and consumer products and controlling the whole production chain as laid down in Regulation (EC) no.882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

The Ministry of EA is responsible for setting the requirements on the monitoring of the food safety in the primary sectors of the food supply chain as well as the requirements on monitoring of the control on food safety as well as animal welfare, nature- and crop protection. The Ministry of VWS is responsible for the preparation and marketing of food products as it is responsible for the public health welfare. The NVWA is constructed into seven departments, each with their own field of expertise:

- The executive board;
- Domain consumer and safety: includes monitoring of the compliance of food and non-food with the set requirements and regulations.
- Domain agriculture and nature: includes monitoring of food businesses in the primary sector on animal welfare and health and their veterinary drug use.
- Domain veterinary and import: includes testing and certification of live animals, monitoring of the compliance on food, animal welfare and health regulations of meat- and meat products. Also responsible for the incident- and crisis management of the NVWA.
- Intelligence and investigation services; the special intelligence service of the Ministry of AE and VWS, focusing mainly complex international organized crime which is related to the supply chain. Covers all domains of the NVWA.
- Complaints and contact services: includes customer services and the issuing of certificates and export documents.
- BuRo: the associate party of the NVWA, carrying out risk assessment and giving advises to the NVWA based on scientific risk assessment.

Looking at food fraud, we can put the practice in at least two of the domains of the NVWA, especially the consumer and safety and the intelligence and investigation services, depending on the type of fraud committed and its extent in the chain.

The NVWA is the national competent authority on 23 different fields within the seven departments, including: animal welfare, animal health, veterinarian drugs, food safety of slaughterhouses and cutting premises, food safety of industrial produced food and foodstuffs, special food stuffs (for example medical diet food and infant food), feed, animal by-products,

fishery, food safety in hospitality and retail, tobacco, consumer products, import and export of animals, animal products, food stuffs and consumer goods.

The organization is tasked to ensure that businesses comply with the national and international regulations on the safety of their food- and consumer products. Within the NVWA there is an independent Office for risk assessment and research (BuRo), which advises ministers on issues regarding animal health and welfare as well as food and consumer product safety (by, for example, carrying out scientific research on specific pathogenic micro-organisms in the products). The NVWA also houses an Intelligence and Investigation Service (NVWA-IOD), which focuses specifically on organized and international crime within the 23 fields.

Lack of capacity

In 2007 it was decided by the cabinet to fuse the Food- and Consumer goods Authority (VWA), General Inspection Authority (AID) and the Plant disease protection services (PD) into one service, which is now the current NVWA. Due to the fusion of three organizations and additional budget cuts over the years, the occupation capacity of the organization dropped from 3478 to 2261 in 2013, while the work field and tasks expanded for the new NVWA. As a result, the system of controlling and verifying weakened as all separate inspection services were harmonized into one service. While the FBOs are responsible for the traceability and the safety of the food, the NVWA is responsible for the verification of each FBO on their legal requirements and procedures, labeling requirements as well controlling products on pathogens, pollutants and/or carcinogens. As an example for several numbers of businesses NVWA has to monitor[20]:

- 10000 business (production-, import-, refrigerating- or transporting) food businesses;
- Around 200 slaughterhouses;
- Almost 500 cutting rooms;
- About 100000 businesses that are selling food directly to the consumers;

While the industrial control on food safety in the Netherlands is sufficient, there is a huge gap with the monitoring and verification on food safety and the sufficiency of control on food fraud. (Smit; 2013) As for October 2013, over slightly more than a hundred inspectors are left to monitor 100000 food production-, preparation- and trade- location (such as catering, supermarkets and bakeries) while around another 60 were responsible for the monitoring of around 6000 food manufacturing-, import-, transport- and warehouse businesses (WWR; 2013).

Due to the recent food scandals (such as the horsemeat case of 2013) it came to light that the NVWA was not well equipped and under capacitated to monitor food and consumer products adequately according to law. Especially the monitoring of slaughterhouses was structurally deficient. The plan of action report of the NVWA generally pointed out that the NVWA does not have the capacity or quality to ensure the monitoring of food- and consumer goods safety as well the control and verification of the production chain and its support, partly due to ongoing multiannual budget cuts. Several recommendations from the plan of action report include:

1. Total reconstruction of the monitoring and verification system into a more effective system by 2017;
2. Substantial more inspectors to strengthen the supervision of domains including livestock and meat, plants, export certification, dairy, consumer and safety;
3. The quality and efficiency of the NVWA needs to be upgraded by expanding its capacity and IT system.

[20] Numbers taken from the NVWA, Available via: http://www.nvwa.nl/english/about-the-netherlands-food-and-consumer-product-safety-authority

4. Sufficient and structural financial contribution from the government as well as the industry from 2014 until 2017 in order to keep on functioning on the level of standard the NVWA wants to function eventually in 2018.

We can state that the NVWA is the designated authority appointed by the government to supervise and monitor the food market based on their work field and competent domains. However, the NVWA (currently) does not have the capacity, experience or knowledge within them to enforce adequate measures against food fraud or even to the measures of based on Regulation (EC) no. 882/2004 which states in the 11th recital of the preamble that:

> *"The competent authorities for performing official controls should meet a number of operational criteria so as the ensure their impartiality and effectiveness. They should have a sufficient number of suitability qualified and experienced staff and possess adequate facilities and equipment to carry out their duties properly."*

As the NVWA is the designated competent authority of the monitoring and verification of 23 domains including the monitoring and compliance of food regulations (as laid down in Regulation (EC) no. 882/2004), it is important to narrow down and prioritize domains in accordance to the urgency and actuality of the subject in order to facilitate pressing matters with the (current) available resources.

Next to this organizational problem, we see that in order for the NVWA to step up as a competent authority (GFL, Article 17(2)) it has to comply with the standard set in Article 4 of Regulation (EC) no. 882/2004 which states that the competent authority needs to have the legal power to carry out official controls and to take appropriate measures. Therefore, it has to operate according to 'food law', pursuing a high level of protection of human life and health, the protection of consumers' interest, including fair practices in food trade (Article 5). The consumers' interest is further elaborated in Article 8, which aims for the prevention of fraudulent and deceptive practices, adulteration of food and misleading.

Unless we do not link food fraud to the concept of unsafe within the same context, the GFL or food law has no specific legislation on the prevention of food fraud unless there are specifically developed or the reasoning of intervention should purposely be turned in in this direction.

Food fraud is lying in a grey area of interpretation, as it is not clear how to govern these types of practices and its prevention. Currently, the government, NVWA and industry are investing in a broader capacity of the organization as a reaction to the 'incapacity' of the NVWA during the scandal of 2013 came about. With this, the NVWA not only needs to expand their capacity but also restructure their 'game plan' in order to step up 'efficiently and effectively' against these practices. But to only depend solely on the GFL as the mode of action against food fraud can be lacking as it is actually more focused on unintentional food incidents and the prevention of unsafe foods on the market. The question still remains if food fraud should be classified as such or that we have to look elsewhere for answers.

"Unfair Business Practices" as a reason to interfere for the Authority for Consumers & Markets (ACM)

For this theory, we assume that UCPD has to deal with the concept of food fraud, making the ACM in charge of dealing with the emerging food fraud cases as competent body of the authorities.

As mentioned earlier, Article 8 of the GFL states that food law shall aim at the protection of the interest of consumers and to prevent fraudulent/deceptive practices, food adulteration and any misleading practices towards the consumers. But the elaboration of Article 8 can be sought elsewhere in other parts of the law (Scholten-Verheijen, 2013), as there is no further explanation within the GFL on these matters.

It is generally accepted that food fraud is an intentional act for financial gain with different types of manifestations such as adulteration, counterfeiting, substitution and deliberate mislabeling of goods (EPRS; 2014). Here we will look up into UCPD and review food fraud as an act that distorts the consumer economic interest and relates to competitors who are harming legitimate businesses by unfair competition for their own financial gain.

Here the scope lies within the (unfair) business-to-consumer commercial practices[21], during and after a commercial transaction in relation to a product, prohibiting unfair commercial practices (Article 5(1)). The UCPD aims for a high level of protection of the consumers' interest as well as a proper functioning of the internal market. (UCPD, Article 1)

'Unfair business practices'

Unfair business practices are prohibited under this directive. A business practice can be deemed unfair if:

- It does not meet the requirements of professional diligence;[22]
- Is (likely) to materially distort the economic behaviour of the average consumer whom the product is directed to, impairing the consumers' ability to make an righteous informed decision on the transaction;
- It deliberately uses misleading actions in order to deceive the average consumer;
- It deliberately omits crucial information on the product;
- Aggressive or harassing practices are used to sell the product.

Annex I of the UCPD contains a list of 31 practices that are regarded as unfair in all circumstances. Some examples, which are of importance of our research include:

- Claiming to be a signatory to a code of conduct[23] when the trader is not;
- Stating or otherwise creating the impression that a product can legally be sold when it cannot;

[21] Directive 2005/29/EC, Article 2(d): 'business-to-consumer commercial practices' means any act, omission, course of conduct or representation, commercial communication.

[22] Directive 2005/29/EC, Article 2(h): 'professional diligence' means the standard of special skill and care which a trader reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or general principle of good faith in the trader's field of activity.

[23] Directive 2005/29/EC, Article 2(f): 'code of conduct' means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.

- Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the products at conditions less favourable than normal market conditions.

Under the UCPD, food fraud can be classified as a misleading commercial practice according to Article 6(1):

> *"A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not take otherwise."*

Unlike the concept of 'unsafe' food, which zooms in on the manufacturing process of the product and its documentation, the concept of 'unfair business practices' deals with deliberate misleading, communication/advertising/marketing towards the average consumer from the manufacturer/business. Here, food fraud can be placed within unfair business conduction on terms of misleading and untruthfulness, deceiving the average consumer and thus their economic interests. Food fraud does not always have to involve health or safety hazards (Smit, 2013), which means it could fall under the UCPD under these circumstances.

The decision to regard a business as ‘unfair’ is based on case-to-case situation. However, when talking about ‘misleading’ or ‘aggressive’ marketing practices it is deemed automatically unfair according to Annex I of the UCPD as it only distinguishably names misleading and aggressive types of practices but no examples of unfair practice which is neither misleading or aggressive is given in the UCPD (Micklitz; 2014). The UCPD is designed in such a way that it is to be applied in administrative and legal assessments, letting the burden of proving a commercial practice being unfair in the judgement of the plaintiff and their argumentation.

It must be noted that in case of a conflict between the UCPD and another Community rules that the latter shall prevail (UCPD, Article 3(4)). In other words, only if there are no other guidelines under the Community rules referring specifically to certain aspects of unfair business practices, the UCPD will apply. Also Article 3(3) states that the UCPD is without prejudice to Community and national rules relating to health and safety of products not much is regulated on food fraud save from the measures taken on the horsemeat scandal resulting into the Commission Recommendation 2014/180/EU of 27 March 2014 on a second coordinated control plan with a view to establishing the prevalence of fraudulent practices in the marketing of certain foods and the Commission Implementing Decision 2014/176/EU of 27 March as regards a Union financial contribution towards a coordinated control plan with a view to establishing the prevalence of fraudulent practices in the marketing of certain foods. Due to the horsemeat scandal, these Commission decisions are primarily focussed on the control of meat- and meat products (including horsemeat), leaving other potential fraudulent sensitive food products out of scope for the time being. Here, the UCPD can be used in order to create specific regulations on unfair business practices in regards to food fraud.

Enforcement of UCPD

Before the UCPD came into act, the Netherlands was actually deregulating and revoking specific regulations on marketing and sales practices. It did not have an act like the UCPD, as the judicial culture of the Netherlands is not based on regulating, criminalizing and legislating commercial practices. Instead it rather looked into general tort and contract law in combatting unfair commercial practices (Civic; 2011).

The UCPD states that the enforcement shall be adequate and effective on the means of combating unfair commercial practices in order to enforce the provisions of the directive in the interest of the consumers (UCPD, Article 11) meaning that the enforcement (approximation of the laws, regulations and administrative provisions) shall be contributing to:

- Proper functioning of the internal market;
- Achievement of a high level of consumer protection;
- Prevention of unfair commercial practices harming consumers' economic interests.

The directive also gives room to persons or organisations (including competitors) that have a legitimate interest in combating unfair commercial practices (as regarded under national law) and these parties may take the following actions:

a) Taking legal action against unfair commercial practices;
b) Bring such unfair commercial practices before an administrative authority competent to either initiate appropriate legal proceedings or to decide on the complaints.

These options are only available if the MS selects to do so in their national legislation. It also states that the MS can decide on which economic sectors and code-owner these actions may direct to (UCPD, Article 11(1)), as long as it does not restrict the freedom to provide services and the free movement of goods (UCPD, Article 4).

The UCPD gives the national legislator the freedom to interpret what 'fairness' is. As for the Netherlands the term unfair business practice is not used. Instead the term 'anticompetitive behaviour' is used instead by the ACM. The UCPD also leaves it up to the national legislator on how to enforce the set rules of the UCPD and whether or not the legislator enables courts or administrative authorities to deal with complaints (UCPD, Article 11(1), Article 12) as well as on laying down effective, proportionate and dissuasive penalties for infringements on their national provisions (Article 13). The UCPD also gives the national legislator the freedom to create national legislation within the principles unfair commercial practices of the UCPD for subjects that are not (yet) developed within other regulations (UCPD, Article 3(4)). The Netherlands has implemented the Unfair Commercial Practices act in 2008, which implemented the UCPD rather in a generic type of sense with no exceptions.

The ACM as competent authority

Regulation (EC) no. 2006/2004 (the Regulation on Consumer Protection Cooperation; hereby RCPC) lays down the enforcement of consumer protection laws and the coordination of the collaboration between national authorities. This regulation is of importance as it is intended to establish mutual assistance on intra-Union infringements of EU regulations on the protection of the interest of the consumers. In order to follow up on the rules laid down in the RCPC, the Netherlands has enforced a national regulation: Wet handhaving

consumentenbescherming[24] (hereby; Whc). When looking at the implemented rules laid down in Whc and the fields of its enforcement. We see that the Whc does not cover the responsibilities but rather refers to other legislations and actions given by other exisiting regulations. The Whc should be accompanied by the RCPC for clarification of the rules.

The Whc states in article 2.2 that the ACM will take the responsibilities as the competent authority when it comes to private international law, in particular related to court jurisdiction and applicable law (except for financial related services or activities) for the directives mentioned in the attachment A of the Whc, including the UCPD (see Annex I of this report for the list of European legislations). Through article 2.3 the ACM is given a special status through this regulation being designated as the national 'single liaison office'.[25] Being the national 'single liaison office' the ACM is also enabled to make covenants with the ministry of VWS, other competitive authorities as well as consumer organizations on the supervision, consumer information and reporting as laid down in article 16, 17 and 21 in the RCPC (on the enforcement coordination, administrative coordination and reporting).

The ACM enforces consumer protection laws by taking action against anticompetitive behaviour in consumer and intermediate markets that directly (or indirectly) harm the consumers' interests. These actions will also benefit businesses that suffer from such behaviour from their suppliers, competitors or customers. The organization was created through the fusion of the Netherlands Consumers Authority (hereby, CA), the Netherlands Independent Post and Telecommunication Authority and the Netherlands Competition Authority to ensure that one authority is overseeing the consumer protection and total market overview.

The ACM is an independent authority, working closely with several Ministries. The Ministry of EA is the far most import as it is (politically) responsible for the biggest part of the legislation that the ACM has to monitor. Other ministries whom are also working together with the ACM is: the Ministry of Infrastructure and Environment, Ministry of VWS, Ministry of Education, Culture and Science and the Ministry of Finance.

In 2009 the ACM and five other supervisory authorities established a market supervisory council in order to share knowledge and exchange information. The council consists of:

- The ACM
- Netherlands Authority for the Financial Markets
- The Dutch Data Protection Authority
- Netherlands game of chance Authority
- De Nederlansche Bank
- The Dutch Healthcare Authority

Next to the close collaboration with the named Ministries and supervisory authorities the ACM also works together with governmental agencies, consumer organisations, trade

[24] Wet handhaving consumentenbescherming is implemented to provide support for the RCPC on the collaboration of private and public enforcement of consumer protection on a national level.
[25] Regulation (EC) no. 2006/2004; article 3(d): 'single liaison office' means the public authority in each Member State designated as responsible for coordinating the application of this Regulation within that Member State.

unions, scientific institutions and dispute committees. Around 30 organizations have signed collaboration agreements with the ACM in one (or more) of the six different domains:

1. Competition and Markets;
2. Consumer rights;
3. Consumer information;
4. Telecommunication and Postal services;
5. Energy;
6. Healthcare.

When talking about food fraud, it could fall in three of the six domains of the ACM: competitions and markers, consumer rights and consumer information.

Because the terms of consumer protection and total market overview are quite broad, the ACM picked out 6 specific themes for the long term to focus on in 2014 and 2015 based on: their own investigations, filed complaints with ConsuWijzer, consultation with businesses and consumer organizations and media reports. The themes with a prioritized focus for the ACM are: health care consumers, government tenders, switching barriers (in energy and health care), online consumers, the willingness to invest in telecommunication and energy networks and the entry in banking industry. Even though these selected themes will be on the main agenda of the ACM, they will take upon unforeseen and new events at all times. However, in regulated industries, the ACM has only specific tasks as there are other competent authorities allocated on these fields. One of the most heavily regulated industries is the food industry next to the financial sector.

We can argue that the ACM could be the responsible competent authority if we classify food fraud as an unfair business practice and a deliberate misleading of the consumers' interest. However, the one of the predecessor parties of the ACM has made some agreements with the predecessor of the NVWA in the past on consumer protection.

Agreements between the VWA and CA

The VWA (now part of NVWA) and the CA (now part of ACM) have signed a collaboration agreement prior to the fusion of both organizations into their current respective organizations. This agreement is signed on the responsibilities within the RCPC and Whc. A similar agreement was signed between the CA and the Dutch Consumers Association (DCA).[26]

The collaboration agreement between the VWA and CA is drawn up within the consumer rights domain on consumer protection laid down in the RCPC and the Whc. It must be noted that this agreement document of the ACM is somewhat out-dated as it is made under their respective preceding organisations and does contain references to expired Dutch legislation (Besluit Organisatie VWA). The ACM states on their website[27] that these drawn up collaboration agreements are still valid for the current ACM organization (as for July 2014).

[26] We will not look into the role of the DCA as it has no power of enforcement. The DCA is a non-profit organization, which undertakes private initiatives on consumer protection. However, they can make agreements with the ACM in relation to consumer information, dealing with complaints and dispute settlement in order to align the tasks and goals of the ACM with the DCA.

[27] ACM on national cooperation. Accessible via: https://www.acm.nl/en/about-acm/collaboration/national-cooperation/. Documents retrievable via Dutch language website: https://www.acm.nl/nl/organisatie/samenwerking/samenwerking-nationaal/

When looking at the list of covenants of the NVWA with other parties[28] we see that the agreement of the VWA and CA is not listed in the valid covenant list. However, the Minister of Public Health, Welfare and Sports mentioned in a letter towards the House of Representatives on questions on Irish beef[29] that there was a signed agreement between the two authorities, stating that each individual case will be carefully viewed first in order to establish which party should act as the competent authority.

According to one of the answers in the letter of the Minister, the labelling and/or the information on the origin of a food product may not mislead the consumer (article 29, WEL). The assessment of whether or not the information is misleading rests with the NVWA. In addition, there are also rules on unfair commercial practices[30] which directs that the information traders give about their products on the main characteristics (such as specification, geographical and commercial origins) shall be transparent and complete as the consumer has the right to make a well-informed decision when purchasing a product. When a consumer is under the assumption that a business is misleading consumers in regards to product characteristics, they can file a report/complaint on this matter with the ACM Consuwijzer. From here, the ACM and the NVWA will assess the complaint before deciding who will take the lead upon this case.

Looking at both organizations, we can see an overlap as well as specific differences between them. The main difference is the field of expertise where it is clear to see that the ACM does not thread into food safety related issues and its risk assessment is mainly administrative/legal based whereas the NVWA prioritize the protection of public health more than the economic protection. Due to the 'single liaison office' status of the ACM, it can (with the support of an agreement/covenant) assist the NVWA on this field in order to fill this gap.

	NVWA	ACM
(Possible) competent authority	✔	✔
Single liaison office	✗	✔
Food safety compliance	✔	✗
Misleading practices	✔	✔
Consumer protection	✔	✔
Economic protection	✗	✔
Health protection	✔	✗
Risk assessment	✔	✔
Science based	✔	✗
Administrative/legal based	✔	✔
Intelligence and investigation	✔	✔

Table 2: Domains in which the NVWA and ACM operate in relation to food fraud as competent authority.

[28] NVWA list with covenant agreement made with other parties. Accessible via: http://www.nvwa.nl/actueel/convenanten?onderwerp=0&maand=0&jaar=0&submit=&page=1

[29] Letter: 333676-117863-VGP of 18 March 2014, answer on question 4: 'The ACM and NVWA have a collaboration protocol in which they decide with each individual case who is going to act as the competent authority.'

[30] Civil code; book 6. Section 3a of Chapter 3 on unfair business practices, which is the implementation of Directive 2005/29/EC on national level. Dutch text available via: http://wetten.overheid.nl/BWBR0005289/Boek6/Titel3/afdeling3a

IV. Which way to go?

After the analysis of the GFL as well as the UCPD, we come to the conclusion that both legislations are acceptable in dealing with food fraud under their respective rules on their own using the concept of 'unsafe' for the GFL and the concept 'fairness' for the UCPD as reason to interfere. If the workflow of the GFL is appointed to deal with food fraud, the NVWA shall assume its position as the competent authority as laid down in Regulation (EC) no. 882/2004. However, if the UCPD gives enough reason and grounds of arguments to deal with food fraud (and there are no other legislations dealing with these types of practices) then the ACM is obliged to act as the competent authority based on the rules laid down in the Whc and RCPC.

When we look at the NVWA and the ACM as potential competent authority on dealing with food fraud we see that the NVWA is (currently) incapable due to lack of capacity, expertise and knowledge in order to take adequate measures. As for the ACM their powers depend on how much is already governed and regulated within the Community on European or national level. The ACM also has a lot of covenants and collaboration agreements with other organizations and institutions, which means their role and interference can depend case-on-case and per situation. Investigation in such matters can take time and in some cases, especially concerning food, time is not an asset what an investigation has. Decisions therefore needs to be made fast and the tasks of a competent authority must be clear.

How should we classify food fraud?

Coming back on the question whether food fraud is a case of 'unsafe' food or 'unfair commercial business practice' we can state that it could be categorized under both descriptions. The unsafe food part can be questionable with each case, as food fraud does not always mean the food product is unfit or unsafe for human consumption. However, it is clear that food fraud is always an intentional act for financial gain at the expense of the consumers' interests as well as their direct competitors. It is also clear that the science-based approach of the GFL alone is not enough in order to combat food fraud nor does the administrative legal approach of the UCPD can solve this issue alone. Another problem with the GFL is that it only lays down rules and prohibitions but not elaborates on how these issues can be solved or prevented. On the other hand the UCPD gives the legislator space to act against such practices by providing the ability to create (penal) measures.

Food fraud can be described as a deliberate act for the own financial gain, which is achieved through a deliberate act of food and/or foodstuffs tampering by means of deceptive practices (such as adulteration, substitution, counterfeiting, falsification, the use of illegally slaughtered/gained substances/foodstuffs, the use of stolen foodstuffs and/or deliberate mislabelling of the products) and afterwards putting these products deliberately on the market for sale. These products are in principle not intended for human consumption but are put on the market as such under inaccurate information provision either through misleading or omission of (crucial) information. The presentation of the food is depicted in its ideal condition, while the content of the food is not on the same par as the presented information, therefore harming the consumers' (economic) interest and health protection.

If we look at food fraud in this way, food fraud is actually a form of economic fraud, which is using food as its tool and mode of action, which eventually harms the consumers' interest. You cannot discard the economic/financial gain aspect as well as the potential food safety hazard when talking about food fraud. The key factor of food safety lies in the exposure to the harmful product/substance (Smit, 2013). Therefore it is important to look at both aspects when assessing food fraud as a term as it does touch multiple topics and subjects than given in either the GFL as the UCPD.

GFL or UCPD?

Article 8 of the GFL starts with stating: '*Food law shall* […]'. This technically means that legislation on food is responsible for the enforcement on fraudulent, deceptive or any misleading practices on food as well as practices of adulterated food. Article 5 of the GFL also backs this up by citing the following:

> *"Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and environment."*

The problem is that the prevention of and the measures against food fraud is not covered well in regulation save from the measures taken on the horsemeat scandal (resulting into the Commission Recommendation 2014/180/EU of 27 March 2014 on a second coordinated control plan with a view to establishing the prevalence of fraudulent practices in the marketing of certain foods and the Commission Implementing Decision 2014/176/EU of 27 March as regards a Union financial contribution towards a coordinated control plan with a view to establishing the prevalence of fraudulent practices in the marketing of certain foods). These Commission decisions are primarily focussed on the control of meat- and meat products (including horsemeat), leaving other potential fraudulent sensitive food products out of scope for the time being.

When we look at the UCPD we see an overlap with several themes of the GFL Article 5:

- The protection of consumers' interest;
- Fair practices in (food) trade.

However, the UCPD does not interfere with rules laid down relating to the health and safety aspects of products (UCPD, Article 3(3)) and aims solely at the protection of the economic interests of the consumers. The food industry is one of the most heavily regulated parts within legislation, which means that the powers of the UCPD is also a lot weaker as it the directive does not preceded the rules of conflicting legislations on unfair commercial practices (UCPD, Article 3(4)).

Apart from Commission Recommendation 2014/180/EU and the Commission Implementing Decision 2014/176/EU there are no specific regulations and measures against fraudulent practices with food. However, beyond the basics mentioned in the GFL and UCPD, there are agreements made between the NVWA and ACM on the protection of the consumers' interest. The (collaboration) agreement defines the responsibilities and roles of both organizations, which is based on consumer protection regulations such as the RCPC and

Whc. It is therefor important to also look at these regulations, rules and agreements in order to decide which authority is competent to deal with food fraud. It must be noted here that this does not solve the uncertainties on how to take measures against food fraud.

If we look at the scope of Regulation (EC) no. 882/2004 on the official controls performance on the verification of compliance we see that the focus is laid on:

a) The prevention, elimination or reduction of acceptable levels of direct or indirect risks to humans and animals and;
b) The guarantee of fair practices in food and feed trade and protecting the consumers' interests, which includes food and feed labelling and other forms of consumer information.

Here it seems the UCPD and GFL are coming together as the GFL does not have much rules laid down on the concept of 'fairness' and is more focuses on safety procedures and risks, whereas the UCPD has covered the subject of 'fairness' more in its directive.

If we look back on the horsemeat scandal of 2013, we see that the Dutch legislator did not treat food fraud as a different entity next to food safety issue. However, the EPRS and Spink & Moyer define a clear difference between the two cases:

- Food fraud: intentional act for financial gain;
- Food safety incident: unintentional act (with unintentional harm).

The question here is if food fraud should be treated as a different entity (and possibly break open the possibilities on the enforcement and control on food fraud) or to treat food fraud as a food safety incident and following through the measures given in the GFL. However, food fraud does not always have to unfold as a food safety incident, which means we have to determine where food fraud lies in this spectrum.

Regulation (EC) no. 178/2002	Directive 2005/25/EC
Aims for a high level of human health protection of consumers.	Aims for a high level of protection of the economic interests of consumers.
Focussed on food safety and the prevention of (unintentional) food safety hazards.	Focussed on fair commercial business practices.
Prohibits the placing in the market of 'unsafe' food.	Prohibits the practices of unfair business conduction.
Concept of 'unsafe'	Concept of 'fairness'
Science based risk assessment: burden of proof lies in the results of the risk assessment.	Administrative and legal assessment: burden of proof lies in the argumentation of the plaintiff and the following assessment.
Safe (and transparent) food practices are important.	Code of Conduct and compliance of business conduct is of importance.
Details on the enforcement of food safety verification for FBO as well as competent authorities.	Prohibition of unfair business practices but leaves the details of the enforcement to the Member States.
Only mentions food fraud specifically in Article 8, but mentions no guidelines on food fraud. It details more guidelines on misleading and unsafe food.	All unfair business practices, which do not have specific guidelines, will fall under the UCPD according to Article 3(4).

Table 3: overview of the differences between the approaches of the GFL and UCPD.

Looking at the GFL and UCPD, we cannot pick one 'definite' solution for the enforcement of food fraud with either one as we see a gap within the parts on how to cover food fraud as a genuine problem and how a competent authority should be dealing with food fraud. Both the GFL and the UCPD seem to touch upon as a subject but they do not say much on how food fraud practices (in particular) must be managed and dealt with by the competent authorities. While the GFL has a science-based risk assessment approach, the UCPD is more of an administrative and legal assessment approach. When we look at food fraud in practice, we see a complex practice that involves food and the possibility that the food is harmful but it also involves an economic (fraudulent) dimension too in which science alone cannot provide the answer of solving the matter.

Due to the current gap in legislation it is not clear which legislation should apply, as the GFL does mention food fraud in its articles. However, no further guidelines are given in the GFL on dealing with food fraud as a competent authority. Therefore, the UCPD can be applied in such cases as it deals with unfair commercial practices, unless other legislation(s) can take over the case. The argumentation and reasoning is crucial in determining which legislation should apply.

We had also looked at legislations that set the roles and responsibilities of the competent authorities as a lack of effective enforcement can enable sellers and suppliers to conduct such practices without being detected and dealt with appropriately.

As for the competent authority and control body on the verification of compliance Regulation (EC) no. 882/2004 states the following in Article 2(4) and 2(5):

> *" 'Competent authority' means the central authority of a Member State competent for the organisation of official controls or any other authority to which that competence has been conferred; it shall also include, where appropriate, the corresponding authority of a third country.*
>
> *'Control body' means an independent third party to which the competent authority has delegated certain control tasks."*

Both the NVWA and the ACM have reorganized and restructured over the past few years. It is thus important to also reassess the previous agreements, as not only their organizational structure has changed but the industry has evolved as well. Existing enforcement agreements on the protection on consumers' interests are currently not adapted to the issues that are currently occurring now on the market. Food fraud does not only affect the food but also the interest of the consumer.

NVWA or ACM?

One of the problems supervisory authorities come across is the conflicting interests in-between several parties when it comes to the functioning and intensity of the monitoring. On the one hand, there are calls for a more lenient system while on the other hand there are calls for a stricter enforcement of rules and regulations, especially after scandals and incidents (WRR, 2013). Due to the conflicting interests, the supervisory authorities are threading in a work field, which has high (but sometimes conflicting) expectations coming

from the consumers, industry, institutions, government and politics, bringing tension along with the conflicting interests of all parties.

Currently, each suspicious (food fraud) case is assessed whether or not it shall be enforced by the NVWA or ACM. There is no such thing as one organization being better than the other or one more well equipped than the other in the current state of affairs as they cover both their own domain and carrying their own expertise with it. However, agreements on responsibilities shall be an important part on the execution of the measures as well as the mutual exchange of information and knowledge is quite important in the combat against food fraud as food fraud seems to hoover in between their own expertise domains (not only food (safety) but also in the intentional harm of consumers' interests for economic gain).

From here there are two ways for interfering as a competent authority, which consists of two different views (public welfare or economic welfare) which depends on where the priorities are laid in reference to that particular case:

- Public welfare: the NVWA is the designated competent authority. The particular case is dealt as a food safety threat. The ACM can give the NVWA support as a liaison office on the fields of economic protection of the consumer as well as the control on unfair business practices when asked, by exchanging information with the NVWA and supporting with the enforcement coordination, administrative coordination and reporting as laid down in article 16, 17 and 21 in the RCPC.
- Economic welfare: the ACM is the designated competent authority. The particular case is dealt as an unfair business conduct. The ACM is responsible for the monitoring an enforcement of policies in regards to the protection of consumer interests as well as the monitoring of fair competition between businesses. Food safety is not a priority or threat in this case. Other legislations do not cover (or do not have any argumentations/reasoning) to take up this case.

The decision of a particular case being food fraud or not is dependant on a thoroughly conducted risk assessment on the safety of the food, which falls within the domain of the NVWA (if the assessment on the safety of the food is not already conducted or established by other countries). When a particular case involves food fraud but is deemed/established not harmful for the public health then the enforcement can go either way, depending on the decision taken which authority is more 'suited' in taking on the case as the case ends up in a grey area of regulation and interpretation whereas in case of conflict the other regulation precedes over the UCPD.

Annex I

Enforcement by the ACM[31] laid down in the Whc

- Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices offered to consumers;
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council;
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods associated guarantees;
- Directive 2008/112/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts;
- Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive');
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market;
- Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising: article 1, 2c and 4 to 8;
- Regulation (EC) no. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on the common rules for the operation of air services in the Community (Recast): article 23;
- Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

[31] Together with the Dutch Financial Markets Authority Foundation

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