

The war on food fraud, the next big challenge for European Food Safety Law.

Fraud and food safety, a question of the prevention and enforcement of food fraud in the Netherlands.



Author: Floris Kets
Registration code WUR: 901003-430-080
Registration code UU: 3525775

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Department of Law & Governance, WUR

Department Staats- en Bestuursrecht en Rechtstheorie, UU.

Thesis Msc. Food Safety

Law LAW-80436, 36 ECTS

27 June 2016

Supervisor: Prof.mr.dr. BMJ (Bernd) van der Meulen

Examiner A: Prof.mr.dr. BMJ (Bernd) van der Meulen

Examiner B: mr.dr. Paulien Willemsen

Abstract

Food Fraud is a much debated topic; the recent discoveries of fraud in Europe made clear there is food Fraud in Europe. Food Safety regulations are based on safety of food, not necessarily on authentic food. However, fraudulent practices can lead to unsafe situations. Food fraud can be unsafe because of substances or ingredients which are toxic or cause an allergic reaction. However, even when the substances in the food are not directly a risk for consumers, the food can be considered unsafe on the basis of the violation of all basic principles of food safety. Food fraud as such is a complex crime, and the possible legal remedies are many.

This thesis is a research into the legal aspects surrounding both fraud and enforcement of fraudulent practices in the food sector. The focus is on the applicable law in the Netherlands, being Dutch national law and European Law. Policy documents and reports on development concerning food fraud will be discussed in the light of the legal framework. The relevant stakeholders and the possibilities of enforcement of food fraud by the stakeholders will be elaborated on to come to a conclusion whether food fraud can be adequately addressed in the Netherlands. Shortcomings or inconsistencies in the current legal framework and policy will be discussed.

Acknowledgment

The quality of this research would not have been the same without all the support from all people who directly, and indirectly helped in writing this thesis. Along the way I discussed topics related to this research with friends, colleges and family. These discussions lead to deeper insights and helped me from my opinion on developments in the field of enforcement. The many meetings with my supervisors helped me to better structure the research, and to ensure I took all relevant elements into account.

In particular, I would like to thank Marloes de Vogel for helping me re-write my research and to painstakingly remove grammar errors.

Summary:

Fraud with food is a phenomenon; the governments, companies and consumers are confronted with. Fraud is complex and the types of fraud with food are many. The recent horse meat scandal brought food fraud back on the political agenda in Europe, and also in the Netherlands. The Netherlands is a food product exporting country; ensuring the authenticity of the food is very important for the international export position of the Netherlands.

The research presented below is a legal analysis of the legal framework of Enforcement law, in the context of food fraud, in the Netherlands. In principle the Member States chose whatever measures to adopt to battle infringement of either national or European Law. As long as the measures are proportionate, effective, and dissuasive. However, European Law influences enforcement on national level. Economic, social, and ethical questions regarding food fraud are outside the scope. The research encompasses a desk research into scientific and legal literature concerning food fraud. However, policy documents, reports and other available documents on the developments of the legal framework to ensure fraud with food is battled are taken into account.

The main research question is: *Does the Dutch national legal framework provide enough means to adequately battle both 'safe', and unsafe food fraud?* By answering this question, the research will be focused on three areas of law: Administrative, Criminal, and Private law. The means consumers have to battle food fraud are outside the scope. The means for authorities, the public prosecutor and private parties will be elaborated on in the context of either punishment of fraud or the prevention of fraud.

There is no legal definition of food fraud, either in Dutch national Law or European Law. A definition is needed and should be comprised of at least three elements: <I> placing on the market, <II> element of intention, and <III> deceiving. The element of economic incentive is of limited added value and will only increase the burden of proof of the authorities. A legal definition in the General Food Law would send a clear message and can be used as the baseline for a harmonized approach in the battle against food fraud.

Official controls and supervision are an integral part of enforcement; without the detection of infringement, the authorities/ third parties cannot adopt measures to ensure compliance. In the Netherlands the supervision and control is done by the authority and private (third) parties. Meta supervision replaces part of the need for official controls. The positive view in the Netherlands on the use of private parties to enforce is not shared on European level; the European parliament is not in favor of delegating the supervision and control task to private parties. Authorities are faced with limited capacity to supervise and control the food supply chain. Private supervision and control might provide the supplementation needed to ensure food safety and food authenticity. Especially taken into account the fact that food supply chains are increasingly international. However, lack of capacity should not be the reason to choose for private supervision and control.

The Dutch national framework provides an arrange of different measures to battle food fraud. Administrative Law primarily the means to repair the situation; the means to ensure the infringement stops and the situation is returned to the situation before infringement. The company can be closed, products suspended, and if necessary recalled. The legislator provided the means for a punitive sanction in Administrative Law: the administrative fine, and drastically increased the maximum possible height of such fines. However, the Legislator did not underpin this increase extensively and the fines cannot be considered tailor made. The advisory board of the supreme court in Administrative Law advised against the use of the administrative fine in the proposed way by the legislator. The safeguards of administrative Law have to be increased before the courts will except this kind of punitive administrative sanctions. Criminal Law provides the means for either a person or company to be punished for committing fraud. The punishment order can be viewed as the equivalent sanction as the administrative fine, from Criminal Law. The Intelligence and Detections service of the Dutch food safety authority is the coordinating division between the food safety authority and the public prosecutor. The food sector increasingly uses private standards. These private standards (if not already) can contain strict rules on food authenticity and severe penalties for companies infringing the private standard on this point. The advantage of the private standards is the international applicability of the standard; especially in the light of the ever more internationally focused food sector. There are

also measures found in Private Law which may have a preventive effect such as internal and external board liability; this far reaching liability will ensure board members do not think lightly of committing fraud.

Relying on only one area of law to provide the possible remedy for food fraud would discard a number of very viable options. A combination of measures is in my opinion the better option. Administrative Law can be used to stop the infringement, whereas Criminal Law can provide the punishment needed to ensure others are deterred to commit fraud and to punish the responsible. Only with severe punishment the effectiveness of enforcement can be achieved due to the high potential profit of committing food fraud.

Does the Dutch national framework provide enough means to adequately battle food fraud? Yes, but there are still some inconsistencies which have to be dealt with. Taken into account all the possibilities of the different areas of law available to battle food fraud; food fraud can be battled. However, the element of capacity to do so remains, and there are no data available to prove private supervision and control in the food chain. On paper this type of supervision and control can have its merits, only time will tell if this type of supervision proves to be effective.

Table of contents

Abstract	3
Acknowledgment.....	4
Summary:	5
List of Abbreviations.....	9
Introduction:.....	10
Methodology	12
Chapter 1: legal angles to food fraud.	14
1.1 Food safety	14
1.2 Safety in national legislation	17
1.3 Traceability	18
1.4 Misleading the consumer	19
1.5 Criminal Law:	21
1.6 Fraud as an economic crime:.....	22
1.7 Private law	24
1.8 In short	25
Chapter 2 Fraud:.....	26
2.1 Types of fraud.....	26
2.2 Defining fraud on a European level.....	27
2.3 inspiration overseas?.....	30
2.5 Meat Production.....	33
2.6 Horsemeat fraud	34
Why is horsemeat potentially dangerous?	35
2.7 In short	36
Chapter 3 Control and supervision and action taken:.....	37
3.1 Control and Supervision	37
3.1.1 Official controls	38
3.1.2 System inspections	39
3.1.3 Meta supervision.....	40
3.2 public supervision entities.....	42
3.2.1 the NVWA.....	43
3.3 Taskforce voedselvertrouwen	45
3.3.1 Report on the food crisis, fraud in the food chain and the control thereof	45

3.4 Reports on the functioning of the NVWA 47

3.5 The road ahead..... 48

3.6 In Short 48

 Chapter 4 enforcement measures in Administrative Law 49

4.1 Enforcement 50

4.2 Defining the limits of enforcement 51

4.3 Administrative and criminal sanction 53

4.4 The power of the European Commission to intervene 55

4.5 National sanctions 59

4.6 Rights of the person concerned 65

4.8 In short 67

 Chapter 5 enforcement measures Criminal and Private Law..... 69

5.1 Intervention policy NVWA..... 69

5.2 Criminal Law 70

5.3 Economic crimes..... 74

5.4 Private Law 75

5.4.1 Board liability..... 76

5.5 In short 78

 Chapter 6 Conclusions 79

 Chapter 7 Recommendations..... 82

Reference list:..... 84

List of Abbreviations

Art.	Article or Articles
BSE	Boviene spongiforme encefalopathie
B.V.	Besloten Venootschap (specific legal structure of a company in the Netherlands)
CA	Competent Authority
CBb	Industrial appeal board
CJEU	Court of Justice of the European Union
COKZ	Central organ for the quality of dairy products
DG	Directorate General
EC:	European Commission
ECA	Economic Crimes Act
ECHR	European Court of Human Rights
EFSA	European Food Safety authority
EHEC	Enterohemorragische Escherichia coli
EMA	Economically Motivated Adulteration
EP	European Parliament
EU	European Union
EZ	Ministry of Economic Affairs
FBOs	Food Business operators
FDA	Food and Drug Administration
FFN	Food Fraud Network
FIC	Food information to Consumers
FVO	Food and Veterinary Office
GALA	General Administrative Law Act
GFL	General Food Law
HACCP	Hazard Analysis Critical Control Points
HR	Supreme court in Private and Tax Law conflicts
ID	Intelligence and Detections service
NGO	Non-Governmental Organization
NVWA:	Dutch food safety authority
OC	Official Controls
OM	Public prosecutor
PC	Penal Code
RvS	Supreme court in Administrative Law conflicts
Skal	Skal Biocontrol is the designated Control Authority responsible for the inspection and certification of organic companies in the Netherlands
SMEs	Small and Medium Enterprises
UK	United Kingdom
US	United States
VWS	Ministry of Public health, Wellbeing and Sports

Introduction:

Food safety is not the only worry of the food safety authorities in-and outside Europe. The emerging problem of food authenticity and food fraud has come from the shades, and into the spotlight. Food fraud is not a relatively new concept or recent development; since ancient times, people adulterate food for a number of reasons, either for economic gain or to poison people.¹ The development of the EU from free market (food security) driven to emphasis on food safety and consumer protection made it possible to take drastic steps towards safe food.² Yet, what if the food is safe, but the food is not what says on the label, that is, safe food fraud? Fraud could be the next big step in food safety regulations. The battle against food fraud, or, highlighting the aim more positively, the strive for food authenticity.

The horsemeat scandal is one example of the food fraud that has plagued the Netherlands in the past few years.³ Consumers consumed products like readymade lasagna's which contained not only minced meat from cows, but also horsemeat. The label of these products did not mention the horsemeat; instead, the product stated 100% beef. The Dutch food safety authority, the NVWA, was confronted with this food fraud, and acted by forcing the food businesses to withdraw and recall all the meat they had produced during the past few years.⁴ The first decision to withdraw and recall⁵ was taken before there was sufficient evidence to determine if the adulterated products were a threat to human health.⁶ The motto was; "the NVWA does not exactly know what the origin of the products is, the administration of the food businesses operator did provided a full overview of the production and origin of the products. This uncertainty remained and thus the NVWA assumed that the origin is not traceable and therefore the NVWA cannot guarantee the safety, the food is therefore considered unsafe." The measures taken were rigorous to say the least: many thousands of tons of meat products were recalled. Although there could be some medicine contaminant from the horses in the final product, horsemeat in readymade meals does not pose much of a threat to human health.

It will only be a matter of time before the next big fraud case will be revealed, and at that moment we need to be prepared. Since in the Netherlands the food sector is very important for international trade, not sufficiently dealing with fraud would undermine the Dutch position as reliable supplier for food products. The main focus of this thesis is on the relation between food fraud and the authorities, although it is the consumer who could potentially become the victim of this fraud. By elaborating on the different measures in both Administrative Law and other areas of law, an overview can be created of the legal means available to battle food fraud. The main stakeholders in the battle against food fraud are the NVWA, the violator (the company committing the fraud), the public prosecutor, and third companies that suffer damage from the fraud by the violator.

The horse meat scandal was taken up by the different Member States in very different ways.⁷ The focus of this thesis will be on the way the NVWA dealt with the food fraud. The way the NVWA dealt with the Food Fraud was not the only way the NVWA could have reacted. The horsemeat fraud will be discussed as an example of fraud to make the topic less theoretical. Developments since the discovery of the horsemeat scandal will be elaborated on, both on European and national level. Next to the measures the NVWA can take, possibilities created by criminal law and private law as a possible remedy (or part of) for Food Fraud will be discussed. However, the main focus will be

¹ H. Deelstra · D. Thorburn Burns · M. J. Walker, *The adulteration of food, lessons from the past, with reference to butter, margarine and fraud*, 2014. Eur Food Res Technol (2014) 239:725–744.

² Bernd M.J. van der Meulen, *The Structure of European Food Law*, Laws 2013, 2, 69–98; doi:10.3390/laws2020069.

³ In chapter two a number of food fraud cases in- and outside Europe will be elaborated on.

⁴ The NVWA ordered the recall and withdrawal of all the meat that was produced during the last two years, meaning 50.000 tons of meat were recalled.

⁵ Withdrawal means taking the products back from the customers (retail, other FBOs in the supply chain. Recall means taking back products from (the final) consumers.

⁶ Chapter four contains an elaboration on means to enforce, the recall and withdrawal will be discussed in this chapter.

⁷ Sofie van der Meulen, Gilles Boin, Ioanna Bousoula, Nicola Conte-Salinas, Valeria Paganizza, Francesco Montanari, Vicente Rodriguez Fuentes, Bernd van der Meulen, *Fighting Food Fraud*, 2015. EFL 1, 2015.

on administrative law, both European and Dutch National law. The different frameworks will be combined and considered in light of both policy and developments on legislative level, to create an overview of the enforcement of food fraud in the Netherlands.

The main research question of this thesis is: *Does the Dutch national legal framework provide enough means to adequately battle both 'safe', and unsafe food fraud?* In the conclusion this question will be answered. To work towards a conclusion, sub questions relating to elements in the main question were formed.

1. what are the different legal angles to address food fraud?
2. How to qualify Food Fraud? Is there a European definition? Conversely, would a definition be necessary?
3. Control and supervision in the food supply chain, how does it work? How is Fraud prevention incorporated in the controls and supervision? What could be done to ensure better Food Fraud prevention?
4. What means are there for the NVWA to battle unwanted behavior, such as food fraud? What legal means does the NVWA have in relation to the qualifications given in the first chapter? Can Criminal law and/or private law provide a possible remedy for food fraud?

The sub questions will be used as red thread in the chapters; the order in which the questions are presented corresponds with the chapters in the research. However, question four is split in two separate chapters; chapter four containing the measures in Administrative Law and chapter five measures in Criminal and Private Law. By answering the four sub questions, elements of the main question can be answered, and in the conclusion the main question will be answered in full. Furthermore, next to a conclusion, recommendations will be formulated on the basis of the research.

Methodology

Food fraud intrigued me because of the reaction of the food authority during the horsemeat scandal, and it made me think about how far a food authority is supposed to go in case of fraud with food.⁸ The subject of food fraud is very broad; one thesis could never touch upon all the matters at hand, even if one would restrict the subject to just the legal aspects of the battle against food fraud. My background is in both Administrative Law and Food Safety Law; the topic of enforcement especially in the light of food fraud is a combination of the two. The complexity of the food chain (for instance for readymade meals) is very high, to even get a complete overview of the whole picture of just food fraud with horsemeat in readymade meals, there are dozens of countries who each have their own enforcement law; which will have to be looked into and link to the specific product. For a law thesis research this topic is less suitable. My focus will be primarily on European legislation and the Dutch national legislation.

To make the thesis less theoretical and more hands on, the horsemeat scandal will be elaborated on as a red thread throughout the thesis. Most chapters will be linked to this scandal, but the main topic is 'safe' food fraud. During the desk research the NVWA will be contacted to provide some inside information on how they dealt with the horsemeat scandal and what is their opinion on the means they have to battle food fraud. The nature of the research is a legal research, although some technical, economic, political and ethical aspects will be part of the research. The core of the research will be the legal analysis of the framework of enforcement law in the Netherlands.

The research will be primarily a literary research (desk research), the main sources of information will be the libraries of both Universities, and the sources available from online databases such as 'Rechtsorde' or Hein Online. There is enough literature to be found; many writers have taken up the topic of food fraud since the horsemeat scandal. The research encompasses a legal analysis of the European and Dutch national framework; most sources are either in Dutch or English. The technical aspects of fraud and food safety in general cannot be found in legal literature, probably because of its technical nature. However, to provide a better overview of the complexity of dealing with fraud in the food production, scientific literature encompasses a part of the source material. The more technical publications are available in the Wageningen Library or on Google Scholar. The main part of all source material will be scientific literature in the form of articles, preferably from peer reviewed scientific journals. Some books are used, mostly as background research and more general information on certain developments. Not all information is available in science journals or books, or the information published is outdated, especially for organizations and their organization; the site of the organization is consulted to ensure the information is up to date. This also goes for policy documents, in literature some of the policy documents are discussed. Case Law can be found on the sites of the different institutions, but also in legal databases together with (possible) additional notes from annotators to provide more insight on the case and the place of the court decision in recent developments.

If the need arises legal sources outside the focus of food are used. This will only be a fraction of the research; for the majority part it will only focus on food safety regulations and enforcing laws relevant for food safety. As the backbone of the legal analysis is the General food law and the Dutch 'Warenwet'. The scope of the 'Warenwet' encompasses more than just food; only the parts that are relevant concerning food will be discussed.

The research will mainly encompass a literature study; however, it will be supplemented by a policy study. The definitions will as much as possible be taken from legal texts or legal literature. The relevant policy documents and reports will be discussed in the light of this framework. Policy documents are not as binding as law documents, but developments and political sentiment on developments can be extracted from policy documents to assess what the legislator is planning to do to battle food fraud.⁹ The legal framework can for instance provide ten possible options; but if the policy does not encompass those measures, the measure is only theoretically available to the authority. Developments in the field of food fraud policy and legislation are not only national, the discussion on how to

⁸ The NVWA ordered a withdrawal and recall of tones of meat and meat products, even before the scale of the whole scandal or the number of adulterated batches was not clear, let alone the question whether the food posed a risk.

⁹ The discussion on the legal value of policy is outside the scope of this thesis.

manage food fraud is a discussion that is also ongoing in Europe. The report of Esther de Lange on developments needed to battle food fraud will be compared to a Dutch advise of the taskforce voedselvertrouwen. Recent legislative developments in the context of enforcement will be discussed. Thus presenting the current legal framework and what steps are being taken to ensure Member States, in particular the Netherlands, are able to battle food fraud.

During the research for relevant sources, a large amount of keywords or small sentences were used. The keywords/ sentences were used from very specific to vague and broad if the keywords would not provide the relevant publications or simply to large amounts of publications. For instance, looking for the administrative fine will give thousands of hits, whereas 'increased administrative fine in the Commodities Act' will only amount to less than 100 hits. More publications do not mean your search keyword was better, if there are more than 200 journal publications as a result of your key word(s), you were not specific enough. Some search engines have added functions to filter the results, for instance on topic date or journal. Keeping in mind the timeframe of development one can select the relevant time frame in which a specific development took place to prevent having to go through many publications before finding the relevant ones. Next to search engines, the footnotes/ reference lists under publications provide a selection of the materials used for the publication, looking up the relevant ones will both increase your understanding of the original publication, but also more relevant sources for the research. Using footnotes and saving all sources during the research is vital to keep track of which sources were used. The sources will be presented in the form of footnotes under each page; in the reference list all source material will be listed on alphabetical order.

The main research will be separated in five separate chapters, and will correspond to the sub questions in the introduction. The sixth and seventh chapter contain the conclusions and recommendations. The first chapter will provide the framework in a broad sense; how is fraud incorporated in different areas of law. The chapter can be viewed as a broad introduction into the topic and the framework, especially for those who are not familiar with the topic of food fraud. The second chapter will provide elaboration on the topic food fraud, including the question if a specific definition for food fraud is needed. In this chapter, the incentives for the different stakeholders to battle food fraud will be elaborated on. The third chapter will provide the supervision and control in the food sector. To view enforcement, separate from supervision and control would in my opinion be incorrect, supervision and control is in my opinion an integral part of enforcement. Without supervision and control the parties, public or private, that take measures do not have the information necessary to take measures, measures should be adopted on the basis of the information from supervision and control. The fourth and fifth chapter will contain the measures found in Administrative, Criminal and Private Law to battle food fraud. The fourth chapter will focus on the available administrative measures, the fifth chapter on the available means in Criminal and Private Law.

Next to conclusions, recommendations will be presented in chapter 7 on issues in the battle against food fraud. The recommendations are based on inconsistencies in the current legal framework and policy concerning fraud. Especially in the context of the difference in opinion between the different stakeholder on how the food safety should be ensured in Member States.

Chapter 1: legal angles to food fraud.

The horsemeat fraud can be addressed from different legal angles. This angle is very important regarding the way the fraud can be dealt with and which authority/ legal entity can intervene when fraud is discovered. It is possible that multiple angles are chosen; for instance, the food safety (public) law in combination with the criminal law. The different legal angles will be dealt with separately. The first angle is food (un)safety. In short, the meat is adulterated with (partly) untraceable horsemeat, which makes it impossible for the food safety authorities to guarantee the safety, or if the food is de facto a risk to human health. The second is the aspect of misleading the consumers; by adulterating mincemeat (supposed to be pure beef) with horsemeat without communicating this to the consumers, the consumers are misled about what they consume. The third is an economic crime: making money out of adulteration of food products, so a purely economic crime. Fraud is also a criminal offence, and lastly fraud can mean breach of contract (private law angle). These angles are viable options for battling food fraud.¹⁰ In this chapter all of these angles will be discussed in the light of the horsemeat scandal. Since The Food Safety Authority used the (un)safety argument, this will be elaborated on most.¹¹

1.1 Food safety

Before going into the horsemeat scandal a small introduction in food safety legislation is required.¹² European Food Safety legislation developed under the pressure of crises.¹³ With the globalization of the food supply chain it became necessary to think beyond national boundaries and national law. After the BSE crisis the white paper on food safety was published, and these documents then provided the background for Food Safety legislation on a European level.¹⁴ The General Food Law (further GFL)¹⁵ resulted from the white paper and can be viewed as the backbone of Food safety law.¹⁶ Food products or supply chains were regulated vertically, meaning that one product (supply chain) was regulated separately to set as detailed legal standards as possible; chocolate is an example of a product regulated in this way.¹⁷ This situation proved impossible to maintain due to the vast variety of products available on the market and the time it takes to agree upon all the detailed rules on a specific food product. The legislator switched from the vertical legislation to horizontal legislation: broader scoped regulations that include more than one product supply chain.¹⁸ The focus is either general, applicable to all FBOs, or specific for one or multiple supply chains that are related, for instance the poultry and meat sector. This chain broad legislation is made on a European level, and has to be implemented in the Member states; at least most EU Food Law consists of Directives which have to be implemented in the member states.¹⁹ The discretionary freedom to deviate from the

¹⁰ Sofie van der Meulen, Gilles Boin, Ioanna Bousoula, Nicola Conte-Salinas, Valeria Paganizza, Francesco Montanari, Vicente Rodriguez Fuentes, Bernd van der Meulen, *Fighting Food Fraud*, 2015. EFL 1, 2015.

¹¹ <https://www.nvwa.nl/onderwerpen/dieren/dossier/paarden/fraude-met-paardenvlees/fraudezaak-vleesgroothandel-willyselten-2013-2015>.

¹² This introduction is not a complete overview, but an overview that will provide some inside in the background of Food Safety Law in Europe. See for a more complete overview; Bernd van der Meulen, *European Food Law handbook*, 2014. Wageningen Academic Publishers, Wageningen, the Netherlands, ISBN: 978-90-8686-246-7.

¹³ Bernd M.J. van der Meulen, *The Structure of European Food Law*, 2013. *Laws* 2013, 2, 69–98; doi:10.3390/laws2020069.

¹⁴ White paper available at: http://ec.europa.eu/dgs/health_food-safety/library/pub/pub06_en.pdf.

¹⁵ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

¹⁶ Bernd van der Meulen, *The Core of Food Law, A Critical Reflection on the Single Most Important Provision in All of EU Food Law*, 2012. EFL 3, 2012 p. 117-125.

¹⁷ Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption.

¹⁸ Bernd van der Meulen, *The Structure of European Food Law*, 2013. *Laws* 2013, 2, 69–98; doi:10.3390/laws2020069.

¹⁹ Directives have to be implemented in national law, opposed to regulations which are in effect in a Member State regardless the implementation in national law. For an overview of how European law works see Klaus-Dieter Borchardt, *The ABC of European Union law*, 2010. Luxembourg: Publications Office of the European Union, 2010 in particular pages 113-124.

European legislation is limited.²⁰ Enforcement on the other hand is primarily a national affair, mostly done by a separate food safety authority in the Member States.²¹ However, the enforcement has to be in accordance with principles and limits set on EU level. In the EU the producer is made responsible for ensuring the food is safe, but the member states have the responsibility to protect consumers from harmful food.²² With the far stretching Europeanisation of Administrative Law, enforcement can no longer be seen as a purely national affair. How European law influences enforcement on national level will be elaborated on in chapter four.

EFSA

The GFL is not only the backbone of European Food Law: with the GFL the creation of European Food Safety Authority (EFSA) was a fact. EFSA provides independent research on food safety related topics. European food safety policy and the regulation of food safety is primarily based on their research. For an overview of the core values of EFSA and how EFSA presents itself, see the link in the footnote.²³ The third chapter of the GFL is dedicated to EFSA, their task, competence, and financing of the Authority. If a Regulation or Directive refers to the Authority with capital letters, EFSA is implied. A major difference between EFSA and the NVWA is that EFSA does not enforce; rather, the enforcement is left to the Member States or, in case of emergency, can be dealt with by the European Commission. EFSA plays a significant role in European food safety regulation, because EFSA is integrated in all pre-market approval procedures on food products.²⁴ EFSA continuously monitors food safety and provides safety data on a range of food products, also on food products which are deemed safe.

GFL

*“This Regulation provides the basis for the assurance of a high level of **protection of human health** and consumers’ interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market.”²⁵*

The GFL includes the responsibilities for food business operators. Food business operator in the sense of the GFL is a very broad concept, which is not limited to the producer of the final product: all links in the supply chain up to the final consumption are made responsible for the safety of the products.²⁶ The primary production falls outside the scope of the GFL. The approach can be summarized with the sentence ‘from farm to fork’, which means that all links in the production chain from the moment of harvest to the consumption of the food are considered food.²⁷ It is more precise to say that the responsibility ends with the purchase by the consumer, as/since the producer is not responsible for what happens in the kitchen of consumers.²⁸ Safety in the GFL is not material safety but formal safety. The difference is that with formal safety, there can be unsafety without actual unsafety for consumers.²⁹ There are legal standards set for residue limits, composition, storage, transport and labeling etc. If these standards are not met, the product is considered as being in disagreement with food safety regulations, and therefore unsafe. Safety in the sense of the GFL means that a product can be considered unsafe even though there might be no or only a theoretical chance consumer would suffer negative consequences from consuming the food. The food safety authorities do not need to check whether all individual batches pose a risk to consumers.³⁰ If the limits are

²⁰ S.Prechal, R.Widdershoven, and J.H.Hans, *Europeanisation of Public Law*, 2015. Europa Law Publishing Groningen, ISBN: 978-90-8952-127-9, p. 13-18.

²¹ Art. 17.2 GFL, the enforcement of Member states consists of Controls, Risk communication, Measures and penalties.

²² Art. 17 GFL.

²³ <http://www.efsa.europa.eu/en/about/values>.

²⁴ For instance, the Novel Foods procedure and the approval procedure for new additives.

²⁵ Art.1.1 GFL.

²⁶ Art 17 GFL, stating the responsibilities of food business operators.

²⁷ Prior to harvest (or slaughter), the products are not considered food and therefore do not fall within the scope of the GFL.

²⁸ Storage conditions and the correct preparation have to be taken into account by the consumers. for instance, the consumer would consume chicken raw and the package explicitly stated to cook or fry the chicken before consumption; the FBO is not responsible for damages.

²⁹ Bernd van der Meulen, *The Core of Food Law, A Critical Reflection on the Single Most Important Provision in All of EU Food Law*, 2012. EFL 3, 2012 p. 117-125.

³⁰ There are scientific baselines in the law: if the values exceed these values during production, transport storage or otherwise, the food is considered unsafe and should not be put on the market. It is possible that some steps in the production process

surpassed in one part of the production process, the whole batch of products is considered unsafe.³¹ In the GFL, foods are considered safe if the food complies with all relevant food safety regulations.³² Controversially a food is considered unsafe if the food safety requirements are not met.³³ For instance, when a food contains ingredients or substances that can cause an allergenic reaction³⁴, but these substances are not labeled properly, it is unsafe in the way that the product is not in compliance with both formal safety and material safety?, because consumers that suffer from food allergies can get seriously ill or in some cases even die from consuming food that contains certain allergen.³⁵ In horsemeat there is no such allergen.³⁶ For food fraud in general adding an ingredient that can cause an allergic reaction is a serious risk.

Why is it important in a legal sense that a product is safe?³⁷ The article that can be viewed as the core article is Art. 14 GFL: food shall not be placed on the market if unsafe.³⁸ Placed on the market is a broad concept, as it includes selling, trading, or giving. Payment in return is not necessary for it to be qualified as being put on the market.³⁹ Unfitness for human consumption is also considered as being unsafe in a legal sense.⁴⁰ 'Unfitness' refers to a state of the food which is considered not good enough for human consumption; although there is not necessarily a food safety problem, it can be a quality problem.⁴¹ Examples of foods which are considered unsafe are contaminated foods, and deteriorated foods. When assessing the safety (material) of the food, the question is whether the food is injurious to health. Injurious to health encompasses more than short term sickness/ death. Injurious means short or long term effect on the consumer and or subsequent generations taken into account in combination with the probable cumulative toxic effects.⁴² For foods that are intended for a specific target group which is more health sensitive to (a) certain compound(s) or toxin(s) (effects), the safety requirements are even more strict to protect this group.⁴³ In these criteria one can make out the scientific nature of food safety regulations.⁴⁴ Without a risk assessment or sufficient scientific evidence that a certain substance is a risk to health, the food cannot be considered to be unsafe. Since Performing a risk assessment is time consuming, there could be a moment in time when there is a potential risk on the market, but the evidence of the risk is lacking or completely absent.⁴⁵ The food safety authorities can (in such case) then act on the basis of the precautionary principle.

The precautionary principle in the GFL makes it possible for food safety authorities to take measures before there is sufficient evidence to act on.⁴⁶ This is not only on domestic products or products from EU countries, but also on imported products from third countries. The measures that can be taken on the basis of the precautionary principle are temporary of nature; how long these measures can stay in place depends on the nature of the risk. All

reduces microbial count and so making the product 'safe' before it is sold, this is not a safety problem; it is the final product that counts.

³¹ Art. 14.6 GFL.

³² Art. 14.8 GFL.

³³ The GFL has no definition of safe food, only of unsafe food. See for elaboration on the choice for this negative concept of safety, Bernd van der Meulen, *The Core of Food Law, A Critical Reflection on the Single Most Important Provision in All of EU Food Law*, 2012. EFFL 3, 2012 p. 117-125.

³⁴ In the EU 14 substances have to be labeled as allergens, see annex II Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

³⁵ A. Muraro et.al., *EAACI Food Allergy and Anaphylaxis Guidelines. Protecting consumers with food allergies: understanding food consumption, meeting regulations and identifying unmet needs*, 2014. *European journal of allergy and clinical immunology* 69 (2014) p. 1464–1472.

³⁶ A. Opperhuizen, *Advies van de directeur bureau Risicobeoordeling & onderzoeksprogrammering aan de minister van VWS en de staatssecretaris van EZ*, 4-03-2013.

³⁷ Apart from the possibility of product liability claims, which are outside the scope of this thesis.

³⁸ Bernd van der Meulen, *The Core of Food Law, A Critical Reflection on the Single Most Important Provision in All of EU Food Law*, 2012. EFFL 3, 2012 p. 117-125.

³⁹ Art. 3.8 GFL.

⁴⁰ Art. 14.2b GFL.

⁴¹ Art. 14.5 GFL.

⁴² Art. 14.4 GFL.

⁴³ Art. 14.4c GFL.

⁴⁴ Bernd M. J. van der Meulen, *Science based Food Law*, 2009. EFFL 1 2009, p. 58-71.

⁴⁵ Art. 7.1 GFL.

⁴⁶ Art. 7 GFL

measures taken by governments such as measures taken by food safety authorities need to be proportionate.⁴⁷ The temporary measures can be taken to achieve a high level of health protection, and for no other reason. The technical and economic feasibility of the measure are factors that influence the measures that can be taken. Before a measure can be taken on the basis of the precautionary principle, three criteria have to be met: there has been an assessment of the available information, the possibility of harmful effects on health is identified, and scientific uncertainty persists (could also mean there is still a lack of information). If one or more of these criteria are not met, then the competent authority cannot take precautionary measures on the basis of Art. 7 GFL. The temporary nature of the measure lies in the fact that the measure has to be revised after a certain period; that is, a Member State cannot indefinitely uphold a measure under the guise of the persistence of scientific uncertainty when the Member State chooses not to do any risk assessment or other research into the potential risk.⁴⁸

1.2 Safety in national legislation

The Warenwet (further the Commodities Act) is comparable to the GFL, but only applicable in the Netherlands, and it encompasses more than just food. For this thesis only the relevant parts relating to food will be discussed. The Commodities Act does not contain a clear distinction as in Art. 14 GFL on what is safe and what is unsafe. In the official explanatory notes⁴⁹, four categories of (un)safeness are described:

1, Food that is injurious to health cannot be put on the market. Unsafe in the sense that there is a risk for consumers, either due to the presence of physical hazards such as glass shards or metal scrap, or due to mistakes made during production such as/related to improper storage, processing, or transportation of the food. One could argue that 'unhealthy food' is also injurious to health, on the long term. This type of (un) safeness is exempted, and thus considered safe in the sense of the Commodities Act.

2, Substances that pose a health risk cannot be used in food production. The raw materials that end up in the final product cannot be toxic or pose a health risk, unless a production step eliminates this risk. For instance, it is forbidden to use already spoiled fish or cheese in the production of pizzas.

3, Food that is unfit for consumption cannot be put on the market. This category is similar to unfitness under the GFL; contaminated, spoiled or otherwise not fit for consumption falls under this category. Even when the food is still safe to eat but has quality problems, the food is considered unfit for consumption and should not be placed on the market.

4, Food cannot be put on the market if the seller knows or can reasonably be expected to know that the food is inferior to what consumers may expect of it. Each food has to be judged separately to determine whether the food is inferior and what consumers can expect from the product. This inferiority can lie in the presentation, the nutritional content, the ingredients used, or the state of the product. In practice this category can be used to battle FBOs that commit food fraud. Examples of foods that could be qualified as inferior: strawberry jam without actual pieces of strawberry (while the package states that it does contain strawberries), or no butter in cookies that are marketed as real butter cookies.⁵⁰ Important in this category is that the food does not have to pose a health risk, which means that 'safe' food fraud can be put in this category as well.

⁴⁷ Proportionate means the measure is in balance with the served goal. If there is a big health risk, heavy measures can be taken to battle this big risk, but for a minor risk less far reaching measures can be enough to 'solve' the problem. In the case where more than one measure can be chosen, the one that will cause the least amount of damage is preferred (as long as it is still effective).

⁴⁸ Kenneth Defares and Bernd van der Meulen, *het voorzorgsbeginsel, preadvies voor de Nederlandse vereniging voor levensmiddelenrecht*, 2009. Sdu Den Haag, 2009, p.16-17.

⁴⁹ Tweede Kamer, zitting 1981-1982, 17 495, nrs. 1-2, p 10.

⁵⁰ DR M.J Lugt, *Hoofdlijnen levensmiddelenrecht*, 2003. SDU-uitgevers, p 82.

Animal Act

The Commodities act applies to all FBO's that operate within the Netherlands, with the exception of fresh meat production. The Animals Act is a *lex specialis* to the Commodities Act and is only applicable to slaughterhouses, meat processing/ cutting plants, Cold Storage plants for fresh meat products, and the primary production of meat.⁵¹ The primary production is outside the scope of the GFL, and will therefore not be discussed. The sanctions as described above are also applicable, and can thus be imposed in case of violation of the Animals Act.⁵² In the Decree to the animals act a number of violations that can be fined are taken up; the maximum for these penalties is described in table 3.1. The administrative fine is similar to the administrative fine in the Commodities act. The Animal Act is relevant for it contains the means to close an FBO encompassed by the Animal Act.

Safety in the Commodities Act is very broad concept; even accompanied by guidance documents there are still some grey areas. In the following two court cases some light was shed upon this grey area.⁵³

Supreme Court, 27 March 2001⁵⁴

The FBO in question was found to have large amounts of figs, dates, and kroepoek (fried shrimp) that were spoiled, off of which rodents had eaten pieces, and on which rodent feces were found/detected. The products were clearly unfit for consumption. Hence, this was not the core of the dispute; the main question was if an FBO can still use this food if the food is cleaned and could possibly be processed again. In the Commodities Act there is an exemption for products that are still being processed to comply with regulations. The court decided that the burden of proof is on the FBO if the FBO uses this argument to avoid enforcement of the food safety authority. This means the FBO has to prove that the unfit food is going to be processed in such a way that the food will be fit for consumption. Since the feces were found all throughout the warehouse, the court did not follow the argumentation that there were only a few batches which were unfit.

Court of appeal Leeuwarden, 30 November 2006⁵⁵

A producer brought food products on the market which were not in line with Food Safety regulations. The defense was that the producer had no knowledge of all relevant regulations and did not have the necessary scientific knowledge to fully understand the chemical processes and therefore the risks that came with the products. The FBO was not familiar with the concrete chemical composition of the concrete product. The court did not follow this argumentation and decided that producers should be informed on the developments on safety and health effects of products in their respective branches. Even if a company is only a link in the production chain, the producers all have the responsibility to ensure the food is safe, and are therefore required to be able to assess the safety of their products. This responsibility follows from the official explanatory notes on the commodities act.⁵⁶ The fact that the company was only a supplier did not excuse the company from the responsibility to form an individual assessment of the fitness of a product to be placed on the market. FBOs that order the production have an increased responsibility to assess the fitness of the products.

1.3 Traceability

Traceability is one of the core elements of food safety. Traceability means the consumer and the FBOs in the supply chain can track and trace batches of food. Tracking is forward in the chain, and tracing is backward in the chain. The GFL obligates FBO's to have a tracking and tracing system in place to enable a certain degree of traceability. The chain can be very complicated with many links in the chain; the legislator did not obligate the FBO's to create a full

⁵¹ Art. 1.2 provides the scope.

⁵² Art. 8.5 Animals Act encompasses enforcement action and Art. 8.7/8.8 encompass Administrative fines.

⁵³ The 'Hoge Raad' is the highest national court, the 'Gerechtshof' is the court that decides on the case in appeal.

⁵⁴ HR, 27 maart 2001, 00485/00 E L J N A B 0 7 3 9.

⁵⁵ Gerechtshof Leeuwarden, 30 november 2006, 24-000793-04 L J N A Z 3 5 9.

⁵⁶ Tweede Kamer, zitting 1981-1982, 17495, nr. 3.

chain transparency, but obligates all FBO's to at least have a system in place in which the FBO can track and trace a batch one step up and one step down in the chain.⁵⁷ It is important to have a traceability system in place, so that when an incident or a crisis occurs, the relevant actors in the chain together with the food safety authority can narrow its search. When it is clear from the start of an incident that the problem is caused at a farm within the chain, and there are four farms, the rest of the companies in the chain do not need to be checked, and the source can be identified relatively quick. By ensuring a transparent chain, problems can be solved relatively quick, thus diminishing the damage from an incident.⁵⁸

The administration in the slaughterhouses connected to the horsemeat scandal was either incomplete or tempered with to such an extent that the complete (correct) administration had become unavailable or inaccessible.⁵⁹ This meant the other FBO's in the chain and the Food Safety Authorities could not establish the amount of horsemeat in the products sold by the slaughterhouses. This then meant the authorities could not guarantee the safety of the products, and therefore deemed the products unsafe.⁶⁰ Having a transparent supply chain in which all batches can be tracked and traced enables the authority to ensure food safety. The FBOs are audited by a system of official controls to ensure compliance with all food safety regulations. If the tracking and tracing would be made impossible by Fraudulent behavior of one of the FBOs in the chain, the authorities cannot guarantee the safety of the food.

Traceability requirements constitute both prevention and damage control in case of an accident. It can be said that without traceability it is practically impossible to find the source of the risk, and thus to intervene. For both the authority, and the producers within the supply chain, having an effective and correct traceability system in place enables the producers to know what substances they use. The times when a butcher got his meat from a farmer he knows is over; supply chains can stretch across Europe or even worldwide. without traceability producers have to trust their suppliers, with traceability a producer can examine the supplied goods in case of doubt or in case of a discovery of adulteration. There are writers who argue that full transparency in the supply chain could be the way to battle food fraud.⁶¹ Increased transparency could be the answer, since all producers in the supply chain will suffer the negative consequences in case of fraud in their food chain, even though they might not directly have anything to do with the fraudulent behavior; Transparency allows other FBOs in the chain to prevent or punish fraudulent behavior before the FBOs become the 'victim' of the fraud.

1.4 Misleading the consumer

*"This Regulation provides the basis for the assurance of a high level of protection of human health and **consumers' interest in relation to food**, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market."*⁶²

The goal of Food Safety Law is the protection of consumers in a broad sense. Safe food is only one element of the consumer protection; the other element is ensuring the consumers interest are not violated. One important element of consumer interest is the informed choice.⁶³ Being able to make an informed choice when it comes to consuming food is important for consumers as well as producers. The average consumer is defined in case law by

⁵⁷ This obligation of one step up one step down cannot be found in the GFL, but in the guiding documents of the GFL, documents provided by the EC to give an explanation on European legislation. Document accessible at: http://ec.europa.eu/food/safety/docs/gfl_req_guidance_rev_8_en.pdf.

⁵⁸ J.H. Trienekens, P.M. Wognum, A.J.M. Beulens, J.G.A.J. van der Vorst, *Transparency in complex dynamic food supply chains*, 2012. *Advanced Engineering Informatics*, Volume 26, Issue 1, January 2012, Pages 55–65.

⁵⁹ See for instance; Letter of the minister of Agriculture Sharon Dijksma on status report investigation and recall Van Hattem Vlees BV, 25 February 2014.

⁶⁰ <https://www.nvwa.nl/onderwerpen/dieren/dossier/paarden/fraude-met-paardenvlees/fraudezaak-vleesgroothandel-willy-selten-2013-2015>.

⁶¹ Myo Min Aung , Yoon Seok Chang, *Traceability in a food supply chain: Safety and quality perspectives*, 2014. *Food Control* Volume 39, May 2014.

⁶² Art.1.1 GFL

⁶³ Art. 5 GFL, other goals are the protection of animal health and welfare, plant health and the environment. These are outside the scope of this thesis and therefore let out.

the European Court of Justice in Luxembourg in a series of cases; in short, the average consumer is reasonable, intelligent, and attentive.⁶⁴ This means that consumers are supposed to be able to read the labels on the food they buy. When the label on a product is correct; When the label on a product is correct, i.e. the product contains exactly what is stated on the label, there is no misleading in a legal sense.⁶⁵ For instance, in the Teekanne case the CJEU decided that every element on the package could potentially be misleading, a correct ingredient declaration is not always sufficient to ensure the consumer is not misled.⁶⁶ The package of tea showed a vanilla pod and raspberries, yet the product did not contain any raspberries or vanilla – not even raspberry or vanilla flavors. It is still unclear whether the CJEU wanted to break with the old average consumer definition and create a ‘new definition of ‘the ‘average consumer’.⁶⁷ How much consumers really know about food and ingredients, and whether they would make an informed choice if they would read the label, is a discussion that is ongoing and outside the scope of this thesis.

Food is a credence good which means the food has to be consumed to assess the quality of the food. Consumers need correct information to make an informed choice on what they buy.⁶⁸ The sheer amount of food products makes it close to impossible to know what all the food one would consume contains. Consumers need correct information to make an informed choice when buying food. Hence, there are strict requirements on labeling and presentation of food.⁶⁹ If a consumer would read the label, it should contain an ingredient list with all the ingredients, additives, and allergens.⁷⁰ If a consumer would like to avoid certain ingredients or additives, for religious ethnic, dietary or other reasons, the consumer can choose not to buy the product containing that specific ingredient.⁷¹ The requirements for labeling and presentation can be found in the Regulation (EU) No 1169/2011 on the provision of food information to consumers (further FIC Regulation).⁷²

“Food law shall aim at the protection of the interests of consumers and shall provide a basis for consumers to make informed choices in relation to the foods they consume. It shall aim at the prevention of:

(a) fraudulent or deceptive practices;

*(b) the adulteration of food; and*⁷³

*(c) any other practices which may mislead the consumer.”*⁷⁴

In Ireland, the horsemeat scandal was first discovered when readymade lasagna was tested for its meat content. The meat should have been beef, yet it contained traces of horse meat. Does this mean the consumer is misled? Horsemeat has been consumed on a regular basis in Europe for many centuries, mainly in France and Italy. Horsemeat in itself is not dangerous, and from a nutritional point of view it is even healthier than beef.⁷⁵ The meat

⁶⁴ C.C. van Dam, *De gemiddelde Euroconsument - een pluriform fenomeen Over de Richtlijn oneerlijke handelspraktijken en de rechtspraak van het Hof van Justitie*, 2009. SEW 2009/2.

⁶⁵ If there are pictures or other elements of the presentation that point to a specific product, such as pineapple juice with on the front of the package a pineapple, the ingredients declaration should state the amount of pineapple used in the product. If there is no pineapple at all in the product the product can be misleading.

⁶⁶ Judgment of EUCJ of 4 June 2015, case C-195/14.

⁶⁷ Luis González Vaqué, Sebastián Romero Melchor and Sara Aparicio Hill, *Food Legislation: The “Teekanne” case of 4 June 2015*. eFOOD-Lab international 3/15, p. 20-24.

⁶⁸ , K. Grunert, *Current issues in the understanding of consumer food choice*, 2002. Trends in Food Science & Technology 2002/13, p.275–285.

⁶⁹ The core Regulation for labeling is Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers (further FIC Regulation).

⁷⁰ Art. 4 FIC Regulation. This is the more general article; Art. 9-35 of the FIC Regulation provide more detailed requirements for labeling.

⁷¹ Brian Wansink , Aner Tal, Adam Brumberg, *Ingredient-based food fears and avoidance: Antecedents and antidotes*, 2014. Food Quality and Preference Volume 38, December 2014, Pages 40–48.

⁷² Art. 9-35 FIC Regulation.

⁷³ The difference between adulteration and fraud will be elaborated on in chapter two.

⁷⁴ Art.8.1 GFL.

⁷⁵ José M. Lorenzo, María Victoria Sarriés, Alessandra Tateo Paolo Polidori, Daniel Franco , Massimiliano Lanza, *Carcass characteristics, meat quality and nutritional value of horsemeat: A review*, 2014. Meat Science 96, 1478–1488.

that was used in the lasagna was mincemeat, which does not contain particularly expensive parts of the cow/horse. Still, it is misleading in a legal sense: it is a product that states it contains only beef, while it actually contains both beef and horsemeat. If a consumer wants to avoid eating horsemeat, the consumer could not have made an informed choice and would have eaten horsemeat without knowing it.⁷⁶

Misleading can also be present when the presentation of a food is misleading.⁷⁷ For instance: the placement of a food product in the supermarket influences consumers – if the shop owner were to place an unhealthy snack between wholesome foods in a similar package, consumers are likely to confuse the unhealthy snack for a wholesome food, even if the ingredient list and the nutrition table on the label indicate that the product is unhealthy. Commercials can also be misleading, for they present the product as healthier than it actually is.⁷⁸

1.5 Criminal Law:

Of all areas of law, criminal law is the area which is mostly related to punishment;⁷⁹ Enforcement of European or national law is not necessarily achieved by measures found in Administrative Law. What area of law is used by a member state is up to that Member State.⁸⁰ Criminal law is national law: the Member States did not delegate this power to the European legislator, and initiatives to create a European penal code did not result in a European criminal code. Hence, each Member State can create their own Criminal Law.⁸¹ However, European law does play a role in criminal law, especially when it comes to the severity of the punishment and the rights of the suspect.⁸² The European Court of Human Rights ruled on issues which influence the whole of the national criminal law (in Europe).⁸³ Because the consequences of measures in criminal law are more drastic in view of the human rights, the crime and the penalty have to be written down in national law. Although this is not different in administrative law, the level of details and the description in criminal law are stricter than in other areas of law. Criminal Law is not law that provides measures that can be 'used' by a food safety authority.⁸⁴ Fraud is a crime in the Dutch Penal Code (further PC).^{85,86}

Criminal Law is one way of dealing with the unwanted behavior of Fraud by an FBO. Additionally, administrative law provides an array of measures to battle Food Fraud. Accordingly, when there is a choice between administrative law and criminal Law, it is up to the Member State to choose. The article mentioned above is relevant for 'safe' food fraud, because the labels on the food products are wrong and this is done purposefully with economical gain in mind. Similar to the horsemeat scandal, the administration could be lacking. The deliberate wrong labeling provides enough basis for a conviction on the basis of falsifying documents.

⁷⁶ For example, a child that rides horses for hobby will not be amused if she hears that she just ate horsemeat.

⁷⁷ Art.7.4 ab, Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

⁷⁸ Art.7.4 ab, FIC Regulation.

⁷⁹ C.P.M Cleiren, *beginselen van een behoorlijke procesorde en idem Identiteit van beginselen van behoorlijke strafrechtspleging en beginselen van behoorlijk bestuur?*, 1989. DD 1990, p.497 – 514.

⁸⁰ In chapter 3 the limits of enforcement will be elaborated on.

⁸¹ In the Treaty of the functioning of the EU there is a chapter on criminal behavior/law, chapter 4. However, this chapter does not delegate the power to the EU legislator to make European criminal law, but only to ensure cooperation in criminal matters. The main competence to make criminal law is up to the Member States in their national law. There have been attempts to create a European criminal code, but so far without any real result.

⁸² Before a citizen is convicted of a crime he is innocent, so one could not speak of a criminal before the suspect had a trail in which it was proven that the suspect was guilty of the crime.

⁸³ See for instance the ECHR case *Salduz v. Turkey* of 27 November 2008.

⁸⁴ The NVWA the competence to take measures derives from the commodities act.

⁸⁵ Accessible at: http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelXII/Artikel225/geldigheidsdatum_02-01-2015.

⁸⁶ "Hij die een geschrift dat bestemd is om tot bewijs van enig feit te dienen, valselijk opmaakt of vervalst, met het oogmerk om het als echt en onvervalst te gebruiken of door anderen te doen gebruiken, wordt als schuldig aan valsheid in geschrift gestraft, met gevangenisstraf van ten hoogste zes jaren of geldboete van de vijfde categorie. Met dezelfde straf wordt gestraft hij die opzettelijk gebruik maakt van het valse of vervalste geschrift als ware het echt en onvervalst dan wel opzettelijk zodanig geschrift aflevert of voorhanden heeft, terwijl hij weet of redelijkerwijs moet vermoeden dat dit geschrift bestemd is voor zodanig gebruik". Citation Art. 225 'Wetboek van Strafrecht', the Dutch PC.

With criminal prosecution individuals that facilitated Food Fraud can be punished. A penalty or even the closing of a company can have a major impact on the FBO. With a criminal prosecution an individual can be punished apart from the FBO. One of the owners of a slaughterhouse connected to the horsemeat scandal is already penalized this way.⁸⁷ However, double punishment of the same behavior is unlawful.⁸⁸

Besides fraud with documents/ administration, another type of behavior is punishable under the PC; namely, placing commodities on the market that constitute a risk to consumers. Commodities also encompass foodstuffs.⁸⁹ There are two varieties of this behavior, one active and one passive: the former If the person who placed the goods on the market knew about the risks, and the latter Art. 175 PC for the person bringing the food to the market without knowing. There is even a specific article on adulteration: for diluting foodstuffs Art. 330 PC. In chapter five an elaboration will be made on the measures deriving from the PC.

1.6 Fraud as an economic crime:

Assuming an FBO is not trying to poison their consumers by producing hazardous food, why would an FBO adulterate their food or commit fraud? As previously mentioned, food is a credence good, so consumers have to consume the product before they can assess its quality. If the taste, smell, and look of the product (further sensory attributes) are the same as the 'original' product, the consumer will not complain. This creates opportunities for FBO's to substitute the more expensive ingredients with cheaper ingredients in order to increase their margin of profit. There are cases known that date back to roman times, concerning the adulteration of wines in order to make more profit than one would make with 'regular' wine.⁹⁰

Substituting ingredients is not illegal in itself.⁹¹ FBO's try to make products 'better' by changing the composition of the food they produce, either for monetary reasons or for other reasons.⁹² Every ingredient in a food product costs money: the raw material, processing costs, transportation, and storage. The product(s) the FBO produces contain a certain amount of ingredients that can be changed without automatically changing the sensory attributes of the product(s). Some ingredients can be substituted by others (cheaper ones), and as long as the FBO clearly communicates this change, or at least states the contents of the product on the label and does not mislead consumers by making them think the food product contains ingredients that it in actuality does not contain, this substitution does not qualify as adulteration or fraud. Consumers can assess if they want to buy the product with the ingredients and nutrition as stated on the label.⁹³ If this would be considered fraud, all innovation would be halted: the composition of each product would have to be laid down, and each change in ingredients would lead to an infringement and subsequent punishment. Furthermore, the change in consumer behavior to consume healthier products could constitute another reason to change product ingredients.⁹⁴ Fibers and other 'healthy' ingredients are added to food products to increase the wholesomeness of these products. Again, this is not adulteration or fraud as long as it is communicated correctly. An element of change is inherent to adulteration and fraud as well, but what makes it adulteration or fraud is that this change is not communicated: without notifying the consumer,

⁸⁷ <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBOBR:2015:1954>.

⁸⁸ This follows from legal principle of *ne bis in idem*; in chapter 4 an elaboration on this principle and on other principles that potentially impact enforcement will be discussed.

⁸⁹ Art. 1.1a Commodities Act.

⁹⁰ Bee Wilson, Swindled, *the dark history of food fraud, from poisoned candy to counterfeit coffee*, 2008. Princeton University Press, p 49-51.

⁹¹ For example, Coca Cola Inc. has a new flavor, 'Coca Cola Life' with stevia extract that substitutes part of the sugar to diminish the amount of sugar in the cola. Why is this then not adulteration, Coca Cola Inc. makes it clear to consumers that part of the sugar is substituted with a different ingredient. Stevia extract is not an inferior product compared to sugar, it is only a different type of sweetener.

⁹² For instance, innovations in the food industry might influence existing products simply because new chemical substances are made that can substitute certain ingredients that the FBO would like to diminish in their final product.

⁹³ The average consumer reads the label and therefore in a legal sense is not misled if the label is correct and no elements on the package constitute misleading.

⁹⁴ Raimo Lappalainen, John Kearney, Michael Gibney, *A pan EU survey of consumer attitudes to food, nutrition and health: an overview*, 1998. Food Quality and Preference Vol. 9, No. 6, pp. 467-478.

the ingredients change from the ‘original’ ingredients to cheaper and sometimes even inferior ones – assuming that FBO’s will not ‘upgrade’ (replace ingredients with superior ones) their products without communicating this to their customers.⁹⁵ Subsequently, was the horsemeat scandal Fraud? Without notifying the consumers, the mincemeat in readymade meals contained horsemeat. When comparing similar cuts, horsemeat is cheaper than beef.⁹⁶ Hence, when executed on a very large scale, adulterating batches of beef with horsemeat can be big business. If the chances of getting caught are slim, the penalty not high enough, and the potential profit large, then there will be fraud, in general.⁹⁷

Punishment based on the qualification ‘economic crime’ is a national affair, and is laid down in the Economic Crime Act (further ECA).⁹⁸ Art. 6 ECA contains the penalties for infringement of the ECA. In setting the maximum punishment for light and major offences, the legislator strove for simplicity and unity in penalties for violations. The legislator deemed it impossible to set individual limits for each individual infringement,⁹⁹ and thus set relatively high penalties. The rationale is that people should not be tempted to weight the benefits of committing an economic offence to the possible penalty.¹⁰⁰ There is even the possibility to cumulate penalties in certain circumstances to come to the enough repression.¹⁰¹ The last sentence of Art. 6.1 EA opens the possibility to increase the maximum penalty to skim off the profit of the infringement in case of punishment for lucrative practices. If the profits from the infringement are higher than the penalty for the infringement, the penalty can be increased to the maximum of the next tier.¹⁰² This option is supplementary to the option in the Criminal Code to increase the maximum penalty for an offence or crime to the next tier if the penalty does not provide adequate punishment.¹⁰³ This way a relatively light offence can be punished with a very high fine in case of lucrative infringement.

Table 1 penalties different tiers, per 1 January 2016¹⁰⁴

Category	Penalty (max)
First	€ 410
Second	€ 4.100
Third	€ 8.200
Fourth	€ 20.500
Fifth	€ 82.000
Sixth	€ 820.000

⁹⁵ For example, in the polish salt fraud, anti-freeze salt – which is marginally cheaper than regular table salt – was sold as table salt in very large amounts to make profit. Anti-freezing salt contains a lot of heavy metals, much more than is allowed in the EU. Consumers did not get sick because they did not consume large amounts of salt, but the product should not have been on the market.

⁹⁶ Michael J Walker, Malcolm Burns and D Thorburn Burns, *Horse Meat in Beef Products Species Substitution*, 2013. Journal of the Association of Public Analysts (Online) vol. 41 p. 67-106.

⁹⁷ Lawrence M. Schell, Mia V. Gallo, Andkatsi Cook, *What’s NOT to Eat—Food Adulteration in the Context of Human Biology*, 2012. American Journal of Human Biology 24:139–148.

⁹⁸ http://wetten.overheid.nl/BWBR0002063/geldigheidsdatum_27-07-2015.

⁹⁹ MvA, *Kamerstukken II 1948/49*, 603, 5, p. 7-8.

¹⁰⁰ MvT, *Kamerstukken II 1947/48*, 603, 3, p. 11.

¹⁰¹ *Kamerstukken II 1947/48*, 603, 3, p. 11).

¹⁰² HR 6 oktober 2009, *NbSr 2009/354*.

¹⁰³ Art. 23.7 and 23.8 Criminal Code.

¹⁰⁴ Art. 23.4 Criminal Code.

1.7 Private law

Not only administrative and criminal law can play a role in case of food fraud. During the last decades, the Food industry realized that a problem (such as fraud) in one of the links in the complex chain will have consequences for the whole chain.¹⁰⁵ Since Food safety authorities cannot monitor everything, some of these problems can happen without the food safety authorities knowing. As consumer trust is very important for FBOs, the FBOs intervened.¹⁰⁶ Private standards were created to control the supply chain and to have the means to punish FBO's within the supply chain that cause these problems.¹⁰⁷ Private standards were introduced to set global standards for quality and safety. Examples are BRC or the Dutch HACCP private standard.¹⁰⁸ There is still no global private standard, and retailers in different countries require different certifications from their suppliers. Although many private standards are created to use worldwide, in practice countries only accept certain private standards. As a consequence, there is still no private standard that is recognized worldwide.

Private standards are contracts within the supply chain which ensure that certain standards are upheld and that special monitoring and control measurements are in place to minimize the chance of problems that influence the whole chain. These standards are a set of private rules on quality and safety standards that have to be implemented in the supply chain. These rules can go beyond the standards in (public) Food Safety Law, and set stricter rules for, for instance, hygiene practices. By means of certification, the companies that comply with a certain private standard and pay a fee can communicate through the certification that the company is in compliance with the private standard. By auditing the companies, the private scheme holder supervises the certified companies. In case a problem arises, the contracts (private certification) contain articles concerning the proper course of action; for instance, the FBO that caused the problem has to pay a large sum of money, or the other FBO's in the chain have the option to remove the FBO at fault from the supply chain. Additionally, besides a fine, the certification for a certain private standard can be revoked by the private scheme owner. Most retailers, especially the large ones, (especially the large ones) ask their suppliers to provide certifications of one or more private standards. Thus, if your certification is revoked, the chances of going bankrupt are realistic.¹⁰⁹ Enforcement through private standards is taken care of by the supply chain itself. Consequently, beside the enforcement by the national authorities, the private schemes create a supplementary enforcement mechanism. This supplementation is especially useful in parts of the world where the enforcement of food Safety Law is lacking. The food safety authorities do not use private standards to enforce law; rather, the NVWA has to base its enforcement measures on the Commodities Act, which is administrative law. There are initiatives to 'help' private enforcement in the supply chain: the NVWA now has a taskforce food authenticity.¹¹⁰

Private standards are not limited to hygiene practices; corporate governance is another aspect. In case of Fraud, personal liability of directors in bigger companies with a corporate structure with a board can potentially be a means to prevent the stimulation of Fraud (either passive and active). Chapter four will further elaborate on personal director's liability in the Netherlands and corporate governance.

¹⁰⁵ Spencer Henson, Thomas Reardon, *Private agri-food standards: Implications for food policy and the agri-food system*, 2005. Food Policy 30 (2005) 241–253.

¹⁰⁶ Kristof De Wulf, Gaby Odekerken-Schröder and Dawn Iacobucci, *Investments in Consumer Relationships: A Cross-Country and Cross-Industry Exploration*, 2001. Journal of Marketing Vol. 65 (October 2001), p. 33–50.

¹⁰⁷ Busch L., *The private governance of food: equitable exchange or bizarre bazaar?*, 2011. Agric Hum Values. 28: 345–352.

¹⁰⁸ http://www.foodsafetymanagement.info/bron/cms_file/65-HACCP_Certification_Scheme_June_2012.pdf.

¹⁰⁹ Trienekens J., Zuurbier, P., *Quality and safety standards in the food industry, developments and challenges*, 2008. international journal of production economics. Economics 113 (2008) p. 107–122.

¹¹⁰ <https://www.rijksoverheid.nl/documenten/rapporten/2013/06/13/actieplan-taskforce-voedselvertrouwen>.

1.8 In short

The central question in this chapter is: what are the different legal angles to address food fraud? From an administrative angle, food safety and consumer interest (authenticity) are the two central elements on which the enforcement of authorities should be based; Both provide sufficient basis to act when Food Fraud is discovered. National Dutch criminal law provides some means to battle food fraud, and is particularly useful for the punishment of individuals or companies that facilitated Food Fraud. Private law could be used by the companies in the supply chain to both prevent fraud in the first place, and to punish the company that commits Food Fraud. All legal angles discussed have the potential to contribute to the battle against Food Fraud. In chapter three the means to battle Food fraud will be elaborated on. Not only the means from administrative law, but the means that can be found in the different legal angles discussed in this chapter will be elaborated on.

Chapter 2 Fraud:

Fraud with food is of all times, and can even be traced back to ancient times: Adulterated jars of wine and olive oil stemming from roman times have been found.¹¹¹ Before elaborating on the horsemeat fraud, the definition of fraud will be elaborated on. Although one of the core goals of the GFL is to prevent/the prevention of fraudulent behavior, The GFL does not contain a definition of fraud.¹¹² In this chapter the definition of food fraud will be discussed in an international context, both on EU level and in the United States (further US). After defining food fraud, a timeline of the horsemeat fraud will be provided (limited to Dutch companies). The horsemeat scandal was chosen as a practical example to supplement the more theoretical framework.

It is important to have a definition of food fraud in order to be able to answer the main research question; Does the NVWA have enough legal means to adequately battle 'safe' food fraud in the Netherlands? Since there is no European nor a national (legal) definition of food fraud, it is necessary to elaborate on the elements of food fraud, to use as basis for the legal analysis. There are definitions for fraud in general and fraudulent behavior, but not specifically for food fraud. The sub questions of this chapter are; How to qualify Food Fraud? Is there a European definition? conversely, would a definition be necessary?

2.1 Types of fraud

To make matters more complicated there are a number of types of food fraud. In the table below the types of Food Fraud will be described including an example to illustrate. The table is taken from literature on food fraud from both European¹¹³, American¹¹⁴ and Asian sources to ensure a complete overview is provided. The examples are added to illustrate the different types of fraud.

¹¹¹ J. Spink & D.C. Moyer, 'Defining the public health threat of food fraud', 2001. *Journal of Food Science* (76) 2011, p. R157-R163.

¹¹² Art. 5 GFL, describes the general objectives of food law. One of these general objectives is ensuring fair practices in food trade.

¹¹³ K.E. Gussow en L.H. Kuipe, *De bestrijding van voedsel fraude in Nederland*, 2014. *JV* 2014/02, p.12.

¹¹⁴ Stephen Wagner, *When tuna still isn't always tuna; federal food safety regulatory regime continues to inadequately address seafood*, 2015. *Ocean and Coastal Law Journal* (20), L.J. 111 2015, p. 111-140.

Table 2, types of Food Fraud¹¹⁵

Type of Fraud	Category	Example
Administrative fraud	Overproduction	Producing more than the product quota's, like there are for milk ¹¹⁶ fish or (products of) protected plants or animals.
	Misleading labels, claims or presentation	Making health or nutrition claims which are not allowed in the EU, for instance <i>light</i> or <i>lowers the cholesterol</i> when the claim has not been approved for that specific ingredient. ¹¹⁷ The presentation can also be misleading by suggesting to the consumers the product has certain qualities which the food does not possess.
	counterfeit products	Fake or counterfeit product of known brands or products unlawfully carrying a protected origin label, for example Gouda Cheese or Parma ham.
	Deliberate mentioning of production or processes, or deliberate wrong weight on label.	Stating that the product is organic, halal or kosher, when the product isn't. The label states <i>free range chickens</i> when the product is not. Or stating wrong amounts of ingredients in the product, for instance the amount of water in chicken.
physical fraud	Substitution	Substituting more expensive ingredients with cheaper ones, beef with horsemeat or extra virgin olive oil with regular oil.
	Adulteration	Substitution or adding ingredients which are forbidden or even hazardous, for instance adding melamine to instant formula to make the product appear to have a high protein content.
	'Laundering' of food	Using Food that is no longer suitable for consumption or never was suitable in the first place. For instance, products with a to high level of contamination with pesticides or using food which already turned rancid. This also encompasses animals illegally slaughtered which means the animals have never been officially checked before or after slaughter.

These types of food fraud differ in motive and damage to society as a whole. The definition should be broad to encompass all these types of food fraud. The question whether all types of food fraud should be remedied by measures found in administrative law will be discussed in chapter four.

2.2 Defining fraud on a European level

Before a definition should be created by the legislator, a valid question would be: is a definition necessary? What difference would it make if there is a definition in the legislation if we already have, be it vague terms, definitions such as ensuring fair practices, as part of consumers interests?¹¹⁸ One of the reasons is that a definition increases the legal certainty.¹¹⁹ If one would consider food fraud a crime, for which criminal law is the remedy, a definition is

¹¹⁵ The basis of table is taken from; John Spink, Douglas C. Moyer, Hyeonho Park, Yongning Wu, Victor Fersht, Bing Shao, Miao Hong, Seung Yeop Paek, Dmitry Edelev, *Introducing Food Fraud including translation and interpretation to Russian, Korean, and Chinese languages*, 2015. *Food Chemistry* 189 (2015), p. 102–107.

¹¹⁶ Until recently there was a maximum limit for milk production, this milkquota was implemented to reduce the overproduction.

¹¹⁷ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

¹¹⁸ Art. 5.1 GFL.

¹¹⁹ You could also argue that legal certainty is only achieved by implementing far more concrete rules on Food Fraud, defining the scope and as far as possible all behaviour that is considered Fraud. So having a broad definition would in that sense not add that much to the legal certainty.

needed.¹²⁰ Another argument is that defining food fraud is the only way the EU can have a harmonized approach in battling food fraud. If it is left to the Member States to define food fraud, there is the possibility some Member States will have a more restrictive interpretation, and will have a different focus than other member states.¹²¹ Enforcement is foremost a national affair, so there could be a difference in enforcement from Member State to Member State.¹²² A harmonized and clear definition can contribute to a harmonized approach in battling food fraud. The food chain is generally not contained within the boundaries of a Member State, so if the EU wants to battle Food Fraud, a EU broad approach should be chosen.¹²³ One definition would at least send a clear message that the EU is willing to pick up arms to battle food fraud.

As previously stated, there is no legal definition (EU) of food fraud. However, in literature, definitions have been formulated. Two often used definitions in literature on this topic:

“Fraud is an act of intentional misrepresentation or concealment of information in order to deceive or mislead”

“The deliberate placing on the market, for financial gain, of foods which are falsely described or otherwise intended to deceive the consumer”¹²⁴

There are a number of different authors all posing their own definition of food fraud.¹²⁵ From these definitions a number of elements can be extracted, that are in my opinion the core of food fraud. <I> placing on the market, <II> an element of intention and <III> an element of deceiving. These elements should all be present: the elements are cumulative. If one of these three is missing, the action(s) should not be qualified as food fraud. When a food business operator is confronted with an incident or production error during the production process, the food might get adulterated.¹²⁶ If in all situations that an incident/error occurs and is not detected along the processing line is labeled as fraud, small SME's in the food business are at risk of getting large fines for unintentional mistakes. Corrections for these SME's are needed, but on the basis of hygiene/ production rules, not on the basis of fraud. Rules on food fraud would encompass behavior of employees as a norm, instead of only focusing on the product itself.

For the qualification: food fraud, the adulteration should be deliberate. So if this mistake is not corrected but the production line is modified because with this mistake the food products are produced cheaper, this behavior could be considered food fraud.¹²⁷ Passive behavior towards such behavior/ non-compliant behavior should be qualified as the intention to commit fraud similar to active fraudulent behavior. Changing the ingredients in a food product is not something uncommon; for instance, when new scientific developments make it possible to reformulate the recipe of your products to produce healthier food. Reformulation can also occur to follow the trends; for instance, lowering the salt content or usage of natural sugar instead of artificial sweeteners. This reformulation has to be communicated to the consumers, that is the essence of the element of deceiving.¹²⁸ The element of intention is uncommon in Dutch national administrative law. The element of intention could have some influence on the adopted measures, but the administrative norms do not encompass intention. The element of intention is difficult

¹²⁰ In Dutch Criminal Law there is such a definition, which will be elaborated on later.

¹²¹ In theory this could mean companies will look for national regimes in the EU with the most lenient interpretation. To avoid getting penalized for their behavior, but still able to legally sell their products on the market on the basis of mutual recognition.

¹²² It is not yet an option to suggest that enforcement is done on a European level, Member States value their enforcement freedom too much to mandate this to the EU. Axel Berger *The Development and Status of Enforcement in the European Union*, 2010. Accounting in Europe, 7:1, p.15-35.

¹²³ J.A. van den Akker en E.M.R. de Lange, *Naar een Europese aanpak van voedsel fraude*, 2014. Justitiële verkenningen, jrg. 40, nr. 2, 2014 p. 84-96.

¹²⁴ K.E. Gussow en L.H. Kuiper, *De bestrijding van voedsel fraude in Nederland*, 2014. JV 2014/02.

¹²⁵ J.A. van den Akker en E.M.R. de Lange, *Naar een Europese aanpak van voedsel fraude*, 2014. Justitiële verkenningen, jrg. 40, nr. 2, 2014 p. 84-96.

¹²⁶ Satu Tähtikäpää, Riitta Maijala, Hannu Korkeala, Mari Nevas, *Patterns of food frauds and adulterations reported in the EU rapid alert system for food and feed and in Finland*, 2014. Food Control 47 (2015), p. 175-184.

¹²⁷ Because of the deliberate avoidance of good hygiene practices for financial gain.

¹²⁸ A change in formulation does not qualify as adulteration, as long as the change is communicated properly.

to prove in court and belongs more in the area of Criminal Law. However, fraud should be linked to intention. A possible remedy for this potential problem is making the FBO prove they did not commit fraud. The NVWA or another party finds for instance adulterated infant formula, deem it fraud and fine the violator. In such case it is up to the violator to prove it was not fraud. The infringement of food safety regulations was done by the FBO and he is responsible for compliance, if they can prove it was a food safety incident of a non-structural nature, the FBO should not be penalized for fraud, instead only for infringement of food safety regulations.

If ingredients are substituted by cheaper/ inferior ingredients, the consumer should be able to know this. As described in the previous chapter, it is of paramount importance that the consumer is informed in such a way that he/she is enabled to make an informed choice. For instance, if the ingredient list would not mention certain ingredients that are used, consumers cannot make an informed choice and are therefore misled. There are a number of products more associated with food fraud than others in scientific literature (American data): milk, olive oil, meat, fish, spices, fruit juice, honey, wine, coffee and tea were the most common products subject to adulteration.¹²⁹

An economic incentive could be an element of the definition.¹³⁰ However, the problem with adding an economic incentive as element, is that the element has to be proven for the behavior to be qualified as fraud. In practice fraud will have an economic motive, but in theory fraudulent behavior doesn't have an economic motive.¹³¹ If the economic incentive is lacking, the behavior could not be qualified as fraud. The economic incentive would only mean an increased burden of proof. The conduct that leads to the adulteration/ misbranding is done to increase profits, not because of temporal defects in the production line for instance. Active 'sabotage' of the production line to increase margins can relatively easy be connected to the intention of the one committing the fraud. More passive behavior on the other hand is far more difficult to connect to fraud, unless it is clear that the margins went up and the company did not repair/ correct the production step that caused the final product to be fraudulent.¹³² Active fraud and passive fraud should both fall within the scope of fraud. A defect in the production line/ behavior of employees can amend to fraud, if not repaired/ corrected immediately passive attitude towards noncompliance should be qualified as fraudulent behavior and should be punished accordingly. The term immediately brings forth a problem: what is immediately? In guidance documents the authorities can set a practical timeframe in which an FBO can correct their actions/ production. A legal definition on EU level would be very difficult to create, and it would be more practical that Member States can take local differences into account.¹³³ The optimal system would be that the production line is halted when a defect/ wrong behavior is detected, but these systems cannot be asked of SME to implement. Still a producer is responsible for the produced goods, so they should be the one who control the production chain. The authorities can via audits check if these corrective systems are in place and working, and if not if the FBO is producing fraudulent food. Further elaboration on control and supervision will follow in chapter three.

Food fraud can be a health concern due to of the toxicity of the substances or allergens in the food. An example of this type of food fraud is the melamine crisis in China.¹³⁴ Nearly 300,000 illnesses resulted from melamine adulteration of infant formula, 6 children died, and about 54,000 children were hospitalized. This crisis showed the

¹²⁹ J.C. Moore, J. Spink & M. Lipp, *Development and application of a database of food ingredient fraud and economically motivated adulteration from 1980 to 2010*, 2012. *Journal of Food Science* (77) 2012, p. R118-R126.

¹³⁰ In the Report of Esther de Lange, an economic incentive is mentioned as one of the elements that constitutes fraud. EP, *Report on the food crisis, fraud in the food chain and the control thereof*, 2013. (2013/2091(INI)) A7-0434/2013. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0434+0+DOC+PDF+V0//EN>.

¹³¹ For instance, someone hates Muslims and produces meat that is sold as halal, but contains pork. After a few years the company will reveal the fraud and tell all the Muslims that consumed the meat that they ate pork. This is clearly fraud, but it is a very theoretical case.

¹³² Satu Tähtkääpä, Riitta Maijala, Hannu Korkeala, Mari Nevas, *Patterns of food frauds and adulterations reported in the EU rapid alert system for food and feed and in Finland*, 2014. *Food Control* 47 (2015), p. 175-184.

¹³³ It does mean that the idea of immediate action is implemented, so a timeframe of 30 working days is not a viable option, for a food business operator.

¹³⁴ Xiaofang Pei et al., *The China melamine milk scandal and its implications for food safety regulation*, 2011. *Food Policy* 36 (2011) 412-420.

extent of (possible) damage that can be caused by adulteration. An example of food fraud closer to the Netherlands is the case of the Polish salt adulteration. Polish salt companies sold salt that was used to defrost roads as table salt; this salt contained far more heavy metals and toxic substances than allowed in table salt.¹³⁵ The number of victims (connected to this specific adulteration) was 0. The difference between these cases is not only the number of victims: the difference is in the type of food which was adulterated. Table salt is used every day, but in very limited quantities, and mostly by normal people (not being YOPI's).¹³⁶ Infant formula, on the other hand, is the only foodstuff young children consume when they are not being breast fed. It is the dosage that makes the poison, is the adage of Percellius.¹³⁷ Additionally, the target group has to be taken into account: the dose of a certain substance that is toxic is much lower in vulnerable target groups – in literature referred to as YOPI's. Both events were cases of food adulteration, but the impact was completely different. These cases illustrate that it is not the impact itself that makes the fraud, it could be an element of the penalization, but not of the definition of Food Fraud.¹³⁸

The discussion on defining food fraud predates the horsemeat scandal, but that scandal did put fraud with food from the shades into the spotlight. The European Parliament appointed a member of Parliament to report on food fraud in Europe.¹³⁹ The horsemeat scandal did spark the attention of the Parliament, but the objective of the study is broader, the food fraud practices in Europe. The Dutch member of Parliament Esther de Lange was appointed as head of this research; she will not only look for the practices, but also for possible solutions to battle these practices.¹⁴⁰ The EP already published a 5-point Action plan in reaction to the horsemeat scandal.¹⁴¹ This 5-point plan consists of 5 steps; <I> Food Fraud, <II> testing program, <III> Horse Passport, <IV> Official control implementation and interpretation, <V> Origin Labeling.

The core of the report of Esther Lange is that a definition is necessary; this definition is one of the necessities to ensure a harmonized approach in the battle against food fraud. She pushes for a broadening of the scope of official controls, encompassing food fraud as new element. De Lange argues that fraudulent practices are kept as much out of sight of the authority as possible, and therefore it is necessary to make fraud part of the official controls. But just increasing the scope of inspections is not sufficient, the industry should do all that is in their power to prevent fraudulent practices from emerging or continuing. The report has no legal value in itself, but does provide an overview of what should be done to battle food fraud on a European scale and the sentiment of the members of the EP on this issue.¹⁴² There is still not a definition, but the Member States are gathering data to assess the problem on a European scale. The Food Fraud network (FFN) was created to ensure efficient communication on cross border fraud.¹⁴³

2.3 inspiration overseas?

Instead of only looking at scientific literature and official documents, the EU could also get inspiration from the US where both a definition of adulteration and food fraud exists. The U.S. the Federal Food, Drug, and Cosmetic Act

¹³⁵ <http://ireport.cnn.com/docs/DOC-760662>.

¹³⁶ YOPI; the young, the old, the pregnant and the immune surpassed. These groups of consumers are considered to be the more vulnerable consumers.

¹³⁷ Percellius could be seen as the founder of toxicology, his most famous phrase forms the core of toxicology; all substances can be dangerous depending on the doses one takes.

¹³⁸ Making one of the criteria the number of DALY's would be an undermining of the whole system of Food Safety Law, only enforcement in case of actual reported deaths or sickness. It would be a gross violation of the precautionary principle.

¹³⁹ http://www.europarl.europa.eu/meps/nl/38398/ESTHER_DE+LANGE_home.html

¹⁴⁰ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0011&language=EN&ring=A7-2013-0434>.

¹⁴¹ http://ec.europa.eu/food/food/horsemeat/plan_en.htm.

¹⁴² EP, Report on the food crisis, fraud in the food chain and the control thereof, 2013. (2013/2091(INI)) A7-0434/2013. Available at; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0434+0+DOC+PDF+V0//EN>

¹⁴³ See for an overview of the activities done in 2015 by the FFN; http://ec.europa.eu/food/safety/docs/official-controls_food-fraud_network-activity-report_2015.pdf

contains a definition of adulterated food, not of food fraud as such, but the definition lies very close to the ‘other’ definitions of food fraud. The Act declares a food adulterated;

“if any valuable constituent has been in whole or in part omitted or if any substance has been substituted wholly or in part or if damage or inferiority has been concealed or if any substance has been added thereto so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.”¹⁴⁴

The U.S. Food and Drug Administration (further the FDA) has a working definition for Economically Motivated Adulteration (further EMA) “fraudulent, intentional substitution or addition of a substance for the purpose of increasing the apparent value of the product or reducing the cost of its production”¹⁴⁵. The FDA has a definition of EMA that encompasses food but is not limited to food products, it also encompasses; “*tobacco, cosmetics, pharmaceuticals, medical devices and equipment. Food fraud encompasses EMA and is intended to explicitly include; economically motivated misbranding, theft, diversion, simulation, smuggling, and counterfeiting, which may be classified as adulteration under the Food, Drug, and Cosmetic Act but may not involve material addition or substitution*”. This definition is an indication of the difficulties faced when trying to define food fraud. Still the definition resembles those presented in paragraph 2.2. However, the difference is that the American definition is for specifically EMA, food fraud does not encompass economic an incentive as element. The EMA definition could be used as inspiration, but not as definition for food fraud.

2.4 Why battle food fraud?

But why would the legislator battle food fraud? One possible explanation could be that the Member States are obliged by the GFL to ensure fair practices in the food sector. By not actively preventing and penalizing fraudulent behavior, the Member States do not ensure fair practices and could be (theoretically) penalized for not complying with EU law. There are a number of arguments that can provide insight in the importance of battling Food Fraud. The following arguments can be; <I> economic damage, <II> risk for the health of consumers, <III> Consumer trust in FBO’s, <IV> trust in the government and <V> general prevention of unwanted behavior. These arguments will be discussed separately in the coming paragraphs.

Consumers and customers suffer economic damage in the sense that they will buy inferior goods for premium prices. Companies selling these products have an unfair economic advantage over FBOs that do not commit fraud, and produce the premium products. Without intervening the Fraudulent FBO’s have an unfair advantage over other FBO’s which are compliant. To ensure the functioning of the internal market in the EU the Member States will have to intervene.¹⁴⁶ The fraudulent behavior can even mean the FBO tries to evade trade tariffs by mislabeling the product.¹⁴⁷ So consumers, other producers and the Member States are all victim in case of food fraud. In the case of one consumer consuming one adulterated foodstuff, the economic damage would be very limited (unless this results in serious illness or death), but fraud on a large scale for a long time can cause serious societal losses. Next to this direct economic damage, if the foodstuff poses a risk for health, this can also lead to economic damage. If consumers get sick this can be seen as a cost for society as a whole, next to the personal DALYs of the consumer.¹⁴⁸ The time it takes to recover including the medicine and health care cost can all be translated into monetary loss.

The substitution of ingredients for inferior ones could pose serious dangers for some consumers. Allergic reaction would be the first to come to mind.¹⁴⁹ The substitute is not labeled, so consumers with an allergy cannot avoid

¹⁴⁴ U.S. Food and Drug Administration. 2010. Federal Food, Drug, and Cosmetic Act, chap. IV. 21 USC 342:402.

¹⁴⁵ U.S. Food and Drug Administration. 2011. Public meeting on economically motivated adulteration, 1 May 2009. Available at: <http://www.fda.gov/NewsEvents/MeetingsConferencesWorkshops/ucm163619.htm>.

¹⁴⁶ Francesca Lotta and Joe Bogue, *Defining Food Fraud in the Modern Supply Chain*, 2015. EFL 2, 2015, p 114-122.

¹⁴⁷ Stephen Wagner, *When tuna still isn’t always tuna; federal food safety regulatory regime continues to inadequately address seafood*, 2015. Ocean and Coastal Law Journal (20), L.J. 111 2015, p. 111-140.

¹⁴⁸ DALY’s; Disability-Adjusted Life Years, a measurement that calculates the loss of life years lost due to sickness or death. In the calculation the life expectancy and life year in which the consumers are confronted with this disease are taken into account.

¹⁴⁹ Scott H. Sicherer, MD, and Hugh A. Sampson, MD, *Food allergy*, 2010. Journal of Allergy and Clinical Immunology Volume 125, Issue 2, Supplement 2, February 2010, Pages 116–125.

these foodstuffs. But not only allergens and toxic substances are a potential problem. In case of substitution of ingredients, the nutritional composition can change. For consumers that follow a restrictive diet for medical reasons such as consumers suffering from diabetes it is necessary to have correct information. Especially with the problem of obesity, people who follow an energy restricted diet should be able to be informed.¹⁵⁰ New ingredients can also pose problems in terms of toxicology or microbiological hazards. Assuming the 'new' ingredients have not been taken into account in the HACCP procedure, the product might be toxic, or be a risk for bacterial or mold growth that will pose health concerns. So even if the product does not pose a direct threat the aspect of risk prevention is not taken into account, making food fraud unwanted. In short, the HACCP procedure is research of a company on the potential risks in their production line. This procedure encompasses a number of steps to map all production steps and the potential risks that these steps bring. Not only mapping, but also preventive, corrective steps have to be developed to ensure the company is able to deal with incidents (if they occur). Food Law as a whole is meant to prevent incidents to happen, the HACCP procedure is an important aspect of this prevention; fraud undermines the integral character of this prevention method because some risks might not be incorporated in the HACCP procedure.¹⁵¹ FBOs are obliged to implement the HACCP principles in their company. SME's can also comply with standards of good hygiene practice, instead of performing an individual application of HACCP.¹⁵² More on the HACCP in chapter three.

For FBO's food fraud even outside their scope of power can have serious consequences for consumers' trust and their willingness to buy food products. The enormous availability in foodstuffs enables consumers to buy different products.¹⁵³ It is thus of grave concern for FBO's to ensure consumers trust the FBO. When somewhere along the chain there is fraud and this fraud is discovered by either the authorities or a private entity, the whole chain can suffer the consequences.¹⁵⁴ Extensive studies have been done on consumer trust; the general conclusion is that consumer trust is not easily won, but can be diminished or lost in an instant.¹⁵⁵ Trust is not only connected to Fraud, also to Safety and quality of products.

Not only the reputation of FBO's can be damaged, the authorities will at the same time lose some of their reputation, because they were the ones that were supposed to ensure our food is safe and unadulterated.¹⁵⁶ Creating an atmosphere of an incompetent authority that is not able to take care of their citizens. In a legal sense the consumers have a point, since the ultimate responsibility for the safety of the consumers lies with the Member States, not with the FBO's. General prevention is an important aspect of punishment, by penalizing unwanted behavior, the behavior is discouraged.

An example of a crisis in which the authority lost some of her credibility due to providing wrong (in hindsight) information on the origin of the EHEC outbreak. In this crisis the authorities communicated wrong information about which food contained the EHEC bacterium that caused the deaths and illnesses (mainly) in Germany. After an elaborate research the most probable source of food connected to the EHEC outbreak was Fenegric Seeds from Egypt; the capabilities of the government to ensure safe food and efficient and effective enforcement in case of an outbreak was diminished significantly.¹⁵⁷ The EHEC crises provided lessons for risk communication, but is less interesting from a legal perspective. However, the Farmers who suffered great damage due to wrong communication by authorities in Germany can be an interesting legal topic.

¹⁵⁰ Giving a wrong nutritional value could potentially become a selling point of a product because consumers might think the foodstuff is (nutritional) healthier than a reference product on which the nutrition values have not been tampered with.

¹⁵¹ Bernd M.J. van der Meulen, *The Structure of European Food Law*, 2013. *Laws* 2013, 2, 69–98; doi:10.3390/laws2020069.

¹⁵² Art. 4.6 Regulation 852/2004 on the hygiene of foodstuffs.

¹⁵³ This is also closely related to brand protection, but in this paragraph is only meant as the reputation of the individual FBO's in the chain.

¹⁵⁴ Francesca Lotta and Joe Bogue, *Defining Food Fraud in the Modern Supply Chain*, 2015. *EFFL* 2, 2015, p 114-122.

¹⁵⁵ Franck Meijboom, Tatjana Visak, and Frans Brom, *From trust to trustworthiness: why information is not enough in the food sector*, 2005. *Journal of Agricultural and Environmental Ethics* (2006) 19, p. 427–442.

¹⁵⁶ The producers are responsible for the safety of their products, but in the end, the Member States are responsible for the overall safety of the citizens in that Member State.

¹⁵⁷ Maria Sol Erdozain, Kevin, J. Allen, Katija A. Morley, Douglas A. Powell, *Failures in sprouts-related risk communication*, 2013. *food control* Volume 30, Issue 2, April 2013, p. 649–656.

2.5 Meat Production

Food fraud with meat products in general has some characteristics which are closely connected to the production chain of meat products. The meat products can come from a variety of animals which have different value per weight. The margin of profit between meat types is quite large: depending on the quality of the cut, the animal it is derived from, and other elements such as origin and way of production (organic for instance).¹⁵⁸ A mean of increasing the profit margins is by adding water to the meat; water is cheaper than meat. Water can be added through injection; directly add volume and weight to the meat by injecting the meat with water combined with a substance to keep as much water in the chicken as possible. Tumbling is a different technique with essentially the same result, the meat is placed inside a barrel like machine, under pressure is rolled in a mixture of water and other ingredients to slowly let the meat suck up the water, creating more volume and weight.¹⁵⁹ Gluing meat is another method to create high value steaks from pieces. With a protein based meat glue, the pieces are put together to look like a more expensive cut although it is made of smaller pieces.¹⁶⁰ The origin of the meat is important for the consumers, whether it is about the region the meat was produced or the way the animals were kept/ slaughtered.¹⁶¹ As a consumer one has to believe in the honesty of the producers in this aspect. By means of certifications schemes, the industry seeks to find an easy way to guarantee the consumers are not misled. Even with a certification, there are limited guarantees for consumers that their meat product is exactly what is says on the label.¹⁶² The meat remains a credence good; if there is not a distinctive taste involved (or this is recreated) the consumer cannot know whether or not they are misled.¹⁶³ These specific activities show that it is not always easy to distinguish fraud from practices that are lawful, although they might pose a potentially misleading element.

One element which makes the qualification of food fraud even more difficult is the difference in size of the FBO's in the supply chain. In large companies the organization actively or passively commits fraud, creating a culture within the company in which this behavior is tolerated or even awarded.¹⁶⁴ In smaller firms the fraudulent behavior can be more easily linked to the owner(s) of the company.¹⁶⁵ The main reason given in literature for criminal behavior in a company is the potential benefit. The company wants to maximize their profit and calculates risk: if the benefit outweighs the risks, they will be tempted to display such behavior.¹⁶⁶ This reason is not necessarily the only reason why companies will break the rules in order to make a larger profit. When the Fraudulent behavior is deemed the only way to save the company from going bankrupt, then fraudulent behavior can save a company at the expense of the consumers.¹⁶⁷

¹⁵⁸ Wim Verbeke Federico J.A. Pérez-Cueto , Marcia D. de Barcellos b,c, Athanasios Krystallis c , Klaus G. Grunert, *European citizen and consumer attitudes and preferences regarding beef and pork*, 2009. *Meat Science* 84 (2010), p. 284–292.

¹⁵⁹ Z. Pietrasika and P.J. Shand, *Effect of blade tenderization and tumbling time on the processing characteristics and tenderness of injected cooked roast beef*, 2003. *Meat Science* 66 (2004), p. 871–879.

¹⁶⁰ To be clear, injecting water, tumbling or gluing meat, as long as labeled properly, are not considered Food Fraud; the consumers are not misled. The other elements of Food Fraud are present, but it is communicated to the consumers, so no qualification as Food Fraud.

¹⁶¹ E. Dransfielda, T.M. Ngapob, N.A. Nielsenc, L. Bredahlc, P.O. Sjödénd, M. Magnussond, M.M. Campoe and G.R. Nute, *Consumer choice and suggested price for pork as influenced by its appearance, taste and information concerning country of origin and organic pig production*, 2005. *Meat Science* Volume 69, Issue 1, January 2005, P. 61–70.

¹⁶² Miguel Angel Sentandreu and Enrique Sentandreu, *Authenticity of meat products: Tools against fraud*, 2014. *Food Research International* 60 (2014), p. 19–29.

¹⁶³ S.F. Hamilton & D. Zilberman, *'Green markets, eco-certification, and equilibrium fraud'*, 2006. *Journal of Environmental Economics and Management* (52) 2006, p. 627-644.

¹⁶⁴ S. van Ruth en W. Huisman, *Kwetsbaarheid voor voedsel fraude in de vleessector*, 2014. *Justitiële verkenningen*, jrg. 40, nr. 2, 2014.

¹⁶⁵ G.W. Brummelkamp, W. Huisman & A.J.M. Denkers, *Bedrijfscriminaliteit: verkennend empirisch onderzoek naar aard en achtergronden*, 2010. Zoetermeer: EIM 2010.

¹⁶⁶ K.E. Gussow en L.H. Kuiper, *De bestrijding van voedsel fraude in Nederland*, 2014. *Justitiële verkenningen*, jrg. 40, nr. 2, 2014, p.8-24.

¹⁶⁷ R. Agnew, N. Leeper Piquero & F.T. Cullen, *'General Strain Theory and white-collar crime'*, in: D. Weisburd & S. Simpson (red.), *The criminology of white-collar crime*, 2009. New York: Springer 2009, p. 35-62.

2.6 Horsemeat fraud

In the following paragraphs an elaboration on three Dutch companies and how they were connected to the horsemeat scandal will be given. The companies are: Draap Trading, Willy Selten and van Hattem B.V.¹⁶⁸

The authorities became aware of the horsemeat scandal when in early 2013 the Irish authorities found out that hamburgers sold in Tesco- supermarkets in the UK and Ireland contained horsemeat.¹⁶⁹ Later, the authorities discovered the beef lasagna of the Swedish brand Findus contained up to 100% horsemeat. The French company 'Comigel' produced and delivered the meals to Findus. Comigel is supplied by another French company Spaghero.¹⁷⁰ This company is supplied from Romania, through Draap Trading, which is owned by a Dutch trader. In some countries the lasagna's and moussaka¹⁷¹ were taken out of the shelves of large supermarkets. Within the supply chain the FBO's all pointed at another part of the chain: Findus blamed Comigel and so on. Eventually the trader was convicted for selling hundreds of tons of horsemeat (ground beef) labeled as beef or in some cases even certified as halal. In the Guardian the trader admitted that he bought horsemeat from two Romanian slaughterhouses and sold part of this meat to Spaghero.¹⁷²

A second Dutch company that is convicted for fraud with horsemeat is the meat supplier Willy Selten. Early 2013 the UK Food safety authority discovered horse DNA in beef burgers. The NVWA reacts to this finding by starting an investigation on horsemeat fraud. In the criminal procedure that focused on the administration of Willy Selten, the noncompliance of the meat supplier is established.¹⁷³ From this investigation, the public prosecutor found out that over the period of 1 January 2011 until 15 February 2013 the origin of the meat could not be established based on the administration. Out of precaution all customers (132 in total) received a request to supply a list within two weeks with all companies they supply with the meat they buy from Willy Selten and in what products they processed the meat. These FBOs were in the range of 370 companies spread around 15 Member States. The NVWA warned the other Member States by activating the Rapid Alert System for Food and Feed, and requested a recall and withdrawal of all the supplied meat products derived from Willy Selten.¹⁷⁴ An Estimated amount of 50.000 tons of meat was encompassed by this request. The NVWA contained all meat from Willy Selten that was still stored in warehouses. The basis of this rigorous enforcement was that the FBO could not track and trace all batches, since the origin of the meat was unknown. PricewaterhouseCoopers did an independent research and came to the same conclusion as the NVWA.¹⁷⁵ PricewaterhouseCoopers also concluded that Willy Selten sold more meat than came in on the basis of the administration, meaning there had been an undocumented part in the production. This meat could have ended up in all meat supplied by Willy Selten. The company went bankrupt in April 2014.

¹⁶⁸ There are far more companies linked to the horsemeat scandal, but these were the Dutch companies that were in the news during the heydays of the scandal.

¹⁶⁹ Onderzoeksraad voor veiligheid, *Risico's in de vleesketen*. Den Haag 2014, p10.

¹⁷⁰ Jesper Falkheimer and Mats Heide, *Trust and Brand Recovery Campaigns in Crisis: Findus Nordic and the Horsemeat Scandal*, 2015. *International Journal of Strategic Communication*, 9:2015, p. 134–147.

¹⁷¹ Ready-made Greek Dish that was supplied by Findus and contained traces of horsemeat.

¹⁷² Jesper Falkheimer and Mats Heide, *Trust and Brand Recovery Campaigns in Crisis: Findus Nordic and the Horsemeat Scandal*, 2015. *International Journal of Strategic Communication*, 9:2015, p. 134–147.

¹⁷³ <https://www.nvwa.nl/onderwerpen/dieren-dierlijke-producten/dossier/paarden/fraude-met-paardenvlees/fraudezaak-vleesgroothandel-willy-selten-2013-2016>.

¹⁷⁴ The NVWA published a list of all companies directly or indirectly supplied by Selten; *Lijst directe en indirecte afnemers vleesgroothandel Selten in Oss, periode 1 januari 2011 – 13 februari 2013*. Accessible at : <https://www.nvwa.nl/onderwerpen/dieren-dierlijke-producten/dossier/paarden/fraude-met-paardenvlees/fraudezaak-vleesgroothandel-willy-selten-2013-2016>. This list was only published after the court in Amsterdam ordered the NVWA to publish this list, more on the case in chapter three.

¹⁷⁵ This research is not published, the NVWA only states on the site of the NVWA; "it confirmed the findings in an independent research".

A third company that came in the news due to of fraud with horsemeat was van Hattem Meat. The NVWA ordered a recall of 28 million kilos of meat: everything produced in the period January 2012 and 22 January 2014.¹⁷⁶ The executor of the bankrupt company tried to lift the restrictions of the confiscated meat to sell what was left of it. On the 20th of December 2013 the judges gave the verdict that the meat would remain confiscated and could not be put on the market.¹⁷⁷ The NVWA did not revoke the license of the slaughterhouse, but did so when the NVWA found horsemeat in the beef produced late January 2014. This meant the company could not slaughter animals and could not put any meat on the market. The revoking of the license in combination with the large recall made the company go bankrupt in March 2014. The NVWA has carried out an analysis of the traceability of the products produced by the slaughter house based on the tracing data supplied by Van Hattem Vlees B.V. This analysis showed that the tracking and tracing system used by the slaughterhouse provided insufficient guarantee about the origin of the meat and meat products. However, the NVWA couldn't demonstrate that the meat posed a danger to public health. On 6 February the NVWA imposed an order of administrative enforcement on the slaughterhouse to have the supplied meat and meat products taken off the market as a precaution (recall). This concerns a recall of all the meat the slaughterhouse had produced between 1 January 2012 and 23 January 2014.¹⁷⁸ Based on its investigation of the slaughterhouse at the time, the NVWA estimated that the business traded around 28,000 tons of meat and meat products during this period.

The above presented cases illustrate the size and the complexity of Food Fraud. The slaughterhouses supplied hundreds of companies that did not discover the food fraud. The responsibility for the safety of the products lies with the producers in the supply chain. The cases present the main problem of Food Fraud, if one of the producers commits Fraud, what about the responsibility of the other FBOs in the supply chain? And what about damages of the other FBOs in the chain? The next chapters will elaborate on the means to battle food fraud and the options to prevent Food Fraud in the supply chain.

Why is horsemeat potentially dangerous?

Horsemeat is potentially dangerous because of medicine residue in the meat. Horses, especially horses used for sports can be exposed to a number of medicines which are potentially dangerous for consumers if they consume the horsemeat. Other life stock can also be treated with medicine that is potentially harmful for consumers, this is the main reason veterinary medicine is regulated strictly. The focus of the authorities during the horsemeat scandal was on the medicine Fenylbutazol. Fenylbutazon is a medicine for use in animals (painkiller and anti-inflammatory), the use is prohibited in horses that are used for food production.¹⁷⁹ According to the legislation there are two types of horses: food producing animals and nonfood producing animals (for instance sport horses). Before a horse can be slaughtered or transported the horse passport is required. In this document the medical history of the horse is documented; this is one of the factors on which it depends if the horse can be used for food products. Horses that are treated with Fenylbutazon are not allowed to be slaughtered for meat production. For this reason, it is important for the NVWA to research whether horses that were slaughtered contain traces of Fenylbutazol, or other traces/ residues of medicine in the horsemeat.

Not only in the Netherlands, but also a European report was presented assessing the dangers of Fenylbutazon in the food chain. In both reports the results were that given the amount of Fenylbutazon in the processed horsemeat, the Fenylbutazon does not pose a threat to health.¹⁸⁰ One of the factors influencing the potential risk is the preparation of the meat. Generally speaking, horsemeat is properly heated before consumption.¹⁸¹ Both

¹⁷⁶ <https://www.nvwa.nl/onderwerpen/dieren-dierlijke-producten/dossier/paarden/fraude-metpaardenvlees/terugroepactie-slachthuis-in-gelderland-2014>.

¹⁷⁷ Industrial appeal board 20 December 2013. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CBB:2013:280>.

¹⁷⁸ That was the official explanation. See; *Status report investigation and recall Van Hattem Vlees B.V.*

¹⁷⁹ Regulation (EU) nr. 37/2010.

¹⁸⁰ <http://www.nvwa.nl/onderwerpen/chemische-samenstellingen-verontreinigingen/dossier/fenylbutazon/hoe-gevaarlijk-is-fenylbutazon-in-paardenvlees>.

¹⁸¹ Only in the French and Italian kitchens have dishes with raw horsemeat. In other dishes the meat is not eaten raw.

reports have a similar conclusion: there is no material danger to the health of consumers of horsemeat. However, horsemeat containing traces of Fenylbutazon is considered unsafe on formal grounds because it contains substances which it should not contain.

The horse passport

Every horse (owner) should have a document called a horse passport for every horse he/she owns. In this document the name and administrative information can be found, and more importantly, the medical history of the animal, vaccination and medicine use. The reason why fraud with passports is lucrative is because it is relatively easy, and official controls are minimal. By changing the medical history of a horse, it becomes a horse for food production instead of a horse who dies and should be burned, costing money instead of becoming a potential source of income.¹⁸² When certain medicines are used, the horse passport should indicate that the horse is no longer suitable for human consumption, because horsemeat is suitable for consumption. With a complete and correct passport, a veterinarian can see if the horse is suitable for slaughter and processing into foodstuffs. The horse should be clear of diseases and should not be on medication which would make the meat unsuitable for consumption.¹⁸³ Horse passports are fraud sensitive, since there are no formal requirements.¹⁸⁴ The many different types of horse passports in circulation poses difficulties when checking the authenticity of the document. Although an owner has to register the medicine use in the passport, some owners will not register the medicine use or register the medicine in other passports. This reduces the function of the tracking and tracing systems in place, because even though the origin might be known, the meat might be unsuitable for consumption. To reduce the possibilities of fraud with horses, one uniform format for horse passports should be created. Laying down requirements such as obligatory registration by veterinarians of medicine that would make the horse unfit for consumption in this passport.

2.7 In short

The central question in this chapter is: how to qualify food fraud? A clear legal definition is not available. Looking at the different elements that constitute Food Fraud in combination with the literature written on this topic a definition could be formulated. A clear European definition would send a clear message to the food industry that the EU strives to ban all forms of Food Fraud. A definition would give more legal certainty and is necessary for a harmonized EU approach. The definition should contain the following elements: <I> placing on the market of a foodstuff, <II> intention, either active or passive, and <III> an element of deceiving. The exact formulation of the definition is up to the legislator. In my opinion the best place for this definition would be the GFL.

¹⁸² Onderzoeksraad voor veiligheid, *Risico's in de vleesketen*. Den Haag 2014, p. 55.

¹⁸³ Residues of the medicine can still be present in the meat after slaughter.

¹⁸⁴ See for the legal framework; http://ec.europa.eu/food/animals/identification/equine/index_en.htm.

Chapter 3 Control and supervision and action taken:

Control and supervision cannot be separated from enforcement: they are an indispensable part of enforcement. Having every mean to enforce is not enough; without correct information on the behavior of producers in the Member State, a food safety authority cannot intervene without checking compliance, in the supply chain and on the market.¹⁸⁵ One of the elements that constitutes effective sanctions is the chance of violators 'getting caught'. It is important to have an effective system of control and supervision in place. In this chapter the systems of control and supervision in the Netherlands will be elaborated on. Not only the current system, but also the current system in light of the advice of the taskforce voedsel vertrouwen and the EP Report on food fraud. These publications provide recommendations to strengthen the current system. This chapter will first elaborate on supervision and control in general, discussing the types of supervision currently in place. The FVO and the NVWA and the relevant division in the context of food fraud will be elaborated on, after which the reports of both the taskforce and the report on food fraud will be discussed. An important report on the meat supply chain and private supervision concludes this chapter.

3.1 Control and Supervision

In literature there is an ongoing discussion on the scope of enforcement. For this research my definition of enforcement is all measures, administrative, criminal or private adopted to ensure compliance with food safety regulations. The measures to prevent infringement are thus also enforcement in my opinion. The official controls are part of enforcement, the detection of criminal behavior included.

European governance of food safety is organized through a multilevel governance system, in which policy responsibility is distributed among the different stakeholders; namely, the government and among the public and private sectors. Multilevel governance is viewed by many economists and political scientists as a necessity for effectiveness, efficiency, and legitimacy of policymaking in Europe.¹⁸⁶ Supervision and control on food safety is an affair in which both public and private parties are involved. The responsibilities found in food safety regulations are 'shared' by the stakeholders.¹⁸⁷ To ensure effective supervision and control both stakeholders have created advanced systems to ensure risks are prevented or in case of occurrence are controllable. It is currently unclear whether this hybrid form of supervision is more effective than supervision and control solely by either government or private parties.¹⁸⁸

Supervision in the light of enforcement can be divided in two separate elements: data collecting and decision making. Data collection can be both within the premises of an FBO or during checks outside the FBO. Within the premises is mainly done by auditing companies during which the company is inspected on compliance with food safety regulations. The NVWA maintains a system in which the number of audits is connected to the track record of the FBO. The system, in short, works with a color system, see table 2. Red means the FBO was found non-compliant during an audit and the supervision is increased. Orange means the FBO was not completely compliant and thus the supervision will be kept at the current level. Green means the FBO has a good track record and the frequency of audits and inspections are reduced. Finding an infringement can lead either to a decision to enforce or a warning.^{189,190} If infringement is discovered the FBO or a part of the production line can be closed, to both stop the infringement and to enable the NVWA to conduct a more thorough search of the premises.¹⁹¹

¹⁸⁵ Actually the NVWA can adopt measures, but without any underpinning adopting measures would be a gross violation of the legitimacy principle.

¹⁸⁶ Frey, B. S, *Liliput oder Leviathan? Der Staat in der Globalisierten Wirtschaft*, 2001. Working Paper 85. Zurich, Switzerland: Institute for Empirical Research in Economics, University of Zurich.

¹⁸⁷ See chapter 1.1 for an elaboration on the responsibilities.

¹⁸⁸ M. Garcia Martinez, P. Verbruggen & A. Fearn, *Risk-based Approaches to Food Safety Regulation: What Role for Co-regulation?*, 2013., *Journal of Risk Research* 2013-9, p. 1101-1121.

¹⁸⁹ A warning can be a decision in a legal sense, in case there are legal consequences to the warning, See ABRvS 20 april 2011, LJN BQ1888.

Table 3, Color system of the NVWA.¹⁹²

Color	Qualification
Green	No infringement in the previous year
Orange	One or more cases of non-compliance, but not more than 2 official fine reports during the past two years.
Red	More than two official fine reports during in the past two years. Before a FBO receives the red color a baseline research is done to assess if the company should receive the red color status.
White	No data available

Supervision outside the premises of the FBO is also done to ensure the foodstuffs on the market are indeed safe. This control is done on the Dutch market: products are tested to see if they comply with relevant food safety regulations, and on products imported in the Netherlands from third countries.¹⁹³ Sampling batches of foodstuff ensures (to some extent)¹⁹⁴ compliance with relevant food safety regulations. Batches of unsafe foodstuff will have to be taken off the market: the NVWA will confiscate the batch and will take action to ensure the risk for consumers is minimized. The protection of the outside borders is outside the scope of this research, although food fraud might be committed in a third country and the foodstuff might end up on the Dutch market. The research focusses on FBOs in the Netherlands, and if they bring this food to the market they are responsible.

The system of food safety supervision is comprised of a number of types of supervision: official controls, system inspection and meta supervision. The individual systems together add up to the supervision and control of food safety in the Netherlands. In the coming paragraphs these systems will be elaborated on separately.

3.1.1 Official controls

To ensure food safety, the NVWA has a system of official controls in place. Official controls encompass both audits and (system) inspections throughout the food supply chain.¹⁹⁵ The responsibility of the Member States to monitor and verify the fulfillment of food safety regulations can be found in Art. 17.2 GFL.¹⁹⁶ Art. 6 Regulation (EC) No 882/2004 of the European parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (further OC Regulation) obligates the Member States to implement a notification system for FBOs to notify the authority of activities and changes in their production.¹⁹⁷ The name official controls derives from the fact that these controls are mandatory for a Member State to implement. Official controls are foremost used to check compliance with safety standards, not to detect crimes. The search for fraudulent practices is therefore not (yet?) an integrated part of official controls. The official controls are done in the Member States by either the competent authority or a third party (private or public). The framework for official controls is regulated on a European level. The Regulations do not oblige authorities to implement public official controls; it is left to the Member States whom will do the official controls. Art. 5 enables the Member States to delegate tasks of the authority to a third party (public or private). By adding this article, the European legislator provided the option to delegate (parts of) the official controls. However

¹⁹⁰ The general idea is to help FBOs being compliant, instead of strict enforcement.

¹⁹¹ The measures available for the NVWA are elaborated on in chapter 4 and 5.

¹⁹² Taken from the report on the inspections in the fishery sector, 2014 by the FVO.

¹⁹³ Third countries being countries not within the EU.

¹⁹⁴ Sampling can practically only be done on a number of batches and only on part of the foodstuffs in the batch. There will always be a margin of error and a chance the batch is tested, but the risk is not found.

¹⁹⁵ Not every company is audited as often as others. The NVWA decides on the frequency of the audits on risk profile of the FBOs.

¹⁹⁶ In chapter four contains an elaboration on this article.

¹⁹⁷ The notification procedure is mainly for the authority to be able to perform official controls. If the NVWA would not know where every FBO is situated and what they produce, it is difficult to supervise.

there have to be some safeguards to ensure the (delegated) official controls are done properly. Outside of the scope of this research, but nonetheless an interesting topic: is the delegation of these obligations in line with competition rules?¹⁹⁸

The OC Regulation contains a number of elements connected to official controls.¹⁹⁹ Member States have to ensure the official controls are carried out, with adequate frequency and on the basis of risk assessment. The past performance of an FBO may be taken into account and lead to a lower frequency of official controls by the authority. The identified risks can also constitute to either increasing or reducing the frequency and intensity of the controls. Just like the responsibility of FBOs, the approach to official controls is from farm to fork and without prior notice to the FBOs. On the other hand, (high) transparency should be taken into account in official controls.

If the official controls lead to discovery of infringement, the NVWA shall adopt measures to ensure compliance with all relevant food safety regulations and in doing so ensure food safety for consumers. What measures are available will be elaborated on in chapter four and five. In the Netherlands the compliance checks, enforcement and the detection of criminal behavior are all encompassed in the NVWA. In line with the *Wet op de bijzondere opsporingsdiensten* (Special Detection Services Act) the NVWA is divided in separated divisions to ensure independency towards the other divisions.²⁰⁰

3.1.2 System inspections

Official controls are to check compliance at a given time. However, infringement of food safety regulations can happen at any time during the production of foodstuffs. To ensure the monitoring and correction of the production processes is done continually, system inspection is an important instrument to ensure the food is safe for consumers. System inspection is company based and could therefore be viewed as a compliance program. If the system functions, the different steps in the production are monitored and controlled. If for whatever reason the production line does not produce according to the predefined standards, the products should be either destroyed or recycled.²⁰¹ The defect or incident should be investigated and if needed actions should be taken. The most important form of system supervision is the HACCP on which will be elaborated in the coming paragraphs.

Hazard Analysis and Critical Control Point (HACCP) Systems

Producers are obliged to do a HACCP analysis before going into business. HACCP is a process control technique based on Total Quality Management principles. The HACCP procedure contains a number of steps to ensure all the relevant risks are taken into account before an incident might happen. Next to making an inventory of all relevant risks, correction plans, monitoring of performance and a plan to use in case of a recall are all implemented in the procedure.²⁰² The HACCP focusses on safety, not on quality. Quality issues can be assessed by consumers; the sensory attributes of the food are off. The safety however, microbiological, contamination with heavy metals or pesticide residues is something the average consumer cannot assess.²⁰³

The HACCP is one of the core obligation derived from the OC Regulation.²⁰⁴ Implementing the HACCP is an expensive procedure, especially for small and medium enterprises.²⁰⁵ To enable the smaller companies to produce

¹⁹⁸ See for an analysis of Risk Plaza, the research of Nathan Meijer: *Between Fra.bo and Frubo, On the Trade Restrictive Effects of Domestic Private Standards*, 2016. 23 May 2016, available in the WUR Library.

¹⁹⁹ verification, audits, inspection, monitoring, surveillance, sampling official certification, official detention documentary check and physical check.

²⁰⁰ *Wet op de bijzondere opsporingsdiensten*, available at: <http://wetten.overheid.nl/BWBR0019919/2013-01-01>

²⁰¹ Depending on the type of defect and the product, some products can re-enter the production line which has the advantage of being eco-friendly.

²⁰² For further information on the principles of a HACCP procedure see; Pieter A. Luning and Willem J. Marcelis, *Food quality management*, 2009. Wageningen Academic Publishers, p.290-306.

²⁰³ A multitude of tests have to be performed in a lab to check these levels, an average consumer will not do these test and will therefore not know the actual residue levels in his/her food.

²⁰⁴ Art. 5 OC Regulation

safely without having to initiate a HACCP, the governments in combination with the sectors have created standards of good hygiene practice which if implemented will ensure the FBO complies with the safety regulations.²⁰⁶ For the remainder of this research I will assume the FBO has an HACCP system. The HACCP could be seen as a major step forward in preventing infringement and setting safety standards for FBOs. Creating a system where all links in the chain are responsible for compliance, many FBOs have implemented HACCPs even in countries outside the EU to ensure a similar level of safety is achieved. Art. 5 OC Regulation contains the HACCP principles. Annex I and II contain the general hygiene requirements applicable to every FBO.

In the HACCP procedure, fraud is not taken into account. The rationale is that fraud is the deliberate frustration of the system that in itself functions according to food safety regulations. One cannot assess all the potential risks of fraud; the possibilities would be endless.²⁰⁷ However, potential 'weak spots' might be investigated to see how to implement a corrective system that will prevent fraud as much as possible. Currently, fraud is not an integral part of HACCP; there are writers in literature who see the HACCP as opportunity to battle food fraud.²⁰⁸ On the other hand, the HACCP is purely meant to prevent safety incidents, not to search for infringement, or even criminal activities. The NVWA focusses more and more on system supervision instead of the official controls. The supervision shifts to supervision of the production processes and the system supervision implemented in the companies. The question that remains is whether it is relatively cheaper to focus on this type of supervision as opposed to official controls.²⁰⁹

3.1.3 Meta supervision

Increasingly, the supervision in the food supply chain is delegated to private parties which are in turn supervised by the authorities; in literature this type of supervision is defined as meta supervision.²¹⁰ A third private party supervises the compliance with food safety regulations, and the authorities in turn supervise the supervisors instead of supervising on compliance with food safety regulations themselves. However, the role of the authority is to control, steer and to shape the supervision on the food safety regulations. Meta supervision can be viewed as a two-step plan in which the authority steers and controls the supervisors, but in doing so leaves (part of) the supervision to third parties. Meta supervision is different from system inspection. In system supervision the supervision is limited to the individual company, comparable to an internal compliance program. Meta supervision is on the supervision of the company, and can encompass system inspection. An example is supervision of an authority on a certification owner and checking whether applying the standard correctly is sufficient to comply with the relevant food safety regulations. The following quote sums up meta supervision:

"regulating the regulators, whether they be public agencies, private corporate self-regulators or third party gatekeepers".²¹¹

By using meta supervision the NVWA delegated the (part of) supervision task. Again a quote sums up this change very clear: *"from rowing to steering"*.²¹² Whereas the norms were previously the sole terrain of the authorities, the

²⁰⁵ Eunice Taylor and Kevin Kane, *Reducing the burden of HACCP on SMEs*, 2004. Food Control Volume 16, Issue 10 December 2005, p.833-839.

²⁰⁶ Art. 4.6 OC Regulation

²⁰⁷ A FBO has to think of theoretical cases in which employees will adulterate the final product at some stage of production or similar scenarios, this would make a full assessment of all risks near to impossible from a practical point of view.

²⁰⁸ Hines, Tony and Muphy, Luke, *combatting Food Fraud with intelligent Due Diligence*, 2016. World Food Regulation (Jan 2016): 20-23.

²⁰⁹ Helderma & Honingh 2009 en C. Maas, Toezicht en zelfregulering herijkt. Vooronderzoek naar 'kansen en bedreigingen' van terugtredend toezicht, Utrecht: Nederlandse Voedsel- en Warenautoriteit 2011.

²¹⁰ Paul Verbruggen & Tetty Havinga, *Metatoezicht op voedselveiligheid*, 2014. Tijdschrift voor Toezicht 2014 (5) 1, p. 6-32.

²¹¹ C. Parker, *The Open Corporation: Effective Self-regulation and Democracy*, Cambridge: Cambridge University Press 2002, p. 15.

²¹² D. Osborne & T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, Reading, MA: Addison-Wesley 1992.

norms are now set by third parties. Steering these norms takes place, but the norms are set by the third party. The authority only corrects the supervisors in case the supervision is deemed inadequate. Different parties can have a role in this meta supervision, public and private parties.²¹³ Two examples of meta supervision used by the NVWA is Bureau de Wit, Riskplaza.²¹⁴ Next to 'regular' meta supervision, the NVWA is also tasked with meta supervision of private entities with a task encompassed in the law like the COKZ and Skal. The COKZ²¹⁵ organization (national) supervises the dairy industry and Skal²¹⁶ is the organization (European) which supervises biological food production. The NVWA itself is also second line supervised by the European Food and Veterinary Office, which will be elaborated on paragraph 3.2.

Why would the authorities use meta supervision instead of official controls or as a supplementation of the official controls for ensuring food safety? The first argument for meta supervision is a limited budget and capacity to do official controls. The NVWA has to deal with reorganizations and budget cuts.²¹⁷ To cope with budget cuts the NVWA focusses more on efficiency and less on monitoring of compliance. Risk profiles are made and official controls are coordinated accordingly. More on this system in paragraph 5.1. In his book *Uitgebeend*, van Silfhout dares to ask the question whether the NVWA can still enforce effectively and if the NVWA can still ensure food safety taken into account the current reorganized NVWA.²¹⁸ A second reason is the globalization of the food supply chain. FBOs within the supply chain operate not only within the boundaries of the Member State, but international; it is difficult for authorities to ensure food safety throughout the supply chain. The FBOs are the parties that work with the food, and are thus best able to supervise and control the production of the food. Mainly these arguments are used in the discussion on the use of meta supervision to ensure food safety. Meta supervision combined with system supervision can replace part of the need of official controls. From a policy point of view this could be an argument, but there are also arguments to be found in Food Safety Law. The responsibility for food safety is 'shared' between the companies and the Member States and could be seen as a reform of Food Safety Law after the BSE crisis.²¹⁹ Taken this shift in paradigm into account, shared supervision on compliance could be a defensible choice. However, budget cuts should not be the motivation for delegating the supervision. It would be a nice bonus if supervision could be done cheaper (or better) by the private sector, but the budget should not be the leading factor when deciding the system of supervision. On the other hand, if the NVWA would not be able to do sufficient official controls to ensure safety, I would personally prefer private supervision over no, or very limited supervision.

A third argument for the use of meta supervision is the pressure from the companies. Owners of private standards or other private control systems want to have a recognition of the authority. This recognition is important to show your reliability.²²⁰ However, it is important to note this recognition is voluntary, not obligatory. Not only the owners of these systems, but also the companies in the food sector asked for a focus on meta supervision. Their motivation lies in the reduction of the 'government interference' or, in other words, the amount of regulations. The government targets (national) on the reduction of rules and interference by the authorities corresponds to this desire.²²¹ The risk of leaving the supervision up to third parties is that the incentives to comply with food safety regulations can deviate from the authority. Yes, private parties want to produce safe food, but for economic

²¹³ C. Scott, *Regulating everything: From mega- to meta-regulation*, Administration 2012-1, p. 61-89.

²¹⁴ Paul Verbruggen & Tetty Havinga, *Metatoezicht op voedselveiligheid*, 2014. Tijdschrift voor Toezicht 2014 (5) 1, p. 6-32. In the Article both Bureau de Wit and Riskplaza are analyzed in the context of meta supervision.

²¹⁵ <http://www.cokz.nl/english/default.aspx>.

²¹⁶ <https://www.skal.nl/home-en-gb/about-skal/>.

²¹⁷ Marcel van Silfhout, *Uitgebeend, hoe veilig is ons voedsel nog?*, 2014. Tweede druk, Uitgeverij oostenwind Amsterdam, ISBN 978-94-91481-04-8, p. 206-207.

²¹⁸ Marcel van Silfhout, *Uitgebeend, hoe veilig is ons voedsel nog?*, 2014. Tweede druk, Uitgeverij oostenwind Amsterdam, ISBN 978-94-91481-04-8 In particular pages 109-117 and 131-138.

²¹⁹ E. Vos, *EU Food Safety Regulation in the Aftermath of the BSE Crisis*, 2003. Journal of Consumer Policy 2000-3, p. 227-255.

²²⁰ The reliability status ensures the company can potentially attract more customers.

²²¹ Regeerakkoord VVD-PvdA, Bruggen Slaan, 20 oktober 2012, <www.kabinetsformatie2012.nl/bestanden/formaties/formatie-2012/documenten/regeerakkoord/20121029-definitief-regeer-akkoord.pdf> (30 augustus 2013), p. 10, zoals uitgewerkt in het document Goed Geregeld, een verantwoorde vermindering van regeldruk 2012-2017, directoraat-generaal Bedrijfsleven & Innovatie, Den Haag 25 april 2013.

reasons, not necessarily out of a strive for safe food on the market. Only if the information is shared without bias between the authority and FBOs the necessary measures can be taken. Private standards owners can set stricter standards than the food safety norms, if FBOs comply with all the standards set in this private standard, the result is that the FBO is at least fully compliant with the administrative norms.²²² If strictly enforced by the Private standard owner, private enforcement can be just as effective as administrative or criminal, but the question: will measures be taken and communicated in case of infringement? Safeguards should be implemented to ensure this system could function effectively, otherwise the meta supervision would be ‘the butcher assessing its own meat’.²²³

Criticism on meta supervision

The actual effectiveness of meta supervision is not yet proven. Furthermore, it is still unclear how and if the NVWA will monitor the private supervision after initial assessment of the scheme.²²⁴ No timeframes or the content of the re-assessment is mentioned. There is currently no clarity on how the NVWA will ensure the schemes are still operational and comply after the initial assessment. However, the certification of the Stichting Ketenborging will remain on the scheme, and if no re-assessment and monitoring takes place, in theory the scheme owner only needs to survive the scrutiny of the initial assessment. Ria Westendorp of the NVWA was contacted, she acknowledged this information was not published yet.²²⁵ However, the publications regarding the re-evaluation will be published in the near future (exact date is unknown). The schemes do not have to be applicable only in the Netherlands; a valid question would be how the NVWA will manage to monitor and control the schemes if the supervision is done outside the Netherlands? The goal of the schemes is to surpass the boundaries of the Netherlands; this will be a challenge for the NVWA. The NVWA was confronted by a number of incidents in the past few years, the horsemeat scandal and the contaminated salmon, which indicated that supervision by the NVWA was lacking. In reaction to these incidents the NVWA published a plan to resolve this problem.²²⁶ In this plan the system of meta supervision was a central theme. Meta supervision was presented as a possible solution for the lacking capacity in the NVWA to sufficiently supervise the food sector.

3.2 public supervision entities

In the coming paragraphs the Food and Veterinary Office (further FVO) and the NVWA, with an emphasis on the relevant division in the context of food fraud will be elaborated on. The FVO periodically audits the (food safety) authorities in Member States. A Member State could potentially delegate the official controls and the ‘first line’ supervision to third parties, but in the Netherlands this is not the case (yet?).²²⁷ Enforcement is not necessarily the sole task of the authorities; private law measures can be imposed by third parties to ensure compliance. However, administrative measures and measures found in Criminal Law cannot be implemented by private parties. It is therefore relevant to first go into the public entities that supervise, in the light of the possible measures the NVWA can adopt.

Food and Veterinary office

Within the EC, the Directorate of DG Santé (previous DG Santo) is responsible for food safety (among other).²²⁸ Within DG Santé, the FVO is responsible for the supervision and compliance of Member States of European

²²² Not all private standards set stricter rules. The private standards are often used to create a contractual relation between the FBOs in the chain.

²²³ Dutch saying that was used in describing the supervision and control in the meat sector before the horsemeat scandal. See report Risico’s in de vleesketen.

²²⁴ The NVWA in their presentation on Stichting Ketenborging refers to ‘periodic reassessment of acceptance of schemes (slide 4), presentation available at; <http://ketenborging.nl/wp-content/uploads/4-Toelichting-criteria-en-toetsing.pdf>.

²²⁵ Ria Westendorp is the head of supervision development, within the NVWA.

²²⁶ Plan van aanpak NVWA, bijlage bij brief van de minister van Economische Zaken aan de Tweede Kamer van 19 december 2013, <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2013/12/19/bijlage-plan-van-aanpak-nvwa.html> (14 februari 2014).

²²⁷ Meta supervision can be viewed as second line supervision; the supervision is indirect.

²²⁸ http://ec.europa.eu/dgs/health_food-safety/about_us/who_we_are_en.htm.

legislation. The audit encompasses an assessment of the level of compliance in the Member State. The FVO not only audits the authorities, but also supervises the authorities during some official controls. The FVO has more tasks: the FVO can recognize third parties how want to export to Europe (from a third country). Especially in the meat industry this recognition is important: without the recognition third countries cannot export their meat to Europe. The third country in which the company is situated can ask for this recognition, FVO will audit both the authority of the country and the company wishing to export to the EU. The recognition is obligatory: without a company a third country cannot export (legally) meat to the EU.²²⁹ If the FVO decides that compliance to European legislation is lacking, the FVO will not sanction the companies. The authorities will be informed and if needed the enforcement division of DG Santé will take action.²³⁰

The last report of an audit by the FVO on the NVWA dates from 2014. The objectives of the FVO audit were to verify that overall, official controls of fishery products are organized. Next to the official controls the FVO evaluated the control system in place for the production and placing on the market of fishery products. The focus was on the fishery sector, but the audit also encompassed the NVWA and the FVO was positive overall. The conclusion of the report is taken up below:

“The CA has in place an official control system based on the EU requirements and national legislation and it is supported by comprehensive CA procedures and protocols and accredited laboratories. This control system is adequately implemented in a consistent way and covers the entire fishery product production chain. However, the control system presents shortcomings with regard to the official controls over fishery products related to the lack of documented inspection of fishing vessels, official sampling for PAH, additives, potable water and histamine and the application of HACCP principles. Overall, the CA, can provide guarantees that the official control of fishery products placed on the market in the Netherlands are generally carried out in accordance with Regulation (EC) No 882/2004.”²³¹

3.2.1 the NVWA

The predecessor(s) of the NVWA were established somewhere in the end of the 19th century, first only in the big cities, later also in the rural area. The reason for establishing an authority for (among other) food safety was because the food industry proved to be fraudulent or at least not as honest as was expected, diluted milk, adulterated spices with sand. The commodities Act is in force from 1919 and is based on two principles: the health of consumers and the fairness of trade. In the early years of the commodities act the emphasis was on fairness of trade, not so much on safety. From the 90s of last century onward the emphasis switched from fairness of trade to food safety. Elaborate labelling requirements would ensure the consumer could trust the FBO's and the products they produced.²³² The current NVWA was formed in 2012 by fusing the 'old' food and commodities authority, the general inspection services and the Plantenziektenskundige dienst. The task of the NVWA is to supervise and enforce, and the NVWA is part of the state supervision on public health. The NVWA currently resides under the Ministry of Economic affairs.

The NVWA checks the compliance with both European and national regulations on food safety. The core tasks are broader than just supervision and control. The NVWA does the risk assessment and risk communication. The organization is quite complex, the organization chart of the NVWA can be found in the link in the footnote.²³³ The responsible ministries already show the complexity of the organization, the ministry of economic affairs is responsible for the NVWA as a supervisor and controller. The ministry of Economic affairs mainly focusses on the supply chains whereas the Ministry of HWS is responsible for the end products that (might) reach the consumers. There are occasions in which both responsibilities come together, especially in times of crisis/ incidents with

²²⁹ http://ec.europa.eu/food/safety/international_affairs/trade/docs/im_cond_meat_en.pdf.

²³⁰ The FVO itself has no means of enforcement, not even in case of infringement.

²³¹ DG SANCO, Final report on audit carried out in the Netherlands from 04-13 March 2014 in order to evaluate the food safety control systems in place governing the production and placing on the market of fishery products, DG(SANCO), 2014-7140, Ares (2014)3251285.

²³² Rik Herbes, 'Voedselsjoemel': de juridische context van het paardenvleesschandaal, 2013. WW 2013/3.

²³³ <https://www.nvwa.nl/actueel/bestanden/bestand/2201900/organogram-nederlandse-voedsel-en-warenautoriteit>.

(potential) risks for consumers. Both ministries are involved in the decision taking during a crisis. However, during the crisis the health of consumers should always be the leading principle.²³⁴

How to qualify the NVWA in a legal sense? The NVWA is comprised of five divisions, a strafdirectie and the bureau of Risk assessment and Research programming. The inspectorate general together with the vice inspector general form the board of the NVWA. The bureau forms an independent public entity. The task of the NVWA is laid down in law. The NVWA is one of the public entities that make up the State supervision.²³⁵ The enforcement of the NVWA is not bound by national/ regional policy, but instead is based on principles established by the NVWA.²³⁶ However, the responsible minister can give general and special instructions to the NVWA. General being the instructions on the policy of the NVWA, and special being instructions regarding a specific case.²³⁷ A quote from the toezichtskader sums up how the NVWA qualifies the organization: (in short) The independency and impartiality should be guaranteed. Citizens and companies should always trust the NVWA will take impartial decisions and the inspectors of the NVWA will supervise independently. The full Dutch quote is taken up in the footnote.²³⁸

One of the divisions of the NVWA is the Intelligence and Detections service (further the ID). This Division is an important division for enforcement in case of food fraud and will therefore be elaborated on.

NVWA IOD

The ID is one of the five divisions of the NVWA and specifically focused on the detection of criminal offences. The ID mainly focusses on complex, chain related, organized and internationally oriented crimes. Under the authority of the OM, the ID can use special detection means, like observation, search of a premises and telephone taps.²³⁹ The possibility of using these special means depends on the severity of the criminal behavior. Having a special division to (among other crimes) detect fraud is rare in Europe; most Member States leave this to the police, sometimes a specialized division or team, but not as part of a food safety authority. Criticism on letting the police deal with food fraud is found in the Elliott Report of 2013: the police lacks the expertise to deal with this type of complex crime.²⁴⁰ Especially in dealing with food fraud, specialized knowledge of the authorities is required. In the Netherlands this was one of the main motives for forming the ID (and the other special detection divisions).²⁴¹ Since its formation the ID has dealt with a number of food fraud cases. From an inventory of 56 cases of food fraud from 2008 to 2014 the ID found some connections between the different occasions of food fraud. Firstly, the main motive for committing food fraud was profit. In a number of food fraud cases the FBO used unfit/ cheaper batches of products to replace the 'original' ingredients. A second element is the length to which producers are willing to go to commit fraud. Falsifying invoices and documents, having multiple administrations and professional printers to be able to replace existing labels on products.²⁴²

²³⁴ Kamerstukken II 2013/2014, 33835, Nr 1.

²³⁵ Art. 36 Gezondheidswet (Health Act) and Art. 1 Besluit Staattoezicht op de volksgezondheid (Public Health Decree).

²³⁶ De Regeling van de Minister-President, Minister van Algemene Zaken van 30 september 2015, nr. 3151041, houdende de vaststelling van de Aanwijzingen inzake de rijksinspecties.

²³⁷ One can have serious doubts if the NVWA can be seen as independent, these instructions influence the functioning of the NVWA. The independency of the NVWA is not within the scope of this thesis, thus the (in) dependency of the NVWA will not be further discussed.

²³⁸ *"De onpartijdigheid en onafhankelijkheid van de NVWA mag nooit ter discussie staan. Burgers en bedrijven moeten kunnen vertrouwen op het onafhankelijke oordeel van de NVWA en op de deskundigheid en onpartijdigheid van de inspecteurs die het toezicht uitvoeren. De NVWA valt als agentschap (baten-lastendienst) organisatorisch onder het ministerie van EZ en ressorteert direct onder de secretaris-generaal. De NVWA is dus niet hiërarchisch ondergeschikt aan een beleids onderdeel van het ministerie van EZ of VWS. Hiermee is binnen het ministerie van EZ een organisatorische scheiding aangebracht tussen beleid en toezicht. Dat is een belangrijke waarborg voor een onpartijdige en onafhankelijke taakuitoefening van de NVWA."* Ministeries van Volksgezondheid, Welzijn en Sport en Economische Zaken, Toezichtkader NVWA, Leidende principes voor toezicht en handhaving, 2015, p. 3.

²³⁹ Wet op bijzondere opsporingsdiensten.

²⁴⁰ Elliott report 2013, p. 47-48.

²⁴¹ (MvT), Kamerstukken II 2004/05, 30182, 3, I.4.

²⁴² K.E. Gussow en L.H. Kuiper, *De bestrijding van voedsel fraude in Nederland*, 2014. Justitiële verkenningen, jrg. 40, nr. 2, 2014, p. 16-18.

The ID is the division with both the expertise and the means to deal with food fraud. The cooperation with the OM is given by the fact that the ID can use special detection means. Food fraud should be battled on the basis of Criminal Law according to the intervention policy of the NVWA.²⁴³ This intervention policy will be elaborated on in chapter five. In the toezichtskader fraud detection and prevention is placed with the ID. The usage of the ID and possible criminal prosecution is in line with the policy of 'soft if possible, but tough when needed'. However, the policy does leave some room for other measures: (in short) Criminal Law measures will be adopted if these measures prove to be more effective than other measures. Criminal Law can play a role next to reparatory measures from Administrative Law.²⁴⁴

3.3 Taskforce voedselvertrouwen

The government wanted to take action towards a better prevention of fraud. Instigated by the horsemeat scandal, a taskforce was formed to look into food fraud and food authenticity. The taskforce is comprised of fourteen representatives from the government and representatives of the industry.²⁴⁵ In their research the taskforce looked for ways to strengthen existing enforcement systems instead of only looking for weak spots. The goals of the taskforce were to strengthen the food chain on food safety and food authenticity, in the context of an increasingly international food supply chain.²⁴⁶

The conclusions of the taskforce focused on the use of private means of enforcement. How can private parties contribute to food safety, and how can the supervision on food safety standards be delegated to private parties.

Next to an action plan, the taskforce created an initiative for private standards holders to assess their private standard. The Stichting Ketenborging, the criteria are already set out, and if the standard survives the scrutiny of the assessment the standard is taken up on the site, so companies can check whether other companies have a certification which holds up to the scrutiny of the authorities. The NVWA assesses these schemes on effectiveness and reliability by performing audits and inspections. Working with accepted schemes will have the advantage to FBOs that the number of official controls, the duration and the depth of these official controls will be reduced.

*"A substantial element in regaining consumer confidence is securing food safety and integrity. This means both public and private safeguarding of food safety and integrity are important in implementing the Task Force's actions. Private quality schemes play an important role here. In cooperation with the Netherlands Food and Consumer Product Safety Authority (NVWA), the Task Force has defined a set of criteria for quality schemes that must strengthen the private safeguarding of food safety and especially food integrity. Transparency and the exchange of information are key elements of these criteria."*²⁴⁷

The taskforce came to a very different conclusion on how to ensure food authenticity than Ester de Lange, reporter of the EP. Before discussing the difference, an elaboration on the report itself will be given.

3.3.1 Report on the food crisis, fraud in the food chain and the control thereof

²⁴³ <https://www.nvwa.nl/onderwerpen/toezicht-nvwa/dossier/interventiebeleid/indeling-overtreding-in-klassen>.

²⁴⁴ "Strafrecht wordt ingezet als dat effectiever blijkt dan andere instrumenten. Het kan een rol spelen naast bestuurlijke herstelsancties. Opsporing kan het aangewezen instrument zijn als andere (bestuursrechtelijke) instrumenten niet of niet meer toereikend zijn." Toezichtskader NVWA, *Leidende principes voor toezicht en handhaving*, den Haag 2015, p. 11.

²⁴⁵ The names of the representatives and the organisation they represent: J.P. Hoogeveen – EZ, P. Huijts – VWS, T. Cuijpers – LTO, H. Flipsen – Nevedi, T. de Groot – NZO, H. Huijbers – LTO, M. Jansen – CBL, S. Korver – COV, B.J. Krouwel - PPE ,K. Lever – EZ, P. den Ouden – FNLI, H. Paul – NVWA, M. Sonnema – VWS, and H. Swinkels – COV.

²⁴⁶ "Het bedrijfsleven en de overheid hebben in de Taskforce, ieder vanuit de eigen verantwoordelijkheid en op hun eigen werkterrein, gewerkt aan versterking van de borging van voedselveiligheid en voedselintegriteit. Omdat de voedselketen een internationaal netwerk is, en enkele maatregelen meer effect hebben in internationaal verband, is ook aansluiting gezocht bij internationale ontwikkelingen". Taskforce Voedselvertrouwen, Resultaten actieplan: Voedselvertrouwen is verantwoordelijkheid nemen 31 maart 2015, p.1. <https://www.rijksoverheid.nl/documenten/publicaties/2015/03/31/eindrapportage-taskforce-voedselvertrouwen>.

²⁴⁷ <http://ketenborging.nl/>.

In chapter 2.3 the report was already touched upon, but mostly in the context of defining food fraud. The report contains a number of recommendations. The core of the report is on the changes needed in official controls, the scope of the controls should also encompass the detection of fraud. The FVO should supervise the effectiveness of the authorities more intensely. The focus is primarily on authorities and the means to battle food fraud from an administrative perspective. The report was created for the EP, and mainly concerns the European means of enforcement. The voting on the report suggest the EP is in favor of reforming the current system and increasing the intensity of the official controls by the authorities. Interesting to see is that the report is not in favor of delegation of inspection tasks to private entities:

“Rejects any plans to delegate inspection tasks from public authorities to economic operators.”²⁴⁸

Only allowing public entities to initiate official controls would be a deviation from the current possibilities for official controls, see chapter 3.1 under Official controls. Next to decreasing the options for Member States, the system where the official controls can also be carried out by third parties is more in line with the shared responsibility for safe food. However, the taskforce proposes the complete opposite by shifting all supervision to private parties and make the NVWA more a meta supervisor that supervises the private standards.

The difference in conclusion between the taskforce and the Ep report could not be bigger: the national taskforce emphasizes on private means, whereas the report focusses on the means found in administrative law. The reports do not really supplement each other at the first glance. However, if one would combine the recommendations of both the system of detection and ways to battle food fraud might be improved. Official controls should encompass the detection of fraud; in the Netherlands the NVWA does not make a distinction between finding infringement and detecting criminal behavior during official controls. Because the detection of criminal behavior is found during these official controls, and the ID has the knowledge and experience to deal with fraud, fraud detection should be an integral part of official controls. However, leaving out the private sector would discard possibilities to battle a complex problem. In my opinion, both reports have their merits, but both provide a too one sided view on the battle of food fraud. If the legislator both in Member States, but also in Europe really wants to battle food fraud, all available means should be used.

Consulting the public

Next to third parties in the sector itself, some voices are raised in literature to encompass NGOs and individual citizens in the supervision process. The arguments to do so are democratic legitimacy and responsibility. NGOs can serve as supplementation of the current system of supervision and can assist in monitoring and detection of malpractices. This way societal stakeholders can help the authorities take their responsibility and in this way assist in the controlling task of the parliament (national). For authorities' societal shareholders can be an ally in reducing the capacity problems every authority faces. However, there are two difficulties in 'adding' NGOs in the supervision process. The first being that not every interest can be represented equally. The NGOs have limited means and capacity; this will create an in-equality in arms between the different NGOs.²⁴⁹ It is therefore important to assess whether the NGOs are representative for all the relevant interests. It is therefore not enough to only look to the NGOs which present themselves best to present the counterbalance to the interests of the sector.

The second difficulty lies in the fact that NGOs do not only exist for the relevant interest: the NGOs are dependent on the members they represent. Working with the authority can lead to a decline in members. This decline is linked to loss of identity due to compromises in policy when working in to close cooperation with the

²⁴⁸ EP, *Report on the food crisis, fraud in the food chain and the control thereof*, 2013. (2013/2091(INI)) A7-0434/2013. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0434+0+DOC+PDF+V0//EN>

²⁴⁹ M. Olson, *The logic of Collective Action. Public goods and the theory of groups*, Cambridge: Harvard University Press 1965; M. Hojnacki, D.C. Kimball, F.R. Baumgartner, J.F. Berry & B.L. Leech, *Studying Organizational Advocacy and Influence: Reexamining Interest Group Research*, *Annual Review of Political Science* 2012 (15), p. 379-399.

authorities.²⁵⁰ From a political ideological perspective adding NGOs and individual civilians in the system of supervision might sound as a healthy counterbalance to the interests of the sector and to increase the democratic legitimacy of the supervision. However, it is by no means a panacea for either democratic legitimacy, a strong system of responsibility or the limited capacity of authorities.

3.4 Reports on the functioning of the NVWA

In the past few years Europe has been confronted with a number of cases of fraud and safety incidents. The incidents/ crisis were reported on to assess the functioning of the NVWA and to reflect upon the way the NVWA dealt with such incidents/crisis. The report *Risico's in de vleesketen* (further meat report) and the reaction to this report will be discussed in the coming paragraphs.²⁵¹

Meat Report²⁵²

The onderzoeksraad voor de veiligheid²⁵³ (Dutch safety board) assessed the Dutch meat sector and enforcement of the NVWA in the light of the horsemeat scandal. The conclusion of the research was not positive. A number of elements contributed to the not functioning of the system: the European legislation, fraud in the chain, the private systems in place and the functioning of the NVWA. European Food safety law has three mayor flaws according to the Dutch Safety Board. The responsibility is placed on FBOs, but the task to supervise and control with the authorities. According to the DSB the FBOs hide behind the official controls and therefore do not take responsibility. The second flaw is that European legislation is based upon two separate interests which do not necessarily complement each other. The interest of safe food and of stimulating trade. When these interests are weighted, the interest of safe food can be overpowered by the interest to stimulate trade. The third argument is specifically for the meat industry, since the legislation does not allow innovation in supervision and control on the meat sector.

The official controls are focused on hygiene and animal health, not on fraud. Fraud can be a serious threat to safety (see chapter two). The private systems in place did not function properly and the self-cleansing ability of the sector was found to be lacking or absent. The private standards implemented in the meat sector proved insufficient safeguards. The CBS concluded the meat sector was not ready for far reaching private regulation.

Governments' reaction:

The government took the recommendations to heart and changes were made. The changes are interventionist and have all been implemented to reduce the risks in the meat supply chain and to control those risk. FBOs are obliged to work with a code of conduct and in doing so accept a bigger responsibility. The government will ensure fraud is detected, and if found severely punished. Developing a governance code specifically for the meat supply chain. The rules on official controls and the assessment of farmed animals (before slaughter) and carcasses in the slaughterhouses and the supervision on this procedure are a public task, and will only be done by the authorities. Third party control and supervision in the meat supply chain is ruled out, for the time being.²⁵⁴ The changes follow the action plan²⁵⁵ of the NVWA which was published before the meat report, in which the NVWA is reorganized to strengthen the organization both in terms of finance and organization as a

²⁵⁰ G. Jordan & W.A. Maloney, *Democracy and interest groups: Enhancing participation?*, London: Palgrave Macmillan Limited 2007; G. Jordan & W.A. Maloney, *The protest business? Mobilising campaign groups*, Manchester: Manchester University Press 1997; H. Klüver & S. Saurugger, *Opening the black box: The professionalization of interest groups in the European Union*, *Interest Groups & Advocacy* 2013, 2 (2), p. 185-205.

²⁵¹ Translation: *Risks in the meat supply chain*.

²⁵² Accesable at: <http://www.onderzoeksraad.nl/nl/onderzoek/1478/risico-s-in-de-vleesketen>.

²⁵³ <http://www.onderzoeksraad.nl/en>.

²⁵⁴ Redactie, *Kabinetsreactie op rapport Onderzoeksraad: (vlees)keuring terug naar de overheid*, 2014. *Waar en Wet*, 2014, nr.5, 72.

²⁵⁵ *Kamerstukken II 2013/14*, 33 835 nr. 1.

whole. More inspectors will be trained for dealing with fraudulent practices, and FBOs who are committing fraud can expect to receive large fines.

Next to the meat report there were a number of other reports which criticize the NVWA and her functioning. The trust in private regulations and supervision and control by private parties is diminished. It is currently unclear what consequences this development has for the acceptance of meta supervision and self-control systems (Stichting Ketenborging). The acceptance will be dependent on the number of incidents. The NVWA will be scolded if incidents happen at FBOs using an accepted standard under de Stichting Ketenborging. Hopefully the legislator does not have to wait for a crisis to take away the possibility for private supervision and control per supply chain, as they did with the meat supply chain.

3.5 The road ahead

Fraud is a complex crime (as described in chapter two), and the same goes for the types of supervision on the food sector. Both the European and national legislator reacted to the recent fraud cases, but with a fundamental difference in opinion. There are a few options which will be discussed in the coming paragraphs. The first option is to keep the systems currently in place. The second going for a more unified European option. The third option is to 're-nationalize' Food Safety Law. The fourth and final option is to encompass private parties in the enforcement of food safety regulations.

From all the reports and research following the fraud cases the past years, a rather clear picture emerges: the current system is not adequate to battle food fraud. If the legislator, both national and European, takes this problem to heart, change is needed to ensure the reputation of the European food industry is protected, not even mentioning preventing incidents from happening in or outside Europe. The second option, advocated by the EP reports (paragraph 3.3) is to harmonize the approach to food fraud and focus on intensified official controls by the authorities. The advantage is that all Member States will have to intensify their official controls and therefore the battle against food fraud will be fought Europe wide on similar terms. The disadvantage is that the question of capacity remains: will the authorities throughout Europe be able to detect fraud and act accordingly? A third option, not discussed in this chapter, but still a theoretical option is the re-nationalization of Food Safety Law. In theory if the Member States can freely create their own system of official controls, the strictness of controls will be an important factor for being able to export food products. The Member States will set stricter standards to ensure their products can be exported, fraud should be one of the factors that will be weighted. The problem with this option is that there are a number of assumptions to be made and the approach in Europe will be even more fragmented. The fourth and final option is encompassing the private sector in enforcement. Private parties can supplement or maybe even replace traditional official controls by implementing their own schemes and supervising on compliance with the standard. The potential advantage is that the limited capacity of the authorities is increased by supplementary controls by private parties. However, the independency of private parties is not always guaranteed. The interests of a private party are different from the authorities, and if enforcement would encompass private parties, safeguards have to be placed to ensure all enforcers are on the same page and work towards safe food, without bias.

The sector is increasingly using private standards and private control schemes, whether the authorities are in favor or not. It would therefore be sensible to encompass the private parties in enforcement. Why not choose the best of both worlds, and increase the scope of official controls and system inspections to enable the authorities to detect food fraud and react accordingly, but also 'use' the sector to do the work for you. As long as there is sufficient meta supervision on the direct supervisors and the supervision is not inferior to official controls in terms of frequency intensity and transparency, encompassing the private sector can increase the overall supervision and control on food safety.

3.6 In Short

The supervision and control on the food sector in the Netherlands is complex. Fraud is a complex crime, so finding a way to create the system in which fraud detection is integrated, is no easy task. It is clear that control and supervision as it was before the horsemeat scandal is not effective to battle food fraud. The recent cases of food fraud showed flaws in the current system. Both on national and European level the discussion on how the supervision and control should be changed took place. The conclusions varied widely. Where on a European level the official controls were viewed as the solution, on a national level the solution was sought in delegating tasks to private parties to ensure the capacity. Both systems can have their merits and when implementing a system to provide the best possible supervision and control, a combination of both might be needed to effectively detect fraud and open the way for measures to be taken. However, how such a system works out in practice is yet to be seen.

Chapter 4 enforcement measures in Administrative Law

The three previous chapters provided the legal angles, the background on food fraud and supervision and control on the food supply chain. This fourth chapter will elaborate on the available measures to battle food fraud. These measures are limited by European principles and standards, these and the relevant Case Law will be discussed, before going into the individual measures. Both measures with a European and national legal basis will be elaborated on. Options of battling food fraud from a Criminal Economic and Private Law angle will be discussed in chapter five. Next to the possible measures, the rights of the violator will be discussed.

The focus is on the NVWA and the measures the NVWA can adopt to battle food fraud. The measures from other areas of law will be discussed in a separate chapter. However, this separation does not mean there is a hierarchy in areas of law regarding enforcement. The sub questions in this chapter are: What means are there for the NVWA to battle unwanted behavior, such as food fraud? What legal means does the NVWA have in relation to the

qualifications given in the first chapter? In answering these questions, the general framework for enforcement will also be elaborated on.

4.1 Enforcement

It is the responsibility of the Member States to enforce Food Law, and to monitor and verify that the relevant requirements of Food Law are fulfilled by FBOs. For that purpose, Member States have to maintain a system of official controls and other activities appropriate to the circumstances, including public communication on food and feed safety and risks, food and feed safety surveillance and other monitoring activities covering all stages of production.²⁵⁶ Enforcement in this research encompasses both verification of compliance with legal obligations and application of sanctions in case of infringements. Art. 17 of the GFL holds the Member States responsible for the enforcement of food law, and European Food Law increasingly sets standards for national enforcement and supervision.²⁵⁷ Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules includes obligations for verification by the Member States, measures to be taken in case of infringements, a framework for co-operation between national authorities and the Commission, and for the Commission to monitor the performance of national authorities in the Member States and in third countries.

Infringements of food safety law may cause food safety incidents. Such incidents can also occur for other reasons (accidents). Incident management and enforcement can be closely related, but they are not necessarily the same thing. If a Member State establishes the non-compliance of an FBO, it shall take action to ensure that the operator remedies the situation.²⁵⁸ When deciding which measure to adopt, the competent authority shall take the nature of the non-compliance and the operator's past record with regard to non-compliance into account.²⁵⁹ Such measures can include the imposition of sanitation procedures or the recall of a food product, the restriction or prohibition of placing foods on the market, or a closure of all or a part of the business concerned. In case of imported products these measures may include: destruction, special treatment to solve the irregularity, and re-dispatch of the product to the country of origin. For the latter action, a timeframe of no more than 60 days applies.²⁶⁰ Measures will always have a negative impact on whom it concerns, unless the measure is of a conditionally nature.²⁶¹ In battling the infringement of fraudulent FBOs not only Administrative Law, but also Criminal Law was applied to punish the persons responsible in the FBOs. More on the Cases related to the horse meat scandal in chapter five.

Member States are free to adopt measures the Member States see fit to combat infringement of Union law. In Food Safety Law such standards are not yet implemented, therefore this development will not be elaborated on more.

4.1.1 national enforcement

Art. 54 and 55 OC Regulation provide the basic framework for enforcement in case of non-compliance of FBOs. Member States are required to implement a system of measures to remedy the situation. Member states are free to choose what measures the Member State will use as long as the measure is appropriate, effective, and dissuasive. The measures can be connected to the product, suspension or removal on the market. The measure can also be connected to the FBO itself; halting the production, or even closing the FBO. Other means which are

²⁵⁶ Art. 10 jo 17 lid 2 GFL.

²⁵⁷ Conclusions of the standing committee on the food chain and animal health, implementation of articles 11,12,16,17,18,19 and 20 of the GFL, 20 December 2004.

²⁵⁸ Art. 19 GFL, see paragraph 3.6.

²⁵⁹ Regulation 882/2004 [57], Article 54)

²⁶⁰ Art. 21 Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls.

²⁶¹ FBO's should comply with food safety standards, if they do not and conditional measures are imposed, the FBO gets the chance to change its ways and comply, this cannot be seen as a negative impact.

deemed appropriate can also be used. Not only measures, but also the possibility to impose sanctions have to be implemented be able to deter FBOs from non-compliant behavior. From these articles it is clear measures of different natures, both reparatory and punitive, are required to come to effective enforcement.

4.2 Defining the limits of enforcement

Enforcement of both European and national standard is (mostly) done on Member State level. The member States are obliged to do all in their power to make sure Union law is respected; this obligation follows from the principle of loyal cooperation, enshrined in Art. 4.3 Treaty of the Functioning of the EU (further TFEU). Member States are free to choose which measure they adopt in a specific infringement case, but there are limits both minimum and maximum for measures that have to be taken into account. The sanctions/ measures cannot be too heavy, in which case the measure is a violation of Union Law or even Human Rights, too lenient, and the measure will not have the deterrent effect and cannot be viewed as an effective measurement. The responsibility of Member states is to ensure adopted measures are in line with legal requirements such as equivalence, effectiveness, dissuasiveness and proportionality. The Europeanization of national enforcement law is in mostly effected through case law by the CJEU. The decisions of the court are in principle only applicable to the individuals to whom it concerns, but the Court also decides on the interpretation of laws. The laws have to be interpreted in the same way in every Member State, thus making a more uniform approach to the application of EU law in all Member States, the Court will give a similar ruling in a similar case. In this chapter only milestone case law will be discussed. The focus of this thesis is on the measures the NVWA can take; rulings of the European Court of Human Rights (further ECHR) will be omitted, unless Case law of the CJEU is based on a Case of the ECHR, or only the ECHR ruled on a particular question.

Akerberg Fransson case

In the Akerberg Fransson Case the CJEU ruled on the applicability of European law, which could be seen as the next step in Europeanization of the national Enforcement Law. The most important question for the development of EU law is: is EU law applicable if a sanction is imposed on a national law basis, but the norm that is infringed is also a European norm? The Court decided that when EU law regulates the specific topic, EU law is applicable. If EU law is applicable, the Charter of fundamental rights of the European Union (further Charter) is applicable to the action. In this Charter among other principles, the principle of ne bis in idem is taken up.²⁶² *The Charter is binding for the Member States always when they act 'in the scope of Union Law'. As a consequence, the scope is identical to the scope of general principles as fundamental rights and of other general principles.*²⁶³ There are situations in which European Law does not provide the norms, but only national law does; in such cases the measures of the member state are not enforcing Union Law and thus the Charter is not applicable.²⁶⁴

The Akerberg Fransson Case for as far as Food Safety Law is concerned makes the Charter applicable to all actions of both member states and authorities, such as sanctions. Food Law is mostly regulated on European level. The Regulations and Directives on food related topics have a very broad scope: the enforcement of food safety regulations in Member states will always have a European character and the Charter will be applicable. Food safety regulations will be based on principles of safety; misleading, traceability or hygiene, see chapter 1, are all regulated on European level.

"From Akerberg Fransson it is clear that the enforcement of Union Law and more particular the sanctioning of Union Laws violations, is 'within the scope of union law' and should respect the Charter and the EU general principles, whenever another Union Law provision gives some guidance as regards the level of enforcement. In this respect Article 325 TFEU, prescribing the Member States to counter Fraud and other irregularities affecting the

²⁶² Art. 50 Charter.

²⁶³ J.H.Reestman & L.F.M. Besselink, *Editorial after Akerberg Fransson and Melloni*, 2013. *European Constitutional Law Review*, p. 170.

²⁶⁴ Case C617/10 (Akerberg Fransson), paragraph 19 and Case 483/12 (Pelckmans) paragraph 18.

*financial interests of the Union through measures that are dissuasive, effective and equivalent, seems more relevant.*²⁶⁵

Bonda case

Fiscal sanction can accompany criminal sanctions to come to an effective and dissuasive enforcement of infringements. However, double sanctioning can violate the legal principle of '*ne bis in idem*'.²⁶⁶ The core of the principle is that a legal entity cannot be punished for the same activity twice. The principle derived from the philosophy that if someone has done something wrong and was punished for it, from a legal point of view the case is closed. In the Bonda Case the question was raised whether an administrative sanction could be qualified as punishment and therefore the principle of '*ne bis in idem*' would apply.²⁶⁷

*"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*²⁶⁸

The CJEU set three criteria for the assessment of such sanction.²⁶⁹ The first is the legal qualification in the national law of the Member State. Second the nature of the infringement. Lastly the nature and severity of the possible punishment for the infringement. The national courts can with these criteria assess the combination of fiscal and criminal sanctions. The court can assess the protection of the rights of the defended in National law, to constitutional rights in particular. The sanctions should still be effective, proportionate and dissuasive.

The Administrative fine which will be discussed in paragraph 4.5, and is of criminal nature. If the administrative fine is, the Charter is applicable to administrative fines. Moor-van Vugt and Widdershoven state; *"the administrative fine – which up to now has not been dealt with by the Court – is undoubtedly of a criminal nature"*.²⁷⁰

Principle of proportionality

Imposed measures can be assessed in court on proportionality; there should be a reasonable goal and the measure(s) taken to reach this goal should not outweigh the goal. A Dutch saying that can be used in this context is; *'do not use a cannon to kill a mosquito'*.²⁷¹ Advocate general Van Gerven in his opinions elaborated on this principle or, in other words, the test of proportionality of a measure in court.²⁷² He defines a number of elements to test if there is a violation of the principle of proportionality. The first element concerns the suitability or appropriateness of the national measure. The measure should be taken to protect the interest that were violated/ about to be violated. There should be a causal relation between the measure and the protected interest and the violation. The interest or objectives should be legitimate to protect.²⁷³ The element of suitability does not cause problems regularly. The second element is the necessity: the measure should be needed and be the 'lightest' available measure to protect the legitimate interest or objective. In court the question can be raised: should the Member State have chosen a different measure? More precisely, a measure that would have less negative implications for whom it concerns. The measure must however provide the level of protection that is required; adopting measures

²⁶⁵ Citation taken from: S.Prechal, R.Widdershoven, and J.H.Hans, *Europeanisation of Public Law*, 2015. Europa Law Publishing Groningen, ISBN: 978-90-8952-127-9, p 154-155.

²⁶⁶ See for a more in depth review of the principle; Juliette Lelieur, '*Transnationalising' Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, 2013. Utrecht Law Review Volume 9, Issue 4 (September) 2013, p. 198-210.

²⁶⁷ Case ECJ C-489/10 (Bonda).

²⁶⁸ Art. 50 Charter.

²⁶⁹ The criteria were developed earlier in the Engel Case, ECHR 8 June 1976, NJ 1978/223 (Engel v. Nederland).

²⁷⁰ S.Prechal, R.Widdershoven, and J.H.Hans, *Europeanisation of Public Law*, 2015. Europa Law Publishing Groningen, ISBN: 978-90-8952-127-9, p.304.

²⁷¹ The official saying is: Killing a mosquito with a cannon. This saying is supposed to be ironic, therefore the translation is without irony to clarify the meaning.

²⁷² Opinion in Case C-312/89 Siefed Conforama or Case C-332/89 Marchandise.

²⁷³ Case 331/88 (Fedessa).

that cannot reach the goal/ protect the interest is not deemed necessary within this context.²⁷⁴ The third and final element is the proportionality 'stictu senso'. This element is what is described by the saying above, the measure should not outweigh the intended result of the enforcement. Measures will always have a negative impact on whom it concerns, be it in financial terms, restrictions of any kind or otherwise, and these negative implications should be weighed against the 'benefit' of enforcement.

Standards of dissuasiveness and effectiveness:

*'A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. What is decisive in this regard is not only the nature and level of penalty but also the likelihood of its being imposed. Anyone who commits the infringement must fear the penalty will in fact be imposed on him There is an overlap between the criterion of dissuasiveness and effectiveness.'*²⁷⁵

Member States have the obligation to ensure compliance with Union law; choosing the measures adopted to reach this compliance is up to the Member States. If the Member States have a legal framework for sanctioning, but chooses not to impose fines on the basis of policy/ lack of manpower/ costs or other motives, the sanctioning is only theoretical. In the Spanish Strawberry Case the Court France (Member State) was scolded, the Member State infringed Art. 34 TFEU due to lack of intervention during protests by French farmers.²⁷⁶ These protests where a market distortion and thus infringement of Union Law. The Member States have an obligation to actively combat infringements to ensure proper functioning of the free market. Another case against the Member State France was the French Fishery Case.²⁷⁷ The Member State had a legal framework to sanction Fishers who brought undersized fish to the market. The sanction was a fine which would not be higher than € 750, -, if the fine was even imposed. The court ruled that this sanction was not in line with the standards of effectiveness and dissuasiveness. The fine was too low and the chance of getting fined was too slim. This combination made that fisherman in France were not deterred from infringement. A relatively recent case of a Member State being scolded for not enforcing on the basis of national policy, is the Dutch vessel Case.²⁷⁸ The Court ruled that a Member State cannot 'hide' behind policy to not enforce Union Law.

Where proportionality provides a ceiling on sanctioning, above a certain degree of severity the sanction is deemed to be disproportionate. Effectiveness and dissuasiveness provide the floor, setting the minimum standards for enforcement, also taking into account the chance of getting sanctioned. The Member states are free to adopt measures between these two extremes. The Member States are not required to ensure full compliance, but by enforcing effective and dissuasively the Member State acts in line with the principle of loyal cooperation.

4.3 Administrative and criminal sanction

Sanctions can be found in both Criminal and Administrative Law. If one would only take a superficial look at these sanctions, one could come to the conclusion these sanctions are similar. A closer look into the sanctions and procedures will reveal there are fundamental differences.

The court in Administrative Law looks primarily at the lawfulness of the decision by the authority; more specifically, if the authority could reasonably take this decision. The court in criminal procedures looks primarily at the actions/ behavior of the defendant. The actions of the government are only indirectly of concern, in the context of control on the principles of a fair trial in a criminal court.²⁷⁹ The second difference is the central legal relationship; in Administrative Law the relation between the government and whom the decision concerns are not only formal, but also material. This far reaching legal relation can be viewed as the direct cause of the creation of Administrative

²⁷⁴ Case C-317/92 Commission v. Germany.

²⁷⁵ Opinion of advocate Kokott in joined cases C-387/02, C-391/02 and C-403/02 Berlusconi.

²⁷⁶ C-265/95 Commission v France (French strawberries).

²⁷⁷ Case C-304/02 Commission v. France (French fishery inspection).

²⁷⁸ Case C-232/08 (Dutch vessels).

²⁷⁹ C.P.M Cleiren, *beginselen van een behoorlijke procesorde en idem Identiteit van beginselen van behoorlijke strafrechtspleging en beginselen van behoorlijk bestuur?* 1989. DD 1990, p.497 – 514.

Law to protect the citizens to an interfering government.²⁸⁰ In criminal law the central relationship is between citizens. The relationship between government and civilians will (generally) be only be formed after an illegal action on the side of the civilian. The relationship between the government and the civilian on the basis of administrative law is a constant factor; the protection from the government is always present.

Another difference derives from the relationship of the OM to the government, the OM is not only focused on the government, but more on the criminal court. This focus on the courts make that the discretionary freedom of the OM is less than other administrative authorities.²⁸¹ This diminished freedom is especially clear in policy on height of the punishment. Other administrative authorities can initiate their own sanctioning policy; this policy will only be marginally assessed by the administrative court. The sanction policy of the OM will be assessed in full and the OM has a responsibility towards the criminal courts that surpasses that of other Administrative authorities. In criminal law the height of the sanction is imposed by the court, not by the OM. In administrative law the height of the sanctions is set by the administrative authority.²⁸²

The legislator deems administrative law as equivalent to sanctioning on the basis of Criminal Law. The drastic increase of the administrative fine and the application in more complex cases are elements that point in this direction.²⁸³ The choice to use either Administrative sanctions or sanctions derived from Criminal Law is foremost based on efficiency of the enforcement. Assuming the violation is effectively punished with a monetary fine, and other sanctions are not deemed necessary.

The administrative court will focus on the decision and the lawfulness of this decision, opposed to the assessment of the infringement as is the case in Criminal courts. In Administrative procedures all evidence is admissible, whereas criminal law only allows certain evidence. Also, how much weight is attributed to certain evidence in the procedure is unrestricted in an administrative procedure. The criminal nature of the administrative fine constitutes to a stricter assessment of the administrative courts on the evidence that is presented by the administrative authority. The burden of proof lies with the administrative authority. The administrative authority should prove the infringement took place.

Suspensive effect of Legal remedies

In administrative procedures, legal remedies do not have a suspensive effect.²⁸⁴ This means if whom it concerns challenges a fine in court, the fine has to be paid although the final verdict has not yet been given on the lawfulness of the fine. The Administrative fine thus has to be paid even before a court has assessed the proportionality of the measure. In some areas of law, the specific law does provide the suspensive effect of legal remedies.²⁸⁵ The Commodities act however, does not provide such a susceptible effect. In Criminal Law the Legal remedy does provide the suspensive effect²⁸⁶, in court but also when challenging the fine in first instance.²⁸⁷ In the legislative history of the GALA the legislator discussed if adding the suspensive effect to legal remedies was needed. Having the suspensive effect would in the eyes of the legislator diminish the ability of administrative law to provide decisive action. The legislator made some exceptions to provide the suspensive effect to legal remedies in case of very high fines. In theory all legal remedies can have a suspensive effect, through the use of Art 8:81 GALA, whom it concerns can ask for suspension of the fine for a limited amount of time.²⁸⁸

²⁸⁰ H. de Doelder, *Is door de bestuurlijke handhaving het primaat van de strafrechtelijke handhaving doorbroken of geldt het strafrecht als ultimum remedium?* 1993. Part of *Bestuursrechtelijke toepassing en handhaving van gemeenschapsrecht in Nederland*, 1993 Kluwer Deventer. Blz 137- 147.

²⁸¹ Art. 1:1 GALA. 'Administrative authority' means: (a) an organ of a legal entity which has been established under public law, or (b) another person or body which is invested with any public authority.

²⁸² Kamerstukken II 2003/04, 29 702, nr. 3, blz. 152.

²⁸³ Kamerstukken II 2012/13, 33 622 and Kamerstukken II 2011/12, 33 207).

²⁸⁴ Art. 6:16 GALA.

²⁸⁵ Examples are fines following from consumer protection law and Competition law.

²⁸⁶ Art. 557 Criminal Procedure Act.

²⁸⁷ Art.257g PC.

²⁸⁸ Kamerstukken II 2003/04, 29 702, nr. 3, blz. 135.

Court fee and legal assistance

The court procedure in Criminal cases is not paid by the violator. If whom the fine concerns wishes to contest a fine for whatever reason, no court fees have to be paid for this legal protection. In administrative law however, fees are due when a violator wishes the administrative court to assess the administrative fine. There are no exceptions for criminal sanctions under administrative law, so a violator will have to pay a court fee to challenge an administrative court. The ECHR accepted court fees, even in case of a criminal sanction.²⁸⁹ The only exception that can be made is in case the court fee would be deemed disproportionate for the violator to pay.²⁹⁰

Next to a court fee, the cost for legal assistance is an expense for the violator. In an administrative procedure, there is no obligation to make use of legal assistance. There is a general rule that a person can make use of a legal professional when dealing with an administrative body.²⁹¹ In criminal procedures this obligation does exist. Even in case of a punishment order (see chapter five) constituting a penalty of € 2000, - or more the violator has the right/ obligation to professional legal assistance. For the punishment order, the legal assistance is required to possibly contest to the fact that the punishment order is adopted without judicial intervention.

4.4 The power of the European Commission to intervene

Member States enforce within their own territory, but what if they can't or are only partially able to counter the violations? Food safety incidents are not always contained within the boundaries of one Member State, but the means to enforce are bound by these boundaries.²⁹² If the enforcement/ lack of enforcement poses a threat to safety of consumers, animals, plants or the environment, the European commission can intervene. The functioning of Union law is supervised by the European Commission.²⁹³ Next to supervision, the European Commission can investigate national authorities and in some cases can even use enforcement measures which surpass the boundaries of one Member State. These measures are initiated only when there is a serious risk for the health of humans, animals, plants or the environment. The Measures can seriously affect the free market, and thus will not be adopted lightly.²⁹⁴ A recent case in which the decision to take enforcement measures by the European commission was brought before court was Case T- 212/06.²⁹⁵

The EC

In principle, the Member States are free to choose the measures they want to impose to ensure the enforcement of national and Union Law. There are measures deriving directly from Union Law; only those which are relevant to food safety are discussed. These measures are either measures that Member States can impose or measures that can be adopted on EU level. In the coming paragraphs these enforcement measures derived from EU law and enforcement by the European commission will be discussed.

The Member State(s) confronted with a crisis can ask the European commission to step in, and adopt emergency measures, the Commission is also competent to initiate emergency measures on its own initiative. In Principle, the Member States will enforce and the Commission will not intervene. However, in emergency cases measures may be required that surpass the boundaries of the Member States. In case the Commission does not act, on the request of a Member State, that Member State can initiate the (interim) measures²⁹⁶ the Commission would have taken in

²⁸⁹ ECRM 16 October 1995, nr. 21351/93.

²⁹⁰ CRvB 13 October 2010, LJN BO1242, r.o. 3.4 en 3.5.

²⁹¹ Art. 2:1.1 Gala.

²⁹² Bernd van der Meulen en Hanna Schebesta, *Onveilig voedsel op de markt*, 2014. Ars Aequi, February 2014, p. 136-145.

²⁹³ Art. 17 Treaty of the European Union.

²⁹⁴ Art.53 GFL.

²⁹⁵ Accessible at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=73362&pageIndex=0&doclang=en&mode=lst&dir=&occ=firs t&part=1&cid=1051517>.

²⁹⁶ Art. 54 GFL.

case of action, be it only until the Commission adopts measures.²⁹⁷ The measures that the EC can adopt can be divided in four categories: <I> special marketing conditions, <II> special import conditions, <III> restrictions and listing and <IV> suspension. The measures adopted can vary widely to combat the situation of unsafety. Similar to enforcement by the Member States, the measures adopted by the EC have to be in line with the principles and standards listed in paragraph 4.2. The EC will only adopt measures if the Member State cannot manage to effectively enforce. Not only foodstuff from a Member State, but also from third countries can be affected by these emergency measures, which include Suspension of foodstuff, temporary blockades or the setting of special conditions for foodstuff. If other measures are needed, the Commission may choose other measures, as long as they are effective and in line with the principles and standards as described above. The suspension on the market could be an effective measure to enable authorities to conduct a thorough research to the origin of the food fraud. However, time is of the essence, especially with perishable goods.

RASFF system

The RASFF system dates back to 1979 and was created to ensure quick communication between authorities in the Member States in case of safety issues concerning food and Feed.²⁹⁸ When Member States (or authorities within) detect a risk for the health of consumers that is directly or indirectly connected to food or feed, all participants in the RASFF network are notified of the risk and can take the necessary measures.²⁹⁹ In 2014 the iRASFF was made available to the public; the system provides compromised information on recent information shared via this network and also shared information that predates the launch of the iRASFF.³⁰⁰ The RASFF system enables Member States to exchange information and act in case of risks concerning food or feed. The RASFF system is part of the enforcement: it can supplement the information authorities gather during official controls and supervision, and lead to measures being adopted to counter the risks.

²⁹⁷ Only if the Commission is asked on several occasions to intervene. If the Commission does not immediately take action, or does not believe that intervening is necessary, does not give the Member States the free pass to take emergency measures.

²⁹⁸ Redactie, *Mede dankzij de RASFF kunnen wij de hoogste voedselveiligheidsnormen garanderen*, 2015. Waar en Wet 2015(7), 96.

²⁹⁹ All European Member States, EFSA, ESA, and the countries: Norway, Liechtenstein, Iceland en Switzerland.

³⁰⁰ Accessible at: <https://webgate.ec.europa.eu/rasff-window/consumers/>.

Withdrawal and Recall.

Member states are free to choose their own measures to impose to FBO's to enforce Food Safety Law. This focus on national enforcement is the reason the GFL does not focus on enforcement measures. One of the most important enforcement measures however is taken up in the GFL: the recall.³⁰¹ The GFL empowers the European Commission to intervene in case of a crisis. Before going into the means of the European Commission, the recall and withdrawal will be discussed.

“Article 19 GFL;

Responsibilities for food: food business operators

1. *If a food business operator considers or has reason to believe that a food which it has imported, produced, processed, manufactured or distributed is not in compliance with the food safety requirements, it shall immediately initiate procedures to withdraw the food in question from the market where the food has left the immediate control of that initial food business operator and inform the competent authorities thereof. Where the product may have reached the consumer, the operator shall effectively and accurately inform the consumers of the reason for its withdrawal, and if necessary, recall from consumers' products already supplied to them when other measures are not sufficient to achieve a high level of health protection.”*

From this article it is clear the authority does not initiate the recall, the FBO does. Not only when the foodstuff is produced within the company, but in one of the companies within the chain. Material food safety is not the only reason for a Recall, if the FBO has reason to believe the foodstuff is not in compliance with food safety requirements the FBO should initiate this measure. The FBO has four responsibilities that are all follow from Art. 19 GFL:

- The producer is obliged to immediately withdrawal the foodstuffs already on the market.
- The producer has to inform the authority immediately if the producer has reason to believe/ knows of an infringement of food safety requirements in their production chain. The producer has to inform the authorities on the measures it will initiate to combat the infringement.
- In case (part of) the food is already at the consumer, the producer should inform these consumers in an effective and precise matter. For as far as (still) possible the producer should recall these products from the consumers and take all possible measures within its power to ensure an as high as possible level of safety.
- The producers have an obligation to work together with the authority to take the necessary measures to diminish the risks or even to prevent risks.

Producers have the responsibility to withdrawal unsafe foodstuffs and if needed recall from consumers. Art. 19 deviates from Art. 14 on a number of elements. Art. 19 does not point to the possible effects of bringing the food to the market, instead the article focusses on the infringement of food safety standards. The focus is on the formal food safety, where the focus of Art. 14 is primarily focused on material safety. The main reason behind this difference is that Art. 19 is also applicable in case Art. 14 is not.³⁰² Even when there is no material safety issue, for instance when a producer is in the Novel Food products, and get a positive safety evaluation but, does not has the required authorization yet. The product is only formally unsafe, presumption of un-safeness, until proven otherwise. In theory; If the system would work optimal: producers infringing or are at the brink of infringement will immediately withdrawal and recall all the foodstuffs not in line with food safety requirements and the all the foodstuff on the market will be compliant.

The responsibility to initiate a recall does not only kick in when there is already an infringement. The article clearly refers to the situation a producer has reason to believe its products or even products in his supply chain are not compliant the producer should initiate a recall, unless other measures are sufficient.

³⁰¹ Art. 19 GFL.

³⁰² Bernd van der Meulen, *Recall, terugroepacties opgelegd door de overheid*, 2015. Waar en Wet 5, 2015 article 111.

*“Where the product may have reached the consumer, the operator shall effectively and accurately inform the consumers of the reason for its withdrawal, and if necessary, recall from consumers products already supplied to them **when other measures are not sufficient to achieve a high level of health protection.**”³⁰³*

Hidden in the final sentence of the first paragraph is the core of the article. A producer should ensure the foodstuffs in their supply chain are both materially safe and are compliant with all food safety regulations, both European and national. The producer does have to initiate a recall if other measures (less interventionist) will have a similar effect, a high level of health protection. As an example, the expiration dates were misprinted and thus wrong, by hanging a sign in the shop where they sell this product with the correct date, the infringement is still there, but the consumer is informed and the potential hazard is avoided. You could view this option of less interventionist measures as an effect of the proportionality principle.³⁰⁴

Art. 19 GFL is based primarily on a legal criterion, not on science, the effects of infringement of food safety standards are therefore clear even when there is uncertainty on the risks that derive from the infringement. On this basis the decision of the NVWA to order a recall during the horsemeat scandal is justifiable, even though it was not yet clear if the food fraud would pose a risk to health of consumers. The definition of producer is broad and the producer is responsible for the compliance with food Safety standards in their supply chain, one producer can therefore be ordered to issue a recall. The nature of the recall is a recovery sanction. The rationale is that the producer placed unsafe food on the market and therefore distorted the safeness of the market, by recalling all the products the initial safe market of food is recovered.³⁰⁵

The recall can be viewed as the final remedy. The recall is a far reaching measure with sometimes enormous economic losses for the FBO, not even taking reputational damage into consideration. FBO's are not easily persuaded to initiate a recall, although the recall policies of FBO's vary widely.³⁰⁶ At this point in time there are still bottlenecks in practice that prevent producers from taken effective measures to ensure a high level of protection. These bottlenecks are at the basis of a well-functioning system of recalls and will therefore be discussed separately.

Transparency:

The growing number of different FBO's in the supply chain, information supply is a logistic bottleneck in complicated supply chains. Not only differences in the FBO's in the supply chain, but also practices within one FBO can complicate matters. Within one company batches can be combined, products can be re-labeled, some products will be destroyed or thrown away and the administrative mistakes can happen. The tracing of about 98% of all products can be done with one push on the button, the remaining 2 % however will be a time consuming challenge, if possible at all. In the feed production the producers have solved this problem by creating an integral information system which makes the whole chain transparent for all the producers in the chain. There are writers who see this as one of the solutions to the complex problem of recall management.³⁰⁷

Unclear streams of returned products

Taking into account the amount of returned products can prove to be a problem especially if an individual consumer can return the food product. Returning fresh or frozen foods is a logistic problem in itself. Not all retailers have the correct storage for these products to store the products before sending them to the FBO's. Correct information on these products is often missing, so the FBO does not have the correct information on storage time, temperatures and condition of the product. As a consequence of this FBO's handle these streams in different ways.

³⁰³ Art. 19.1 Final sentence.

³⁰⁴ The food business operator has to initiate a recall, so it is not really an administrative measure or sanction, but in practice the recall will be ordered in one way or another by the authority. By having the option of other measures, the principle of proportionality is not violated.

³⁰⁵ Bernd van der Meulen, *Recall, terugroepacties opgelegd door de overheid*, 2015. Waar en Wet 5, 2015 article 111.

³⁰⁶ Trienekens, J.H., & Vorst, J.G.A.J. van der, Traceability in Food Supply Chains, 2006. In P.A. Luning, F DeVlieghere, & R Verhé (Eds.), *Safety in Agri-Food Chains*, 2006 Wageningen: Wageningen, Academic Publishers p. 439-470.

³⁰⁷ Pauline van Beusekom, Wendy Jansen en Bart Vos, Total recall: *het logistiek effectief managen van voedselveiligheidsincidenten*, WW 2013/6, artikel 71.

Lacking communication

The final logistic bottleneck is the communication. Between FBO's in the supply chain, cultural differences play part in the communication. An open communication between FBO's is needed. Companies who invested in relationships with the other FBO's experience less problems with communication. The NVWA was scolded in the past for changing their contact persons too often, which led to a decrease in notifications of incidents by FBO's

4.5 National sanctions

The general legal framework for enforcement is the General Administrative Law Act (further GALA), Chapter 5 of this act is devoted to enforcement.³⁰⁸ The Chapter contains the definitions, means to enforce, the rights of the violator and some procedural rules. This general framework is elaborated on in other laws, such as the Commodities Act and the Animal Act. There are a number of measures the authorities can impose on the basis of Administrative Law. These measures will be discussed separately within the context of applicability and nature. The administrative fine is increasingly used and the maximum penalty was increased significantly. The administrative fine is the central administrative sanction to combat food fraud in the eyes of the Dutch government, therefore this sanction will therefore be elaborated on most.³⁰⁹

Sanctions can be imposed for a number of motives; to 'repair' the damage, to dissuade individuals or the general public and as punishment for the behavior. The administrative fine is a combination of all three of this motives. An enforcement action decision is of different nature; this sanction is used as a mean to put pressure to stop the infringing behavior. The fine only has to be paid if the infringement is not stopped in time. With an administrative fine the sanction is after the infringement; the fine is not related to the behavior of the person it concerns after the infringement. According to the administrative court, punishment is the motive when a sanction is aimed at forcing compliance through the addition of individual concrete (financial) loss.³¹⁰

Administrative fine

The general framework for administrative fines can be found in the GALA. The competence to impose an administrative fine should follow from a special law, for instance the Commodities Act or the Animal Act. This special law should encompass the description of the violations under that law. For the Commodities Act these violations are in the annex of the underlying decrees. There is a maximum for fines (general), the special laws can deviate from this general maximum, but cannot surpass the maximum. Art. 5:46 second and third paragraph GALA, puts another limitation on the use of the administrative fines, all fines should be tailor made. In past few years there is a tendency not only in food safety related cases, but also in data protection law and other areas of law.³¹¹ The maximum fines in these areas are also increased drastically. Some writers are already asking the question if the rise of the administrative fine should be stopped?³¹²

The height of the administrative fine differs per law on which the fine is based and per violation. The severity of the violation can contribute to the height of the imposed fine. The law can either contains a fixed fine per violation or a maximum and minimum, giving the room to impose an administrative fine that is deemed suitable. In the annex to the law there should be a list with the different violations and the height of the fine, these heights are created within the general framework for administrative fines. When in a specific case the fine is deemed disproportionate, there is a possibility the fine is lowered. This lowering of disproportionate fines is known as the anti-strictness clause. The Industrial appeal board (CBb) has already deemed the fines from the Commodities act to be relatively

³⁰⁸ The Dutch name for the GALA is AWB (Algemene Wet Bestuursrecht).

³⁰⁹ Tweede Kamer, vergaderjaar 2015–2016, 33 775, nr. 21, p.5.

³¹⁰ ABRvS 27 March 2002, AB 2002/195 & ABRvS 20 November 2002, JB 2003/18.

³¹¹ C.L.G.F.H. Albers, *De bestuurlijke boete Magische lijn of hellend vlak?*, 2000. Jurisprudentie Bestuursrecht plus 4, 30 November 2000, 138-152.

³¹² G.A. Biezeveld & Arnt Mein, *Moet de opmars van de bestuurlijke boete worden gestuit?*, 2015. Tijdschrift voor Toezicht 2015 (6), 1, p.64-71.

lenient, there will not be many cases in which the college shall deem the fine as disproportionate.³¹³ This statement was made before the height of the fine was increased 180 fold. The minister has, in exceptional cases, the competence to deviate from the set fines in the annexes to the laws.³¹⁴

The development of relatively high administrative fines created two different penalty systems which are fundamentally different. For both civilians and companies this can be confusing. There are differences between a fine on the basis of Criminal Law and the administrative fine. The main differences derive from the different assessment of the courts, a difference in rights of the defendant, the suspensive effect and the fact that a court fee has to be paid in administrative procedures. There are more differences, but because of the theoretical nature of these differences these will not be elaborated on.

Two types of administrative fines

The legislative history of the administrative fine presents two separate systems of determining the height of the administrative fine. The height of the administrative fine can be either fixed or flexible; flexible meaning the height of the penalty is determined by the administrative body imposing the fine. The flexibility is relative; the administrative body can determine the height, as long as the height is between the minimum and maximum penalty set in the law. The height of the fixed fine is determined by the legislator and in determining the height, the principle of proportionality is taken into account, the height is a set amount per violation. An administrative court will only assess whether the decision to impose the fine is lawful, not a full assessment on the height of the fine. However, in case of a flexible height, the court can assess the fine as a whole.³¹⁵

From jurisprudence it is clear that assessment of the severity of a punitive sanction in relation to the principle of proportionality is a full assessment in case of the height of the administrative was flexible. An administrative fine is a punitive sanction. Sanctions other than punitive sanctions are only assessed marginally. This assessment derives from Art. 6 paragraph 1 European Charter of Human Rights, in which the courts are empowered to choose which sanction should be imposed. On this particular point, the administrative courts have a similar task as criminal courts.³¹⁶ The CBB ruled that the competence to lower a fixed administrative fine a very strict criterion is needed: only in very circumstances and under very important conditions in special cases. The CBB will not deviate easily from the height set by the legislator. The argument for such a strict assessment was that the administrative fines were relatively low compared to fines in other areas of law. With the big increase in height of the maximum penalty, this argument is not valid anymore, and thus the CBB might assess the height of the fines less stringent. The CBB can diminish the fine with a maximum of 50 % of the 'original' fine.

Table 4 Height of fines that can be imposed by the NVWA:³¹⁷

Legislation	Fixed height of penalties and the variation per violation, minimum and maximum:
Commodities Act (Warenwet)	€ 525,00 - € 810.000,00
Tobacco Act (Tabakswet)	€ 450,00 - € 450.000,00
Alcohol and catering act (Drank- en Horecawet)	€ 680,00 - € 2.720,00
Medicine Act (Geneesmiddelenwet)	€ 450,00 - € 450.000,00
Pesticide and biocide Act (Wet Gewasbeschermingsmiddelen en biociden)	€50,00 - €10.000,00
Animal welfare Act (Gezondheids- en welzijnswet voor dieren)	€500,00 - €2.500,00
Animal Act (Wet dieren)	€500,00 - €10.000,00

³¹³ R.O. 5.3 en 5.4, CBB, 5-04-2005 AWB 03/739 , AB 2006, 82, annotation by O.J.D.M.L. Jansen

³¹⁴ Kamerstukken II 1998/99, 26 698, nr. 3, p. 8.

³¹⁵ MvT 2003-2004 29702 nr 3. p. 141.

³¹⁶ H.E. Bröring, De bestuurlijke boete, Kluwer 2005, p. 200.

³¹⁷ <https://www.nvwa.nl/onderwerpen/toezicht-nvwa/dossier/bestuurlijke-boete/de-hoogte-van-de-bestuurlijke-boete>.

Developments concerning the administrative fines

The maximum fines that could be imposed on the basis of the commodities act were relatively low. One could question if these fines were even effective and dissuasive. The horsemeat scandal brought Fraud in the supply chain to the attention of the government and the sanctions in the commodities act were discussed. The maximum penalty of €4500,- was deemed insufficient, or at least a to light sanction, because the potential profit of noncompliance with food safety regulations was a multitude of the sanction.³¹⁸ The legislator chose a drastic approach and increased the maximum penalty by 180 fold, or in case of very large 'profits' a sanction of 10 % of the annual turnover.³¹⁹ The maximum sanction is now €810.000,-.³²⁰ Art. 32B Commodities Act refers to an annex in which the height of the administrative fine per violation. The height can be influenced by the number of employees, the negligence, the turnover or the turnover of part of the turnover produced by a natural person or legal entity. The increase of the administrative fine both in the Commodities Act and the other laws in which the sanction was increased is part of a bigger legislative operation to increase the fines throughout Administrative Law. The increase is motivated by the need to increase the means for administrative bodies to enforce. The increased fine is not only connected to fraud, instead the increase is part of this bigger legislative operation.³²¹

The height of € 810.000, - was not chosen at random, the maximum sanctions in the Commodities Act are directly connected to the height of fines in the PC.³²² The legislator will by introducing this system level the administrative sanctions in the separate laws.³²³ In the Annex the height per violation will be set. The system has another benefit, when the sanctions in criminal law change, the administrative sanctions follow automatically. The difference between the old maximum and the new maximum is significant, it is not unthinkable that FBOs who are fined will ask for a reduction under the anti-strictness clause because of a disproportionate sanction. Art. 32.3 a Commodities Act states that a fine based on the Commodities Act cannot be adopted in case the ECA allows for the adoption of higher penalties. This article pre-dates the increase of the administrative fine, and thus now that the administrative fine is increased, this article has lost its meaning because the administrative fines that can be imposed on the basis of the Commodities Act are now superior to the fines on the basis of the economic violation Act. Because the development is very new, there is still no case law and how these new sanctions will work out in practice are yet to be soon.

The line between administrative sanctioning and criminal sanctioning is getting less clear. Sanctions will be increased in the law, but it is plausible the courts will not agree with these sanctions and will 'correct' the legislator. In a number of cases the courts corrected the fines. It is still unclear if the courts will follow this line of jurisprudence when confronted with fines following from the commodities act. The central argument in all cases is that administrative fines should be tailor-made, so just increasing the height to relatively high fines can only be imposed if these fines are in line with the violator and the violation. The administrative court did 'correct' the legislator in a number of cases in which the court argued that the height of the fine was disproportionate and therefore corrected the fines. The following paragraphs only elaborate on the topics relevant for assessment of the administrative fine next to criminal punishment.

Supreme Court 3 March 2015³²⁴ and Supreme Administrative Court 4 March 2015³²⁵

Cases on the alcohol lock in cars of persons who drink and drove. Next to a fine, a lock is placed in the violators car which permanently locks the car until the driver takes an alcohol test, before the car is unlocked. This lock can be

³¹⁸ Kamerstuk 33775 nr. 15 Vergaderjaar 2014-2015 Gepubliceerd op 13 april 2015 10:20 available at: <https://zoek.officielebekendmakingen.nl/kst-33775-15.html>.

³¹⁹ Sofie van der Meulen, 180 fold higher fines in Dutch Commodities Act, 2015. Accessable at: <http://foodhealthlegal.com/>.

³²⁰ Art 32A, lid2; Ten hoogste zesde categorie, bedoeld in artikel 23, vierde lid WvSR (€810.000).

³²¹ A.R. Hartmann & H.J.B. Sackers, bestuursstrafrecht, 2016. DD 2016/20.

³²² Art. 23 PC, contain categories of maximum fines.

³²³ Not every law that encompasses an administrative fine has a similar system as in the Commodities Act. There See table 3.1 for all administrative fines the NVWA can impose. The legislator is looking to unify the fines on the long term, kamerstukken II 2012/13, 33 400 VI, nr. 80.

³²⁴ HR 3 March 2015, ECLI:NL:HR:2015:434.

³²⁵ ABRvS 4 March 2015, ECLI:NL:RVS:2015:622.

viewed as a measure to ensure traffic safety. The Supreme Court ruled that the alcohol lock is a punitive sanction, and is adopted next to the fine.³²⁶ This is a violation of the principle of ne bis in idem. The fine and the alcohol lock are both adopted to ensure traffic safety and are adopted because the person it concerned drove under the influence of alcohol.

The administrative court ruled in line with the decision of the Supreme Court. The legislator in the official guidance documents to the law on which the alcohol lock is based did see this problem, but argued the motive for the lock can be different than the fine, and therefore both measures could be adopted.³²⁷ In the official guidance documents the legislator mentions the principle of ne bis in idem, but does not lay down rules or restrictions for both an alcohol lock and a fine. The administrative court ruled that the legislator by creating this system structurally undermines the proportionality principle. The application of the law was deemed infringement of 3:4.2 GALA, the Dutch codified principle of proportionality. The law cannot be applied anymore, because there is no possibility to deviate from the law in individual cases in which the alcohol lock is disproportionate.³²⁸ For a more complete overview of all case law and relevant laws on alcohol locks see the article by Tom Barkhuysen & Michiel van Emmerik.³²⁹

Supreme Court 1 February 2011³³⁰

The Supreme Court ruled on the question if an infringement is the same infringement and therefore cannot be punished twice. The same infringement refers to both the nature of the infringement (qualification) and the factual assessment of the infringement. So even if the nature of the sanction is different, the factual assessment can still mean the infringement cannot be sanctioned twice. The relevant cases that formed the basis of this 'mixed' assessment can be found in the annotation by Buruma, see footnote 330.

Supreme Administrative Court 6 mei 2015³³¹

The administrative court ruled that next to the anti-strictness clause, there is room for the court to assess the proportionality of the sanction. The anti-strictness clause constitutes to a maximum reduction of 50% of the 'original' fine. In the case, the company did all in their power to prevent the infringement. The court ruled that in such cases a reduction is justified, and reduced the fine with 75%. The court can reduce the fine even further than 50% in case of circumstances that would make the fine disproportionate to adopt.

Supreme Court 24 November 2014 and 23 June 2015³³²

In the height of a fine the individual situation of the violator should be taken into account. The fine should be adjusted to the culpability of the violator. In assessing the height in an individual case, the culpability, ranging from intention to diminished negligence.

Supreme Court 11 January 2016³³³

Next to the culpability of the violator the financial capability of the violator should be taken into account when deciding on the height of a fine. The violator should be able to pay the fine within a reasonable time. A maximum period of time to pay the fine should two years.³³⁴

Tailor made administrative fine in case of food fraud?

³²⁶ The cost for the alcohol lock are paid by the violator, this can cost up to € 5000, -.

³²⁷ Kamerstukken II 2008/09, 31 896, nr. 3, blz. 31/32.

³²⁸ For instance, bus or taxi drivers for whom driving is their job.

³²⁹ Tom Barkhuysen & Michiel van Emmerik, *Alcoholslot exit*, 2015. NJB 2015/543.

³³⁰ HR 1 February 2011, ECLI:NL:HR:2011:BM9102, NJ 2011/394. Also see the annotation by Y. Buruma in NJ 2011/394.

³³¹ ABRvS 6 May 2015, ECLI:NL:RVS:2015:1421

³³² CRvB 24 November 2014, ECLI:NL:CRVB:2014:3754, AB 2015/8 and CRvB 23 June 2015, ECLI:NL:CRVB:2015:1801.

³³³ CRvB 11 Januari 2016, ECLI:NL:CRVB:2016:12.

³³⁴ The focus of judgement is social welfare subsidies, but the scope of this rule is general, so outside the area of social welfare this rule is also applicable.

As already mentioned above, administrative fines should be tailor made to fit the violator and the infringement. The violations should be taken up in the law on which the administrative fine is based, or in case the legislator left room for delegation of the details of the infringement, the infringement and penalty can be placed in the underlying decrees to the law. The infringement food fraud is not taken up in law at the moment, there is however a concept and a draft available which will be elaborated on in the coming paragraphs. The administrative fine is deemed the measure of choice in case of infringement of rules on fairness of trade, deceiving practices or fraud.³³⁵

The legislator in the draft amendment does not only see food fraud as the behavior to punish with the administrative fine, also misleading behavior. The sanction should be deterrent, there is no mentioning of proportionality or other standards/ principles either from national or European law. Even deterrent is not elaborated on, the legislator just states, as long as the administrative fine is deterrent it is an adequate measure to battle food fraud and misleading practices.

The Legislator specifically split safe and unsafe food fraud. In case of food fraud with a direct risk for the health of consumers, the public prosecutor should start a criminal procedure and the administrative fine is not deemed sufficient.³³⁶ In case of fraud on a large scale (international proportions), in which the integrity of the society is in danger, the administrative fine is not deemed adequate. The quote in the footnote is the core of the motivation for the use of either Administrative Law or Criminal Law.³³⁷ In both documents, there is no mentioning what the legislator deems food fraud, other than just an infringement of fair market practices.³³⁸ The behavior is not described in detail, when does the behavior count up to food fraud? The sanctioning is also only elaborated on minimally. For a FBO it is not possible to know the exact extend of food fraud and which sanction would be applicable in case of infringement. Thus if this draft is not elaborated on extensively, there will not be a tailor made administrative fine for food fraud. Which in turn would be a violation of the GALA, if adopted to battle food fraud.

Decision to enforce by means of administrative penalty³³⁹

A decision to enforce by means of administrative penalty is an alternative to enforcement action. A decision to enforce by means of administrative penalty encompasses two elements. The first being an order to recover/ repair the violation and bring back the situation in the state before the violation.³⁴⁰ The legislator used the words whole or partially, by using these words the legislator clearly meant to create the possibility to partially enforce, if circumstances require so.³⁴¹ The recovery/ repair can mean the full or partial recovery of the situation/ ending the violation, but can also be used to prevent repetition, or in some cases only to diminish the consequences of the violation.

³³⁵ *"In het geval van overtredingen op het terrein van eerlijkheid in de handel en goede voorlichting gaat het om misleiding en fraude. Afdoening met een bestuurlijke boete is dan een adequate sanctie, mits deze bestuurlijke boete voldoende afschrikwekkend is."* Concept - Besluit wijziging van het Warenwetbesluit bestuurlijke boeten in verband met het stellen van regels over de omzetgerelateerde boete: <https://www.rijksoverheid.nl/documenten/besluiten/2015/12/10/concept-besluit-wijziging-van-het-warenwetbesluit-bestuurlijke-boeten-in-verband-met-het-stellen-van-regels-over-de-omzetgerelateerde-boete>.

³³⁶ *"Een strafrechtelijke sanctionering blijft in beeld bij opzettelijke of roekeloze overtredingen die een direct gevaar voor de gezondheid of veiligheid van de mens tot gevolg heeft. De regering is van mening dat in die gevallen strafrechtelijke sanctionering aan de orde is omdat het gaat om overtredingen die de maatschappelijke orde zodanig schokken dat een bestuurlijke boete geen adequate en bevredigende sanctie is. Het strafrecht blijft tevens in beeld bij grootschalige fraude met internationale proporties waarbij de integriteit van de samenleving in het geding is. Tussen het OM en de NVWA vindt afstemming plaats over wanneer bestuursrechtelijke en wanneer strafrechtelijke handhaving aan de orde is."* Concept - Besluit wijziging van het Warenwetbesluit bestuurlijke boeten in verband met het stellen van regels over de omzetgerelateerde boete

³³⁷ In neither the concept, nor the draft an elaboration is made on what is international scale or what is the integrity of society.

³³⁸ <https://www.rijksoverheid.nl/documenten/besluiten/2016/03/16/ontwerpbesluit-wijziging-warenwetbesluit-bestuurlijke-boeten>.

³³⁹ Art. 5:31d GALA.

³⁴⁰ Het woord herstel verwijst naar de definitie van herstelsanctie in art. 5:2 lid 1 onderdeel b.

³⁴¹ In ABRvS 27 February 2002, AB 2002/224 oordeelt de afdeling dat Slechts onder bijzondere omstandigheden er aanleiding kan zijn van het uitgangspunt af te wijken door een handhavingsbesluit te nemen dat betrekking heeft op het slechts gedeeltelijk ongedaan maken van de overtreding.

The second element is the obligation to pay a fine. This obligation is conditional. The fine is conditional during the time the violator has to recover/repair the violation. The idea behind the decision to enforce under administrative penalty is that the violator is pushed to repair the situation to prevent the fine, and thus will remedy the situation. An administrative authority has the option to impose a decision to enforce by means of administrative penalty if that Administrative authority has the competence to impose enforcement action. It is not necessary to specifically mention the measure in the specific law.

The definition of violator is defined in article 5:1 paragraph 2 GALA is an important element in a number of articles in both the GALA and special laws. A violator is the person that infringes the standard on which the enforcement is focused.³⁴² Not only the person doing the infringement, but also the responsible persons/legal entities are considered to be violators.³⁴³ The responsibility in this context means the final responsibility within the company.³⁴⁴ According to jurisprudence in which reference is made to the legislative history, the violator should have the means/ power to take action or stop the infringement.³⁴⁵ The violator therefore should be at least in a legal sense be able to take the necessary measures.

On the basis of Art. 5:7 GALA, a decision to enforce by means of administrative penalty can be imposed when the risk of a violation is apparent. The Administrative authority does not have to wait until the infringement has already taken place before adopting the measure. An early measure can have a preventive effect. The infringement should however be apparent, not only theoretical.³⁴⁶ There is jurisprudence in which the administrative court ruled that a measure can be taken on the basis of evidence that the infringement will happen with a large degree of serenity and on the condition that this infringement can be taken up in the decision to adopt the measure.³⁴⁷ The measure can thus be a preventive measure, on the condition, the authority has evidence that infringement is taking place or is about to take place and there is a high degree of certainty the infringement will take place.

The choice of enforcement measure is within the discretionary freedom of the Administrative authority. The Administrative authority can therefore freely choose to either use a decision to enforce by means of administrative penalty or another measure. The Administrative authority is not obliged to motivate the why it chose to adopt for a Decision to enforce under administrative penalty, instead of enforcement action.³⁴⁸ However, Art. 5:6 GALA forbids Administrative authorities to adopt two measures for the same violation, so no double sanctioning of one infringement. The alternative of an administrative fine should not be chosen in case the risk of the violation continuing after the sanctioning will continue or will be repeated. Enforcement action is the measure to stop the infringement and it is possible to adopt enforcement action, this measure should be adopted.³⁴⁹ This measure can have its merits in case of a first violation, by having the means to adopt high fines in case the violator does not remedy the situation. The measure is less useful in case of large scale infringement or a direct risk to the health of consumers, because the deterrent effect of the measure is less than an administrative fine or even criminal prosecution

³⁴² ABRvS 20 August 2008, AB2008/290.

³⁴³ ABRvS 15 October 2008, AB2008/354.

³⁴⁴ ABRvS 27 March 2001, AB 2002/102.

³⁴⁵ Kamerstukken II 2005/06, 29 702, nr. 7, p. 31.

³⁴⁶ ARRvS 1 February 1985, AB 1985/587 en ABRvS 7 November 2001, AB 2002/177.

³⁴⁷ ABRvS 25 January 2006, AB 2006/229 (ontvangst slachtafval) en ABRvS 11 January 2006, AB 2006/240 (*Houseparty Mill en St. Hubert*).

³⁴⁸ ABRvS 19 June 2002, AB 2003/53, en ABRvS 11 August 2004, AB 2004/444).

³⁴⁹ Kamerstukken II 1994/95, 23 700, nr. 5, p. 81.

Decision on enforcement action³⁵⁰

The competence to adopt enforcement action is taken up in the law, this law will in turn state the way enforcement action should be adopted. In case the law only mentions decision on enforcement action, the competence to enforce through the use of enforcement action is given. The law thus does not have to specifically mention enforcement action next to last to enforcement action. Enforcement action is characterized as a reparatory measure and is defined in art 5:2 paragraph 1 GALA part b: “an administrative sanction to whole or partially undo or end the infringement, to prevent repetition, or to take away or diminish the consequences of the infringement.” An infringement is defined as; “behavior contrary to any legal standard”.³⁵¹

enforcement action itself is the factual behavior of the Administrative authority in the way as described in Art. 5:2 paragraph 1 sub b GALA. Whether after the violator did not remedy the situation before the deadline in case of a decision on enforcement action or the enforcement action without a previous last. It is not necessary for the government to act; third parties can do the factual activities. An example of enforcement action is forced evacuation of a building. Enforcing conditions to a decision is also viewed as enforcement action. This can be the case when the authority has the competence to set conditions with a decision.³⁵² Enforcement action can similar to decision on enforcement action be adopted before the actual infringement.³⁵³ The criteria are the same as for decision on enforcement action. Not only from Case law, but also the legislative history mentions the possibility to adopt the measure before the actual infringement.³⁵⁴ Because this measure can be adopted in a relatively early stage, the FBO is given the chance to change its ways. This measure is not of a punitive nature and in case of infringements after the deadline for the decision, other measures can still be adopted. The measure can be a way to reach compliant behavior without actually having to enforce. In case enforcement action is needed, the products can be suspended on the market, the FBO can be closed or parts of the production line can be stopped until the FBO and the products it produces do not longer infringe.

4.6 Rights of the person concerned

As stated earlier there are differences in the rights of the violator/ defendant in Administrative law as opposed to Criminal Law. The coming paragraphs will elaborate one the rights in an administrative procedure, which can be started on the basis of a decision to adopt an administrative fine. In a criminal procedure, the defendant has a number of rights which he/she can exercise in and outside court to ensure a fair trial. If Administrative law has similar or even higher sanctions as the violator could get in a criminal procedure for a similar violation, the defendant should have at least the same rights. Administrative fines are not the solution to undermine the rights of the defendant in a criminal procedure.³⁵⁵ The advice department of the RvS (the supreme court for administrative law cases) has on own initiative published an advice on administrative fines and the use in practice.³⁵⁶ In short; the administrative fine was used in case of light violation with relatively light penalties. Now that the administrative fine is (under the commodities act among other laws) is increased drastically, the administrative fine can be viewed as a measure to replace Criminal Law. Citizens have a better protection under Criminal Law than under Administrative law (administrative fine). The difference was justified by the relatively lightness of the administrative fines and the relatively simple cases in which the administrative fine was used. Now that the

³⁵⁰ Art. 5:21 GALA.

³⁵¹ Art. 5:1.1 GALA.

³⁵² For instance; a building permit can contain detailed conditions which the builder should respect, the height and wideness of the building etc.

³⁵³ ARRS 1 February 1985, AB1985/587 en ABRvS 7 November 2001, AB 2002/177.

³⁵⁴ *Kamerstukken II* 2003/04, 29 702, nr. 3, p. 90.

³⁵⁵ Already before the maximum was increased, the discussion on the rights of the defendant can be found in literature, see for instance; C.L.G.F.H. Albers, *De bestuurlijke boete Magische lijn of hellend vlak?*, 2000. *Jurisprudentie Bestuursrecht* plus 4, 30 November 2000, 138-152.

³⁵⁶ A.R. Hartmann & H.J.B. Sackers, *bestuursstrafrecht*, 2016. DD 2016/20.

administrative fine is used for complex infringements and the height is increased drastically, the legal protection should be increased. How the legislator wants to 'upgrade' the legal protection is left to the legislator.³⁵⁷

Administrative law is first and foremost the protection of citizens from a government intervening too much in their affairs. The Member States cannot impose sanctions as they please without giving the citizens the legal means to combat the decision to impose certain measures that affect them. The following paragraphs will not go into the actual procedure and how to battle decisions under Dutch law, but will only focus on the rights of whom receives a sanction from the NVWA. These rights are, the right to be heard, the right to access to relevant documents, the right to sufficient time to prepare a defense and the right not to incriminate oneself. The right to legal assistance will not be discussed.

Right to be heard

The Court already in 1974 ruled; "that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known".³⁵⁸ When sanctions are imposed, especially fines or other monetary penalties the right to be heard must be observed.³⁵⁹ The right to be heard is important for both the citizen and the authority, the citizen can make his/her view on the case clear and the authority can with this information make a full assessment of all relevant factors. The rights of the whom it concerns have to be respected, even if the authority enforces Union Law. When authorities adopt and implement measures from EU law, either Directives or Regulation the authority has to respect the rights of whom it concerns.³⁶⁰ The right to be heard can be restricted in the light of national security or terrorism, for as long as the effectiveness of the measure will be compromised by the hearing of whom it concerns.³⁶¹

Next to the right to be heard, whom it concerns should be able to access all incriminating evidence or non-incriminating evidence that led to adopting the measure. All documents and observations that will or can be used in court to influence the initial decision should be accessible for whom it concerns. Without adequate access the civilian cannot assess his chances in court and cannot prepare a defense, in essence infringing the fundamental right to an effective legal remedy.³⁶² The NVWA will create a report of findings (*rapport van bevindingen*) in which all relevant documents are present. The person receiving the fine can assess this report and can battle the decision to impose a fine.³⁶³ The right to be informed also includes knowledge of the intention to fine. This obligation derives from competition law Cases, but nonetheless create this obligation for authorities to inform the whom it concerns of the intention to fine. In Competition Law the Court went as far as to deem a fine by the Commission without informing whom it concerns to be unlawful.³⁶⁴

The right to sufficient time to prepare a defense

Even with access to all relevant documents, time is required to prepare a defense in case of an in your view unlawful or wrong measure. The more complex the case and the higher the fine, the more time is required to prepare an adequate defense. It is difficult to give a number of days that is sufficient to prepare your defense, given the difference in size and complexity of the cases. In the *Sopropé* case the CJEU ruled that fifteen days were adequate opportunity for a taxpayer to exercise his right to a hearing. The Court took into account that the whom was sanctioned was a professional.³⁶⁵ In the Netherlands, the period to oppose the decision in first instance (*bezwaar maken*) is six weeks, so well above fifteen days.

³⁵⁷ Afdeling advisering van de Raad van State, *Analyse van enige verschillen in rechtsbescherming en rechtspositie van de justitiabele in het strafrecht en het bestuursrecht*, Stcrt, 2015/160.

³⁵⁸ Case 17/74 (*Transocean Maritime Paint Association*) in literature referred to as the *TMP* case.

³⁵⁹ Case 85/76 *Hoffmann-La Roche*.

³⁶⁰ Case C-28/05 (*Dokter*) and Case C-349/07 (*Sopropé*).

³⁶¹ Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and al Brakaat International Foundation v. Council*.

³⁶² Case C-300/11 ZZ paragraph 55-56 and Case C-437/13 *Unitrading Ltd* paragraph 21.

³⁶³ Art.5:48 *Gala*.

³⁶⁴ Joined cases C-322/07, C-327/07 and 33/07 *Papierfabriek August Koehler*.

³⁶⁵ Case C-349/07 (*Sopropé*).

The right not to incriminate oneself

Art. 5:10a Gala contains the right to remain silent. In case a person is punitively sanctioned, the person does not have to make a statement on the infringement. In case of an official interrogation, the right to remain silent will be explicitly mentioned to the person whom it concerns.

This right derives from the presumption of innocents, in literature referred to as *nemo tenetur prodere seipsum*.³⁶⁶ In a Competition Law Case, the CJEU ruled that the Commission cannot oblige a company to incriminate itself. Factual information may be asked, but the company cannot be asked to provide documents or other evidence of their own infringement. The company cannot be asked to provide evidence for future infringements.³⁶⁷ This can prove to be a difficult question because if the company/ person did infringe, how far can you go in asking factual questions on the infringement? One Court case illustrates the border of questions, the *Mannesmannröhren-Werke* Case.³⁶⁸ The Court approved a number of questions the Commission asked the concerning Company because; 'the questions were purely factual' and the 'requests for the production of documents already in existence'. If in an administrative procedure the authority knows of the existence of documents, they can ask whom is sanctioned to provide this information. With Fraud this is a problem, especially when the administration is incomplete or cannot provide a full image of the production of the FBO. If the administration is tempered with, this documentation does not prove the infringement, unless it the administration is produced to prove the administration was not in order.

Notification and cooperation:

For a number of products and actions, a notification to the authorities is required.³⁶⁹ Also in case of infringement by the FBOs. How these procedures are in line with the rights of the FBO is yet to be seen. One could argue that the FBO has to incriminate itself by such notification procedures. In a number of articles related to enforcement, the FBO has the obligation to cooperate with the authorities. This cooperation is obligatory, so although the FBO might not wish to cooperate with the authorities, the FBO has to provide information and work together with the authority and still be fined or the authority taking measures. notification and cooperation in the light of the rights of the defendant/ the FBOs is outside the scope of this research. However, it would be a nice topic for further research.

Consequences of a violation of principles or standards by the authorities

There are a number of cases in which the rights of the person concerned were violated during the process of taking the decision and adopting the measure. The Court never explicitly answered the question what to do in case of irregularities on the side of the authority. There are three options for either the national courts or the CJEU to take when a violation has been established; firstly, the decision is annulled. Secondly the courts can oblige the authority to pay damages to whom the decision concerns. And lastly, the court can assess whether the violations of the rights of whom it concerns changed the outcome of the case. When the outcome would not have been different without the violation, the court can decide that the decision is still lawful, and thus the legal consequences of the decision stay the same. For the time being, the legislator did increase the maximum fines to match the fines in criminal law. However, the rights of the defendant in case of large fines are not increased. Because of a lack in case law there is still uncertainty if this system will be accepted in court.

4.8 In short

There are a number of measures the authorities can adopt to battle food fraud. Enforcement is no longer just a national affair, especially standards and principles following from Case Law of the CJEU establish boundaries for Enforcement measures. Enforcement has to be in line with these principles and standards to be deemed lawful

³⁶⁶ Translation would be: not guilty until proven guilty before court.

³⁶⁷ Case 374/87 Orkem.

³⁶⁸ Case T-112/98 Mannesmannröhren-Werke.

³⁶⁹ Either pre-market approval procedures or obligatory notifications of specific products.

before a court. From EU and national Case law questions can be raised to the lawfulness of the choice for the increased administrative fine in case of food fraud. The Administrative fine was deemed the measurement of choice of the legislator, in case there was no direct risk for consumers. The administrative fine was increased drastically and is now connected to the height of criminal penalties. These questions mainly concern the proportionality, the *ne bis in idem* principle, the rights of the violator and the tailor made criterion from national law. However, because of the relative short period of time between the implementation of the increased administrative fine, no Case Law is yet available, but from the existing Case Law it is clear that it will not be easy to defend the authority in case of adoption of an administrative fine of € 820.000, -.

Chapter 5 enforcement measures Criminal and Private Law

The NVWA can impose measures on the basis of Administrative Law, the competence for enforcement follows from the Commodities Act. Food Safety norms are of an administrative nature, the NVWA has both the competence and the means to enforce. However, there are other legal ways to enforce, not always initiated or even executed by the NVWA. This chapter will elaborate on those means and the place of the NVWA in case of enforcement by these means. Already in the previous chapter Criminal Law was touched upon to provide a possible remedy for the infringement. In the coming chapter the measures available from Criminal Law will be discussed. Next to Criminal Law, Private Law can potentially provide (part of) the remedy, and will be elaborated on.

5.1 Intervention policy NVWA

The NVWA has an intervention policy in which infringements are classified from class A to D.³⁷⁰ This policy creates a framework for enforcement; when to use what measure? The policy is not set in stone and there are circumstances in which the NVWA can deviate from the policy, but this policy is the starting point to assess which measure to adopt.³⁷¹ Next to which measures and what consequences the infringement brings³⁷², the role of the NVWA is discussed, not in all categories the NVWA will be the sole administrative body dealing with the infringement.

Fraud and misleading practices are closely related, in the intervention policy they are separated and classified differently. This deviates from the draft guidance documents on the increase of the administrative fine, where both fraud and misleading practices are deemed similar in nature.³⁷³ Misleading practices are specified and classified as either class B or C depending on the nature of the misleading behavior. For instance, unclear or incomplete nutritional information is class C, whereas using unauthorized health claims is class B. Fraud is deemed the worst infringement, and is qualified as class A. However, all fraud is deemed class A and fraud is not elaborated on.

“Punishable or criminal conduct that is of complex nature and/or can have large effects. These infringements clearly damage the society as a whole. Using measures found in Criminal Law is required.”^{374,375}

Fraud should thus be battled using means for Criminal Law.³⁷⁶ The intervention policy does not state how to battle fraud, only that it is in the line of reasoning to enforce on the basis of Criminal Law. The NVWA is the authority to find food fraud, but the sanctioning should be done using means from Criminal Law. The NVWA in its intervention policy stated a contrario; the NVWA will not make use of the administrative fine to battle food fraud, but the legislator deemed this measure appropriate to battle fraud. If this intervention policy will be adapted to use the administrative fine, instead of enforcement on the basis of Criminal Law, is not yet clear.

³⁷⁰ A being the ‘worst’ category, being complex and severe to D being the lightest infringement.

³⁷¹ <https://www.nvwa.nl/onderwerpen/toezicht-nvwa/dossier/interventiebeleid/afhandeling-overtreding-per-klasse>.

³⁷² In the table on the site (page in the previous footnote), the NVWA elaborates on the sanctions when the infringement happens the first time; if there will be a follow up and what will be done when the infringement is structural of nature.

³⁷³ Concept - Besluit wijziging van het Warenwetbesluit bestuurlijke boeten in verband met het stellen van regels over de omzetgerelateerde boete, p 1-2.

³⁷⁴ Citation class A, accessible at: <https://www.nvwa.nl/onderwerpen/toezicht-nvwa/dossier/interventiebeleid/indeling-overtreding-in-klassen>.

³⁷⁵ *“Beoetbare of strafbare feiten die naar hun aard en omvang complex zijn en/of grote effecten tot gevolg kunnen hebben. Daarbij is meestal sprake van overduidelijke schendingen van de rechtsorde. Strafrechtelijk optreden ligt in de rede”*

³⁷⁶ It does not explicitly state that Administrative Law is not applicable or should not be used, but the emphasis is on Criminal Law.

5.2 Criminal Law

As stated in the previous chapter, whether a Member State chooses to 'use' Criminal Law or Administrative Law to enforce is up to the Member State. Criminal law is foremost national law, there is Case Law of the ECJ and the ECHR that influence all Criminal Law within the EU, but this Case Law is outside the scope of this thesis. Before going into the individual measures, two Dutch national cases to illustrate how the courts look at food fraud. In both cases the suspects were condemned to pay fines, because of infringement of Art. 225 PC. The content of that article is already discussed in paragraph 1.5, the articles 174 and 175 will be elaborated on later in this chapter. Enforcement through prosecution under the articles in the PC means administrative sanctions of a punitive nature can no longer be used. Important to note is that a sanction on the basis of these articles adopted, a judgement from the criminal court is needed, unless it encompasses a punishment order which will be elaborated on later in this chapter.

Court of appeal Arnhem 15-06-2012³⁷⁷

The suspect was prosecuted and condemned for on a number of occasions falsifying invoices. The falsifying concerned the naming of the meat on the invoices, on the invoices the word meat scraps was used. These were in fact no meat scraps (for use in mincemeat), but were batches of meat no longer fit for human consumption. The suspect was convicted for her role in falsifying the invoices.

What is interesting in this case is the fact the criminal court condemns not only the company itself, but an individual employee because of the falsifying of the invoices. The final sanction was imprisonment for 12 months, of which 6 months' conditional. The most important paragraphs are cited in the footnote.³⁷⁸ The court deemed this sanction as fitting and needed in the light of the circumstances. The fraud was on a large scale and the suspect was condemned for fraud on nine occasions. The suspect did create unsafety by selling pieces of meat that were unfit for human consumption as 'safe' meat. On the other hand, the court did rule a custodial sentence was fitting and needed.

Court of appeal 's-Hertogenbosch (Halal Case)³⁷⁹

The suspect imported horsemeat from Brazil and Mexico, for a period of two years. This meat was stored and sold as being halal beef, on paper, to a slaughterhouse in Amsterdam. This company could then get certain forms that were required to sell the meat to France. By selling the meat only on paper to the slaughterhouse in Amsterdam, the company could sell the meat as halal beef. Next to horsemeat from Brazil and Mexico, a similar construction to sell horsemeat as halal beef was done through Germany. During the procedure it was not proven that the company profited from selling of the meat of falsified origin. The court took into account a number of elements. After the meat (falsified origin) was sold, it is unclear what happened to the batches. The court assumed therefore that the meat did reach the final consumer, but that does not prove under which name or qualification the meat was sold to the consumer. The court also takes into account that a direct risk to the health of consumers was not proven. The most important paragraph is cited in the footnote.³⁸⁰

³⁷⁷ Gerechtshof Arnhem 15-06-2012, case number 24-002928-09, Accesable at; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARN:2012:BW8509>.

³⁷⁸ *"De hierna te melden strafoplegging is in overeenstemming met de aard en de ernst van het bewezenverklarde en de omstandigheden waaronder dit is begaan, mede gelet op de persoon van verdachte, zoals van een en ander bij het onderzoek ter terechtzitting is gebleken. Het hof heeft bij de straftoemeting in het bijzonder in aanmerking genomen -en vindt daarin de redenen die tot de keuze van een deels onvoorwaardelijke vrijheidsstraf van de hierna aan te geven duur leiden- de navolgende omstandigheden."*

³⁷⁹ Gerechtshof 's-Hertogenbosch, 02-05-2013, case number; 20-000388-12, accesable at; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSHE:2013:BZ9218>.

³⁸⁰ *"Verdachte heeft door zijn handelwijze de werkelijke aard en herkomst van het vlees dat hij verhandelde verhuld. Verdachte heeft hierdoor meegewerkt aan de mogelijke misleiding van consumenten en bemoeilijking van de traceerbaarheid van de herkomst van het vlees. Dat laatste brengt in het bijzonder risico's met zich mee wanneer dierziektes of ziekteverspreiders*

The court did differ in opinion on the punishment of the suspect. The court in first instance and the advocate general were in favor of a severe punishment because of the seriousness of the violation. The court ruled differently due to the fact that large profits were made because of falsifying was not proven. The court only followed the argumentation that the assumption could be made that the meat was consumed, and the likelihood that by doing so the consumers were misled. Taking these elements into account the court found a high monetary fine as adequate punishment. The suspect got a conditional confinement next to the fine.³⁸¹

The horse meat fraud

A number of cases concerning mainly the fraud by the company Willy Selten B.V. have been brought before a court. Not only the decision to take measures was contested, the owner Willy Selten was criminally prosecuted. The third court case was Foodwatch v. the NVWA on a question of openness. Only the parts of the jurisprudence that concerns food fraud are discussed.

High court 20-12-2013³⁸²

Multiple batches of meat were seized that derived from the slaughterhouse of Willy Selten. The seized products were not released. The court ruled; it is not unthinkable that within the company Selten the course of business was to buy un-documented meat which is mixed with meat produced by certified EU-slaughterhouses. It cannot be proven that one of the batches is as a whole produced in a certified EU-slaughterhouse. The safety of these batches is not proven, the batches are considered unsafe on the basis of Art. 14 GFL. No risks can be taken that potentially constitute a risk to food safety. *"A risk for the food safety is clearly present."*³⁸³

Court in first instance East-Brabant, 07-04-2015³⁸⁴

An economic incentive was the only motivation for the fraudulent behavior. The horse meat only provided only a small part of the total turnover, but none the less the suspect mixed the horsemeat with beef fat to sell the batches as more expensive beef. The suspect has in this way saved on his expenses (buying cheaper meat) and sold the pieces for a better price than he would have gotten with horsemeat. The profits from the fraud were limited, still the court ruled that the suspect did commit fraud by facilitating the fraud for a period of two years in which he was the supervisor in the company.

In adopting the punishment, the court took into account that both his businesses went bankrupt and the possibility of a large board liability claim because of the function of supervisor within the company. The final verdict was 2,5 years' imprisonment.

Court in first instance Amsterdam, 02-12-2015³⁸⁵

Foodwatch demanded openness on which companies were supplied by Selten. To get this information Foodwatch filled an official request for these data. This request was rejected, Foodwatch fought the decision to not provide the

aanwezig lijken te zijn en de bron snel moet worden gevonden. Ongeacht of de bedrijven zouden meewerken aan de opheldering over de herkomst van het voedsel, zou een eerste vermoeden van de herkomst gebaseerd worden op onjuiste informatie."

³⁸¹ The court deemed conditional confinement needed for special prevention of this behavior.

³⁸² College van Beroep voor het bedrijfsleven, 20-12-2013³⁸², AWB 13/886 AWB 13/887 AWB 13/888 AWB 13/912 AWB 13/956, accessible at; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CBB:2013:280>.

³⁸³ Paragraph 9.

³⁸⁴ Court in first instance Oost-Brabant, 07-04-2015, 01/997004-13 accessible at; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBOBR:2015:1954>.

³⁸⁵ Rechtbank Amsterdam, 02-12-2015, AMS 14/6213, accessible at; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2015:8599>.

relevant data on suppliers of the slaughterhouse. The court ruled that the information on suppliers should be provided because without this information it is impossible to assess for third parties to what extent the NVWA uses the available legal means to battle the infringement. This case is a development that is not to be underestimated, if all suppliers and customers of a FBO that committed fraud will be known, their reputation can be tarnished.

5.2.1 Other articles in the PC connected to fraud

Next to falsifying documents³⁸⁶, the PC also contains articles on behavior that creates risk for consumers. The scope of the article is broader than foodstuffs, also encompassing Commodities not being food, only food will be discussed. Where the GFL encompasses a more formal approach to food safety, the articles in the PC only refer to the material risk. Material in this sense means there is not only a risk but also caused factual damage already.

The unsafety of the products can be 'solved' in the process of producing the final product. For instance, raw chicken meat can have large amounts of salmonella on its surface, which would be a risk to consumers. If this chicken meat is heated properly during a production step, the risk of salmonella poisoning is negligible. Another element is the deceiving, either intentionally or not intentionally. If the consumer would know of the 'risky' nature of the foodstuff and would still consume the product, then that behavior is outside the scope of the article. The sales of dangerous commodities in itself is not within the scope of the article, not even if the seller knows of the dangers. The element of deceiving is the final element that has to be proven for the behavior to be punished under the article. The difference between article 174 and 175 is that 174 is on the basis of actively causing damage (intentionally), whereas article 175 refers to the situation the foodstuff brought on the market caused damage, but the seller was not aware of the risks. The element of knowing the dangers of the actual foodstuff can be hard to prove, the official charge will therefore often contain 174 as first and secondary 175, to ensure that the suspect can be convicted even if this element cannot be proven. The maximum sanction in 175 is lower.³⁸⁷ The difference with falsifying documents and articles 174 and 175 is that the focus is on the documents or administration as opposed to the actual products.

Combination of Criminal Law and Administrative law

Regarding Food Fraud, articles 174 and 175 can be used as basis for criminal prosecution. The problem however is that the foodstuff should have already caused damage. This would be far too late to intervene; the health of the consumers is already affected. If measures need to be taken after the danger becomes clear (damage has been done to some extent) the articles can be used to start the prosecution of the responsible within the FBO. When adopting both enforcement action to close the FBO, ordering a recall and penalizing the responsible; the enforcement is in line with the severity of the violation. Willingly and knowingly putting dangerous foodstuffs on the market is from a food safety point of view the worst crime one could commit.³⁸⁸ Enforcement that intervenes with the business, ensures removal from the market as well as punishment of the responsible is proportionate. The advantage of using Criminal Law is that the criminal courts can adopt punishment in the form of imprisonment, instead of only a monetary sanction. So instead of only focusing on the company, individuals within the company can be prosecuted to deter infringement. However, the criminal court will decide on the height of the sanction, the OM will not be able to set the sanction. This is different from an administrative fine or punishment order in which the initial sanction is set by either NVWA or another administrative body.³⁸⁹

³⁸⁶ Art. 225 PC.

³⁸⁷ The maximum penalty is prison sentence of 1 year or a fine of the fourth category, unless the consumer dies, than the maximum imprisonment is increased to two years.

³⁸⁸ In the intervention policy of the NVWA, Fraud is classified as the worst category.

³⁸⁹ The height of the penalty can be decreased in court, but in case of no heavy weighing circumstances to lower the fine or no protest against the fine, the initial height will be enforceable.

5.2.2 The punishment order

The punishment order is a special measure in Criminal Law that can potentially replace the need for an administrative fine to sanction fraudulent behavior. Every infringement can be punished with a punishment order as long as the infringement is punishable under Criminal law. The sanctions adopted on the basis of a punishment order can encompass a fine, but also other sanctions.³⁹⁰ As described above the articles in the PC that can be linked to fraud come very close to the definition of food fraud and might prove to be enough ground to fine the violator on the basis of the punishment order. 'safe' food fraud can be linked to falsifying documents, and unsafe to either Art. 174 or 175, depending on the situation. But before drawing such conclusion, an elaboration will be provided on the framework and background of the punishment order.

The legislator initial plan was to use the administrative fine in small cases of infringement, creating an effective and relatively quick mean to battle infringement. The Administrative fine would only be applicable for relatively simple infringements and only encompasses small fines. The Criminal sanctioning system should be available for those cases in which the cases were more complex or in case the fine would be substantially higher.³⁹¹ The developments of the administrative fine (as described in chapter four) is not in line with the initial meaning of the legislator. The legislator can have a change of heart, but in the guiding documents on the developments regarding the administrative fine, this change of heart is not addressed specifically.³⁹² The systems (administrative and Criminal) developed individually, not together.³⁹³ The initial idea of creating a system where the administrative fine is used in case of 'light' infringement, where criminal law would be used for the more serious infringements. The developments in administrative law however, showed a different motivation. Driven by the scale of infringement and the potential profits of noncompliance the legislator created what some writers refer to as Punishment Administrative Law. This 'system' was created to be used as it is, not in combination with the means from Criminal Law, thus creating a sort of secondary Criminal Law.³⁹⁴

The punishment order is a decision taken on criminal law basis to similar to the administrative fine adopt a measure without judicial intervention. The courts can be involved if the infringer protests against the punishment order within the appeal period. The sanction is enforceable when the violator did not protest in time or at all.³⁹⁵ This system reduces the work load for both prosecutor and Criminal courts, and is seen as a mean to increase efficiency.³⁹⁶ If the violator appeals and the decision is brought to court, the court will assess the facts and the sanction in full, not only the decision. The punishment order as well as the administrative fine are means to deal with infringement without having judicial intervention (necessary). The punishment order opens the possibility for administrative bodies to use their knowledge, because the punishment order can be adopted by administrative bodies. The argument for administrative fines because of the specialized knowledge of the body enforcing, has lost much of its power because the body can also adopt a punishment order (as long as the infringement is punishable under the PC).

³⁹⁰ Art 257 SV, the punishment order can also encompass a taakstraf and rijontzegging. These sanctions are not relevant for battling food fraud, therefore will not be elaborated on more.

³⁹¹ Jean-Paul Heinrich, Marije Batting & Reimer Veldhuis, *Handhaving*, 2015.NTB 2015/45, p. 10.

³⁹² In the 'concept - Besluit wijziging van het Warenwetbesluit bestuurlijke boeten in verband met het stellen van regels over de omzetterelateerde boete' the legislator does not specifically address this issue.

³⁹³ A.R. Hartmann, *Strafbeschikking en bestuurlijke boete: wildgroei in de handhaving?*, 2005. Justitiële verkenningen, jrg. 31, nr. 6, 2005.

³⁹⁴ R.C.P. Haentjens en J.A.W. Lensing, *Bestuurlijk (en commuun) straff en: tegengestelde tendensen?*, 2015. Trema October 2015.

³⁹⁵ Art. 257.1e Wetboek van Strafvordering.

³⁹⁶ A.R. Hartmann, *De bestuurlijke strafbeschikking: panacee voor de gemeentelijke handhaving*, 2010. PROCES 2010 (89) 2, p. 67-68.

Appeal period

For both the administrative fine and the punishment order there is an appeal period in which the violator has to take action, if the violator does not the fine/order is enforceable. The maximum period to take action however differs. In case of an administrative fine, the period to take action is six weeks³⁹⁷, the period for action in case of a punishment order is two weeks. There are exceptions to this two weeks' period for certain offences and above a maximum height. In the legislative history the period of appeal was discussed and eventually two weeks was deemed sufficient. The measure of administrative fine and punishment order is closely related and can amount to the same penalty, it is therefore needed that the appeal period for a punishment order adopted by an administrative body should be the same as it would be in case of an administrative fine.³⁹⁸

The punishment order, solution for food fraud?

Every infringement can be brought under the punishment order as long as the behavior is punishable under the PC. For food fraud the three articles described above are the most important. Food fraud is punishable under the PC, whether it is 'safe' or 'unsafe' food fraud. If the Safety of consumers is jeopardized, Art. 174 and 175 can be the basis of the punishment order. With 'safe' food fraud, so no safety risk, the infringement is punishable under the falsifying of documents. By having the legal protection, the Criminal Law provides, the main arguments against the use of the increased administrative fine are no longer valid. A potential problem however is that the cost to enforce should be paid to the administrative body that made these cost. Art. 576a should provide for a system in which the administrative body can claim a reasonable amount of the fine that they send on enforcement (in the broad sense), to ensure the administrative authority has the means and can effectively enforce.³⁹⁹ If there would not be such a system, administrative bodies might not want to use the punishment order, but will rely more on the administrative fine. The two systems should form one system where the administrative fine can be adopted to battle relatively light and simple infringements, in case of either more complex infringement or the need for high fines; the punishment order should be used. The problem is that there is not enough coordination between the NVWA and the OM. The draft decision on turnover based sanctions in the Commodities act, see paragraph 4.5 under Tailor made administrative fine in case of food fraud, only in one sentence refers to this collaboration.⁴⁰⁰ This should be laid down in policy to create a transparent and clear overview of what infringement should be battled with what sanction. This could also be said for the other specific laws in which the administrative fines where or are about to be drastically increased.

There are some complications; a punishment order can only be adopted if the sanction under the PC is not higher than six years' imprisonment. For both art. 225 and 175 that is not a problem.⁴⁰¹ The maximum sanction for art. 174 is fifteen years, so well above six years. This article cannot provide the basis in Criminal Law that is necessary for a punishment order to be adopted. Art. 175 PC is applicable in a situation where the risk in the food materialized and thus consumers already suffered the consequences of consumption. In the documents described in paragraph 3.4 under tailor made fines, food fraud that actually caused damage to the health of consumers should be exclusively the competence of Criminal Law, and a normal criminal procedure is necessary.⁴⁰² In such case a punishment order is not an effective remedy because of the severity of the infringement.

5.3 Economic crimes

³⁹⁷ Art. 6:7 GALA.

³⁹⁸ A.R. Hartmann, De bestuurlijke strafbeschikking: panacee voor de gemeentelijke handhaving, 2010. PROCES 2010 (89) 2,.

³⁹⁹ A.R. Hartmann, De bestuurlijke strafbeschikking: panacee voor de gemeentelijke handhaving, 2010. PROCES 2010 (89) 2, p. 74.

⁴⁰⁰ The translation is; there should be a good coordination between the NVWA and the OM. There is no mentioning of timeframe, topic, or even a suggestion on the how.

⁴⁰¹ In both articles the maximum penalty is not in excess of 6 years.

⁴⁰² Concept - Besluit wijziging van het Warenwetbesluit bestuurlijke boeten in verband met het stellen van regels over de omzetgerelateerde boete.

Food fraud can also be considered an economic crime, see paragraph 1.6. On the basis of the ECA fines can be adopted. The Commodities Act still contains an article that refers to the ECA;

Freely translated as; If on the basis of the crime act higher fines are possible for the same infringement, the fine on the basis of the ECA should be adopted.⁴⁰³ This system predated the drastic increase in administrative fines. By increasing the maximum penalties beyond the maximum height in the ECA, this article has lost (part of) its function, because the fines in the Commodities act are higher than in the ECA. The ECA can still be of value to evaluate proportionality of the administrative fines, one could see these fines in the light of fines that are possible under the ECA.⁴⁰⁴

Art. 1 and 1a ECA contain a list of infringements of legal standards which are also considered a crime under the ECA. Infringement of standards found in articles 1a, 4-11, 11a, 13-20, 21, 21b, 26, 21,27,30, 31 and 32k Commodities Act are considered violations under the ECA.

History of the ECA

The legislator decades ago, elaborated on the problem of enforcement on economically motivated infringement. The legislator in the legislative history already pointed at all the problems that are now being solved by increasing the administrative fines. It is therefore interesting to look at this history to look for answers to the current problems and to look if the ECA can provide measures that can be deemed adequate to battle food fraud. Formulated in the legislative history is the core of the problem.⁴⁰⁵

The main elements of the sanction for an economic crime consists of a swift and deterrent punishment and a way to nullify the profits of the infringement. The legislator chose for the criminal courts to be competent to enforce the ECA because of general preventive effect. The criminal courts have the expertise to deal with economic crimes. Similar arguments are used to underpin the administrative fine. The high punishment in the ECA was underpinned with the argument that in economic crimes the profit margins can potentially be very big, in case of light punishment, the violator could make a calculation of the costs and benefits of infringement. Next to high punishment, in the ECA sanctions are simplified and unified (as opposed to the more complex PC), one of the arguments for this was that big economic crimes are committed by people with money who will make use of every loophole. Strict procedural rules would benefit those parties in finding ways to escape punishment.⁴⁰⁶

Food fraud is an infringement of the commodities act, under the ECA infringement of certain articles or delegated acts setting rules on certain topics is considered a crime.⁴⁰⁷ A criminal court can punish this infringement with imprisonment up to six years or a fine of the fifth category.⁴⁰⁸ The monetary fine is similar to the maximum set for administrative fines, but administrative fines cannot encompass imprisonment. The violation is sanctioned under Criminal law, so the rights of the defendant are guaranteed. The system is already in place for decades and functions. It would therefore be a valid option to use Economic Criminal Law as the basis for punishment of fraud. This would be in line with the current intervention policy of the NVWA.

5.4 Private Law

⁴⁰³ 32a Commodities Act.

⁴⁰⁴ The maximum penalties under the ECA are relatively high and can be adopted for infringement of certain legal standards, food fraud and misleading practices are punishable under the ECA.

⁴⁰⁵ "De in omvang en maatschappelijke betekenis steeds toenemende wetgeving op het terrein van het economische leven is van de aanvang af in haar werking belemmerd, doordat handelingen verricht in strijd met haar voorschriften niet met voldoende snelheid en gestrengheid warden gestraft." R.M.J. de Rijck, *De geest van de WED : strenge straffen en publiek normbesef*, 2016. Tijdschrift voor Sactierecht en onderneming, Nr. 1 februari 2016. p.6.

⁴⁰⁶ R.M.J. de Rijck, *De geest van de WED : strenge straffen en publiek normbesef*, 2016. Tijdschrift voor Sactierecht en onderneming, Nr. 1 februari 2016, p. 7-12.

⁴⁰⁷ The ECA refers to the more general standards in the Commodities Act, food fraud violates these general requirements, and thus the ECA is applicable.

⁴⁰⁸ Art. 6 ECA.

The NVWA and the OM are not the only relevant stakeholders in the battle against food fraud. As described in chapter one, if one FBO in the supply chain is linked to fraud, the entire chain or even the whole sector can feel the consequences of such infringement.⁴⁰⁹ The FBOs as being one of the stakeholders has means to battle food fraud on the basis of private law, opposed to the NVWA and the OM. Two separate relations can be the basis of this enforcement, the FBO is certified or a certain standard or the FBO is either a supplier or a customer of the FBO that committed the fraud.

Enforcement of companies certified for a private standard

Being certified for a certain private standard would mean nothing if the private standard did not prescribe rules to the certified FBOs. These rules are private regulations and will not be enforced by the authorities.⁴¹⁰ It is possible that there is an overlap between administrative norms and the private regulations, but then the authority will only enforce on the basis of administrative norms, private regulations are enforced by private parties. These private regulations in a legal sense are a contract between the certification owner and the FBOs certified for this private standard. The private regulations therefore have to contain the sanctions to punish infringement, or the framework for either breach of contract or tort law applies.⁴¹¹

Private regulations are created to set standards next to already existing legal standards, if these were not enforced the certification would amount to nothing. The FBOs that want to have certification have to pay a fee and will be audited by either the certification owner or a third party on compliance with the standard. Audits and possible supervision systems in place ensure the FBOs certified comply with the rules laid down in the standard.⁴¹² If they do not, there are a number of ways the noncompliant FBO can be punished. The first being a monetary fine, which is different from the administrative fine or punishment order. The fine is imposed by the certification holder and will not easily be lowered by a civil court.⁴¹³ The FBOs certified for the private standard agree upon this way of punishment and are therefore informed and have agreed upon the consequences of infringement. Next to a monetary fine, some private standards encompass the option to exclude or expel the FBO from the certification scheme, factually meaning the FBO will lose the right to use the certification of the certification owner. This can mean factual bankruptcy of the FBO, because it might not be able to supply their customers because these customers require certain certification.⁴¹⁴

Food fraud is a topic that is regulated poorly on national level and European level, private standards can create a framework for this and make sure that misleading and fraudulent practices within the food chain should be prevented as much as possible. By setting high penalties with big consequences for FBOs, the NVWA can be assisted in their battle against food fraud by the sector itself. The information from official controls and audits within the certification scheme should be shared to ensure enforcement of food fraud. The information within the chain can supplement the information the authorities already has. Perhaps in the future the enforcement can be coordinated not only between the NVWA and the OM, but also involve the chain itself.

5.4.1 Board liability

⁴⁰⁹ Francesca Lotta and Joe Bogue, *Defining Food Fraud in the Modern Supply Chain*, 2015. *EFFL* 2, 2015, p 120.

⁴¹⁰ Paul Verbruggen, *Regulatory governance by contract: the rise of regulatory standards in commercial contracts*, 2014. *Recht der Werkelijkheid* 2014 (35) 3.

⁴¹¹ The law does not contain standard sanction for breach of contract. In private standards the standard owner can take up possible penalties or sanction that follow infringement of the standards. By agreeing to the terms of the private standard, the FBO is bound by the contract and can be sanctioned in the way the FBO agreed on.

⁴¹² Busch L., *The private governance of food: equitable exchange or bizarre bazaar?*, 2011. *Agric Hum Values*. 28.

⁴¹³ By having the certification, the FBO agreed to the 'terms of use', which includes sanctions. In Dutch national law there are only two exemptions to the validity of a contract (assuming the contract was not agreed under pressure or in another way invalid), the contract is a violation of the law (contract to supply firearms to a consumer), or the contract is invalid on basis of morality.

⁴¹⁴ Spencer Henson, Thomas Reardon, *Private agri-food standards: Implications for food policy and the argi-food system*, 2005. *Food Policy* 30 (2005).

When fraud is committed the company or individual in the company can be sanctioned under both administrative and Criminal Law, but private law might provide another mean of enforcement. Board liability is derived from the responsibility of the board of a company, they are the ones pulling the strings and taking the decisions on the functioning of the company.⁴¹⁵ However there is a second form of board liability, the external liability in case of bankruptcy of the company. If fraud is committed in the company either initiated from by the board or fraudulent behavior is not corrected from the top, the board is facilitating fraud and could therefore potentially be held liable. In the past years' case law broadened the scope of board liability in the Netherlands. Board liability is an option for other FBOs that have suffered from the fraudulent behavior of the FBO concerned to fully or partially be recompensed for their damages.⁴¹⁶ Board liability can be seen as a private repair sanction, the damage suffered can be compensated, but more importantly the board liability has a preventive effect. If members of the board know that they can be held liable personally for damage suffered by a third party, they will think twice before facilitating fraud. There are some writers who oppose the idea of board liability because it will scare the entrepreneurs to take radical decisions and therefore maybe halt innovations.⁴¹⁷

Internal board liability

For board liability to be applicable the person should show behavior that can be linked to the management of the company. Only when the person acts as being a member of the board (or factual supervisor) the board liability is an option. Individual employees who do not have the position in the company to pull the strings are not within the scope of board liability. Not every action of a board member is considered to be an action as a board member.⁴¹⁸ The action is considered an action of a board member if the action is a decision concerning the company or the implementation of such decisions. The function as described in law and in the statutes of the company are also important to assess if the person took an action as a board member. There has to be a link between the damage and the action, or negligence of the board member.⁴¹⁹ The central element in the assessment is the element of culpability. In assessing if board liability is applicable, the court (civil) should take all circumstances into account. This means all elements to the behavior have to be weighted, also taking into account the nature, severity, frequency of the infringement, as well as the culpability. The character of the culpability is a mix of these elements and is referred to as having a composite character.⁴²⁰

In the assessment of culpability, all circumstances have to be taken into account, even if the behavior is a direct violation of company policy or the task that as described in the statutes of the company.⁴²¹ If a board member would infringe the law in his/her actions, the infringement is assessed in the light of Art. 2:9 Civil Code.⁴²² Fraud is a serious infringement of legal standards and therefore in principle enough to constitute culpability of a board member, even if the statutes or company policy do not contain rules on fraud. Fraudulent behavior is not in the best interest of the company, there is a realistic chance the company will go bankrupt after fraud is discovered. The possibility of successfully claiming board liability can be a mean for third parties to recover (whole or part of) the damage suffered from the fraudulent behavior.

The possibilities to effectively claim damages under board liability are increased in case law. Not only board members (formal) can be held liable, employees that take decisions or actions as if they are board members can suffer the same fate. The criterion for assessing whether a non-board member can be seen as a de facto board

⁴¹⁵ Art. 2:9 Civil Code.

⁴¹⁶ Board liability can be used to place a personal liability on a person, not being the company. In some cases, the company will go bankrupt after the fraud is discovered, then it is difficult to get compensation of damages. By opening the possibility to directly claim the damage from the person, the damage might still be compensated even in case of bankruptcy of the company.

⁴¹⁷ Risk and profit go hand in hand (or high risk, high reward) is a commonly used sentence to summarize why companies are willing to take risks.

⁴¹⁸ A. Karapetian, *Bestuurdersaansprakelijkheid na Van de Riet/Hoffmann: over hoe het is, hoe het was en zou moeten zijn*, 2015. WPNR 2015(7052).

⁴¹⁹ Art. 2:9.2 Civil Code.

⁴²⁰ Hoge Raad van 5 september 2014, *NJ* 2015, 22 (RCI).

⁴²¹ HR 29 november 2002, *LJNAE*7011, *NJ* 2003/455 (*Berghuizer Papierfabriek*)).

⁴²² HR 2 maart 2007, *LJN* AZ3535, *NJ* 2007/240 (*Nutsbedrijf Westland*)).

member is; did the person have an important influence on the companies' policies and or day to day operation. If a board member is assisted by another employee, but his individual employee has an important influence on the policy and the operational management, the employee can be qualified as behaving as a board member and can therefore be held liable for damage suffered because of the decisions taken. The court in this case ensured that board members cannot hide behind formal requirements for board members, but that the factual power within the company can be taken into account.⁴²³

External board liability

Board liability can reach even further than being held liable for the direct damage of third parties; it comprises the complete amount of debts of the company, including the costs of bankruptcy. Under certain circumstances the board members can be held liable for all financial shortcomings of the company in case of bankruptcy. This type of board liability is commonly referred to as external board liability; the legal framework can be found in Art. 2:248 Civil Code. External board liability is only applicable in case of bankruptcy of the company. The board member can be held liable in case three elements can be proven: <I> bad governance, <II> the activities of the board member have taken place in three years from the moment of the bankruptcy, and <III> these activities contributed in an important degree to the bankruptcy. Keeping a correct administration is one of the core responsibilities of the board. An incorrect or lacking administration can be viewed as a bad governance. Assuming the fraud took place in the years previous to the bankruptcy the only element that has to be proven is the causal relation between the bad governance and the bankruptcy. A board member can also provide the evidence another factor drove the company to bankruptcy to avoid being held liable (under Art. 2:248 Civil Code). External board liability is more difficult to prove than internal board liability, but the potential reach of liability is greater in case of external board liability.⁴²⁴

Could board liability be the answer to the question how to battle food fraud? Yes, but it can only provide some protection. The preventive effect of the board liability will ensure board members think twice before committing fraud. Board members will have to be more vigilant and might be pursued more easily to take action in case of fraudulent practices. The developments in Case Law created the means to also claim board liability from the person that runs the place, even if that person is not officially registered as being a board member.

Other private means

FBOs, other companies or individual citizens can have damages from fraud. This damage can be caused by the fraudulent behavior of the FBO. The administrative or criminal sanctioning of this FBO will not diminish the damage of the 'victims', the payment of fines is not to the victims of the infringement. Above the Framework for board liability is described to illustrate how this type of liability might provide a solution (to a certain extent) of the damages from the fraudulent behavior of the third party. Next to board liability, tort law and liability can both provide the means to individuals or companies to get compensation for the damage suffered. The subject of tort and liability law are very broad and are not within the scope of this research, therefore will not be elaborated on more, it would however be a nice topic for a research on food fraud from the private law perspective.

5.5 In short

Enforcement on the basis of Criminal Law and Economic Criminal Law has the merit of providing better protection of the violator, and can be the basis of punitive sanctions similar to administrative fines under the Commodities Act. Sanction on the basis of Criminal Law can encompass both fines and imprisonment. Private Law measures are not imposed by the NVWA but can have a preventive effect, and hurt those companies that infringe. Board liability can provide a preventive effect and a mean to get compensation for the damage suffered.

⁴²³ JOR 2015/136 Rechtbank Noord-Holland, 25-03-2015, 14-146, ECLI:NL:RBNHO:2015:2480.

⁴²⁴ W.A. Westenbroek, *Externe bestuurdersaansprakelijkheid, rechtspersoonlijkheid en toerekening*, 2016. Ondernemingsrecht 2016/24.

Chapter 6 Conclusions

The main research question as formulated in the introduction will be answered in this chapter: *“Does the Dutch national legal framework provide enough means to adequately battle both ‘safe’, and unsafe food fraud?”* In this chapter the answers to the sub questions will be combined to formulate an answer to the main research question.

There are a number of legal angles to food fraud. Standards in all these areas of law are infringed if food fraud occurs; every area has its own remedies for such infringement, potentially providing means to battle food fraud. The (public) standards for food safety can be found in Administrative Law, as well as the general principles; such as safety and traceability. To see food fraud only from the administrative perspective would leave out stakeholders, and possible means to battle food fraud. From a Criminal Law perspective, fraud can be sanctioned due to its negative impact on the society as a whole. Private law is mostly important within the supply chain and in the relation between the fraudulent FBO and a third (private) party.

There are vague European legal definitions which can be interpreted as being the definition of food fraud. However, a clear European definition is still missing. To ensure a harmonized approach in all EU Member States in the battle against food fraud, and in line with the EP report on food fraud, a definition is necessary. Enforcement is, and probably will remain mostly national law; a definition would at least give a baseline for Member States to enforce. A definition should be formulated on the basis of at least the elements described in chapter two: <I> placing on the market, <II> intention and <III> deceiving. The element of economic incentive would only create problems for the authorities to prove fraud, and will have limited added value; fraud will mostly be linked to economic gain, but this is not necessarily the case. The place to take up this definition could be the GFL; this Regulation is considered the backbone of food safety regulation: the uptake of this definition would send a clear message that fraudulent practices are to be prevented and if they occur, are to be severely punished. Food fraud does not stop at the boundaries of a Member State: it is therefore of paramount importance that the Member States battle food fraud together. A clear legal definition would increase the legal certainty and create some unity in the battle against food fraud, or at the very least send a clear message that the EU is willing to pick up arms to battle food fraud.

Similar to the responsibility for food safety, the supervision and control is divided between the authorities and private parties. Whereas the tendency to choose for private supervision and control is clear in the Netherlands. However, a similar trust in private supervision and control is not present on European level (EP). The NVWA has a specialized division that focusses on food fraud and is best able to prevent fraud. However, this is not the same as encompassing fraud in official controls; the recommendation from the EP report on food fraud. The choice for meta supervision can be defended from an international perspective, the NVWA can only enforce in the Netherlands, whereas food supply chains and private standards increasingly become more international. Budget cuts and reorganizations of the NVWA in recent years have created the need for a system of official controls in which the risk based approach is central. With the Stichting Ketenborging, an additional possibility for meta supervision on private standards was created.⁴²⁵ On paper the option of meta supervision looks promising; the actual effect on food safety is yet to be seen.

The measures available in Administrative Law are plentiful, from the administrative fine to the recall; all measures can have their merits in the battle against food fraud. The legislator in reaction to the horsemeat scandal deemed the administrative fine the measure of choice to battle both misleading practices and fraud. The administrative fine that can be adopted if the Commodities Act is infringed was increased 180 fold; creating a way to be able to punish a company using the administrative fine. However, the motivation in the legislative history of this increase is minimal to say the least: the administrative fine was initially created to serve as a mean to quickly deal with small and simple infringement, with relatively low fines. Fraud with food can be a complex infringement and should be punished severely; the administrative fine was not created for this purpose. In an advice, the advisory board of the RvS, deemed the system in this form inadequate and predicts that the courts will not accept punishment in this form by means of the administrative fine. The main arguments point at the difference between administrative law

⁴²⁵ In chapter 7 recommendations for the Stichting Ketenborging will be presented.

and Criminal Law: on the rights of the violator and the assessment in court. Next to national means there are a number of enforcement means found in EU Law, such as the recall. Depending on the type of sanctions the NVWA needs to adopt, Administrative Law primarily provides the means to adopt measures which 'repair' the situation. Suspension of products on the market and initiating a recall to ensure the products which are not in compliance with the food safety regulations are taken off the market. However, Administrative Law lacks the means to really punish behavior; assuming the administrative fine cannot be adopted in the way that was meant by the legislator. For the aspect of punishment, other areas of law can provide the means to create effective enforcement. In using administrative measures that repair the situation, as opposed to punish the violator; the principle of *ne bis in idem* is not violated and both measures from Administrative Law and Criminal Law can be adopted simultaneously.

Both Criminal Law and Private Law can provide legal means to supplement the enforcement on the basis of Administrative Law. The enforcement potentially cannot reach the same level of effectiveness when restricting to measures found in one area of law, as a combination of the means found in Administrative, Criminal and Private Law. In Criminal Law fraud (with food or other types of fraud) are punishable; both in a normal prosecution and by the punishment order. In the intervention policy of the NVWA food fraud is qualified as being the worst type of infringement and that fraud should be enforced on the basis of Criminal Law. The intervention policy does not discriminate between different types of food fraud (see chapter 2). However, there are different types of food fraud with different impact on the society as a whole. When food fraud constitutes a material danger (for instance the Melamine crisis) the NVWA should ensure the food safety by enforcement action and ordering a recall, and the OM should initiate prosecution, the punishment order is not an effective remedy in case of a direct risk. Similar to the administrative fine, but found in Criminal Law is the punishment order. For food fraud that is 'safe', in the sense that there is no direct risk to harm for consumers other than being misled; the punishment order might be the mean to adopt a fine without a judicial review (unless the violator protest and the sanction is assessed by a criminal court). The prosecution is primarily initiated by the OM. However, the punishment order can also be initiated by the NVWA, this way ensuring that the knowledge of the NVWA is not lost in the 'transfer' of enforcement from the NVWA to the OM. Private Law provides means to prevent fraudulent behavior from happening, and to 'punish' the violator as a third party suffering damage from the infringement. Private standards can set higher standards, also on fraud, but the NVWA cannot impose a private standard on FBOs: private standards are on voluntary basis and create a relation between the private standard owner, the certified FBO and the other FBOs also carrying the same certification. Board liability, both internal and external, as a special form of liability can provide the means for third parties to get compensation for damage suffered from fraudulent behavior of a FBO. Board liability has a preventive effect: board members will think twice before facilitating fraud, because this behavior may in turn create personal liability for the damage.

Does the Dutch legal framework provide enough means to adequately battle food fraud? There is a variety in options for the stakeholders to adopt to battle food fraud. The battle is not only to ensure compliance with food safety standards and principles from Food Law. Fraud is primarily connected to financial gain, the NVWA and OM should be able to ensure compliance and take away the economic incentive of fraudulent behavior. High fines can have the deterring effect needed to prevent fraud, as much as possible. The initial administrative fines that could be adopted on the basis of the Commodities Act was not deterrent, the legislator increased the maximum penalty 180 fold to make sure the administrative fine has this effect. However, the legislator poorly underpinned this increase; it is not unthinkable the courts will not agree with the administrative penalties and will lower an adopted fine or even deem it unlawful. So currently it is unclear that the NVWA can adopt the measures needed to adequately battle food fraud on the basis of Administrative Law. Similar punishment can also be achieved by adopting measures from Criminal Law. The punishment order is a measure very similar to the administrative fine which can be used to the extent that the administrative fine is supposed to be used. It is in line with the current policy of the NVWA and Criminal sanctions, not being punishment orders, can encompass imprisonment. For unsafe food fraud, the punishment order cannot provide the remedy. Unsafe food fraud has an even greater impact to society. Next to the economic damage, the health of consumers is at risk. Adopting only a fine would not be proportionate to the severity of the infringement. Criminal Law does provide the means to prosecute companies or individuals on this basis and adopt severe punishment.

Private law measures can have a preventive effect, both by implementing private standards and by providing means for individuals/ companies to get compensation for the damage suffered. The NVWA cannot impose a

private standard on a FBO, but can and should exchange information with supply chains to ensure enforcement will take place in case of infringement.

Now to answer the main research question: "Does the Dutch national framework provide enough means to adequately battle food fraud?" The answer is Yes and No, the NVWA currently only has the means to adopt reparatory measures, whereas the NVWA deems it necessary to punish the FBO in case of fraud. However, The ID division of the NVWA is the direct link to the public prosecutor in case of food fraud; coordination between the NVWA and the OM is therefore possible. Criminal Law can provide the means necessary to punish the violator. However, the administrative fine and its current framework cannot be seen as an adequate measure, the courts will not agree with the use of the administrative fine in the proposed (by legislator) way. With the increased focus on private standards, the food sector can adopt stricter standards on food fraud; ensuring FBOs do not commit fraud, or in case fraud occurs are severely punished. When coordination between the private enforcers and the authorities takes place, the systems can supplement each other instead of being to separate systems of enforcement. Integration of private enforcement is especially useful for international enforcement: enforcement that surpasses the national boundaries of the Netherlands. However, private enforcement should not be used to fill the gap in capacity of the authorities to enforce. Private enforcement can be used to supplement national enforcement, but not to replace it. The combination of the measures found in Administrative, Criminal and Private Law cover all elements which need to be battled. Administrative measures can stop the infringement, and repair the situation. Criminal Law can provide the punishment needed to ensure the enforcement is deterrent and potential violators are dissuaded to commit fraud. Prevention is better than dealing with the consequences, the role of Private Law measures is primarily to prevent fraud from happening and if fraud does occur to provide the means for third parties who suffered damages from the fraudulent behavior to recover their losses due to the fraudulent behavior of third parties. Potentially the means presented in this research can be adopted to ensure effective enforcement of food fraud. However, coordination between the authorities and private parties is needed for this system to function to its full potential. The intervention policy of the NVWA has to be modified to encompass this strategy of enforcement.

Chapter 7 Recommendations

Fraud with food infringes all principles of Food Safety Law and can pose serious risks to consumer, and has a negative economic impact. The uptake of a definition of food fraud in the GFL would send a clear message that food fraud should be prevented and if it occurs severely punished. A harmonized approach is the way to battle a problem that is not contained within the boundaries of one Member State. The vague terms now used in the GFL do not provide enough legal certainty on what is food fraud. Esther de Lange, the reporter on food fraud, in the EP Report stated that a definition is needed; currently there is still no definition. In the EP report, economic incentive was considered one of the important elements of food fraud. However, as discussed in the second chapter, adding an economic incentive in the definition would create difficulties for the authorities in proving fraud, and will have limited added value. The definition should be taken up in the GFL to ensure the definition applies on all stages of production and in all supply chains. The definition should encompass at least the elements: <I> placing on the market, <II> element of intention, and <III> deceiving. Taking up the definition in a Regulation as opposed to a Directive has the advantage that the definition doesn't need to be implemented in national law; reducing the risk of Member States creating their own definition and in doing so undermining the harmonized approach to battle food fraud in Europe.

System supervision, in particular, the HACCP does not encompass fraud yet. The focus of the HACCP is not fraud, and it is close to impossible to map all possibilities of fraud in the production chain. However, during the HACCP procedure, weak spots can be detected and if possible correction procedures may be implemented. Fraud is the deliberate sabotage of the production process; it is therefore difficult to encompass fraud in system supervision. The supervision and control is under discussion in the Netherlands. Is food safety guaranteed if supervision and control is based purely on official controls, or is a system of meta supervision more efficient to ensure food safety in the context of increasingly international food chain. The EP Report focused on 'upgrading' the official controls and encompassing fraud as integral part of official controls; whereas the taskforce voedselvertrouwen focused on supervision and control by third parties. Both systems have their merits and pitfalls; using one of the two systems does not exclude the other. The systems can complement each other; although presented as opposites. However, choosing for only one system would again leave out possibilities to ensure food safety. Private enforcement in the international context can have its merits. However, private party enforcement should not be used for replacement of enforcement by the authorities due to lack of capacity, although delegating (part of) the enforcement task to private parties in principle is not a violation of European Law. A mixed system would be the best of both worlds; that is if the coordination between both systems is effective. The two systems should not coexist separately; if that were the case, supervision and control would just be doubled instead of being one coherent whole.

The Stichting Ketenborging creates the opportunity for certification owners to receive an official recognition of their certification scheme. However, there are a number of improvements necessary for this system of meta supervision to work. The first and foremost being the lack of clarity when and how re-evaluation of the schemes takes place. Currently the framework for re-assessment is not published. As long as the initial assessment is the only moment of assessment by the Stichting Ketenborging, the recognition doesn't amount to meta supervision. There is no supervision, just an initial assessment. The Stichting Ketenborging should make available timeframes and criteria for re-evaluations, stating a re-evaluation will take place in a PowerPoint is not sufficient.

Member States are free to choose which measures to use for enforcement, the discussion is not on what to use, but on the how. Administrative Law measures can provide both reparatory and punitive sanctions, which are both needed in case of food fraud. The first step is to stop the infringement, the second to restore the safe food market by recalling all unsafe food and food that is not in compliance with food safety regulations.⁴²⁶ After or during the enforcement to stop the infringement, the FBO that committed the fraud should be punished for the infringement. An administrative fine could potentially be the measure to deal with food fraud that does not pose a direct risk to consumer's health. The legislator deemed the administrative the effective mean to do so and increased the maximum penalty to ensure deterrent fines could be adopted. This is however not in line with the intervention policy of the NVWA. The NVWA in its policy state that Criminal Law should be used in punishment of food fraud.

⁴²⁶ Unless other measures are sufficient to ensure a high level of safety, see chapter 4.5.

Either the policy need to be changed, or the developments of the administrative fines are symbolic, because the administrative fine will not be used for the given purpose. The advisory board of the RvS gave its negative advice on the drastic increase of the administrative fine without upgrading the safeguards within the administrative procedure, to at least match those in a criminal procedure. The board however did not advice a general increase in legal protection under administrative law, but an increase in case of high fines. So if the administrative fine is still deemed the measure of choice, the legal safeguards have to be increased. Administrative fines can only be adopted if the fine is tailor made. As long as there is no definition, no set maximum and no differentiation between the different types of food fraud, there will be no tailor made fines. The size of the undertaking and the potential profit can already be taken into account, but these are only two elements in the complex infringement that is food fraud. By creating a system that differentiates between different types of food fraud, were size of the company and the fraud can be taken into account, the administrative fine might become the mean to battle 'safe' food fraud.

In my personal opinion and in line with both Case Law and the intervention policy of the NVWA, food fraud should be battled using Criminal Law. At the very least, food fraud that put the health of consumers at a risk: with 'safe' food fraud one could argue that the crime is of a purely economic nature and the punishment in the form of a fine will be effective because it will both punish the company and take away the profit of the infringement. I agree with the NVWA's current intervention policy that fraud is should be battled using Criminal Law, not only because of the safeguards in the procedure, but mostly because sanctions can also encompass imprisonment. For 'safe' food fraud a punishment order can serve as an adequate replacement for the increased administrative fine. Fraud undermines all core values of food safety law, be it safe or unsafe food fraud, because of this severe punishment is required to deter potential violators and prevent fraud as much as possible. If a judicial review is needed because of the protest of the violator, the NVWA can play the role of informant/expert on the more technical aspects of the food fraud.

Further research

The research limited to specific elements of the enforcement of food fraud in the Netherlands. There is an array of related topics that were out of the scope for this thesis. The research only encompassed the battle on food fraud in the Netherlands, not in other European Member States or even worldwide. If there is a wish to truly have a harmonized approach to food fraud, all Member States will have to implement a similar enforcement policy. Research should be done to the most effective enforcement system in Europe before such steps shall be undertaken.

Another topic not encompassed in this research is the position of the consumer in the discussion on enforcement of food fraud. Also the measure of naming and shaming was not encompassed, although it is a potential measure to battle food fraud. Especially in light of transparency the measure of naming and shaming can be an interesting topic for further research in relation to food fraud. Also the rights of FBOs in the light of notification and cooperation requirements in Food Law could be a potential topic for research.

The focus of the research was the legal framework, economic, social, ethical and technical aspects where only touched upon, further research on these aspects will contribute to a better understanding of the problems and opportunities surrounding the enforcement of food fraud in the Netherlands and abroad. Some institutions currently working in the area of food fraud where left out of this thesis research, or only mentioned briefly. These institutions, the FFN, Olaf are an interesting topic for students to dig into in the context of the battle against food fraud.

It would be interesting to see the next big scandal or crisis to see if the authorities have learned from the recent fraud cases; and if newly implemented measures provided adequate means to battle food fraud. Also a comparison on systems the different Member States currently have in place to battle food fraud and the effectiveness in case of a new food scandal.

Reference list:

Articles:

- R. Agnew, N. Leeper Piquero & F.T. Cullen, 'General Strain Theory and white-collar crime', in: D. Weisburd & S. Simpson (red.), *The criminology of white-collar crime*, New York: Springer 2009, p. 35-62.
- J.A. van den Akker en E.M.R. de Lange, *Naar een Europese aanpak van voedsel fraude*, 2014. *Justitiële verkenningen*, jrg. 40, nr. 2, 2014 p. 84-96.
- C.L.G.F.H. Albers, *De bestuurlijke boete Magische lijn of hellend vlak?*, 2000. *Jurisprudentie Bestuursrecht plus 4*, 30 November 2000, 138-152.
- Tom Barkhuysen & Michiel van Emmerik, *Alcoholslot exit*, 2015. *NJB* 2015/543.
- Axel Berger *The Development and Status of Enforcement in the European Union*, 2010. *Accounting in Europe*, 7:1, p.15-35.
- Pauline van Beusekom, Wendy Jansen en Bart Vos, *Total recall: het logistiek effectief managen van voedselveiligheidsincidenten*, 2013. *WW* 2013/6, artikel 71.
- G.A. Biezeveld & Arnt Mein, *Moet de opmars van de bestuurlijke boete worden gestuit?*, 2015. *Tijdschrift voor Toezicht* 2015 (6), 1, p.64-71.
- H.E. Bröring, *De bestuurlijke boete*, 2005. Kluwer 2005, p. 200.
- G.W. Brummelkamp, W. Huisman & A.J.M. Denkers, *Bedrijfscriminaliteit: verkennend empirisch onderzoek naar aard en achtergronden*, 2010. Zoetermeer: EIM 2010.
- Busch L., *The private governance of food: equitable exchange or bizarre bazaar?*, 2011. *Agric Hum Values*. 28: p. 345–352.
- C.P.M Cleiren, *beginselen van een behoorlijke procesorde en idem Identiteit van beginselen van behoorlijke strafrechtspleging en beginselen van behoorlijk bestuur?*, 1989. *DD* 1990, p.497 – 514.
- C.C. van Dam, *De gemiddelde Euroconsument - een pluriform fenomeen Over de Richtlijn oneerlijke handelspraktijken en de rechtspraak van het Hof van Justitie*, 2009. *SEW* 2009/2.
- H. Deelstra · D. Thorburn Burns · M. J. Walker, *The adulteration of food, lessons from the past, with reference to butter, margarine and fraud*, 2014. *Eur Food Res Technol* (2014) 239:725–744.
- Klaus-Dieter Borchardt, *The ABC of European Union law*, 2010. Luxembourg: Publications Office of the European Union, 2010 especially p. 113-124.
- E. Dransfielda, T.M. Ngapob, N.A. Nielsenc, L. Bredahlc, P.O. Sjødénd, M. Magnussond, M.M. Campoe and G.R. Nute, *Consumer choice and suggested price for pork as influenced by its appearance, taste and information concerning country of origin and organic pig production*, 2005. *Meat Science* Volume 69, Issue 1, January 2005, P. 61–70.
- Jesper Falkheimer and Mats Heide, *Trust and Brand Recovery Campaigns in Crisis: Findus Nordic and the Horsemeat Scandal*, 2015. *International Journal of Strategic Communication*, 9:2015,p. 134–147.

- Frey, B. S, *Liliput oder Leviathan? Der Staat in der Globalisierten Wirtschaft*, 2001. Working Paper 85. Zurich, Switzerland: Institute for Empirical Research in Economics, University of Zurich.
- K.E. Gussow en L.H. Kuiper, *De bestrijding van voedsel fraude in Nederland*, 2014. Justitiële verkenningen, jrg. 40, nr. 2, 2014.
- Grunert, K. (2002). *Current issues in the understanding of consumer food choice*. Trends in Food Science & Technology 13, p. 275–285.
- S.F. Hamilton & D. Zilberman, 'Green markets, eco-certification, and equilibrium fraud', *Journal of Environmental Economics and Management*, 2006. (52) 2006, p. 627-644.
- A.R. Hartmann & H.J.B. Sackers, *bestuursstrafrecht*, 2016. DD 2016/20.
- Helderman & Honingh 2009 en C. Maas, *Toezicht en zelfregulering herijkt. Vooronderzoek naar 'kansen en bedreigingen' van terugtrekkend toezicht*, 2011. Utrecht: Nederlandse Voedsel- en Warenautoriteit 2011.
- Spencer Henson, Thomas Reardon, *Private agri-food standards: Implications for food policy and the agri-food system*, 2005. Food Policy 30 (2005) 241–253.
- Rik Herbes, 'Voedselsoemel'; *de juridische context van het paardenvleeschandaal*, 2013. Waar en Wet 2013/3.
- Hines, Tony; Murphy, Luke, *Combating Food Fraud With Intelligent Due Diligence*, 2016. World Food Regulation Review, 25.8 (Jan 2016).
- G. Jordan & W.A. Maloney, *Democracy and interest groups: Enhancing participation?*, London: Palgrave Macmillan Limited 2007; G. Jordan & W.A. Maloney, *The protest business? Mobilising campaign groups*, Manchester: Manchester University Press 1997; H. Klüver & S. Saurugger, *Opening the black box: The professionalization of interest groups in the European Union*, Interest Groups & Advocacy 2013, 2 (2), p. 185-205.
- A. Karapetian, *Bestuurdersaansprakelijkheid na Van de Riet/Hoffmann: over hoe het is, hoe het was en zou moeten zijn*, 2015. WPNR 2015(7052).
- Raimo Lappalainen, John Kearney, Michael Gibney, *A pan EU survey of consumer attitudes to food, nutrition and health: an overview*, 1998. Food Quality and Preference Vol. 9, No. 6, pp. 467-478.
- Juliette Lelieur, 'Transnationalising' *Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, 2013. Utrecht Law Review Volume 9, Issue 4 (September) 2013, p. 198-210.
- José M. Lorenzo, María Victoria Sarriés, Alessandra Tateo, Paolo Polidori, Daniel Franco, Massimiliano Lanza, *Carcass characteristics, meat quality and nutritional value of horsemeat: A review*, 2014. Meat Science vol. 96, p. 1478–1488.
- Francesca Lotta and Joe Bogue, *Defining Food Fraud in the Modern Supply Chain*, 2015. EFFL 2, 2015, p 114-122.
- M. Garcia Martinez, P. Verbruggen & A. Fearn, *Risk-based Approaches to Food Safety Regulation: What Role for Co-regulation?*, 2013., Journal of Risk Research 2013-9, p. 1101-1121.
- Franck Meijboom, Tatjana Visak, and Frans Brom, *From trust to trustworthiness: why information is not enough in the food sector*, 2005. Journal of Agricultural and Environmental Ethics (2006) 19, p. 427–442.

Bernd van der Meulen, *Recall, terugroepacties opgelegd door de overheid*, 2015. WAAR en WET 5, 2015 article 111.

Bernd M. J. van der Meulen, Science based Food Law, 2009. EFFL1 | 2009, p. 58-71.

Bernd van der Meulen, The Core of Food Law, A Critical Reflection on the Single Most Important Provision in All of EU Food Law, 2012. EFFL 3, 2012 p. 117-125.

Bernd M.J. van der Meulen, The Structure of European Food Law, 2013. Laws 2013, 2, 69–98; doi:10.3390/laws2020069.

Bernd van der Meulen en Hanna Schebesta, *Onveilig voedsel op de markt*, 2014. Ars Aequi, Februari 2014, p. 136-145.

Sofie van der Meulen, Gilles Boin, Ioanna Bousoula, Nicola Conte-Salinas, Valeria Paganizza, Francesco Montanari, Vicente Rodriguez Fuentes, Bernd van der Meulen, *Fighting Food Fraud*, 2015. EFFL 1, 2015.

A. Muraro , K. Hoffmann-Sommergruber, T. Holzhauser , L. K. Poulsen , M. H. Gowland , C. A. Akdis, E. N. C. Mills, N. Papadopoulos, G. Roberts, S. Schnadt, R. van Ree, A. Sheikh & S. Vieths, *EAACI Food Allergy and Anaphylaxis Guidelines. Protecting consumers with food allergies: understanding food consumption, meeting regulations and identifying unmet needs*, 2014. European journal of allergy and clinical immunology 69 (2014) 1464–1472 © 2014 John Wiley & Sons A/S. Published by John Wiley & Sons Ltd.

M. Olson, *The logic of Collective Action. Public goods and the theory of groups*, Cambridge: Harvard University Press 1965; M. Hojnacki, D.C. Kimball, F.R. Baumgartner, J.F. Berry & B.L. Leech, *Studying Organizational Advocacy and Influence: Reexamining Interest Group Research*, Annual Review of Political Science 2012 (15), p. 379-399.

C. Parker, *The Open Corporation: Effective Self-regulation and Democracy*, 2002. Cambridge University Press 2002, p. 15.

Xiaofang Pei, Annuradha Tandon, Anton Alldrick, Liana Giorgi , Wei Huang and Ruijia Yang, *The China melamine milk scandal and its implications for food safety regulation*, 2011. Food Policy 36 (2011).

Z. Pietrasika and P.J. Shand, *Effect of blade tenderization and tumbling time on the processing characteristics and tenderness of injected cooked roast beef*, 2003. Meat Science 66 (2004) ,p. 871–879.

Redactie, Kabinetsreactie op rapport Onderzoeksraad: *(vlees)keuring terug naar de overheid*, 2014. WAAR en WET, 2014, nr.5, 72.

Redactie, *Mede dankzij de RASFF kunnen wij de hoogste voedselveiligheidsnormen garanderen*, 2015. Waar en Wet 2015(7), 96.

J.H.Reestman & L.F.M. Besselink, *Editorial after Akerberg Fransson and Melloni*, 2013. European Constitutional Law Review, p. 170.

R.M.J. de Rijck, *De geest van de WED : strenge straffen en publiek normbesef*, 2016. Tijdschrift voor Sactierecht en onderneming, Nr. 1 februari 2016.

S. van Ruth en W. Huisman, Kwetsbaarheid voor voedsel fraude in de vleessector, 2014. Justitiële verkenningen, jrg. 40, nr. 2, 2014.

Ch.I. Sambrook, Illegale pesticiden en Voedselcriminaliteit, 2014. Justitiële verkenningen, jrg. 40, nr. 2, 2014.

Lawrence M. Schell, Mia V. Gallo, Andkatsi Cook, *What's NOT to Eat—Food Adulteration in the Context of Human Biology*, 2012. *American Journal of Human Biology* 24:139–148.

C. Scott, *Regulating everything: From mega- to meta-regulation*, Administration 2012-1, p. 61-89.

Scott H. Sicherer, MD, and Hugh A. Sampson, MD, *Food allergy*, 2010. *Journal of Allergy and Clinical Immunology* Volume 125, Issue 2, Supplement 2, February 2010.

Miguel Angel Sentandreu and Enrique Sentandreu, *Authenticity of meat products: Tools against fraud*, 2014. *Food Research International* 60 (2014),p. 19–29.

J. Spink & D.C. Moyer, 'Defining the public health threat of food fraud', 2011. *Journal of Food Science* (76) 2011, p. 157-163.

Satu Tähkääpää, Riitta Maijala, Hannu Korkeala, Mari Nevas, *Patterns of food frauds and adulterations reported in the EU rapid alert system for food and feed and in Finland*, 2014. *Food Control* 47 (2015),p. 175-184.

Eunice Taylor, *HACCP in small companies: benefit or burden?*, 2001. Volume 12, Issue 4, June 2001, p. 217–222.

Eunice Taylor and Kevin Kane, *Reducing the burden of HACCP on SMEs*, 2004. *Food Control* Volume 16, Issue 10 December 2005, p.833-839.

J.H. Trienekens, P.M. Wognuma, A.J.M. Beulensb, J.G.A.J. van der Vorst, *Transparency in complex dynamic food supply chains*, 2012. *Advanced Engineering Informatics*, Volume 26, Issue 1, January 2012, Pages 55–65.

Trienekens, J.H., & Vorst, J.G.A.J. van der (2006). *Traceability in Food Supply Chains*. In P.A. Luning, F DeVlieghere, & R Verhé (Eds.), *Safety in Agri-Food Chains*, Wageningen Academic Publishers, p. 439-470.

Trienekens J., Zuurbier, P., *Quality and safety standards in the food industry, developments and challenges*, 2008. *international journal of production economics*. *Economics* 113 (2008) p. 107–122.

Luis González Vaqué, Sebastián Romero Melchor and Sara Aparicio Hill, *Food Legislation: The “Teekanne” case of 4 June 2015*. *eFOOD-Lab international* 3/15, p. 20-24.

Wim Verbeke a,* , Federico J.A. Pérez-Cueto a , Marcia D. de Barcellos b,c, Athanasios Krystallis c , Klaus G. Grunert, *European citizen and consumer attitudes and preferences regarding beef and pork*, 2009. *Meat Science* 84 (2010), p. 284–292.

Paul Verbruggen, *Regulatory governance by contract: the rise of regulatory standards in commercial contracts*, 2014. *Recht der Werkelijkheid* 2014 (35) 3.

Paul Verbruggen and Tetty Havinga, *Metatoezicht op voedselveiligheid*, 2014. *Tijdschrift voor Toezicht* 2014 (5) 1.

E. Vos, *EU Food Safety Regulation in the Aftermath of the BSE Crisis*, 2000. *Journal of Consumer Policy* 2000-3, p. 227-255.

Stephen Wagner, *When tuna still isn't always tuna; federal food safety regulatory regime continues to inadequately address seafood*, 2015. *Ocean and Coastal Law Journal* (20), L.J. 111 2015, p. 111-140.

Michael J Walker, Malcolm Burns and D Thorburn Burns, *Horse Meat in Beef Products Species Substitution*, 2013. *Journal of the Association of Public Analysts* (Online) vol. 41 p. 67-106.

Brian Wansink, , Aner Tal, Adam Brumberg, *Ingredient-based food fears and avoidance: Antecedents and antidotes*, 2014. Food Quality and Preference Volume 38, December 2014, Pages 40–48.

W.A. Westenbroek, *Externe bestuurdersaansprakelijkheid, rechtspersoonlijkheid en toerekening*, 2016. Ondernemingsrecht 2016/24.

Kristof De Wulf, Gaby Odekerken-Schröder and Dawn Iacobucci, *Investments in Consumer Relationships: A Cross-Country and Cross-Industry Exploration*, 2001. Journal of Marketing Vol. 65 (October 2001), p. 33–50.

Official documents:

A. Opperhuizen, Advies van de directeur bureau Risicobeoordeling & onderzoeksprogrammering aan de minister van VWS en de staatssecretaris van EZ, 4-03-2013.

Esther de lange (rapporteur, EP), *Report on the food crisis, fraud in the food chain and the control thereof*, 2013. (2013/2091(INI)) A7-0434/2013. Available at; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0434+0+DOC+PDF+V0//EN>

Minister of Agriculture, Status report investigation and recall Van Hattem Vlees BV, 25 February 2014. Accessible at; <https://www.nvwa.nl/onderwerpen/dieren-dierlijke-producten/dossier/paarden/fraudemet-paardenvlees/terugroepactie-slachthuis-in-gelderland-2014>.

Afdeling advisering van de Raad van State, Analyse van enige verschillen in rechtsbescherming en rechtspositie van de justitiabele in het strafrecht en het bestuursrecht, Stcrt, 2015/160.

Regeerakkoord VVD-PvdA, Bruggen Slaan, 20 oktober 2012, <www.kabinetformatie2012.nl/bestanden/formaties/formatie-2012/documenten/regeerakkoord/20121029-definitief-regeerakkoord.pdf> (30 augustus 2013), p. 10, zoals uitgewerkt in het document Goed Geregeld, een verantwoorde vermindering van regeldruk 2012-2017, directoraat-generaal Bedrijfsleven & Innovatie, Den Haag 25 april 2013.

Plan van aanpak NVWA, bijlage bij brief van de minister van Economische Zaken aan de Tweede Kamer van 19 december 2013, <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2013/12/19/bijlage-plan-van-aanpak-nvwa.html> (14 februari 2014).

DG SANCO, Final report of an audit carried out in the Netherlands from 04-13 March 2014 in order to evaluate the food safety control systems in place governing the production and trading on the market of fishery products, DG(SANCO), 2014-7140, Ares (2014)3251285.

De Regeling van de Minister-President, Minister van Algemene Zaken van 30 september 2015, nr. 3151041, houdende de vaststelling van de Aanwijzingen inzake de rijksinspecties.

Ministeries van Volksgezondheid, Welzijn en Sport en Economische Zaken, Toezichtkader NVWA, Leidende principes voor toezicht en handhaving, 2015, p. 3

Elliott report 2013, p. 47-48.

Tweede Kamer, vergaderjaar 2015–2016, 33 775, nr. 21, p.5.

Kamerstukken II 1998/99, 26 698, nr. 3, p. 8

Kamerstuk 33775 nr. 15 Vergaderjaar 2014-2015 Gepubliceerd op 13 april 2015

kamerstukken II 2012/13, 33 400 VI, nr. 80.
Kamerstukken II 2008/09, 31 896, nr. 3, blz. 31/32
NV, Kamerstukken II 2005/06, 29 702, nr. 7, p. 31.
NV, Kamerstukken II 1994/95, 23 700, nr. 5, p. 81
Kamerstukken II 2003/04, 29 702, nr. 3, p. 90
Kamerstukken II 2003/04, 29 702, nr. 3, blz. 152.
Kamerstukken II 2012/13, 33 622
Kamerstukken II 2011/12, 33 207
(MvT), Kamerstukken II 2004/05, 30182, 3, l.4.
Kamerstukken II 2013/14, 33 835 nr. 1.

Books:

Kenneth Defares en Bernd van der Meulen, *het verzorgingsbeginsel*, 2009. Preadvies voor de Nederlandse vereniging voor levensmiddelenrecht, SDU Den Haag, 2009.

H. de Doelder, *Is door de bestuurlijke handhaving het primaat van de strafrechtelijke handhaving doorbroken of geldt het strafrecht als ultimum remedium?* 1993. Part of *Bestuursrechtelijke toepassing en handhaving van gemeenschapsrecht in Nederland*, 1993 Kluwer Deventer. Blz 137- 147.

DR M.J Lugt, *Hoofdpijnen levensmiddelenrecht*, 2003. First edition SDU Uitgevers, p 82. ISBN 978-90-12098-16-8.

Pieterneel A. Luning and Willem J. Marcelis, *Food quality management*, 2009. Wageningen Academic Publishers, 2009.

S.Prechal, R.Widdershoven, and J.H.Hans, *Europeanisation of Public Law*, 2015. Europa Law Publishing Groningen, ISBN: 978-90-8952-127-9.

Marcel van Silfhout, *Uitgebeend, hoe veilig is ons voedsel nog?*, 2014. Second edition, Uitgeverij Oostenwind Amsterdam, ISBN 978-94-91481-04-8.

Bee Wilson, *Swindled, the dark history of food fraud, from poisoned candy to counterfeit coffee*, 2008. Princeton University Press.

European Case Law:

Case 17/74 (Transocean Maritime Paint Association). 1974

ECHR 8 June 1976, NJ 1978/223 (Engel v. Netherlands).

Case 85/76 Hoffmann-La Roche. 1979.

Case 374/87 Orkem (1989).

Case C-331/88 (Fedessa) 1990.

Case C-312/89 (Sidef Conforama), 1991.

Case C-332/89 (Marchandise), 1991.

Case C-317/92 (Commission v. Germany), 1994.

ECHR 16 oktober 1995, nr. 21351/93

C-265/95 Commission v France (French strawberries). (1997)

Case T-112/98 Mannesmannröhen-Werke (2001).

joined cases C-387/02, C-391/02 and C-403/02 Berlusconi (2005).

Case C-304/02 Commission v. France (French fishery inspection) (2005).

Case C-28/05 (Dokter) 2006.

Case C-349/07 (Sopropé) 2008.

Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and al Brakaat International Foundation v. Council, 2008.

Case C-232/08 Dutch vessels (2009).

Joined cases C-322/07, C-327/07 and 33/07 Papierfabriek August Koehler (2009).

Case ECJ C-489/10 (Bonda) 2012.

Case C-300/11 ZZ (2013)

Case C617/10 (Akerberg Fransson) 2013.

Case C-437/13 Unitrading ltd (2014)

Case 483/12 (Pelckmans) 2014.

National Case Law:

ARRvS 1 February 1985, AB 1985/587

ABRvS 27 March 2001, AB 2002/102.

ABRvS 7 November 2001, AB 2002/177.

ABRvS 27 February 2002, AB 2002/224

ABRvS 27 March 2002, AB 2002/195 & ABRvS 20 November 2002, JB 2003/18.

ABRvS 19 June 2002, AB 2003/53

ABRvS 11 August 2004, AB 2004/444).

CBB, 5 April 2005 AWB 03/739 , AB 2006, 82.

ABRvS 11 January 2006, AB 2006/240 (*Houseparty Mill en St. Hubert*).

ABRvS 25 January 2006, AB 2006/229 (ontvangst slachtafval).

ABRvS 20 August 2008, AB2008/290.

ABRvS 15 October 2008, AB2008/354.

CRvB 13 October 2010, LJN BO1242

HR 1 February 2011, ECLI:NL:HR:2011:BM9102, NJ 2011/394.

ABRvS 20 April 2011, LJN BQ1888.

CBb 20 December 2013, ECLI:NL:CCB:2013:280.

HR 3 March 2015, ECLI:NL:HR:2015:434.

ABRvS 4 March 2015, ECLI:NL:RVS:2015:622.

ABRvS 6 May 2015, ECLI:NL:RVS:2015:1421

Sites:

<http://www.cokz.nl/english/default.aspx>. Last accessed on 20th June 2016.

http://ec.europa.eu/food/safety/docs/gfl_req_guidance_rev_8_en.pdf. Last accessed on 20 June 2016.

<http://www.efsa.europa.eu/en/about/values>. Last accessed on May 15th 2016.

<http://foodhealthlegal.com/>. Sofie van der Meulen, 180 fold higher fines in Dutch Commodities Act. Last accessed on 7th June 2016.

<http://ketenborging.nl>. Last accessed on 24th June 2016.

<https://www.nvwa.nl/onderwerpen/dieren/dossier/paarden/fraude-met-paardenvlees/fraudezaak-vleesgroothandel-willy-selten-2013-2015>. Last accessed on 15th April 2016.

<https://www.nvwa.nl/onderwerpen/toezicht-nvwa/dossier/bestuurlijke-boete/de-hoogte-van-de-bestuurlijke-boete>. Last accessed on 10th May 2016.

<https://www.skal.nl/home-en-gb/about-skal/>. Last accessed on 5th June 2016.

news articles:

Wojciech56, *Multiple government agencies in Poland knew of road salt in food since 2003*, 2012. CNN IReport, 12 March 2012, available at: <http://ireport.cnn.com/docs/DOC-760662>. Last accessed on 7th February 2016.