WAGENINGEN UR

For quality of life

Department of LAW & Governance, WUR

Between *Fra.bo* and *Frubo*

On the Trade Restrictive Effects of Domestic Private Standards

Nathan Meijer

23 February 2016

Author: Nathan Meijer
Registration code: 880424567100

‘Between *Fra.bo* and *Frubo*: On the Trade Restrictive Effects of Domestic Private Standards’

Department of Law & Governance, WUR
Thesis Msc. Food Safety Law
LAW-80436, 36 ECTS
23 February 2016

Supervisor: Prof.mr.dr. BMJ (Bernd) van der Meulen
Examiner A: Prof.mr.dr. BMJ (Bernd) van der Meulen
Examiner B: KP (Kai) Purnhagen, PhD

Acknowledgements

This thesis is the result of a six-month research project conducted at the Law & Governance chair group at Wageningen University as a part of the Msc. Food Safety Law curriculum. I wish to thank the Law & Governance chair group staff for their support during this period; in particular I want to thank Bernd van der Meulen and Kai Purnhagen for their supervision and guidance.

I would also like to thank C-Law's Guus de Bruijn for his point of view on competition law; Larissa Schümmelfeder and Floris Kets for their insightful comments on the draft version of this thesis; and the NVWA's Hans Beuger and RiskPlaza's Sjoerd Kanters for their willingness to be interviewed on the RiskPlaza scheme.

-Nathan Meijer

Abstract

The use of private standards has certain advantages for both the public as well as the private sector, but it can also have negative effects; particularly by restricting market access. This thesis consists of two parts: in the first part the legal framework on trade restrictive effects of standards is presented and current developments are discussed. The second part is an analysis of a case-study that is believed to shed a new light on that framework. The focus of that case-study was the RiskPlaza Audit+ Scheme, which was developed in close coordination with the Dutch food safety authority. That government cooperation, in combination with the scheme's own governance system, may have resulted in a trade restriction. Several changes are recommended to diminish those effects.

Contents

1. Introduction

1.1. On Standards

Private standards for quality and safety have become increasingly important for the food sector in the past few years. Being certified by one of the big international schemes such as BRC Food or IFS has become a prerequisite to supply for most retailers in Europe.[1] Private standards originated in the 90s as standardized contracts meant to decrease the workload involved with frequent audits: by standardizing the provisions and outsourcing the auditing to third parties, both suppliers as well as retailers could cut down on costs and time.[2] There is no doubt that private standards can bring benefits: by protecting liability and reputation; by increasing market access, market share and product margins; and by providing consumers with reliable and trustworthy information.[3] Moreover, they can act as supports to help ensure compliance with public standards.[4] With the current trend of diminishing funds for public authorities, it is therefore hardly surprising that they have come to rely more on forms of self-regulation for their supervisory tasks.[5] Such is the case for the Netherlands Food and Product Safety Authority (further: NVWA) which has had to deal with several rounds of budget-cuts in the recent past.[6] One novel initiative of self-regulation was the RiskPlaza audit scheme, developed in close coordination with the NVWA. The rationale for this scheme was that if food businesses could trust their suppliers, there would be no need to duplicate safety controls performed earlier in the chain – one way to show compliance would be by being audited by a recognized scheme, such as the RiskPlaza one. But RiskPlaza is primarily focused on the domestic market: consequently there is a possibility that Dutch food businesses may choose to trade with Dutch suppliers over foreign ones for not being RiskPlaza certified – a possible trade barrier?

---

[1] See Bernd van der Meulen, "The Anatomy of Private Food Law", in Bernd van der Meulen (ed.), *Private Food Law* (Wageningen: Wageningen Academic Publishers, 2011), pp. 75, *et sqq.*, at p. 89-108

[2] Ibid. at p. 77-80

[3] Commission Communication — EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs, (2010/C 341/04), at p. 1

[4] Bernd van der Meulen, *Reconciling Food Law to Competitiveness* (Wageningen: Wageningen Academic Publishers, 2009), at p. 35

[5] See also Report from the Commission to the European Parliament and to the Council On the overall operation of official controls in the Member States on food safety, animal health and animal welfare, and plant health, COM(2013) 681 final, at p. 6: "Some Member States are re-allocating staff resources from routine controls to more risk-based "control campaigns", and there is a general awareness that resources must be deployed more efficiently, especially in the current economic climate where public expenditure is under pressure."

[6] Leonie van Neerop, 'Te veel in eigen vlees gesneden', 5 December 2015, available on the internet at < http://www.nrc.nl/handelsblad/2015/12/05/irritatie-over-een-gehavende-organisatie-1540245> (last accessed on 23 February 2016): the authority has had to endure failed reorganizations, budget and personnel cuts (down to half of the personnel employed 10 years ago), and political, public, and industry pressure

The European Commission warns of certification schemes restricting cross-border trade in various ways, and highlights this potential effect as a result of support by regional or national authorities. With regards to rules related to the operation of schemes, the Commission's guidance document for voluntary certification schemes lists the following potential anti-competitive effects in particular:

> "(…) horizontal and vertical agreements; foreclosure of competing undertakings by one or more undertakings with significant market power; (…) preventing access to the certification scheme by market operators that comply with the applicable pre-requisites; preventing the parties to the scheme or other third parties from developing, producing and marketing alternative products which do not comply with the specifications laid down in the scheme".[7]

1.2. Structure and Methodology

This thesis consists of two parts: in the first part the legal framework on trade restrictive effects of standards is presented and current developments are discussed. The second part is an analysis of a case-study that is believed to shed a new light on that framework. The body responsible for the RiskPlaza private standard was chosen as a case study: it is unique both in terms of its substantive requirements as well as the way the relevant public authority (NVWA) is involved with it.[8] Primary research question was: what are the potential trade restrictive effects of domestic private standards, particularly when they are supported or recognized by national public authorities? This primary research question was divided into the following four sub-questions:

1. Under what circumstances can a standard restrict cross-border trade in the EU?
2. What is RiskPlaza and what is the NVWA's relation to it?
3. Does RiskPlaza restrict cross-border trade in the EU?
4. If so, can this trade restriction be justified? If the trade restriction cannot be justified, in what manner would changing RiskPlaza's governance/operation remove this trade restriction, or make it justifiable?

The first step of the research methodology consisted of legal desk research on the applicable (case) law and surrounding academic discussions to answer the first sub-question. To answer

[7] EU best practice guidelines for voluntary certification schemes, *supra* note 3, at p. 1-2

[8] It is unavoidable that by the very nature of the subject, Dutch legislation plays a large role in this thesis. Efforts have been made to predominantly cite European (case) law to ensure that research results have relevance outside the Netherlands as well

the second sub-question, the initial desk research was followed by semi-structured interviews with representatives from RiskPlaza and the NVWA to gather the required information for subsequent analysis to answer sub-questions 3 and 4 (see Annex I). The two parts in this thesis are divided into five sections: section II gives an overview of relevant EU (case) law on the internal market and competition; section III describes the RiskPlaza private body, its history, and its relation to the NVWA; in section IV this relation and the body's own organization is analyzed in terms of applicable EU law; finally section V ends with a conclusion and recommendations.

2. Background: Standards and Market Restrictions

The objective of the European single market is to facilitate trade: customs duties on imports and exports between Member States are hence prohibited.[9] But some State measures can have the equivalent effect of tariffs; and businesses can also erect trade barriers in the case of sufficient market power alone, or in concertation with others. The European single market is therefore supported by two fundamental pillars: States have to follow the rules on quantitative restrictions for their measures (Articles 34-37 TFEU), and undertakings have to conduct themselves in a manner compatible with the objectives of the internal market (Articles 101-109 TFEU). Agreements between businesses that restrict trade, and abuse by an undertaking with a dominant position, are hence in principle prohibited under the provisions of competition law. Since standardization bodies in the EU have traditionally been tightly connected to public authorities, it is not surprising that the Court of Justice of the European Union (further: the Court or CJEU) has found standardization bodies capable of violating both fields of law. Additionally, Member States have an obligation to uphold the proper workings of the Treaties, a concept known as the *effet utile* doctrine. This obligation means that Member States are prohibited from introducing national laws that would render the provisions of the Treaties ineffective. In the context of the internal market, this translates to an obligation not to force undertakings via national legislation to engage in anti-competitive conduct lest they break that legislation; or by instead allowing some businesses to force that type of conduct on other undertakings.

Standards can be classified as business-to-consumer (B2C) or business-to-business (B2B) schemes. Focus of this thesis is on B2B schemes which are usually characterized by their focus on management systems.[10] Purnhagen defines private standards as:

> "(...) written requirements or a set of written requirements ('documented agreements') which are related to a regulatory goal (mostly safety) and are at least planned for common and repeated use, which gain legally binding status by instruments of private law. These documented agreements are referred to as 'standards', which form 'uniform' (mostly safety) market-oriented management systems. As such, they lay down detailed requirements for service providers and producers".[11]

[9] Article 28 TFEU
[10] EU best practice guidelines for voluntary certification schemes, *supra* note 3, at p. 1-2
[11] Kai Purnhagen, "Mapping Private Regulation – Classification, Market Access and Market Closure Policy and Law's Response" 49 Journal of World Trade, no. 2 (2015) pp. 309, *et sqq*., at p. 312

This definition will be used as a reference for this thesis. While the voluntary nature of standards is emphasized in some definitions, Busch criticizes that concept: those unwilling or unable to participate will in many scenarios simply have to exit the market due to the standard being a *de facto* mandatory particular.[12] The question of which factors play a role in establishing a standard as *de facto* mandatory for market access is a major theme in this thesis.

In this section the particular obligations of public and private standardization bodies with regards to trade restrictions are discussed. Subsection 2.1 focuses on the criteria standardization bodies ought to abide by to ensure effective competition, ranging from the obligation to recognize alternatives to the rules on encouragement and incentives to use a standard. Subsection 2.2 describes the relevance of the *effet utile* doctrine to standards. In 2.3, analysis of a 2012 CJEU case, *Fra.bo*[13], takes prominence: in that case the Court ruled that article 34 TFEU applied directly to a private agency – instead of holding the Member State responsible for that agency's conduct as done previously. Subsection 2.4 concludes with a summary.

2.1. General Criteria for Standardization Bodies to Ensure Effective Competition

2.1.1. On Regulatory Plurality

On the topic of multiple private actors regulating in a single market, Scott claims that competition between standards may enhance their accountability in terms of conflicts of interest: he advocates other mechanisms than 'hierarchical accountability' in the case of lower intensity of state activity within a regime to hold private actors in check. According to him, since private regulators are not subjected to the same public audit as public authorities and elected politicians, market-forces to force accountability on private regulators are a superior alternative.[14] To use Schepel's words: "A voluntary standard is subjected to testing by the market; a bad standard can theoretically just be ignored".[15] The Commission's position is in line with those assessments: anti-competitive effects are unlikely in case of multiple standard-setters competing, but a proper governance structure is essential to avoid prosecution under

[12] Lawrence Busch, "Quasi-states? The unexpected rise of private food law", in Bernd van der Meulen (ed.), *Private Food Law* (Wageningen: Wageningen Academic Publishers, 2011), pp. 51, *et sqq.*, at p. 68
[13] Case C-171/11, *Fra.bo* [2012] ECLI:EU:C:2012:453
[14] Colin Scott, "Self-Regulation and the Meta-Regulatory State", in Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn: Kluwer Law International, 2006), at p. 131 *et sqq.*, at pp. 140-144
[15] Harm Schepel, *The Constitution of Private Governance* (Oxford and Portland, Oregon: Hart Publishing, 2005), at p. 337

competition law in case of a single agency. In the Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, particular attention is paid to standardization agreements. In this document it is stated:

> "Where participation in standard-setting is *unrestricted* and the procedure for adopting the standard in question is *transparent*, standardisation agreements which contain *no obligation to comply* with the standard and provide *access to the standard on fair, reasonable and non-discriminatory terms* will normally not restrict competition within the meaning of Article 101(1)." [16] [Emphasis in original]

This new guideline is a decidedly more moderate sequel: in the previous version of its guidelines, the Commission had claimed that standardization agreements complying with those requirements were held not to restrict competition – the exception for agreements 'normally' not restricting competition was at that time limited to the 'recognized standards bodies'.[17] A legitimate governance structure seems now more like a prerequisite to avoid prosecution; this is less likely to happen, but 'antitrust immunity'[18] is seemingly not granted based on procedural arrangements alone – more of a warning sign than one promising sanctuary?

In the case of a public-private hybrid form of governance, and the private regulator being a monopolist, Cafaggi[19] advocates sufficient representation by all forms of stakeholders, and 'amenability to judicial review of the body's governance' to remedy any abuse of powers. In the case of multiple private actors regulating in a single market wherein each body performs its own regulatory functions ('private regulatory plurality') on the other hand, he warns of a higher likelihood of antitrust violations due to the common use of exclusionary rules. To counter this, he advocates the use of framework rules to guarantee a balance between differentiation and homogeneity, for instance by using the same basis for the standard; and to prevent lock-in due to prohibitive costs to switch standards.[20] He concludes that:

---

[16] Commission Notice – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01, at para. 280

[17] Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001/C 3/02. at at para. 163. 'Recognized standards bodies' were presumably CEN and its National Standardization Body members, see Regulation (EU) No. 1025/2012 on European Standardization for the current rules

[18] Harm Schepel, *The Constitution of Private Governance*, *supra*, note 15, at p. 320

[19] Fabrizio Cafaggi, "Rethinking Private Regulation in the European Regulatory Space", in Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn: Kluwer Law International, 2006), at p. 3

[20] Ibid. at p. 75

> "The transfer of regulatory power to private actors [is] acceptable or should be promoted to the extent that public interest goals are pursued, [but] too high a level of differentiation among private regulators would run contrary to that goal".[21]

2.1.2. The Principle of Mutual Recognition

Articles 34 and 35 TFEU prohibit quantitative restrictions on, respectively, imports and exports, and all measures having equivalent effect. The definition of measures having equivalent effect was clarified in *Dassonville*:

> "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions".[22]

In areas of law not harmonized at Union level, Member States are to respect the principle of 'mutual recognition' first enshrined in *Cassis de Dijon*: if products are lawfully produced and marketed in one of the Member States, then those products should be able to be introduced into any other Member State unless there is a 'valid reason' against it.[23] Restrictions on the free movement rules may be justified if they are enacted on one of the grounds laid down in Article 36 TFEU: public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property – or if those measures are necessary to satisfy 'mandatory requirements' such as fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer.[24] Measures cannot be justified on the basis of budgetary or economic reasons.[25] In any case, even if a measure may be justified, it still needs to be proportional: it must be capable of achieving the stated objective, the measure must be the least disruptive measure capable of achieving the effect and the measure must be ´proportionate vis-à-vis the lawful objective´.[26] This can be translated to three tests applied to the disputed measure: respectively the suitability, necessity and the proportionality *stricto sensu* test. Via the third test, it is

[21] Ibid. at p. 48-55
[22] Case C-8/74, *Dassonville* [1974] ECLI:EU:C:1974:82, at para. 5
[23] Case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42 at para. 14
[24] Ibid. at para. 8
[25] Case C-103/84, *Commission v. Italy* [1986] ECLI:EU:C:1986:229, at para. 22; and Case C-238/82, *Duphar* [1984] ECLI:EU:C:1984:45, at para. 23
[26] Hanna Schebesta and Menno van der Velde, "The Foundations of the European Union" in Bernd van der Meulen (ed.), *EU Food Law Handbook* (Wageningen: Wageningen Academic Publishers, 2014), p. 107, *et sqq*., at pp. 118

assessed whether a measure, even if suitable and necessary, "nevertheless imposes an excessive burden on the individual".[27]

The principle of mutual recognition was held to also be applicable to standards: national legislation should generally provide for the recognition of equivalent certification issued by another Member State body. In *Ascafor*[28], members of the Spanish association for the manufacture and marketing of reinforcing steel for concrete (Ascafor) and the association for importing of steel for construction (Asidic) had applied for annulment of a Royal Decree[29] recognizing a certain label of quality by AENOR[30] because, they argued, the requirements to acquire that label were more wide-ranging than the necessary minimum requirements of a directive[31] and that therefore steel from other Member States would not necessarily meet those requirements which made it more difficult/costly to import steel into Spain. The Court therefore held that the disputed requirements were a violation of Article 34 TFEU – it was then up to the referring court to determine which of those requirements were proportionally justified.[32]

While Member States are, in the absence of harmonizing rules, free to decide on their intended level of protection of health and life of humans and may require prior authorization procedures for some products[33], these rules may not go beyond what is necessary to attain the objective pursued if they duplicate controls which have already been carried out in the context of other procedures.[34] The Court further noted that the principle of mutual recognition not only binds Member States but that the national body to which applications are made must also show an 'active approach' in cooperating with competent approved bodies from other Member States to facilitate market access.[35]

[27] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal*, no. 2 (2010), pp. 158, *et sqq*., at p. 165
[28] Case C-484/10, *Ascafor* [2012] ECLI:EU:C:2012:113
[29] Royal Decree No. 1247/2008 of 18 July 2008
[30] 'Asociación Española de Normalización y Certificación', the National Standardization Body of Spain
[31] 'Directive 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products
[32] Case C-484/10, *Ascafor* [2012], at para. 71
[33] Case C-432/03, *Commission v. Portugal* [2005] ECLI:EU:C:2005:669, at para. 44
[34] Case C-484/10, *Ascafor* [2012], at para. 45
[35] Ibid. at para. 68

2.1.3. On Alternatives

In 1998 Elferink[36] wrote about the competition law aspects of the dilemma between the copyrights of standards holders on the one side, and the democratic right to have accessible knowledge of the law if those standards are interpreted or filled in norms of laws and could thus be considered to be 'elevated' to law themselves on the other side. She first established, citing *Magill*[37], that since the Dutch NNI[38] was the only rights holders of certain standards and could unilaterally set its prices, it held a monopoly position. Since those standards were free to access in other Member States but the NNI charged for them, she called into question whether that was abuse of that dominant position.[39] Competition law has always had an awkward relationship with intellectual property laws: by their very definition they grant an 'intellectual monopoly'[40] to the owner of an idea. Of course, for a dominant position to constitute a violation of Article 102 TFEU there must also be *abuse* thereof (Article 102 TFEU). In the context of copyright law, the Court defined abuse in *Microsoft v. Commission* as follows:

> "(…) in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be regarded as abuse, it is sufficient that three cumulative conditions be satisfied, namely that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market".[41]

Elferink argued that if a law referenced a NNI standard, it should be accessible at no cost under the Dutch Freedom of Information Act ('Wet Openbaarheid Bestuur'[42]). While NNI itself did not fall under that Act – as it was not explicitly designated in that Act's annex and thus did not have to comply with Freedom of Information Act requests regarding standards not recognized in law – she argued that the agency should, in fact, be designated as such.[43]

---

[36] Mirjam Elferink, *Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen* (Leiden: Kluwer BV)
[37] Joined cases C-241/91 and C-242/91, *RTE and ITP v. Commission* [1995] ECLI:EU:C:1995:98
[38] 'Nederlands Normalisatie Instituut', the National Standardization Body of the Netherlands
[39] Elferink, *Verwijzingen in wetgeving*, *supra*, note 36, at p. 221-235
[40] See Michele Baldrin and David K. Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008)
[41] Case T-167/08, *Microsoft v. Commission* [2012] ECLI:EU:T:2012:323, at para. 139
[42] Wet van 31 oktober 1991, houdende regelen betreffende de openbaarheid van bestuur (Wet openbaarheid van bestuur)
[43] Elferink, *Verwijzingen in wetgeving*, *supra*, note 36, at p. 237-261

This came up again when the Dutch Supreme Court ('Hoge Raad') ruled on *Knooble*.[44] Knooble, a Dutch consultancy company, had wanted to publish some NEN-standards on its website but NNI disallowed it because it claimed copyright on them. Knooble sued NNI and the Dutch government: firstly because they claimed that since the standards had not been published "in accordance with the demands of Article 89 of the Dutch Constitution and Articles 3 and 4 of the Dutch Publication Act" [45], those standards were not legally binding; and secondly that the standards should be made available for no more than reproduction costs and free from copyrights, since Article 11 of the Dutch Copyright Act (DCA)[46] states that:

> "No copyright subsists on laws, decrees or ordinances issued by public authorities, or on judicial or administrative decisions".[47]

The Court of Appeals had ruled that while references to standards make them generally applicable, it does not turn them into law.[48] Most NEN standards, according to the Court of Appeals, did not in fact create rules but laid down measuring techniques or calculation methods; and there were alternative possibilities to show compliance with the law. Thus Knooble's appeal was rejected. The Dutch Supreme Court mostly agreed with the Court of Appeals. Van Gestel & Micklitz criticize the Advocate General's dismissal[49] of the claim that NNI can refuse to sell someone a standard, hypothetically leading to a situation wherein someone would not be able to know his legal obligations and could be punished for violating a law without being able to know the content of the obligations arising out of that law which would "clearly be an infringement of the *lex certa* principle".[50] They raise an important question that seems to be unsatisfactorily answered:

> "If the result of the alternative way of complying with the obligations in legislation must be equivalent, how can one know what that means in practice without knowing the content of the standards? In other words, if one first has to purchase the relevant

[44] Case BW0393, *Knooble* [2012] ECLI:NL:HR:2012:BW0393
[45] Wet van 4 februari 1988, houdende regeling van de uitgifte van het Staatsblad en de Staatscourant en van de bekendmaking en de inwerkingtreding van wetten, algemene maatregelen van bestuur en vanwege het Rijk anders dan bij wet of algemene maatregel van bestuur vastgestelde algemeen verbindende voorschriften (Bekendmakingswet)
[46] Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet)
[47] Rob van Gestel and Hans W. Micklitz, 'European Integration through Standardization. How judicial review is breaking down the club house of private standardization bodies', 50 *Common Market L.aw Review* (2013) pp. 145, *et sqq*., at p. 161-162
[48] Case BO4175, *Knooble* [2010] ECLI:NL:GHSGR:2010:BO4175
[49] Opinion of Advocate General Langemeijer in case BW0393, *Knooble* [2012] ECLI:NL:PHR:2012:BW0393, at para. 4.20
[50] Van Gestel & Micklitz, 'European Integration through Standardization', *supra*, note 47, at p. 166

> standards to find out how to develop an equivalent way of complying with the underlying piece of legislation for which standards function as the point of reference, is it still realistic then to argue that the use of standards is completely voluntary?"[51]

If Member States restrict the marketing of products legally manufactured and/or marketed in another Member States, procedures to obtain authorization must at least be "easily accessible, must be capable of being concluded within a reasonable time, and, if it leads to a refusal, the refusal decision must be capable of review before the courts".[52] In *Commission v. France*, the French Government had imposed a prior authorization scheme on processing aids and foodstuffs where their manufacturing process used processing aids from other Member States. The Commission had objected to that scheme because, as it argued, the scheme was disproportionate in relation to the possible risks which processing aids may pose for human health because a scheme systematically making all processing aids subject to prior authorization goes beyond the legitimate objective pursued by it. The French government attempted to justify its scheme under the precautionary principle, but the Court dismissed that argument in this case by referring, *inter alia* to its ruling in *Commission v. Denmark*[53]:

> "A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of processing aids, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research."[54]

Since the French government had not demonstrated that those conditions had been met for all requirements, but that instead it relied upon a 'generalized presumption of a health risk' to justify its scheme; it was held to infringe on Article 34 TFEU.

When it comes to providing alternatives to meet legal obligations, the Dutch Supreme Court's reasoning in *Knooble* is reasonably consistent with the CJEU's in *Max Havelaar*[55], and *Commission v. France*[56] cited above. In *Max Havelaar*, the CJEU had ruled that the province of North Holland had violated a directive[57] by requiring in a tendering procedure for a public

[51] Ibid. at p. 176
[52] Case C-333/08, *Commission v. France* [2010] ECLI:EU:C:2010:44, at para. 81
[53] Case C-192/01 *Commission* v *Denmark* [2003] ECLI:EU:C:2003:492, at para. 51
[54] Case C-333/08, *Commission v. France* [2010], at para. 92
[55] Case C-368/10, *Commission v. Netherlands* [2012] ECLI:EU:C:2012:284. See also Malte Müller-Wrede, 'Sustainable Purchasing in the Aftermath of the ECJ's "Max Havelaar" Judgment' 2 *EPPPL* (2012) pp. 110
[56] Case C-333/08, *Commission v. France* [2010]
[57] Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

contract for the supply and management of coffee machines that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications.[58] Of course, the decision in *Knooble* was strictly based on Dutch copyright and constitutional law; and *Max Havelaar* on EU public procurement law and directives; but as long as substantive requirements *can* be met via suggested standards, but detailed description of alternative procedures is sufficiently comprehensive and easily accessible, the Courts will find no fault. This is in principle also in line with the Commission's guidelines on the applicability of Article 101 to horizontal co-operation agreements[59] – although the NNI in *Knooble* was arguably shown considerable leeway for its alleged antitrust violations by virtue of its nature as a recognized national standardization body.

2.1.4. Standards and Agreements that Restrict by their Object

In competition law, an undertaking is functionally defined as an entity carrying out an economic activity. This entity may be a company, partnership, or sole trader or an association, whether or not dealing with its members – legal personality is irrelevant.[60] Economic activities are more loosely defined as those activities that are 'normally' performed by undertakings[61]: the offering goods and services on a given market.[62] Economic activities can thus generally be understood as being the polar opposite of those activities which are 'typically those of a public authority'.[63]

To be found in violation of Article 101 TFEU, an agreement between undertakings must by its object or effect restrict competition. It is not necessary to examine an agreement's actual or potential effects on the market once its anti-competitive object has been established[64]: extensive market analysis is, as Bailey argues, expensive, time-consuming and it diminishes the practical benefits of object restrictions as an administrative tool.[65] Moreover: experience

[58] Case C-368/10, *Commission v. Netherlands* [2012] ECLI:EU:C:2012:284, at para. 112

[59] Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, *supra*, note 16, at para. 280 ("no obligation to comply") and at para. 293: "Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard-setting organisation remain *free to develop alternative standards or products* that do not comply with the agreed standard" [emphasis in original].

[60] Valentine Korah, An Introductory Guide to EC Competition Law and Practice (Oxford: Hart Publishing, 2007), at p. 46

[61] Case C-41/90, *Höfner and Elser v. Macrotron* [1991] ECLI:EU:C:1991:161

[62] Case C-309/99, *Wouters and Others* [2002] ECLI:EU:C:2002:98

[63] See Case C-343/95, *Diego Calì* [1996] ECLI:EU:C:1997:160, at para. 23-25

[64] Ibid., at para. 24. See also Case C-239/11, *Siemens v. Commission* [2013] ECLI:EU:C:2013:866, at para. 218: "Such an object cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned"

[65] David Bailey, 'Restrictions of Competition by Object Under Article 101 TFEU', 49 *Common Market L.aw Review* (2012) pp. 559, *et sqq*., at p. 569

and consensus in economics have proven some types of agreements to be restrictive 'by their very nature'[66], and undertakings knowing about those types of agreements as being unlawful promotes legal certainty and deterrence.[67] In a situation with a monopolistic private regulator, restriction by object can be more easily claimed[68] – in case of 'private regulatory plurality' however, agreements must be analyzed on their 'legal and economic context' with regard to their actual and likely effect on competition.[69] This legal and economic context is defined by the Commission as follows:

> "[The] context in which competition would occur in the absence of the agreement with all of its alleged restrictions (that is to say, in the absence of the agreement as it stands (if already implemented) or as envisaged (if not yet implemented) at the time of assessment). Hence, in order to prove actual or potential restrictive effects on competition, it is necessary to take into account competition between the parties and competition from third parties, in particular actual or potential competition that would have existed in the absence of the agreement. This comparison does not take into account any potential efficiency gains generated by the agreement as these will only be assessed under Article 101(3)."[70]

Examples of when the Court or Commission found a standardization agreement to restrict competition by its object are, *inter alia*: *Pre-Insulated Pipes*[71], *Belasco*[72], *SCK and FNK v. Commission*[73], and *IAZ v. Commission*[74], the latter of which will be discussed below.

2.1.5. On Encouragement and Incentives

Encouragement or an incentive to use products of domestic providence, dissuasion or deterrence of exports to the country[75], no matter the measure's construction and wording; if the measure or action establishes a trade restriction the Court takes a very narrow view. In

[66] Case C-209/07, *Competition Authority v. Beef Industry Development Society and Barry Brothers ('Irish beef')* [2008] ECLI:EU:C:2008:643, at para. 17
[67] Bailey, 'Restrictions of Competition by Object Under Article 101 TFEU', *supra*, note 61, at p. 262-569
[68] Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, *supra*, note 16, at para. 273-276
[69] Ibid. at para. 277 and T-168/01, *GlaxoSmithKline Services v. Commission* [2006] ECLI:EU:T:2006:265, at para. 117
[70] Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, *supra*, note 16, at para. 29
[71] Commission Decision in Case IV/35.691, *Pre-insulated pipes*, OJ L 24, 30.1.1999, p. 1
[72] Case 246/86, *Belasco and Others v. Commission* [1989] ECR 2117
[73] Joined cases T-213/95 and T-18/96, *SCK and FNK v. Commission* [1997] ECLI:EU:T:1997:157
[74] Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983] ECLI:EU:C:1983:310
[75] Case C-286/07, *Commission v. Luxembourg* [2008] ECLI:EU:C:2008:251

Buy Irish[76], the Irish State was held accountable for a measure capable of introducing a trade restriction for merely encouraging consumers to buy more products of domestic provenance. The encouragement criterion from *Buy Irish* was confirmed to be applicable to standardization bodies in *Commission v. Belgium*.[77] In that case dealing with construction materials, the Belgian Institute for Standardization owned a conformity mark of the name BENOR; various national laws provided for a presumption of conformity with the national technical specifications of products bearing that mark.[78] The Commission argued that the Kingdom of Belgium had introduced "an incentive for economic operators wishing to market in Belgium construction products legally manufactured or marketed in another Member State, to obtain the conformity marks".[79] The Court agreed with the Commission that the Kingdom of Belgium had thereby established a restriction on the free movement of goods.[80]

According to Jojnik, with the recent and current economic, food, and climate change crises forcing national politicians to respond with various mechanisms to protect their national economies, 'ethno/local-centrist buy domestic' campaigns such as used in *Buy Irish* would be more easily justified on grounds of, *inter alia*, environmental and consumer protection.[81] In any case, the justification must, as she argues, predominantly be based on recognized grounds and not in fact be strictly protectionist[82] – a sentiment in line with Article 36 TFEU's assertion that a measure may not constitute 'a means of arbitrary discrimination or a disguised restriction'.

That some undertakings can also be held accountable in some cases for encouraging others to engage in anti-competitive conduct was confirmed in *IAZ v. Commission*.[83] The facts of this case are as follows: ANSEAU[84], a non-profit making association composed of various water-supply undertakings in Belgium each set up by local authorities with the aim of supplying and distributing water, and guaranteeing its safety, had altered its rules to make distributors criminally liable for the quality of water. Only appliances with a certain mechanism that would 'prevent flowback of foul water' were allowed to be connected to the Belgian water

[76] Case C-249/81, *Commission v. Ireland* [1982] ECLI:EU:C:1982:402
[77] Case C-227/06, *Commission v. Belgium* [2008] ECLI:EU:C:2008:160, at paras. 23, 52, 54
[78] Ibid. at para. 6-9
[79] Ibid. at para. 42
[80] Ibid. at para. 56
[81] Janja Hojnik, 'Free Movement of Goods in a Labyrinth: Can *Buy Irish* Survive the Crises', 49 *Common Market L.aw Review* (2012) pp. 291
[82] Ibid. at p. 312
[83] Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983] ECLI:EU:C:1983:310
[84] Association Nationale des Services d'Eau, the Belgian National Association of Water Suppliers

system. This was initially tested at consumers' homes, but this proved to be costly and inefficient – ANSEAU thus introduced a procedure via which a type or model of appliance could be checked for conformity. Still, due to frequent modifications to appliances – modifications that did not necessarily affect the water system – the choice was made to use a conformity label that would be affixed to the appliance by the importer or manufacturer to testify that it was in compliance. ANSEAU's tasks were thus confined to random checks to ascertain whether the conformity checks (by different undertakings, not named in the case) were being carried out properly. Different associations of manufacturers and importers complained to ANSEAU that some parallel importers were benefiting from the system without paying for it: while the appliances they sold would not bear the conformity label, they would still be authorized to be imported – the official importers wanted "preferential treatment over non-members". ANSEAU and the associations of manufacturers and importers drew up an agreement that banned all sales of appliances not bearing the conformity label: only 'sole importers for Belgium' of machines would be granted the conformity labels.

The Commission objected to this agreement by stating that its purpose and effect were to make impossible or at least more difficult parallel imports into Belgium of washing machines and dishwashers and that those restrictions amounted to restrictions of competition within the meaning of Article 101(1) TFEU. The Commission further indicated that it wanted to establish that the agreement could not be exempted under article 101(3) TFEU, that it wanted to require the parties to the agreement to terminate the infringement, and that they would be fined for it. ANSEAU argued that it was not an 'association of undertakings' as defined earlier in *Frubo*[85] because it itself didn't carry on any economic activity and the association was only empowered to make recommendations.[86] The Court responded by citing *van Landewyck*[87] to rule that:

> "A recommendation, even if it has no binding effect, cannot escape [Article 101(1)] where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question".[88]

Since ANSEAU's recommendations determined the conduct of a large number of its members; and the agreement was found to have *as its purpose and its effect* to appreciably

[85] Case C-71/74, *Frubo* [1975] ECLI:EU:C:1975:61
[86] Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983], at para. 19
[87] Joined cases 209 to 215 and 218/78, *van Landewyck and others v. Commission* [1980] ECLI:EU:C:1980:248
[88] Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983], at para. 20

affect intra-Community trade[89]; the Court ruled in the Commission's favor on all counts.[90] Fines ranged from 9500 ECU[91] to 76500 ECU for the biggest infringers (Miele, Bauknecht, and ANSEAU itself for bearing most of the responsibility for the agreement): the total fine was calculated at 1.5% of the value of imports in Belgium in 1980 and divided according to the market position of the undertakings and expected benefits from the agreement.[92]

2.2. The *Effet Utile* of Competition Law

2.2.1. *Effet Utile* and Autonomous Conduct

The rules on quantitative restrictions generally affect measures emanating from the State – but the provision also applies where a Member State abstains from adopting the measures required to deal with obstacles to the free movement of goods which are not caused by the State[93] in view of its obligations under Article 4 TEU "to take all appropriate measures to ensure fulfilment of Treaty obligations and the *effet utile* of EU law".[94] In other words, Member States may in some instances be held accountable for failing to step in when private individuals create barriers to the free movement of goods. Letting national public authorities decide on "how to best further the public interest, regardless of the anti-competitive consequences of their actions, would be to let Member States determine the scope of EC competition law unilaterally, a consequence the Court has stated to be unacceptable".[95] After all, Member States could otherwise simply outsource their market restrictions to private parties by depriving its own legislation of its 'official character' by delegating to private parties the responsibility for taking decisions affecting the economic sphere.[96] Decisions affecting the economic sphere are not strictly limited to legislative powers, but may also include discretionary powers of an executive nature.[97] Member States have an obligation to observe the *effet utile* of both free movement law as well as that of competition law: an example of a delegated violation of Article 34 TFEU was in *Radlberger and Spitz*[98] in which

[89] Ibid. at para. 23-28
[90] Ibid. at para. 61
[91] The European Currency Unit (ECU) was the unit of account which was used before it was replaced by the Euro (which was real currency of course) at a rate of 1 ECU = 1 euro.
[92] See Article 23 of Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty for the current rules on calculation of fines
[93] Case C-265/95, *Commission v. France ('Rioting Farmers')* [1997] ECLI:EU:C:1997:595, at para. 30
[94] DG Enterprise, Guide to the application of Treaty provisions governing the free movement of goods (Luxembourg: Publications Office of the European Union, 2010), at p. 11
[95] Harm Schepel, *The Constitution of Private Governance*, *supra*, note 15, at p. 43-44
[96] Case C-267/86, *van Eycke v. ASPA* [1988] ECLI:EU:C:1988:427, at para. 16
[97] Case C-9/56, *Meroni v. High Authority* [1958] ECLI:EU:C:1958:7
[98] Case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECLI:EU:C:2004:799: the German government had left the task of collecting packaging and packaging waste for reuse to private operators

the Court ruled that even when a certain public task is left to private administration, the Member State may still be held accountable for trade restrictions created by those private parties.

The question is then when to apply which regime when trade restrictions are outsourced to private parties: the rules on quantitative restrictions or of competition law? The Court had ruled in the past that the two are mutually exclusive: when the provisions on the free movement of goods applied, competition law did not. In *van de Haar* the Court had given some idea on the objectives of each regime:

> "[Article 34 TFEU], which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of [Article 101], which seeks to maintain effective competition between undertakings".[99]

The obligation for Member States to uphold the *effet utile* of the provisions on the internal market consists of two branches. The first branch is held to be infringed if a Member State makes autonomous decisions impossible and national legislation imposes on undertakings the obligation to engage in anti-competitive conduct, in which case that Member State should be held responsible for it.[100] The second branch of this doctrine deals with undertakings being 'encouraged' to enter into horizontal co-operation agreements by public authorities to attain a public policy objective by way of self-regulation; those businesses may still be held liable under Article 101 if that was an autonomous and voluntary decision[101] - although the effects of the national laws may be taken into account as a mitigating factor when calculating the resulting fine.[102]

2.2.2. On Exemption/justification and Delegation

Agreements between undertakings may be granted exemption under Article 101(3) TFEU if they meet four cumulative conditions: they must contribute to improving the production or distribution of goods or to promoting technical or economic progress; the restrictions must be 'indispensable' for the attainment of those objectives; consumers must receive a 'fair share' of the resulting benefit; and finally the agreement must not afford the parties the possibility of

[99] Joined Cases, C-177/82 and C-178/82, *Van de Haar* [1984] ECLI:EU:C:1984:144, at para. 14
[100] See Case C-13/77, *INNO v. ATAB* [1977] ECLI:EU:C:1977:185; Case C-227/06, *Commission v. Belgium*; and Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, *supra*, note 16, at para. 22
[101] Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, *supra*, note 16, at para. 22. See also Case C-198/01, *CIF*, [2003] ECLI:EU:C:2003:430, paragraphs 56–58
[102] Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, at para. 620

eliminating competition in respect of a substantial part of the products in question.[103] As confirmed in *Irish Beef*, only those considerations given in Article 101(3) may be used to obtain exemption for a violation of Article 101(1).[104] As mentioned above, some State measures restricting trade under Article 34 may be justified if they (proportionally) meet certain public interest criteria. Public-private cooperation, for instance in the case of standardization, often aims for both public interest goals as well as efficiency gains –hence it is only natural that both are taken into account to assess the possible justification of, respectively, anticompetitive conduct or trade restrictive State measures. But the Court has been rather uncomfortable with the prospect of regulatory capture in past cases dealing with the *effet utile* of competition law to take public interest grounds into consideration to grant exemption to those provisions.[105] In *Reiff*, tariffs for the road transport industry were set by 'Tariff Boards' consisting of experts from the relevant sectors appointed by the Minister. These experts were held not to be bound by orders or instructions from the undertakings that proposed them for appointment, and the meetings of those Boards could thus not be regarded as meetings of representatives of undertakings in the industry concerned. Moreover, those experts had to take into account "the interests of the agricultural sector and of medium-sized undertakings or regions which are economically weak or have inadequate transport facilities"[106]. Since the Minister could attend those meetings, control the composition of the Boards, and retained the power to fix tariffs himself – the Court did not find delegation.[107] As explained in *Reiff* and similar cases[108]: as long as the final decision to adopt a proposal lies with the public authority and is thus not strictly delegated; and private representatives act as independent experts; the Court will find no fault. This 'delegation test' is not perfect:

> "A voluntary standard adopted by a fair process subject to wide interest representation, public review, and acknowledged expertise, would not be immunized from antitrust review on the grounds of those public interest safeguards; these public interest grounds

[103] Commission guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, *supra*, note 16, at para. 49
[104] Case C-209/07, *Irish Beef* [2008], at para. 21
[105] Harm Schepel, *The Constitution of Private Governance*, *supra*, note 15, at p. 321
[106] Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Reiff* [1993] ECLI:EU:C:1993:886, at para. 18
[107] Ibid. at para. 21-22
[108] Case C-185/91, *Reiff* [1993], at para. 17-19, 24. See also, *inter alia*, Case C-35/96, *Commission v. Italy* [1998] ECLI:EU:C:1998:303 at para. 44; Case C-35/99, *Arduino* [2002] ECLI:EU:C:2002:97 at para. 37; Case C-96/94, *Spediporto* [1995] ECLI:EU:C:1995:308 at para. 20-22

would only be allowed into the analysis if [the] standard were subsequently rendered mandatory by public law".[109]

As evidenced by the confirmation of *Reiff* as recently as 2014 in *API and Other* however, the Court still sees value in that 'delegation test' to find safeguard mechanisms against regulatory capture.[110] It must be stated that in *Reiff* and similar cases, the Court generally ruled on the levy of tariffs. Since non-tariff State measures are also capable of restricting trade (i.e. via Article 34 TFEU), it follows that the same holds true in the case of agreements between undertakings. This is the 'market access test' developed in *Commission v. Italy*[111], as referenced in *Api and Others*:

"As regards the adverse effect on intracommunity trade, it is sufficient to recall that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the TFEU is designed to bring about".[112]

In *Api v. Others*, minimum operating costs for road transport in Italy were fixed by an association of undertakings recognized in a legislative decree. These minimum costs were meant to protect road safety but, unlike in *Reiff*, the State representative had no right of veto or a casting vote which "might make it possible to rebalance power between the public authorities and the private sector".[113] Since the fixing of those tariffs was made mandatory by legislation and were therefore capable of restricting competition in the internal market[114]; and that restriction was held not to be appropriate to ensure road safety[115]; the Court ruled that this was an infringement of article 4 TEU in combination with article 101 TFEU.

[109] Harm Schepel, *The Constitution of Private Governance*, *supra*, note 15, at p. 337
[110] Case C-184/13, *API and Others* [2014] ECLI:EU:C:2014:2147, at para. 33, 34
[111] Case C-35/96, *Commission v. Italy* [1998], at para. 48. See also Joined Cases C-295/04 to C-298/04, *Manfredi and others* [2006] ECLI:EU:C:2006:461
[112] Case C-184/13, *API and Others* [2014], at para. 44
[113] Ibid. at para. 33
[114] Ibid. at para. 45
[115] Ibid. at para. 49-55

2.3. Free Movement Law after *Fra.bo*

2.3.1. Factual and Legal Background

The Court's 2012 judgement in *Fra.bo*[116] created some discussion on the direct applicability of Article 34 TFEU to private parties - a provision previously only applied directly to Member States. The facts of this case are as follows: the Italian company Fra.bo SpA had applied to the German DVGW for certification of copper fittings. DVGW is a certification body established under German private law that was recognized in German legislation in the sense that products certified by that body were presumed to be compliant with the relevant substantive requirements. DVGW commissioned a German materials testing agency to carry out the appropriate tests for Fra.bo's products, that agency in turn subcontracted this work to one in Italy. This Italian Agency was recognized by the Italian authorities, but not by the DVGW. Regardless, the Spa.bo products were certified for the time being. However, after receiving complaints from third parties; the DVGW instituted a re-assessment procedure and the products were found not to pass a certain test: a test report by the aforementioned Italian agency was not accepted by the DVGW because it was not a recognized agency. Meanwhile, the DVGW had altered the substantive requirements to include a new quality test (the material would be exposed to boiling water for 3,000 hours). Since Spa.bo had not applied for additional certification within three months of that amendment, the certificate was cancelled. Spa.bo then sued the DVGW for the cancellation and for refusing to extend the certificate.[117]

The discussion on the possible direct applicability started when the Advocate General in the case argued, citing the reasoning in *Viking*[118], that since the other three Fundamental Freedoms (Free movement for workers, the freedom of establishment and the freedom to provide services) guaranteed by the Treaties[119] already had – albeit somewhat restricted – direct applicability; the AG saw no reason why the same should not be true for Articles 34 and 36 TFEU as well in this case. In *Viking*, often quoted together with *Laval*[120] due to its similar subject matter and outcome, a Finnish Transport Workers' Union and its affiliated international umbrella organization had threatened collective action against the commercial ferry operator Viking Line ABP because that company had wanted to reflag a ship from

[116] Case C-171/11, *Fra.bo* [2012]
[117] Case C-171/11, *Fra.bo* [2012], at para. 6-13
[118] Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union ('Viking')* [2007] ECLI:EU:C:2007:772. In particular at para. 37: "It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC"
[119] Opinion of Advocate General Trstenjak in case C-171/11, *Fra.Bo* [2012] ECLI:EU:C:2012:176, at para. 36
[120] Case C-341/05, *Laval un Partneri* [2007] ECLI:EU:C:2007:809

Finland to Estonia. That ship was operating at a loss because it had to compete with Estonian vessels that could pay their crew less. Reflagging the ship would allow the company to engage into a new collective wage agreement with a trade union in a different State. The international umbrella organization thus sent a memo to its various affiliates that they were to refrain from entering into negotiations with Viking Line, and the Finnish union gave notice of a strike unless its demand of more crewmembers on the ship was met and the company would give up its plans to reflag the vessel – the first demand was conceded, the second wasn't. To go through with those plans, Viking Line sued those two unions; it was argued that their actions had been an infringement of Article 49 TFEU: the Freedom of Establishment or, alternatively, of Articles 45 and 56 TFEU: the Freedoms of, respectively, Movement of Workers and to provide Services. The unions countered by claiming that they had the right to take collective action to preserve jobs under, in particular, Article 151 TFEU.[121] Because the vessel had not been reflagged at the time, and since the Court cannot rule on hypothetical situations; the Court only ruled on the interpretation of Article 49 TFEU. This ruling confirmed Viking's Line stance in the sense that, in principle, collective action by a trade union is not excluded from the scope of that Article since those matters are not in all Member States resolved by (quasi-) public authorities:

> "(…) working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*[122], paragraph 19; *Bosman*[123], paragraph 84; and *Angonese*[124], paragraph 33)."

According to the AG in *Fra.bo*, the DVGW was *de facto* competent to restrict the marketing of those goods in Germany[125]; and, by analogy[126] of the reasoning in *Viking* cited above; the provisions on the Free Movement of Goods should also have direct horizontal effect.[127]

---

[121] Article 151 TFEU reads as follows: "The Union and the Member States, (…) shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion."
[122] Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others* [1974] ECLI:EU:C:1974:140
[123] Case C-415/93, *Union royal belge des sociétés de football association and Others v. Bosman and Others* [1995] ECLI:EU:C:1995:463
[124] Case C-281/98, *Angonese* [2000] ECLI:EU:C:2000:296
[125] Opinion of Advocate General Trstenjak in case C-171/11, *Fra.Bo* [2012], at para. 40-43

The Court agreed with the AG that the DVGW was bound by Article 34 TFEU: firstly since products certified by the DVGW were compliant with national legislation[128]; secondly because the DVGW was the only body to certify the products in question[129]; and thirdly because lack of certification placed a considerable restriction on the marketing of the products concerned in Germany.[130] There being an alternative route to market the products besides certification was found to be of 'little to no practical use' due to the associated administrative difficulties and extra costs.[131]

2.3.2. Discussion and Analysis

The judgement in *Fra.bo* is difficult to reconcile with the traditional notion that the Free Movement provisions only bind Member States, and not private parties. To hold the State responsible for trade restrictions created by private parties as done for Article 34 TFEU violations in *Rioting Farmers*[132] and Article 101(1) in *Radlberger and Spitz*[133] both discussed above, is nothing new – but to bypass the State's role as gatekeeper, and apply that provision with all its consequences directly to a private body is quite something else. The other Fundamental Freedoms (work; services; establishment) already enjoyed a certain degree of horizontal applicability however: some authors had therefore indicated that it was merely a matter of time before the Court had to rule on a case dealing with the Free Movement of Goods as well.[134]

One of the problems with standards in the EU is that since the public or private nature of standard setters is not consistent throughout the Union, applying different rules – competition law to private agencies and the provisions on quantitative restrictions to public ones – may

[126] Ibid. at para. 47-49. At para. 47 the AG notes that: "In the context of the present proceedings this consideration, which is based on the *effet utile* of Union law, can be applied to the standardisation and certification activity of DVGW and its wholly owned subsidiary, since, as is evident from the request for a preliminary ruling, DVGW is able *de facto* to determine, by issuing standards and certifying products for the installation, enlargement, alteration and maintenance of drinking water equipment on the house-side of the connection, which products gain access to the German market."
[127] Ibid. at para. 50
[128] Case C-171/11, *Fra.bo* [2012], at para. 27
[129] Ibid. at para. 28
[130] Ibid. at para. 30
[131] Ibid. at para. 29
[132] Case C-265/95, *'Rioting Farmers'* [1997]
[133] Case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz* [2004]
[134] See Harm Schepel, "Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law", 18 *European Law Journal* No. 2 (2013) pp. 177; Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods', 49 *Common Market L.aw Review* (2012) pp. 177

'undermine the goal of integration'.[135] Moreover, some argue that *not* applying those provisions consistently would in certain cases risk creating an 'escape route' for public authorities to simply 'outsource' the restrictions of fundamental freedoms to private parties.[136] If, in a hypothetical scenario, the DVGW in *Fra.bo* had been formally classified as a public body, then the relationship between Fra.bo as a private business and the DVGW as a public body would have been a clear case of direct vertical effect of Article 34 TFEU.[137] But the DVGW was a non-profit, private-law body whose activities were not financed by the Federal Republic of Germany and the state had no decisive influence over the DVGW's standardization and certification activities either[138] - accordingly, that 'Vereinigung' contended that Article 34 TFEU was not applicable to it.[139] As discussed above, the Court ended up ruling that the DVGW's actions were in fact within the ambit of Article 34 TFEU – but the judgement appears to have raised more questions than it answered. Various authors have indicated three major, interconnected issues with interpreting the case:

1. In what cases do the provisions on the Free Movement of Goods now apply to private parties?
2. On what basis can private standardization bodies now justify their actions if they restrict trade? On public interest grounds, or economic freedoms?
3. If those bodies are expected to work in the public interest, to what extent do they have to adopt procedural arrangements or substantive requirements to ensure that those bodies are not subject to regulatory capture?

The first problem is regarding the Court not acknowledging the AG's line of reasoning in its judgement. While both come to the same conclusion – the DVGW is bound by Article 34 TFEU – they arrive to that conclusion via very distinct paths. As discussed above, the AG largely based her reasoning on the analogy of the situation to the cases in which the other Fundamental Freedoms had already been granted (limited) horizontal effect. The Court, instead, did something unprecedented:

[135] Fabrizio Cafaggi, "Does Private Regulation Foster European Legal Integration?" in Kai Purnhagen and Peter Rott (eds.), *Varieties of European Economic Law and Regulation* (Switzerland: Springer International Publishing, 2014), pp. 259, *et sqq*. at p. 275
[136] See Van Gestel & Micklitz, 'European Integration through Standardization', *supra*, note 47, at p. 158-159
[137] Herman van Harten and Thomas Nauta, "Nog geen horizontale rechtstreekse werking van het vrije verkeer van goederen?", 10 *NtEr* (2012) pp. 329, *et sqq*., at p. 331
[138] Case C-171/11, *Fra.bo* [2012], at para. 24
[139] Ibid. at para. 25

> "It must therefore be determined whether, in the light of inter alia the *legislative and regulatory context* in which it operates, the activities of a private-law body such as the DVGW has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State."[140] [Emphasis mine]

The term 'legislative and regulatory context' has never been used by the Court before, but it is reminiscent of the method used to determine the nature of a restriction under competition law: either as an 'economic activity' performed by undertakings; or those 'activities falling within the exercise of public powers', generally performed by the State.[141] This concept is by some defined as a 'functional approach': instead of focusing on the identity of a standardization body, under this approach the Court would look at that body's activities to determine applicability of, respectively, competition law or the provisions on the Free Movement of Goods.[142]

The discrepancy between the Court's and AG's conclusions implies that the full horizontal effect of the Free Movement of Goods advocated by the AG[143] is not fully upheld by the Court. Van Gestel & Micklitz therefore conclude that standards bodies must be treated as 'quasi statutory entities'[144]: while they state that the Court avoided that question altogether, it can be inferred that under that theory Article 34 TFEU is not given direct horizontal effect, but is rather *extended* to include those types of entities. Schepel on the other hand is convinced that the exceptions that previously limited the full horizontal effect of the Fundamental Freedoms no longer apply.[145] A premise he, while convinced of, is not comfortable with: if all rights and principles can be invoked horizontally (i.e.: if one private party infringes the rights of another), without there being a coherent hierarchy of those rights; then the "legal certainty, uniformity of application, and the effectiveness of internal market

[140] Case C-171/11, *Fra.bo* [2012], at para. 26
[141] Harm Schepel, "Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference", *supra*, note 134, at p. 186.
[142] Ibid. See also: Fabrizio Cafaggi, "Does Private Regulation Foster European Legal Integration?" in Kai Purnhagen and Peter Rott (eds.), *Varieties of European Economic Law and Regulation* (Switzerland: Springer International Publishing, 2014), pp. 259, *et sqq*., at p. 275: "A functional approach to standard setting is based on the correlation between process and output."
[143] Opinion of Advocate General Trstenjak in Case C-171/11, *Fra.bo* [2012], at para. 27-35; 42-45. Para. 45 in particular: "In these circumstances, there are no fundamental objections to the application of the argument developed in case-law on the limited horizontal effect of the freedom of movement for workers, the freedom of establishment and the freedom to provide services to a case such as the present one, in which the applicability of the principle of the free movement of goods to a private-law association with *de facto* rule-making competence is at issue."
[144] Van Gestel & Micklitz, 'European Integration through Standardization', *supra*, note 47, at p. 159
[145] Harm Schepel, "Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law", 21 *ERPL* 5&6 (2013) pp. 1211: "After *Fra.bo*, however, even the free movement of goods, that bastion of the Court's resistance,6 has fallen to horizontal direct effect".

law" is undermined.[146] Until the Court rules either way, it is unclear in what cases the provisions on the Free Movement of Goods now apply to private parties.

The second issue is with the 'awkward relationship' between the applicability of competition law on one side, and the provisions on the Free Movement of Goods on the other side.[147] Even if the Court can now use the 'functional approach' to differentiate between the applicability of the two areas of law depending on the type of activities conducted; other differences remain. As Lundqvist notes; "the notions of restriction of trade and discrimination are based on nationality, while the competition rules mainly turn on whether competition has been restricted".[148] Indeed, as seen in *van de Haar,* discussed above, it was concluded that the two pursue very different objectives.[149] Furthermore, these provisions' respective justification/ exemption grounds are mutually exclusive: if the DVGW is bound by Article 34, then it should be able to justify its actions on the public interest grounds laid down in Article 36 TFEU and the mandatory requirements of *Cassis de Dijon.*[150] Yet it also follows that it can then *not* justify its actions on the primarily financial exemption grounds of Article 101(3), or on the protection of the fundamental right to conduct a business under Article 16 of the Charter of Fundamental Rights of the EU[151]; because those rights can only be invoked by private parties. Van Gestel & Micklitz connect *Fra.bo* to *Knooble*: besides the economic freedoms discussed above, could the protection of copyrights as was the case in *Knooble* also be such an appropriate restriction of the fundamental freedoms? [152] Again, that is a right generally reserved for private parties, but whether those grounds can be used by standardization bodies after *Fra.bo* is uncertain - up to the point that they raise the possibility

[146] Ibid. at p. 1228-1229
[147] Ibid. at p. 1212-1215
[148] Björn Lundqvist, Standardization Under EU Competition Rules and US Antitrust Laws: The Rise and Limits of Self-Regulation (Cheltenham: Edward Elgar Publishing, 2014), at p. 379
[149] Joined Cases, C-177/82 and C-178/82, *Van de Haar* [1984]. To reiterate: "[Article 34 TFEU], which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from that of [Article 101], which seeks to maintain effective competition between undertakings"
[150] Case C-120/78, *Cassis de Dijon* [1979]
[151] As highlighted in the Opinion of Advocate General Trstenjak in Case C-171/11, *Fra.bo* [2012], at para. 56. See also Harm Schepel, "Freedom of Contract in Free Movement Law", *supra,* note 145 at pp. 1215 who cites Joined cases C-90/90 and C-91/90, *Neu* [1991] ECLI:EU:C:1991:303, at para. 13: "it must be stated that the freedom to pursue a trade or profession (...) includes, as a specific expression of that freedom, the freedom to choose whom to do business with."
[152] Van Gestel & Micklitz, 'European Integration through Standardization', *supra*, note 47, at p. 160

that *Knooble* might have been ruled very differently if the question came up after *Fra.bo* was ruled on by the CJEU.[153]

The third issue is regarding the legitimacy of the 'outsourcing' of public tasks to private entities, as in the case of private standardization replacing national legislation. Many authors cite *Meroni*[154] and conclude that how this has been implemented quite often does not fulfill the requirements set up by the Court for when the Commission (and by extension, national public authorities) is allowed to delegate to a private body.[155] In *Meroni*, the High Authority of the European Coal and Steel Community (predecessor of the European Commission) had entrusted the administration of a system designed to keep the prices of imported ferrous scrap low, to a private party – the 'Joint Bureau of Ferrous Scrap Consumers'. That Bureau charged fees to commercial operators in that sector, with those fees depending on the amount of ferrous scrap processed. Meroni & Co., Industrie Metallurgiche, S.p.A. refused to pay those fees because the Bureau did not disclose how it calculated them. Important here is that the Court ruled that the High Authority had *de facto* delegated powers of a discretionary nature to a private entity without retaining responsibility for the decisions made by that private entity – that the High Authority contended that there was no case of *formal* delegation did not persuade the Court.

The Court not discussing the consequences of possible justification under Article 36 TFEU in *Fra.bo* is problematic for a reason besides legal uncertainty: it was never analyzed whether the DVGW was even fit to make decisions setting public policy without the State's 'decisive influence'. If a public function is attributed to a private body, to what extent does that body then have to comply with "public law making and public law enforcement requirements, such as the right to participate in the decision-making process and the publication of the standards they produce (access to public information)"?[156] From the criteria discussed above it is clear that private parties with sufficient market power or influence have had to institute such safeguards to a certain degree to avoid potential anti-competitive effects already – but to what extent that is expected of them after *Fra.bo* is utterly unclear from the judgement. If this

[153] Ibid. at p. 175: "Pursuant to *Fra.bo SpA* one might raise the question whether the Dutch (…) law is fully in compliance with EU law. If standards bodies must be regarded as public bodies when having de facto public powers, what they produce is "law" and therefore cannot be protected via copyrights."
[154] Case C-9/56, *Meroni* [1958]
[155] Lundqvist, Standardization Under EU Competition Rules and US Antitrust Laws", *supra*, note 148, at p. 375. See also Van Gestel & Micklitz, 'European Integration through Standardization', *supra*, note 47, at p. 151, 177-178; Merijn Chamon, 'EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea', 48 *Common Market Law Review* (2011) pp. 1055
[156] Ibid. at p. 160

required to a significantly higher degree than of bodies operating in the realm of competition law, then the Court completely avoids the question whether the DVGW even contains the proper "procedural arrangements or substantive requirements" capable of ensuring that the body can conduct itself as "an arm of the State working in the public interest".[157]

2.4. Conclusion

Standards have the potential to restrict trade, but with the proper governance structure those effects can be minimized. In the case of multiple standard-setters competing with one another, anti-trust violations are less likely to occur but care must be taken to make sure that lock-in costs are not prohibitively high. In the case of a single standard-setter, the potential for abuse is higher and both States as well as private parties must make an effort to reduce anti-competitive effects. These efforts include, but are not limited to:

- Member States as well as approved standard-setting bodies have an obligation to recognize equivalent certification schemes from outside the country and must show an active approach to fulfill that objective;
- Standards may be used to fulfill substantive requirements from law, but description of alternative routes must be sufficiently comprehensive and not involve disproportionate administrative difficulties or costs;
- States and influential associations of undertakings are not allowed to encourage, or provide incentives for the use of a standard if this encouragement results in a considerable restriction to market access.

If national legislation provides no option for private autonomous conduct not to restrict trade, the Court will rule to dis-apply that legislation and those businesses will not be held liable. If, however, the national rules merely promote that behavior then the undertakings responsible can still be held liable under competition law. The Court has been hesitant to allow public-private cooperation in place of formal legislation, but those initiatives in which the final decision to adopt a proposal lies with the public authority; private representatives act as independent experts; and safeguard mechanisms are in place to ensure public interest objectives are attained, are in principle allowed.

The Court's judgement in *Fra.bo* started a discussion on the applicability of Article 34 TFEU to private parties – but the judgement appears to have raised more questions than it answered.

[157] Case C-184/13, *API and Others* [2014], at para. 38

Three major issues with *Fra.bo* were indicated by various authors: (i) in what cases do the provisions on the Free Movement of Goods now apply to private parties?; (ii) on what basis can private standardization bodies now justify their actions if they restrict trade? On public interest grounds, or economic freedoms?; and (iii) if those bodies are expected to work in the public interest, to what extent do they have to adopt procedural arrangements or substantive requirements to ensure that those bodies are not subject to regulatory capture?

While *Fra.bo* may have opened the door for the full horizontal effect of the Free Movement of Goods; those questions remain and the road is, as van Harten & Nauta said, still filled with many speedbumps.[158] Until a similar case is ruled on by the CJEU, recognized standardization bodies live in a twilight zone between the rules on State measures (as in *Fra.bo*) and those governing associations of undertakings (as in *Frubo*). The facts of the RiskPlaza scheme may present such a case.

[158] van Harten & Nauta, "Nog geen horizontale rechtstreekse werking van het vrije verkeer van goederen?", *supra*, note 137, at p. 335

3. About RiskPlaza

3.1. History of NVWA supervision and the RiskPlaza Scheme

In the past, the NVWA had attempted to work together with private parties in 'partnership' arrangements, but later it was decided to solely continue in 'cooperation' arrangements. The NVWA too often found that businesses certified by one of the big international schemes (e.g. IFS, BRC) still showed non-compliance – but catalyst for this change to cooperation arrangements was the 2013 Horse Meat Scandal.[159] To restore the Dutch public's trust in food supply chains, the Ministers of Economic Affairs and Health, Welfare and Sport, together with representatives from the meat, dairy and feed industry, started the 'Taskforce Trust in Food' ('Taskforce Voedselvertrouwen'). This Taskforce created an action plan indicating various resolutions aimed at improving food safety. Parallel to that development, the Dutch Safety Board, tasked with investigating the scandal, published a highly critical report on the state of public and private supervision in the meat sector. It concluded that the reliance on routine checks that focused only on 'the truth on paper' had led to an illusion of safety. The emphasis had been on checkboxes instead of the actual situation on the work-floor where natural products were being processed: the meat sector, at least, had not been ready for private audits taking over government supervision.[160] The Safety Board's conclusions are fairly similar to the Taskforce's, but the Taskforce seems to emphasize *increased* reliance on private standards; the recommendations on how audits should focus more on the real situation, is consistent though.[161]

Upon publication of its action plan, the Taskforce was dissolved and a new foundation was started ('Stichting Ketenborging') to put in practice the Taskforce's resolutions. Private assurance schemes could apply for NVWA recognition; if the scheme showed compliance with a new set of criteria[162] set up by the Taskforce, this new status as accepted/recognized would be published on the foundation's website. Businesses could then check that website to see if their supplier was certified with a recognized scheme and alter its control methods

[159] For an overview of the 2013 Horse Meat Scandal, see DG Health and Food Safety's on it, available on the internet at < http://ec.europa.eu/food/food/horsemeat/> (last accessed on 23 February 2016)
[160] Onderzoeksraad voor Veiligheid, "Risico's in de Vleesketen", March 2014, available on the internet at <http://www.onderzoeksraad.nl/uploads/phase-docs/559/0257ce30ca1drisico-s-vleesketen-nl-web.pdf> (last accessed on 23 February 2016)
[161] Taskforce Voedselvertrouwen, "Actieplan Taskforce Voedselvertrouwen", 13 June 2013, available on the internet at <https://www.rijksoverheid.nl/documenten/rapporten/2013/06/13/actieplan-taskforce-voedselvertrouwen> (last accessed on 23 February 2016)
[162] NVWA, "Requirements for the acceptance of quality systems by the Netherlands Food and Consumer Product Safety Authority (NVWA)", 4 June 2014, available on the internet at <http://ketenborging.nl/wp-content/uploads/Criteria-voor-acceptatie-Engels.pdf> (last accessed on 23 February 2016)

accordingly – the NVWA would do the same which could result in reduced or 'adapted supervision'. Currently, twelve schemes have applied for recognition but none have been formally accepted thus far.[163] The NVWA's intended form of cooperation is shown schematically in figure 1: NVWA's intended future role of certification in official controls. It shows three categories of food businesses: those certified with a recognized scheme, those not certified but in compliance, and those not in compliance. The idea is that by trusting on systems of private certification, the NVWA will be able to focus more on those businesses not in compliance.

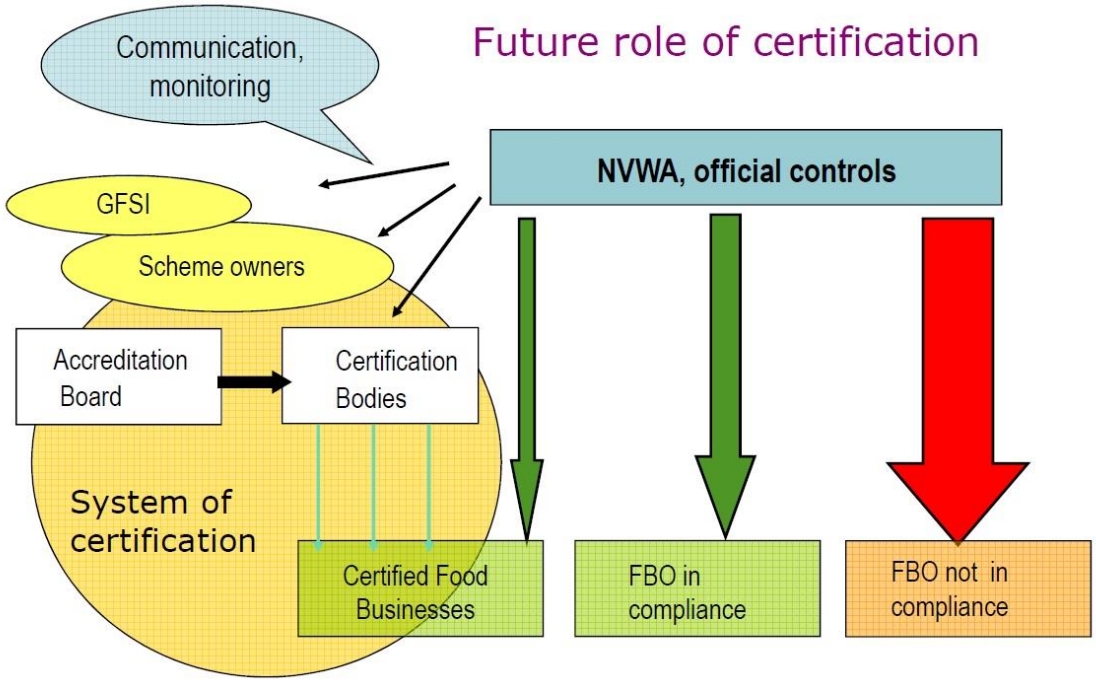

Figure 1: NVWA's intended future role of certification in official controls[164]

Food business operators in the Netherlands have been mandated to implement procedures based on the principles of the Hazard Analysis Critical Control Points (further: HACCP) since the mid-nineties following the implementation of European Directive 93/43/EEC[165], and later in Regulation 852/2004.[166] The introduction of this provision in the Netherlands was not without opposition or confusion. The NVWA noticed in particular that to control possible hazards in ingredients, businesses sometimes stated on the purchasing specification that those

[163] Stichting Ketenborging, "Kwaliteitsschema's en Status", available on the internet at < http://ketenborging.nl/kwaliteitsschemas-en-status/> (last accessed on 23 February 2016)
[164] Copied from Hans Beuger, "Food Safety, a Risk Based Approach in the Netherlands", Presentation held at Wageningen University, Wageningen, 12 May 2015
[165] Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs
[166] Regulation (EC) No. 852/2004 on the Hygiene of Foodstuffs

hazards had to be controlled by the supplier; or worse, that the ingredient simply had to 'comply with the law'. In case of the former, businesses often did not verify those controls; this can become problematic later on in the chain. In case of the latter, the hazards aren't controlled at all. Thus the NVWA published a policy document ('Infoblad 64'[167]) in which the authority laid out its interpretation of HACCP, emphasizing the role of control and verification of ingredients from suppliers in a product's safety. It offered three routes via which verification could at least take place: laboratory test results of relevant hazards to be affixed to every batch supplied (either paid by the supplier or purchaser); audits performed at the supplier's premises; or by being certified by a recognized 'self-check system' ('ketengarantiesysteem').

The Agriculture Product Board ('Hoofdproductschap Akkerbouw') – which was set up as a semi-public law agency to promote the agriculture sector's interests[168] – developed a database of hazards associated with agricultural products (primarily focused on bakery products, later also other types of products) and an audit scheme which was later recognized as a 'self-check system' by the NVWA in the context of 'Infoblad 64' – this was to become the RiskPlaza assurance scheme.[169] These product boards were gradually defunded during 2014 and the Agriculture Product Board ceased to exist on 1 January 2015. A call for tender had been issued for the RiskPlaza scheme, to which five organizations responded. It was decided that the scheme's administration would be moved to an independent foundation, which was to be facilitated by the commercial holding People in Food. While RiskPlaza was under the Product Board, the NVWA had legally bound the agreements in a so called 'covenant' – this was not officially extended when RiskPlaza moved, but the NVWA affirmed that the agreements would not change in practice.[170] The 'Stichting Ketenborging' approval system is meant to replace the 'self-check system'.

[167] Infoblad 64 - Borging van voedselveiligheid in de levensmiddelenketen met betrekking tot de gevaren verbonden aan grondstoffen (version 7 December 2015), available on the internet at <https://www.nvwa.nl/documenten-nvwa/infobladen-voor-ondernemers-voedselveiligheid/bestand/10378/informatieblad-64-borging-van-voedselveiligheid-in-de-levensmiddelenketen> (last accessed on 23 February 2016)

[168] Article 71 of 'Wet van 27 januari 1950, tot toepassing ten aanzien van het bedrijfsleven van de artikelen 80 en 152 tot en met 154 van de Grondwet'

[169] For an analysis of RiskPlaza's beneficial effects, see Marian Garcia Martinez, Paul Verbruggen & Andrew Fearne, 'Riskbased approaches to food safety regulation: what role for co-regulation?', 16 *Journal of Risk Research* 9 (2013) pp. 1102

[170] Letter from the NVWA to RiskPlaza on the status of the covenant NVWA-RiskPlaza, available on the internet at < https://www.riskplaza.nl/documents/system/Bevestiging_afspraken_NVWA_met_Stichting_Riskplaza.pdf> (last accessed on 23 February 2016)

Within the context of the intended cooperation with those schemes accepted via Stichting Ketenborging, the NVWA interprets this as a form of risk based supervision in terms of Article 3 of Regulation 882/2004.[171] This provision reads as follows:

> "Member States shall ensure that official controls are carried out regularly, *on a risk basis* and with appropriate frequency, so as to achieve the objectives of this Regulation taking account of (…) the reliability of any own checks that have already been carried out." [emphasis mine]

Other risk factors to be taken into account are a food business operator's past records of compliance, identified risks that may influence food safety, and any other information that might indicate non-compliance. The rationale is that public authority supervision should focus on those businesses or industries most likely to show non-compliance or where non-compliance could lead to the most severe consequences. The NVWA denies any delegation of official tasks in the form of Article 5 of that Regulation within the context of Stichting Ketenborging recognition. Delegation of official tasks is subject to strict criteria and control bodies to which tasks have been delegated to act under the authority and responsibility of the competent authority. While RiskPlaza is not yet fully accepted in the context of Stichting Ketenborging, the NVWA is currently using the scheme for a form of adapted supervision as per the continued agreement. In addition, NVWA inspection officers use the database to check ingredient hazard analyses during their official inspections – also at businesses that are not indexed by RiskPlaza – it calls this the 'shared truth' between the public authority and the private Dutch food sectors.

[171] 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

3.2. RiskPlaza's Governance Structure

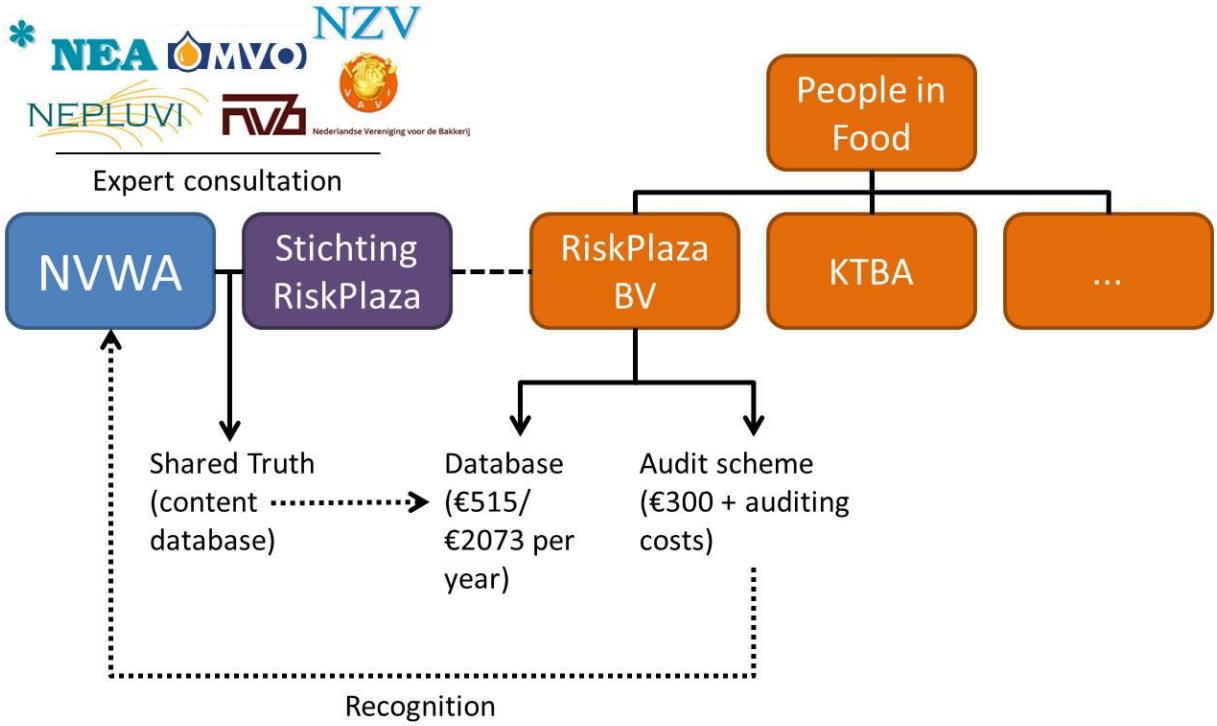

Figure 2: RiskPlaza governance structure

The RiskPlaza governance structure is shown as a diagram in Figure 2 and will be explained below. RiskPlaza consists of two distinct products: a database, and an audit scheme. The database essentially links products with their associated hazards. An example: wheat flour can contain carcinogenic mycotoxins – a hazard that should be controlled at the production stages because it is virtually impossible to remove later. Users can consult the database for information about hazards and their severity level, relevant legislation, and suggestions for control methods. This database is updated frequently to reflect changes in legislation and global developments in food safety. Second feature is the audit scheme: businesses can apply to be audited by an accredited auditing agency; this audit will primarily focus on hazards associated with ingredients. Whereas commonly used international schemes such as BRC and IFS only review a small random sample of a business's ingredient/hazard analysis, RiskPlaza claims that this is done 100% with their scheme. Being certified with one of those more general auditing schemes is a prerequisite for being audited and indexed by RiskPlaza – it thus functions as a sort of 'on-top' audit.

As mentioned, RiskPlaza was moved to the commercial holding group People in Food in 2015. Part of that holding is RiskPlaza BV (comparable to a Private Limited Company (Ltd)) which facilitates marketing, housing, billing, etc. The database's content is decided in the

expert consultation of an independent foundation ('Stichting RiskPlaza') in which representatives from RiskPlaza BV, the NVWA, and partnered industry sectors are seated. The NVWA does not currently have a voice in the appointment of industry representatives, but verification of their qualifications as experts has been a point of discussion. The audit scheme's governance structure is discussed in working group consultations; in practice that is discussed during the expert consultation on the database's content but the NVWA representative has no vote on the governance structure (as laid down in the foundation's bye-rules). Other business units of the People in Food holding group are, inter alia, KTBA, a food safety and quality consultancy agency; LabelCompliance; and FoodCampus. RiskPlaza BV is housed in the same building as the other People in Food holding group's business units and its director was a former KTBA employee. KTBA is further listed as an 'ambassador' on RiskPlaza's website which means that KTBA promotes the use of RiskPlaza. KTBA markets its consultancy services for RiskPlaza specifically by claiming to have assisted 70% of the current companies with that certificate. KTBA is not formally involved with any of RiskPlaza's content or procedures and the NVWA indicates that it currently sees no reason to question the scheme's effectiveness due to any possible conflicts of interest.

The RiskPlaza database is marketed as a subscription service at a cost of €515 per year for Dutch companies and €2073 for companies outside the Netherlands. Auditing costs amount to €300 to RiskPlaza plus those costs incurred by the auditing agency at an hourly rate that will depend on the number of ingredients and suppliers – and whether or not they in turn are RiskPlaza certified. It must be stressed that proper verification may still require some laboratory tests or even more than used before certification if a supplier cannot be relied on to properly control a hazard. Some businesses may require assistance from a commercial consultancy agency in setting up its food safety system which would add in costs. The database and audit are in principle sold as a package deal. RiskPlaza justifies the difference in subscription costs between domestic and foreign businesses on the grounds that they are not represented in the expert consultation – those Dutch businesses that are not a member of one of the industry cooperatives are therefore in principle also not entitled to this discount. Industry representatives are expected to provide technical input during those expert consultations as a condition for reduced prices for their associations' members. The NVWA pays for its inspectors' use of the database with its technical expertise in the expert consultation and by affirming RiskPlaza's credibility (the 'shared truth'). The NVWA does

not have veto power when it comes to the database contents, but past disagreements have been satisfyingly resolved according to the NVWA.

Primary incentives for businesses to be indexed by RiskPlaza are to showcase compliance, to be subject to reduced government supervision, and to incur lower costs for supplier audits and maintenance of the food safety system. Incentives for the NVWA to cooperate with private standards are: to acquire more data (as supplied by recognized schemes), less duplication of audits, and – if authorities can rely on certification – more focus can be placed on the real offenders. RiskPlaza was praised by the FVO in its report on the state of implementation of HACCP in the Member States as an example of public-private cooperation 'good practice' in the area of hazard analysis.[172] As part of the NVWA's new set of criteria for recognition under the banner of Stichting Ketenborging, a scheme must be accredited by the Dutch Accreditation Council – RiskPlaza is therefore currently working towards ISO17021 accreditation. Another roadblock before recognition is that the NVWA is uncomfortable reviewing a scheme that in large part is supported by that same authority: otherwise it would be reviewing the validity of its own input in the expert consultation. The NVWA is therefore discussing a formal divide between administration of the database and the auditing scheme, preferably by organizing them in separate companies, but no solution has been found for this yet.

[172] DG(SANTE) 2015-7752 – MR – Final Overview Report on the State of Implementation of HACCP in the EU and Areas for Improvement, at p. 31-32

4. Analysis of Trade Restrictive Effects of RiskPlaza

The assertion that it being more difficult for foreign businesses to acquire RiskPlaza indexing may lead to domestic players choosing Dutch suppliers over foreign ones was not contested in interviews with RiskPlaza and the NVWA. The question is hence not so much whether there is a market restriction but under which branch of law it should be categorized, and possibly justified. At first glance, RiskPlaza shows quite a few similarities with the DVGW in *Fra.bo* in the sense of being the only recognized body to testify compliance. On the other hand, the system of agreements between the standardization body and sector specific representative agencies is reminiscent of the one contested in *IAZ v. Commission.*

This section is organized as follows: subsection 4.1 starts with the relevant national and European legal frameworks, followed by an analysis of attribution and accountability in 4.2; and finally existence of a trade restriction in 4.3.

4.1. National and European Legal Frameworks

Following the Commission White Paper on Food Safety[173], harmonization of food law has accelerated rapidly. Starting with the General Food Law in 2002[174] as its cornerstone and followed in 2004 with the Regulations on food hygiene[175] and enforcement[176], there are few areas not covered by common rules.[177] The only way for national governments to introduce measures that derogate from harmonized legislation is by proving that they offer a higher level of protection of human life and health, and that they are proportional.[178]

Since the NVWA based its strict policy of requiring verification of all incoming ingredients on an interpretation of HACCP, but to what level is HACCP harmonized? Under Article 5(1)

[173] Commission White Paper on Food Safety, COM (1999) 719 final
[174] Regulation (EC) No. 178/2002 on the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety
[175] The 'Food Hygiene Package' consists of: Regulation (EC) No. 852/2004 on the Hygiene of Foodstuffs, Regulation (EC) No. 853/2004 laying down specific hygiene rules for food of animal origin, and Regulation (EC) No. 854/2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption
[176] 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 Commission is currently reviewing this Regulation but the new proposal does not appear to alter the provisions discussed here: Commission Proposal for a Regulation of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, plant reproductive material, plant protection products … [Official Controls Regulation], COM(2013) 265 final
[177] For more information on the history of food law, see Bernd van der Meulen, "Food Law: development, crisis and transition" in Bernd van der Meulen (ed.), *EU Food Law Handbook* (Wageningen: Wageningen Academic Publishers, 2014), pp. 199
[178] Anna Szajkowska, "From mutual recognition to mutual scientific opinion? Constitutional Framework for risk analysis in EU food safety law", *Food Policy* 34 (2009) pp. 529, *et sqq.*, at p. 534-535

of Regulation (EC) 852/2004, "food business operators shall put in place, implement and maintain a permanent procedure or procedures based on the HACCP principles." Paragraph 2 of that Article lists the seven HACCP principles, and food business operators have an obligation under paragraph 4 of that Article to: provide the competent authority with evidence of their compliance; ensure that documentation is up-to-date at all times; and that this documentation is retained for the appropriate time. The Regulation finally provides for the opportunity to make use of a 'Guide to Good Practice' as an alternative to creating a custom HACCP plan – if applicable to the food business's products and processes of course. In preamble 15 of the Regulation, the Codex Alimentarius Guidelines on HACCP are referenced and it is noted that the HACCP requirements should be sufficiently flexible to account for the burdens of small businesses.[179] The two primary guidance documents on HACCP are the referenced Codex document and a DG SANCO guidance document on the implementation and facilitation of HACCP[180] - the latter is referenced by the NVWA's 'infoblad 64' policy document as an authoritative source.[181] In both these guidance documents it is stated that hazards associated with raw materials should be part of the hazard analysis and "where necessary, laboratory tests should be made to establish [their] fitness for use".[182] While neither document holds formal legal status, there is no reason to question the requirement's scientific legitimacy in principle.

The Commission has attempted to harmonize enforcement of food law via the Regulation on Official Controls[183], but the NVWA as the competent authority in the Netherlands is ultimately responsible for it.[184] Focusing on certain parts of food law in its own official controls, as exemplified by the policy to check for compliance with the requirement to verify control of hazards in raw materials (the 'infoblad 64' policy), is thus undeniably within its autonomous limits. It could be argued that if it is apparent that competent authorities from other Member States don't prioritize this requirement as much as is necessary to ensure food safety according to the NVWA; and this difference in priorities is resulting from a diverging

[179] Codex Alimentarius Commission – CAC/RCP 1-1969 – General Principles of Food Hygiene (v2003)
[180] SANCO/1955/2005 - Guidance document on the implementation of procedures based on the HACCP principles, and on the facilitation of the implementation of the HACCP principles in certain food businesses
[181] Infoblad 64, *supra,*note 167, at p. 1
[182] Codex General Principles of Food Hygiene, *supra*, note 179, at p. 13
[183] 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
[184] The definition of 'competent authority' is given in Article 2(1)(d) of Regulation (EC) No. 852/2004; the primary responsibilities are laid out in Article 17(2) of Regulation (EC) No. 178/2002; the NVWA is the designated competent authority in the Netherlands according to Article 3 of Warenwetbesluit Hygiëne van Levensmiddelen

scientific opinion; then the NVWA has an obligation under Article 30 of Regulation 178/2002 or Article 114 TFEU to discuss this with EFSA respectively the Commission.

The RiskPlaza database relies on formal European and national[185] legislation for its content, but also on EFSA Scientific Opinions and Codex Guidelines. It must be remembered that these documents produce no binding legal effects however; they would need to be adopted by the Commission first.[186] By independently interpreting these documents in the approach to catalogue hazards, the NVWA and RiskPlaza (the 'shared truth') may establish a different level of protection than the Commission's. When it comes to setting legal maximum levels of contaminants, this is unquestionably the Commission's prerogative however[187]: precisely because differences in rules between Member States may hinder the functioning of the common market, the Commission has adopted harmonized rules in this area.[188]

Besides the control and verification thereof of specific hazards in ingredients, the 'Infoblad 64' policy also touches on traceability requirements. Under Article 18 of Regulation 178/2002, food business operators have to be able to identify suppliers and customers of their wares, and such operators have to have in place a system and procedures to ensure that this information can be made available on demand. The traceability requirement relies on the "one step back-one step forward" approach.[189] The rationale behind the 'Infoblad 64' policy, and by extension the RiskPlaza scheme, is that the entire chain is mapped however – and this certainly goes beyond the basic requirements of Article 18. While the idea of controlling and documenting, particularly chemical, hazards throughout the food chain is a scientifically valid premise; it inevitably increases compliance costs.[190] The approach of recognized schemes replacing the necessary audits and laboratory tests may lower those compliance costs; but there is the risk of market access barriers for foreign businesses if those schemes operate on an exclusionary or discriminatory basis.

[185] Potential derogation of formal national legislation in the form of laws or decrees, compared to harmonized European legislation, is beyond the scope of this analysis
[186] Under Article 22(2) and (6) of Regulation (EC) 178/2002, EFSA is only allowed to provide scientific advice and technical support. That these opinions produce no binding legal effects was confirmed in joined cases T-311/06 R I, T-311/06 R II, T-312/06 R and T-313/06 R, *FMC Chemical v. EFSA* [2007] ECLI:EU:T:2007:67, at para. 68
[187] Article 114 TFEU
[188] See preamble 3 of Regulation (EC) No. 1881/2006 setting maximum levels for certain contaminants in foodstuffs or the preambles of Regulation 315/93/EEC on Contaminants
[189] Standing Committee on the Food Chain and Animal Health - Guidance on the implementation of Articles 11, 12, 14, 17, 18, 19 and 20 of Regulation (EC) No. 178/2002 on general food law, 26 January 2010, at p. 16
[190] Ibid. at p. 17

4.2. Attribution and Accountability

The Dutch public and private food sectors cooperate in a different setting besides the RiskPlaza expert consultation: before adopting any national legislation in the area of food, the responsible Ministers are to consult an advisory committee ('Regulier Overleg Warenwet'[191]) in which representatives from industry, consumer associations, the responsible Ministries, and the NVWA are seated – RiskPlaza also has a seat in this committee. While the Ministers are to *consider* the advice from this committee, they are not strictly bound to it. Moreover, industry representatives are expected to represent the interests of their respective associations and the public interest, and not the business they work at. In case of RiskPlaza, this is different: it is unclear whether adequate safeguard mechanisms are in place to protect against regulatory capture. The NVWA does not have a veto power or a decisive influence on the RiskPlaza expert consultation's composition. It is certainly imaginable that representatives from the private sectors are not bound to orders or instructions from the undertakings or associations of undertakings they represent; but – in contrast to the 'Regulier Overleg Warenwet' advisory committee – the proper procedural arrangements or substantive requirements to ensure that the expert consultation conducts itself as an arm of the State working in the public interest do not appear to be present. It is clear that the NVWA iself, as the designated competent authority in the Netherlands, is *capable* of introducing measures potentially violating Article 34 TFEU.[192] But it can also be concluded that the NVWA may have deprived the 'shared truth' requirements of its official character, despite enforcing them as such.

As mentioned above, RiskPlaza shows quite a few similarities with the DVGW in *Fra.bo*. All three criteria the Court used to apply Article 34 TFEU to that body are seemingly met by RiskPlaza as well: (i) a single private agency, (ii) recognized by the State to testify compliance with certain substantive requirements, (iii) with this certification playing an important role in market access – but there are some differences. First of all the DVGW was recognized in national legislation, whereas RiskPlaza has a more informal agreement with the NVWA. Because the 'shared truth' is enforced as though it is legislation, it is argued here that this type of recognition amounts to the same effect. Looking at market access, members of

[191] 'Protocol voor het Regulier Overleg Warenwet', available on the internet at < http://www.row-minvws.nl/binaries/row-minvws/documenten/publicatie/2014/12/08/protocol-voor-het-regulier-overleg-warenwet/PROTOCOL+voor+het+Regulier+Overleg+Warenwet.pdf> (last accessed on 23 February 2016)

[192] See Case C-434/85, *Allen & Hanburys v. Generics* [1988] ECLI:EU:C:1988:109, at para. 25: "It should be observed that the requirements laid down by the Treaty regarding the free movement of goods apply equally to all the authorities of a Member State, whether they be judicial or administrative bodies".

affiliated associations represented in RiskPlaza account for market shares in the Netherlands of, *inter alia*: 90% of the sales of poultry meat[193]; 95% of trade and production of oils and fats[194]; and 84.7% of the bread market in volume.[195] Certainly not all members are believed to be RiskPlaza certified and it is unclear to what extent members of those associations are in practice encouraged to acquire RiskPlaza certification, but it must be considered as a supplementing factor to the NVWA's incentive of reduced supervision, and the reduced administrative burden of only purchasing from certified businesses. In the interviews it was stated that several large businesses had been identified as having restricted their primary purchasing to only those suppliers indexed by RiskPlaza, or were in the process of doing so. While the NVWA claims not to explicitly encourage RiskPlaza certification during its official inspections, it is clear that the resulting reduced supervision provides a substantial economic incentive. It follows that the NVWA and industry associations may be held (partly) accountable for any resulting trade restrictions by analogy of, respectively, *Commission v. Belgium*[196] and *IAZ. v. Commission*[197] cited above.

If the Court's judgement in *Fra.bo* stands, it is possible that Article 34 TFEU applies directly to RiskPlaza in its totality. Looking at the database and auditing scheme separately paints a more complicated picture. Owners of private auditing schemes can be understood to perform economic activities that are normally performed by undertakings, and should therefore be classified as such. Provided that the RiskPlaza audits are not intended to replace the NVWA's official inspections - which could be understood as delegation in effect as in *Meroni*[198] for which the NVWA could reasonably be held accountable - that at least is an activity generally performed by undertakings and competition law applies. The setting of substantive requirements enforced as such by the competent authority is a decidedly public task that cannot be understood to be an economic activity however.

4.3. Existence of a Trade Restriction

It must be emphasized here that the focus of this analysis is the current cooperation between the NVWA and RiskPlaza: the intended form of cooperation via the Stichting Ketenborging

[193] NEPLUVI, 'Company Profile', available on the internet at < http://www.nepluvi.nl/page/19/company-profile.html> (last accessed on 23 February 2016)
[194] MVO, 'Sectorrapportage 2013', 2014, available on the internet at < http://mvo.nl/media/sectorrapportage/mvo-sectorpublicatie-def.pdf> (last accessed on 23 February 2016), at p. 2
[195] Nederlandse Vereniging voor de Bakkerij, 'Visie en Missie', available on the internet at < http://www.nedverbak.nl/visie_en_missie.htm> (last accessed on 23 February 2016)
[196] Case C-227/06, *Commission v. Belgium* [2008]
[197] Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983]
[198] Case C-9/56, *Meroni v. High Authority* [1958]

system is beyond the scope of this thesis. By all appearances, that system will employ mutual recognition clauses for non-domestic schemes, and operate in a transparent and inclusive manner that is therefore unlikely to lead to market restrictions. This is different for its current cooperation with RiskPlaza.

The first factor playing a role in the scheme potentially restricting trade is the lack of mutual recognition of other schemes. The apparent paradox of the 'Infoblad 64' policy as currently carried out is this: control of hazards in ingredients is argued to be an essential part of HACCP, a requirement of all GFSI approved schemes[199]; yet those schemes are denied equivalence to RiskPlaza. Issue is taken not with the substantive requirements in those schemes, or their wording; but with the alleged lack of scrutiny on the compliance of those requirements during private audits that the NVWA claims as the basis not to recognize those schemes as equivalent to RiskPlaza at the moment. Member States have an obligation of mutual recognition of accredited conformity-assessment bodies and are not allowed to refuse certificates on grounds related to the competence of those certifying bodies[200], but domestic bodies auditing GFSI approved schemes are treated identically – the problems the NVWA sees is with the schemes themselves, not the discrimination of private certifying bodies accredited by those schemes.

Secondly, on the topic of substantive requirements from the database: as long as those do not go beyond harmonized legislation, they are not likely to result in trade restrictions. As the NVWA has argued, all food businesses in the EU have to comply with those requirements whether or not they were *informed* of it via a recognized database or not. Furthermore, businesses have an obligation not to market unsafe food[201]: those requirements from the database that are not based on harmonized legislation are, as argued by the NVWA and RiskPlaza, still required to achieve that objective. It is clear however that those substantive requirements not covered or specified by harmonized legislation or standards are subject to the obligations under the Treaties, in particular Articles 34 and 36 TFEU.[202] The discretion to

[199] GFSI, 'GFSI Guidance Document, version 6.4', October 2013, available on the internet at < http://www.mygfsi.com/schemes-certification/benchmarking/gfsi-guidance-document.html> (last accessed 23 February 2016), at p. 154

[200] Article 5 of Regulation (EC) No. 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC: "Member States shall not refuse certificates or test reports issued by a conformity-assessment body accredited for the appropriate field of conformity-assessment activity in accordance with Regulation (EC) No 765/2008 on grounds related to the competence of that body."

[201] Article 14 of Regulation 178/2002

[202] See in particular Case C-432/03, *Commission v. Portugal* [2005] at para. 35; and Case C-484/10, *Ascafor* [2012], at para. 55-57

make rules for the purpose of protecting the life and health of humans is 'particularly wide' where it is shown that uncertainties continue to exist in the current state of scientific research.[203] If that exception is invoked however, then it is up to the NVWA to demonstrate in each case of a non-harmonized requirement that it is proportionally justified.[204] In any case, the Court may object to the unofficial character of the requirements adopted in this manner.

Thirdly, on the incentives for Dutch businesses to primarily purchase from RiskPlaza certified suppliers coupled with the scheme's exclusionary and/or discriminatory character: it is argued here that this may result in a *de facto* import restriction. To summarize:

- RiskPlaza is currently the only private party able to testify compliance with the 'shared truth' substantive requirements for hazards in raw materials;
- The NVWA does not currently employ mutual recognition instruments for schemes from other Member States in the context of those requirements;
- While alternative options to fulfill those requirements are available in theory, the exact requirements can only be known by subscribing to the database;
- The NVWA provides financial incentives for businesses to join the scheme (reduced supervision) and, more importantly, the scheme by its nature provides administrative incentives to choose domestic suppliers over foreign ones. Dutch businesses are finally encouraged to join the scheme by their industry associations.

The argument that the costs could be argued to be of minor importance and that they cannot appreciably restrict competition[205] must be dismissed: a business could be expected, by that line of reasoning, to buy into 28 different schemes to be able to export within the EU which is clearly a significant barrier to free trade in the internal market. The claimed rationale for the difference in prices charged for foreign businesses compared to domestic ones is to discourage them 'freeriding' on the expertise supplied by affiliated Dutch industry representatives paid for by those associations' members. While restricting imports may thus not be the stated intention[206], in light of the above it must be concluded that the system by its

[203] Case C-333/08, *Commission v. France* [2010], at para. 86 (precautionary principle)
[204] Ibid. at para. 87
[205] Commission Notice - agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), 2001/C 368/07
[206] See Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983], at para. 23-25

very nature reinforces the partitioning of markets on a national basis[207] and as such has as its object the prevention or limiting of competition.[208]

These restrictions created by the combined operation of the recognized database and the audit scheme do not necessarily fall within the prohibition laid down in Article 101(1) read in conjunction with Article 4 TEU, as long as the anti-competitive effects are inherent to the pursuit of 'legitimate objectives' and the disputed rules are limited to what is necessary to attain those objectives.[209] Such a legitimate objective may in this case be to fully guarantee the quality or safety of certified goods. While the operation of the RiskPlaza audit scheme in this manner may be suitable and even necessary to pursue that objective, it must be concluded that not all possible steps have been taken to diminish the scheme's trade restrictive effects and is therefore not proportional in a strict sense.

[207] Case C-35/96, *Commission v. Italy* [1998], at para. 48
[208] Case C-501/06 P, *GlaxoSmithKline Services and Others v. Commission and Others* [2009] ECLI:EU:C:2009:610, at para. 59-60
[209] Case C-184/13, *API and Others* [2014], at para 46-48. For the definition of 'legitimate objectives' the Court refers to: Case C-309/99, *Wouters and Others*[2002], at para. 97; Case C-519/04 P, *Meca-Medina and Majcen v. Commission* [2006] ECLI:EU:C:2006:492, at para. 47; and Case C-136/12, *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* [2013] ECLI:EU:C:2013:489, at para. 53-54

5. Conclusions and Recommendations

The NVWA requires of Dutch businesses that they verify that the raw materials they purchase do not contain hazards at a level that could subsequently put the consumer at risk. Those businesses may fulfill that requirement by performing their own audits, focused on the relevant hazards; subjecting raw materials to laboratory analyses; or by purchasing from suppliers certified by a recognized 'self-check system'. The only system currently recognizedin that context is the RiskPlaza Audit+ Scheme. That scheme consists of two products: a database with relevant hazard-ingredient relationships catalogued, and an audit scheme focused on verifying the control of those hazards. The NVWA has a seat in the scheme's expert consultation (together with representatives from industry) providing the input for that database, yet despite enforcing that 'shared truth' as though it is formal legislation; the NVWA does not have a veto power or a decisive influence on that expert consultation's composition. It is therefore argued here that by effectively allowing a legislative task to be performed by an association of undertakings without ensuring that the proper procedural arrangements or substantive requirements are in place to protect against regulatory capture, the NVWA has deprived this legislation of its official character.

The database has catalogued some hazard-ingredient combinations that are not covered by harmonized legislation or standards. Those substantive requirements are therefore subject to the obligations from Article 34 TFEU. They may be justified for the protection of human health and life, but the NVWA would have to be able to demonstrate proportionality of every requirement separately: a 'generalized presumption of a health risk' will not suffice for such a system. A comparative analysis on whether this is currently the case was beyond the scope of this research, the assessment on that matter therefore remains inconclusive.

Looking at RiskPlaza's legal and economic context points to an agreement that has as its object the prevention or limiting of competition: by encouraging businesses to purchase primarily from certified suppliers, with that certification having an exclusionary and discriminatory nature, the partitioning of the internal market is reinforced. While the operation of the RiskPlaza audit scheme in this manner may be suitable and even necessary to pursue the legitimate objective of fully guaranteeing the quality or safety of certified goods, it must be concluded that not all possible steps have been taken to diminish the scheme's trade restrictive effects and is therefore not proportional in a strict sense.

It is finally emphasized that the NVWA is on the frontier of public-private cooperation; a trend that is expected to only increase in the coming years. Undoing that work or stifling innovation in that regard would run counter to the idea of developing novel, efficient governance styles.

The following actions and changes are recommended:

- Independent of intended changes to the scheme and/or the NVWA-RiskPlaza cooperation: this case should be brought before the CJEU. As is evident from the discussion the Court´s judgement generated, *Fra.bo* has left too many questions on the cooperation between standardization bodies and public authorities unanswered. Full legal certainty on the limits of those types of cooperation is therefore not only necessary for the continued operation of the RiskPlaza scheme, but for all standards in Europe.
- That step should in particular give closure on RiskPlaza's discriminatory pricing, and its practice of making the audit scheme subject to the supplementary obligation of subscription to the database. If RiskPlaza is classified as a private law entity it could reasonably be expected to, to a certain degree, rely on the economic right to conduct a business to justify those practices – a scenario much less likely if classified as a quasi-governmental entity by analogy of *Fra.bo*.
- The NVWA should employ mutual recognition instruments for schemes from other Member States, particularly in the context of the ´infoblad 64´ policy. The ´Stichting Ketenborging´ scheme presents an opportunity for mutual recognition, but that project´s progress appears to have been stalled indefinitely.
- The NVWA should reconsider its position in the RiskPlaza expert consultation: either by leaving it; by insisting on a veto; and/or reorganizing it in the form of an advisory committee similar to the ROW.

Reference list

International documents and legislation

Treaties

Treaty on European Union

Treaty on the Functioning of the European Union

EU Regulations

Regulation 315/93/EEC on Contaminants

Regulation (EC) No. 178/2002 on the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

Regulation (EC) No. 852/2004 on the Hygiene of Foodstuffs

Regulation (EC) No. 853/2004 laying down specific hygiene rules for food of animal origin

Regulation (EC) No. 854/2004 laying down specific rules for the organization of official controls on products of animal origin intended for human consumption

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

Regulation (EC) No. 1881/2006 setting maximum levels for certain contaminants in foodstuffs

Regulation (EC) No. 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC

Regulation (EU) No. 1025/2012 on European Standardization

Directives

Directive 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products

Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs

Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Commission Decisions

Commission Decision in Case IV/35.691, *Pre-insulated pipes*, OJ L 24, 30.1.1999, p. 1

CJEU Case Law

Case C-9/56, *Meroni v. High Authority* [1958] ECLI:EU:C:1958:7

Case C-6/72, *Continental Can* [1973] ECLI:EU:C:1973:22

Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663

Case C-8/74, *Dassonville* [1974] ECLI:EU:C:1974:82

Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others* [1974] ECLI:EU:C:1974:140

Case C-71/74, *Frubo* [1975] ECLI:EU:C:1975:61

Case C-13/77, *INNO v. ATAB* [1977] ECLI:EU:C:1977:185

Case C-120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECLI:EU:C:1979:42

Joined cases 209 to 215 and 218/78, *van Landewyck and Others v. Commission* [1980] ECLI:EU:C:1980:248

Case C-58/80, *Dansk Supermarked* [1981] ECLI:EU:C:1981:17

Case C-249/81, *Commission v. Ireland* [1982] ECLI:EU:C:1982:402

Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission* [1983] ECLI:EU:C:1983:310

Joined Cases, C-177/82 and C-178/82, *Van de Haar* [1984] ECLI:EU:C:1984:144

Case C-238/82, *Duphar* [1984] ECLI:EU:C:1984:45

Case C-103/84, *Commission v. Italy* [1986] ECLI:EU:C:1986:229

Case C-434/85, *Allen & Hanburys v Generics* [1988] ECLI:EU:C:1988:109

Case 246/86, *Belasco and others v. Commission* [1989] ECR 2117

Case C-267/86, *van Eycke v. ASPA* [1988] ECLI:EU:C:1988:427

Case C-41/90, *Höfner and Elser v. Macrotron* [1991] ECLI:EU:C:1991:161

Joined cases C-90/90 and C-91/90, *Neu* [1991] ECLI:EU:C:1991:303

Case C-185/91, *Bundesanstalt für den Güterfernverkehr v. Reiff* [1993] ECLI:EU:C:1993:886

Joined cases C-241/91 and C-242/91, *RTE and ITP v. Commission* [1995] ECLI:EU:C:1995:98

Case C-415/93, *Union royal belge des sociétés de football association and Others v. Bosman and Others* [1995] ECLI:EU:C:1995:463

Case C-96/94, *Spediporto* [1995] ECLI:EU:C:1995:308

Joined cases T-213/95 and T-18/96, *SCK and FNK v. Commission* [1997] ECLI:EU:T:1997:157

Case C-265/95, *Commission v. France* [1997] ECLI:EU:C:1997:595

Case C-343/95, *Diego Calì* [1996] ECLI:EU:C:1997:160

Case C-35/96, *Commission v. Italy* [1998] ECLI:EU:C:1998:303

Case C-281/98, *Angonese* [2000] ECLI:EU:C:2000:296

Case C-35/99, *Arduino* [2002] ECLI:EU:C:2002:97

Case C-309/99, *Wouters and Others* [2002] ECLI:EU:C:2002:98

Case T-168/01, *GlaxoSmithKline Services v. Commission* [2006] ECLI:EU:T:2006:265

Case C-192/01 *Commission* v *Denmark* [2003] ECLI:EU:C:2003:492

Case C-198/01, *CIF* [2003] ECLI:EU:C:2003:430

Case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECLI:EU:C:2004:799

Case C-432/03, *Commission v. Portugal* [2005] ECLI:EU:C:2005:669

Joined Cases C-295/04 to C-298/04, *Manfredi and others* [2006] ECLI:EU:C:2006:461

Case C-519/04 P, *Meca-Medina and Majcen v. Commission* [2006] ECLI:EU:C:2006:492

Case C-110/05 *Commission v. Italy* [2009] ECR I-519

Case C-341/05, *Laval un Partneri* [2007] ECLI:EU:C:2007:809

Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union ('Viking')* [2007] ECLI:EU:C:2007:772

Case C-227/06, *Commission v. Belgium* [2008] ECLI:EU:C:2008:160

Joined cases T-311/06 R I, T-311/06 R II, T-312/06 R and T-313/06 R, *FMC Chemical v. EFSA* [2007] ECLI:EU:T:2007:67

Case C-501/06 P, *GlaxoSmithKline Services and Others v. Commission and Others* [2009] ECLI:EU:C:2009:610

Case C-209/07, *Competition Authority v. Beef Industry Development Society and Barry Brothers ('Irish Beef')* [2008] ECLI:EU:C:2008:643

Case C-286/07, *Commission v. Luxembourg* [2008] ECLI:EU:C:2008:251

Case T-167/08, *Microsoft v. Commission* [2012] ECLI:EU:T:2012:323

Case C-333/08, *Commission v. France* [2010] ECLI:EU:C:2010:44

Case C-109/09, *Ker-Optika* [2010], ECLI:EU:C:2010:725

Case C-368/10, *Commission v. Netherlands* [2012] ECLI:EU:C:2012:284

Case C-484/10, *Ascafor* [2012] ECLI:EU:C:2012:113

Case C-171/11, *Fra.bo* [2012] ECLI:EU:C:2012:453

Case C-239/11, *Siemens v. Commission* [2013] ECLI:EU:C:2013:866

Case C-136/12, *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* [2013] ECLI:EU:C:2013:489

Case C-184/13, *API and Others* [2014] ECLI:EU:C:2014:2147

Opinions of Advocate Generals for the CJEU

Opinion of Advocate General Trstenjak in case C-171/11, *Fra.Bo* [2012] ECLI:EU:C:2012:176

Commission Communications

Commission Proposal for a Regulation of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, plant reproductive material, plant protection products … [Official Controls Regulation], COM(2013) 265 final

Report from the Commission to the European Parliament and to the Council On the overall operation of official controls in the Member States on food safety, animal health and animal welfare, and plant health, COM(2013) 681 final

Commission Communication — EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs, (2010/C 341/04)

Commission Notice – the definition of relevant market for the purposes of Community competition law, 97/C 372/03

Commission White Paper on Food Safety, COM (1999) 719 final

Commission Notice - agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), 2001/C 368/07

Commission Notice – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01

Commission Notice – Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001/C 3/02

National (case) law, policy documents and International Standards

Spain

Royal Decree No 1247/2008 of 18 July 2008

The Netherlands

Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet)

Wet van 27 januari 1950, tot toepassing ten aanzien van het bedrijfsleven van de artikelen 80 en 152 tot en met 154 van de Grondwet

Wet van 4 februari 1988, houdende regeling van de uitgifte van het Staatsblad en de Staatscourant en van de bekendmaking en de inwerkingtreding van wetten, algemene maatregelen van bestuur en vanwege het Rijk anders dan bij wet of algemene maatregel van bestuur vastgestelde algemeen verbindende voorschriften (Bekendmakingswet)

Wet van 31 oktober 1991, houdende regelen betreffende de openbaarheid van bestuur (Wet openbaarheid van bestuur)

Besluit van 3 oktober 2005, houdende vaststelling van het Warenwetbesluit hygiëne van levensmiddelen

Case BO4175, *Knooble* [2010] ECLI:NL:GHSGR:2010:BO4175

Opinion of Advocate General Langemeijer in case BW0393, *Knooble* [2012] ECLI:NL:PHR:2012:BW0393, at para. 4.20

Case BW0393, *Knooble* [2012] ECLI:NL:HR:2012:BW0393

'Protocol voor het Regulier Overleg Warenwet', available on the internet at < http://www.row-minvws.nl/binaries/row-minvws/documenten/publicatie/2014/12/08/protocol-voor-het-regulier-overleg-warenwet/PROTOCOL+voor+het+Regulier+Overleg+Warenwet.pdf> (last accessed on 23 February 2016)

Standing Committee on the Food Chain and Animal Health

Guidance on the implementation of Articles 11, 12, 14, 17, 18, 19 and 20 of Regulation (EC) No. 178/2002 on general food law, 26 January 2010

European Union Directorate-Generals

SANCO/1955/2005 - Guidance document on the implementation of procedures based on the HACCP principles, and on the facilitation of the implementation of the HACCP principles in certain food businesses

DG(SANTE) 2015-7752 – MR – Final Overview Report on the State of Implementation of HACCP in the EU and Areas for Improvement

International Standards

Codex Alimentarius Commission – CAC/RCP 1-1969 – General Principles of Food Hygiene (v2003)

Books, articles in edited volumes, and published reports

Bernd van der Meulen, "Food Law: development, crisis and transition" in Bernd van der Meulen (ed.), *EU Food Law Handbook* (Wageningen: Wageningen Academic Publishers, 2014), pp. 199

Bernd van der Meulen, "The Anatomy of Private Food Law", in Bernd van der Meulen (ed.), *Private Food Law* (Wageningen: Wageningen Academic Publishers, 2011), pp. 75

Bernd van der Meulen, *Reconciling Food Law to Competitiveness* (Wageningen: Wageningen Academic Publishers, 2009)

Björn Lundqvist, *Standardization Under EU Competition Rules and US Antitrust Laws: The Rise and Limits of Self-Regulation* (Cheltenham: Edward Elgar Publishing, 2014)

Colin Scott, "Self-Regulation and the Meta-Regulatory State", in Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn: Kluwer Law International, 2006), at p. 131

DG Enterprise, *Guide to the application of Treaty provisions governing the free movement of goods* (Luxembourg: Publications Office of the European Union, 2010)

Fabrizio Cafaggi, "Does Private Regulation Foster European Legal Integration?" in Kai Purnhagen and Peter Rott (eds.), *Varieties of European Economic Law and Regulation* (Switzerland: Springer International Publishing, 2014), pp. 259

Fabrizio Cafaggi, "Rethinking Private Regulation in the European Regulatory Space", in Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law* (Alphen aan den Rijn: Kluwer Law International, 2006), at p. 3

Hanna Schebesta and Menno van der Velde, "The Foundations of the European Union" in Bernd van der Meulen (ed.), *EU Food Law Handbook* (Wageningen: Wageningen Academic Publishers, 2014), pp. 107

Harm Schepel, *The Constitution of Private Governance* (Oxford and Portland, Oregon: Hart Publishing, 2005)

Horatia Muir Watt and Diego P. Fernández Arroyo (eds.) *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014)

Lawrence Busch, "Quasi-states? The unexpected rise of private food law", in Bernd van der Meulen (ed.), *Private Food Law* (Wageningen: Wageningen Academic Publishers, 2011), pp. 51

Michele Baldrin and David K. Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008)

Mirjam Elferink, *Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen* (Leiden: Kluwer BV, 1998)

Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (Oxford: Hart Publishing, 2007)

Journal Articles

Anna Szajkowska, "From mutual recognition to mutual scientific opinion? Constitutional Framework for risk analysis in EU food safety law", *Food Policy* 34 (2009) pp. 529

Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods', 49 *Common Market L.aw Review* (2012) pp. 177

David Bailey, 'Restrictions of Competition by Object Under Article 101 TFEU', 49 *Common Market L.aw Review* (2012) pp. 559

Harm Schepel, "Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law", 18 *European Law Journal* No. 2 (2013) pp. 177

Harm Schepel, "Freedom of Contract in Free Movement Law: Balancing Rights and Principles in European Public and Private Law", 21 *ERPL* 5&6 (2013) pp. 1211

Herman van Harten and Thomas Nauta, "Nog geen horizontale rechtstreekse werking van het vrije verkeer van goederen?", 10 *NtEr* (2012) pp. 329

Janja Hojnik, 'Free Movement of Goods in a Labyrinth: Can *Buy Irish* Survive the Crises', 49 *Common Market L.aw Review* (2012) pp. 291

Kai Purnhagen, "Mapping Private Regulation – Classification, Market Access and Market Closure Policy and Law's Response" 49 Journal of World Trade, no. 2 (2015) pp. 309

Malte Müller-Wrede, 'Sustainable Purchasing in the Aftermath of the ECJ's "Max Havelaar" Judgment' 2 *EPPPL* (2012) pp. 110

Marian Garcia Martinez, Paul Verbruggen & Andrew Fearne, 'Riskbased approaches to food safety regulation: what role for co-regulation?', 16 *Journal of Risk Research* 9 (2013) pp. 1102

Merijn Chamon, 'EU Agencies Between Meroni and Romano or the Devil and the Deep Blue Sea', 48 *Common Market Law Review* (2011) pp. 1055

Rob van Gestel and Hans W. Micklitz, 'European Integration through Standardization. How judicial review is breaking down the club house of private standardization bodies', 50 *Common Market L.aw Review* (2013) pp. 145

Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal*, no. 2 (2010), pp. 158

Unpublished theses and presentations

Hans Beuger, "Food Safety, a Risk Based Approach in the Netherlands", Presentation held at Wageningen University, Wageningen, 12 May 2015

Websites

DG Health and Consumers, 'Horse meat: one year after – Actions announced and delivered', available on the internet at <http://ec.europa.eu/food/food/horsemeat/> (last accessed on 23 February 2016)

GFSI, 'GFSI Guidance Document, version 6.4', October 2013, available on the internet at < http://www.mygfsi.com/schemes-certification/benchmarking/gfsi-guidance-document.html> (last accessed on 23 February 2016)

Infoblad 64 - Borging van voedselveiligheid in de levensmiddelenketen met betrekking tot de gevaren verbonden aan grondstoffen (version 7 December 2015), available on the internet at <https://www.nvwa.nl/documenten-nvwa/infobladen-voor-ondernemers-voedselveiligheid/bestand/10378/informatieblad-64-borging-van-voedselveiligheid-in-de-levensmiddelenketen> (last accessed on 23 February 2016)

Leonie van Neerop, 'Te veel in eigen vlees gesneden', 5 December 2015, available on the internet at < http://www.nrc.nl/handelsblad/2015/12/05/irritatie-over-een-gehavende-organisatie-1540245> (last accessed on 23 February 2016)

Letter from the NVWA to RiskPlaza on the status of the covenant NVWA-RiskPlaza, available on the internet at <https://www.riskplaza.nl/documents/system/Bevestiging_afspraken_NVWA_met_Stichting_Riskplaza.pdf> (last accessed on 23 February 2016)

MVO, 'Sectorrapportage 2013', 2014, available on the internet at <http://mvo.nl/media/sectorrapportage/mvo-sectorpublicatie-def.pdf> (last accessed on 28 January 2016), at p. 2

Nederlandse Vereniging voor de Bakkerij, 'Visie en Missie', available on the internet at <http://www.nedverbak.nl/visie_en_missie.htm> (last accessed on 23 February 2016)

NEPLUVI, ‘Company Profile’, available on the internet at < http://www.nepluvi.nl/page/19/company-profile.html> (last accessed on 23 February 2016)

NVWA, “Requirements for the acceptance of quality systems by the Netherlands Food and Consumer Product Safety Authority (NVWA)”, 4 June 2014, available on the internet at <http://ketenborging.nl/wp-content/uploads/Criteria-voor-acceptatie-Engels.pdf> (last accessed on 23 February 2016)

Onderzoeksraad voor Veiligheid, “Risico’s in de Vleesketen”, March 2014, available on the internet at <http://www.onderzoeksraad.nl/uploads/phase-docs/559/0257ce30ca1drisico-s-vleesketen-nl-web.pdf> (last accessed on 23 February 2016)

Stichting Ketenborging, “Kwaliteitsschema’s en Status”, available on the internet at <http://ketenborging.nl/kwaliteitsschemas-en-status/> (last accessed on 23 February 2016)

Taskforce Voedselvertrouwen, “Actieplan Taskforce Voedselvertrouwen”, 13 June 2013, available on the internet at <https://www.rijksoverheid.nl/documenten/rapporten/2013/06/13/actieplan-taskforce-voedselvertrouwen> (last accessed on 23 February 2016)

Annex I: Methodology and Interview Questions

Representatives from the NVWA and RiskPlaza were interviewed in a semi-structured manner. These questions were designed to gather all relevant information on the RiskPlaza scheme to analyze it in light of the legal framework researched beforehand. These questions were sent to the representatives prior to the interviews; a written reply to these questions was initially sent by the NVWA followed by an oral interview later. The interview with the RiskPlaza representative was only oral. Both interviews were recorded and transcripts were sent to both representatives for validation. Section III: 'About RiskPlaza' was written afterwards and sent to both representatives for validation. Follow-up questions were sent via e-mail to clarify some concepts where necessary. Transcripts are available on request.

Interview questions NVWA

Thursday 10/12/2015, 13:45 – 15:00

Hans Beuger, Nathan Meijer

Hoofdkantoor NVWA, Utrecht, the Netherlands

Over Stichting RiskPlaza

1. Wat is voor de NVWA het doel van de samenwerking met RiskPlaza?
2. Wat houdt de samenwerking met Stichting RiskPlaza concreet in?
3. Op welke manier verhoudt de RiskPlaza databank zich tot Europese wetgeving op het gebied van chemische/microbiologische criteria? Is er sprake van extra eisen of andere wetsbronnen?
4. Welke onderdelen van Verordening 852/2004 geeft de RiskPlaza audit+ specifiek invulling aan, en op welke manier vult deze extra audit private systemen als BRC en IFS aan?

Over Stichting Ketenborging en andere systemen

5. RiskPlaza is aangemeld bij Stichting Ketenborging.nl, doel voor de NVWA daarvan is om het hebben van een certificaat als risicofactor[210] mee te laten wegen voor de inspectie-frequentie. De criteria voor acceptatie zijn echter gelijk aan die van delegatie van officiële taken[211]. Hoe moeten de Ketenborging voorwaarden in deze context worden geïnterpreteerd?

[210] In de zin van artikel 3(1) van Verordening 882/2004
[211] Artikel 5(2) van Verordening 882/2004

6. Op welke manier ziet de NVWA toe op de onafhankelijkheid van de bij Stichting Ketenborging.nl aangemelde private systemen?
7. Wat zijn de criteria om als privaat systeem als zijnde equivalent aan RiskPlaza geaccepteerd te worden?
8. Zijn er private iniatieven die zijn geaccepteerd als ketengarantiesysteem (of in andere zin als zijnde equivalent aan RiskPlaza), of dit proces op het moment doorlopen?
9. Indien een ander bedrijf met Stichting Riskplaza zou willen concurreren, op welke manier zou dit bedrijf dan met de NVWA kunnen samenwerken?

Over marktwerking

10. Op welke manier verwacht u dat RiskPlaza van invloed is op de keuze van zakenpartners binnen en buiten Nederland? Op welke manier draagt de (impliciete) steun van de NVWA hier aan bij?
11. Stichting RiskPlaza lijkt primair gericht te zijn op de Nederlandse markt. Op welke manier verwacht u dat dit van invloed is op handel binnen de EU?

Interview questions RiskPlaza

Wednesday 16/12/2015, 15:00 – 16:15

Sjoerd Kanters, Nathan Meijer

Stichting RiskPlaza Office, Kaatsheuvel, the Netherlands

Over de inhoud van het systeem

1. Op de markt van welk type producten is RiskPlaza primair actief?
2. Op welke manier verhoudt de RiskPlaza databank zich tot Europese wetgeving op het gebied van chemische/microbiologische criteria? Is er sprake van extra eisen of andere wetsbronnen?
3. Welke onderdelen van Verordening 852/2004 geeft de RiskPlaza audit+ specifiek invulling aan, en op welke manier vult deze extra audit private systemen als BRC en IFS aan?
4. Wat is de belangrijkste drijfveer voor bedrijven om RiskPlaza audit+ gecertificeerd te worden? Is dit om een competitief voordeel te behalen, of omdat het door afnemers wordt gewenst?

5. Op welke manier is bij productiebedrijven het hebben van een audit+ certificaat van invloed op de keuze van leveranciers?

Over de juridische achtergrond

6. Wat houdt de samenwerking met de NVWA concreet in?
7. Bent u bekend met andere private iniatieven die zijn geaccepteerd als ketengarantiesysteem (of in andere zin als zijnde equivalent aan RiskPlaza), of dit proces op het moment doorlopen?
8. Wat is de reden dat een abonnement op de database een voorwaarde is voor een audit?
9. Op welke manier is Stichting RiskPlaza nog verbonden met KTBA?

Over de kosten

10. Kunt u een indicatie geven van de kosten van de alternatieven geboden binnen het kader van infoblad 64 (eigen audits of laboratorium testen)?
11. Wat is de reden dat de abonnementskosten van RiskPlaza voor buitenlands bedrijven hoger liggen dan voor Nederlandse bedrijven? (respectievelijk 1995 en 495 euro)
12. Kunt u een indicatie geven van de gemiddelde certificatiekosten voor de audit+? Is er hierbij een verschil voor buitenlandse bedrijven ten opzichte van Nederlandse bedrijven?