



foodwatch 

Report 2018

LOST IN THE SUPERMARKET

Why European food law fails to protect consumers
from fraud, health hazards and food scandals

IMPRINT

Publisher

Thilo Bode, responsible according
to the German press law (Vi.S.d.P.)

foodwatch e. V.
Brunnenstraße 181
10119 Berlin · Germany
Phone +49 (0) 30 / 24 04 76 - 0
Fax +49 (0) 30 / 24 04 76 - 26
Email info@foodwatch.international
www.foodwatch.org

Donations

foodwatch e. V.
GLS Gemeinschaftsbank
IBAN DE 5043 0609 6701 0424 6400
BIC GENO DEM 1 GLS

Photo Licenses

Title: © fotolia_Sergey Ryzkov
Page 10: © fotolia_Nitr
Page 16: hello-i-m-nik-522061 on unplash
Page 28: © fotolia_nikolaskus
Page 38: © fotolia_weyo
Page 46: © fotolia_Mariusz Blach

Design

Annette Klusmann, puredesign.

Publication Date

October 2018

LOST IN THE SUPERMARKET

Why European food law fails to protect consumers from fraud, health hazards and food scandals

Foreword	6
Summary	8
1 THE EU DISCOVERS CONSUMER PROTECTION	10
1.1 EU consumer protection and the “average consumer”	11
1.2 BSE catastrophe gives rise to a new food law	13
2 HEALTH HAZARDS, FRAUD AND DECEPTION IN LEGAL PRACTICE	16
2.1 Inadequate health protection	17
2.2 Inadequate fraud prevention	24
2.3 “Legal” fraudulent labelling	25
3 LEGAL SHORTCOMINGS OF HEALTH-PROTECTION AND FRAUD-PREVENTION POLICIES	28
3.1 Inadequate implementation: Precautionary principle, fraud prevention and traceability	29
3.2 Inadequate accountability of food operators/retailers	31
3.3 Inadequate disclosure requirements for businesses and public authorities	32
3.4 Inadequate information rights for consumers	34
3.5 Toothless food controls and “smiley” systems	35
4 STRUCTURAL/POLITICAL REASONS FOR INSUFFICIENT CONSUMER PROTECTION	38
4.1 Unequal protection for consumers and companies	39
4.2 Criminal law, civil law and right of action	40
4.3 The power of the industry lobby: Remedial instead of precautionary measures	43
4.4 The EU’s trade agreements	45
5 AMENDMENT OF THE GENERAL FOOD LAW	46
5.1 “REFIT” and Fitness Check of the General Food Law	47
5.2 foodwatch’s demands with respect to the amendment of the General Food Law	49
Notes	52

LOST IN THE SUPERMARKET

Why European food law fails to protect consumers from fraud, health hazards and food scandals

More than fifteen years ago – in 2001 – the epidemic of “mad cow disease” (bovine spongiform encephalopathy or BSE) reached its peak for the time being. To date, over 150 people worldwide have died from the human form of the disease (vCJD) after consuming BSE-infected beef. The animals had been fed with inadequately sterilised meat-and-bone meal from infected cows. These events made it shockingly clear that the practices of the food and feed industry had severely endangered and harmed the health of consumers. However, it also became apparent that the governments, through inadequate regulatory oversight of the feed industry and cattle farmers, had failed in their duty to protect public health. Consumers had been given no chance to defend themselves or to recognise the risks they were taking by consuming beef. In the end, no one was held liable for this catastrophe.

In Europe the BSE crisis marked a turning point in consumer protection. A European “General Food Law” (EC Regulation 178/2002) was introduced. In addition, the European Food Safety Authority (EFSA) was established. Ministries of consumer protection were created in several EU Member States.

It has been more than 55 years since U.S. president John F. Kennedy asserted the importance of basic consumer rights in his famous speech to the United States Congress, but what do we have to show for it? Has the legal position of consumers actually been significantly improved? Are these basic consumer rights – namely the right to the protection of health and safety, the right to be informed, the right to be heard and the right to choose – actually being protected? Are consumers on equal footing with manufacturers and retailers when it comes to protecting their interests? Can they truly fulfil their role as “average” consumers? Are consumers really the sovereign drivers of the marketplace, or is their legal position weak? And are they the masters of the food market, or its victims?

In order to strengthen the legal position of consumers and achieve the aims of food law – namely the prevention of fraud and the protection of public health – extensive measures are necessary at both national and European level.

The food market and food law must be shaped in such a way as to ensure that consumers are protected from health hazards and fraudulent practices through preventive policies. At the same time, the self-policing capacity of the market must be strengthened. Important elements of a self-policing market, which would inherently exert a significant preventive effect, include, for example, improved transparency and properly enforced information rights/disclosure obligations.

The requirements that apply to the production and labelling of foods and their introduction to the market are practically identical in the individual EU Member States owing to the extensive harmonisation of food law. However, differences between countries do exist in several areas, such as civil and criminal law provisions, food control systems and information rights.

This report not only addresses these differences, focusing on Germany, France and the Netherlands (the countries in which foodwatch offices are located), but also – recognising the high level of harmonisation of EU food law – provides a representative picture of the situation on the food market throughout Europe.

The first section offers a description of the significance of consumer protection in EU primary law, as well as the general principles of food law, both at EU and national level. Section 2 follows with examples of insufficient measures for protecting public health and the widespread use of fraudulent and deceptive practices that are prohibited under food law. Section 3 analyses the legal shortcomings in EU food law and the inadequate implementation and enforcement of the respective regulations by the Member States. Section 4 examines the structural/political shortcomings that contribute to the inadequacies of consumer protection in the EU. Finally, Section 5 summarises foodwatch's demands for improving the legal position of consumers in the food market in the context of the European Commission's plans to update and amend the General Food Law.

This report includes demands as to what amendments should be made to the General Food Law in the context of the upcoming review process in order to enforce consumers' rights to health protection, fraud prevention, transparency and freedom of choice, both in law and in practice.

SUMMARY

1. European food legislation, as enshrined in the General Food Law (GLF), provides explicitly for the protection of human health and consumers' interests through the prevention of health hazards and consumer deception. Although its introduction was a very positive step, the General Food Law has failed to achieve many of its objectives and can therefore hardly be considered a success. Several provisions are too weak, many loopholes exist, and the regulation is not being adequately enforced by the Member States. Consumers are currently being exposed to significant health risks. Fraudulent and deceptive practices are the order of the day. The respective legislation in the EU and its Member States does not have a sufficient preventive effect: its effect, if any, is remedial. By the time a fraudulent practice or health hazard is identified, the food in question has, in the vast majority of cases, already been consumed, and therefore the damage is usually irreversible.

2. There are countless products and practices that illustrate the inadequate protection of consumers from health hazards. For example, numerous foods contain additives that are known to be toxic or potentially toxic, such as azo dyes. Other products are contaminated with unnecessarily high levels of potentially mutagenic and carcinogenic substances like acrylamide, endocrine disruptors or certain mineral oil fractions. It is not unusual for animal by-products (e.g. slaughterhouse wastes) to be diverted back into the food chain. Dioxins can find their way into milk, meat and eggs via contaminated animal feed. The indiscriminate use of antibiotics in livestock may facilitate the emergence of potentially life-threatening antibiotic-resistant bacteria in humans. Manufacturers are intentionally formulating their processed foods with excessively high levels of sugar, salt and fat so that consumers will want to eat more of them. These foods can contribute to diseases like diabetes and obesity.

3. Manufacturers frequently violate laws against fraud or simply circumvent regulations using perfectly legal practices. False declarations (e.g. mislabelling) are clear-cut violations of anti-fraud policies. This practice was observed in the horsemeat scandal, when horsemeat was sold as beef in lasagne products. However, consumers can also be deceived by entirely legal practices. This is made possible by the inadequate provisions for product presentation and information. Misleading origin claims and high-sugar snacks marketed as healthy products – these are examples of “legal fraud” that can be commonly found on supermarket shelves.

4. The timely and effective public disclosure of information by companies and government authorities would enable consumers to protect themselves from fraudulent and unsafe products. However, this seldom occurs in practice. Furthermore, consumers rarely have statutory rights to information, and if such rights do exist, their enforcement is impaired by ineffective laws. In practice, consumers cannot use information from public authorities to protect themselves from fraud or potentially dangerous products because it is almost impossible for them to access such information. And when they do get access, the information is often provided so late that it is effectively useless.

5.

The food control systems in most EU Member States are inherently ineffective. The competent authorities are not organised in such a way as to guarantee independence from political interference. Accordingly, they are not immune to conflicts of interest (e.g. their responsibilities for increasing business tax income and promoting job creation) and cannot enforce food law with the necessary focus and consistency. In addition, they lack the personnel and equipment required for performing their duties as mandated by law. This has a negative impact on consumer protection.

7.

The EU is planning to amend the General Food Law. This represents a major political opportunity to eliminate the shortcomings of the existing law and correct its inadequate enforcement and implementation. However, the EU Commission's proposals to date do not address the above-mentioned shortcomings and would therefore have the opposite effect. Furthermore, the Commission's approach makes it alarmingly clear that the internal market, and thereby Europe itself, primarily serves the interest of food companies and not those of its citizens.

6.

The introduction of the EU General Food Law was the correct response to the BSE catastrophe. However, some provisions are too weak, there are significant loopholes, and numerous provisions have not been enforced and implemented by the EU Member States. The result: food companies are able to violate anti-fraud laws and circumvent health-protection and traceability requirements on a large scale with no fear of repercussions. The food industry profits from the weaknesses of the law. The reason: preventive provisions would shift the costs of health protection and fraud prevention onto the manufacturers and retailers, while a solely remedial approach diverts costs away from companies, imposing a heavy financial burden on society. The political system has failed to halt this development, thereby surrendering its control over the market to the food industry.

8.

From foodwatch's perspective, any amendments to the General Food Law should fulfil the following key requirements:

- > Traceability (Art. 18 GFL) must be enforced.
- > The application of the precautionary principle (Art. 7 GFL) must be made mandatory.
- > The GFL must explicitly prohibit food labelling *that has the potential* to mislead consumers.
- > Public authorities must be required to fully disclose information in cases involving health risks and fraud (Art. 10 GFL).
- > Businesses, including retailers, must be required to test and verify the quality and safety of the products they sell (Art. 19 GFL).
- > Consumers must be granted effective information rights.
- > Consumers must be granted the right to bring class actions against companies, and consumer groups must have the right to sue companies for failure to comply with legal requirements.
- > Consumer groups must have the right to not only sue public authorities for failure to enforce regulations but also have secondary legislation checked for compatibility with higher-ranking law.

1 THE EU DISCOVERS CONSUMER PROTECTION



1 THE EU DISCOVERS CONSUMER PROTECTION

1.1 EU CONSUMER PROTECTION AND THE "AVERAGE CONSUMER"

In the formation of the European Union, priority was given to the interests of the industry – not those of consumers. This fact is evidenced by the number of decades that passed before the EU laid down the rights of consumers at Community level: it wasn't until the Maastricht Treaty of 1992 – 35 years after the Treaty Establishing the European Economic Community (TEEC, 1957) – that the law of the federal union of states now known as the European Union gained an independent legal basis for consumer protection measures in primary law. Article 169, Paragraph 1, of the TFEU (Treaty on the Functioning of the European Union, ex Article 153 TEC) reads as follows:

“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.”

Article 169, Paragraph 2, of the TFEU authorises the EU to contribute to the achievement of these objectives of consumer protection through (a) measures adopted in the context of the completion of the internal market and (b) measures which support, supplement and monitor the policy pursued by the Member States. However, the reference to the internal market reveals a systematic weakness of primary law with respect to consumer protection. It requires all consumer protection measures to additionally serve the “completion of the internal market”, meaning unrestricted trade. This dual objective exacerbates conflicts between commercial interests and the principles of consumer protection.

Consumer protection is about as well-enshrined in EU primary and secondary law as environmental protection. One of the key guiding principles in these areas is the so-called *precautionary principle*. Its purpose is to ensure that states act with precaution, even in cases of scientific uncertainty or disagreement about the potential for harm stemming, for example, from the use of certain chemicals. Although the only explicit mention of the precautionary principle in the TFEU is in reference to environmental protection,¹ this principle is also applied in the area of consumer and health protection.²

On the basis of primary law, legislative acts were issued in the form of directives and regulations for the purpose of legal harmonisation and the protection of consumers. The benchmark for the legislative acts governing the prevention of consumer deception is the model of an “average consumer who is reasonably well-informed and reasonably observant and circumspect”.³

The question of how this model of the average consumer should be defined in detail is controversial and in constant flux – in spite of its definition in European law. Some feel that a high level of protection provided in the law would necessitate an overly restrictive, paternalistic state, while others believe that only minimal state provision would be required for enabling the consumer to make responsible and well-informed choices. The actual interpretation of the model of the average consumer is an ongoing process that is shaped by court rulings and influenced by social developments and political discourse.

The current court rulings are often based on a consumer model that does not adequately reflect the information needs of consumers. One example is the ruling from the German Federal Court of Justice (Bundesgerichtshof) on the yoghurt “Monsterbacke”. The Court held that the advertising slogan for this product, “As important as a daily glass of milk”,⁴ was not misleading in spite of the fact that the yoghurt contains 13% sugar, which is twice the sugar content of milk. As a justification for its decision, the Court reasoned that consumers would be able to find information on the sugar content by reading the ingredients list on the package.⁵ The European Court of Justice came to a different conclusion with its decision in the “Teekanne” case in June 2015. The German tea company Teekanne had been advertising its tea product “Felix Raspberry and Vanilla Adventure”⁶ with a label depicting large raspberries and vanilla flowers in spite of the fact that the product contained neither raspberries nor vanilla. Although the Court recognised that the list of ingredients clearly expressed the fact that the product did not contain the advertised ingredients, Teekanne’s argumentation was not accepted. According to the Court’s ruling, the list of ingredients “may in some situations not be capable of correcting sufficiently the consumer’s erroneous or misleading impression concerning the characteristics of a foodstuff”.⁷ Whether the ruling will set a new precedent for interpreting the term “average consumer” in favour of consumer protection remains to be seen.

In foodwatch’s opinion, the decisive factor in health protection is not the amount of information to which consumers are entitled, but rather – and above all – whether the information they are given enables them to make an informed choice quickly and easily on the basis of quality. Ensuring that “everything inside is shown on the outside” – i.e. the manufacturer provides an accurate listing of all ingredients used – is simply not enough, as this essential basic requirement in no way guarantees the consumer’s ability to make an informed choice quickly and easily on the basis of quality. Considering the increasing flood of often incomprehensible facts and data that con-

sumers are faced with today, it is particularly important that the information on food packaging be presented in such a way that members of all social groups can readily understand it. Another problem is that the label does not always list all of the ingredients. For example, the use of animal substances in supposedly plant-based foods, such as venison extracts in paprika crisps, does not have to be reported on the packaging.⁸

1.2 BSE CATASTROPHE GIVES RISE TO A NEW FOOD LAW

The BSE crisis provided a salutary shock. As a result, food law was completely revised. A significant indication of this change is the General Food Law (GFL),⁹ which in a sense represents the “constitution” of EU food law. The GFL puts the rights of consumers at the focus of food legislation. It lays down general principles and requirements and has been directly binding on all citizens of all Member States since 1 January 2005.¹⁰ European food law and the corresponding national legislation rest on two pillars: health protection and fraud prevention. In other words, at the heart of food law are the consumers and their individual rights to protection from health hazards and deception. The wording of the provisions on health protection and fraud prevention is clear and unambiguous. With respect to health protection, the potential to cause an adverse health effect is sufficient to constitute a health hazard. This means that there is no need for actual adverse health effects to occur.

In this way, EU food law guarantees a high level of protection on paper (“law in the books”). The main features of this approach are the two guiding principles enshrined in the GFL Regulation: the precautionary principle (Art. 7 of the GFL) and the general requirement for the traceability of goods through all stages of production, processing and distribution (Art. 18 of the GFL).¹¹ Full traceability is essential for not only ensuring food safety (e.g. for the rapid identification of the entry routes of hazardous substances) but also providing information to consumers (e.g. on a product’s origin).

The intention of the precautionary principle is to ensure that the necessary protective measures are even taken in cases where there is uncertainty as to the extent and likelihood of risk to human health. This means that, when consumers’ health, life and well-being are at stake, it is not enough to simply provide information about hazards: instead, consumers must be protected through the establishment and enforcement of requirements and prohibitions. Furthermore, the precautionary principle is associated with a reversal of the burden of proof. In other words, it is up to the potential perpetrators to prove that the measures they are planning pose no risk to human health.¹²

According to the GFL, the food market must be organised so as to preventively eliminate or minimise health hazards. However, the relevant statutory regulations and corresponding inspection and testing obligations give rise to a system that is organised on the basis of remedial instead of preventive action. This blatant shortcoming is evidenced by the reoccurring food scandals. The effects of fraud and health hazards are irreversible – especially when it comes to food. In most cases, the “corpus delicti” has already been placed on the market or irrevocably consumed by the time the fraud and health hazards, or adverse health effects, become evident.

This also demonstrates why transparency provisions – e.g. legal obligations for businesses and public authorities to disclose information of public interest in cases of fraud and health hazards/risks – play such an important role. However, the existing regulations are inadequate because they contain too many loopholes. The provisions on disclosure obligations in cases of potential health risks are vaguely worded, and there are no provisions whatsoever requiring public disclosure in cases of fraud and deception. These regulatory deficiencies are to a large extent responsible for the occurrence of major food scandals, like the horsemeat-lasagne scare, the fipronil-egg crisis and the Lactalis scandal involving Salmonella-contaminated baby milk products.

However, the legal position of consumers is not only dependent on the effectiveness of health-protection and anti-fraud policies. It is also determined by the rights that consumers have – as players in the marketplace – in their relationship with the state, manufacturers and retailers. These rights must be upheld not only for individual consumers, but also for consumer groups and associations: the protection of consumers cannot be achieved by simply strengthening the individual’s right to health protection and fraud prevention. Equally important is the legal position of consumers in relation to the rights of other players, for example with respect to the protection of fundamental rights and the ability to take action for the enforcement and strengthening of their rights. However, the strengthening of consumer rights is hindered by the fact that there is no EU law guaranteeing the right of consumer organisations to protect the collective interests of consumers by bringing legal actions.

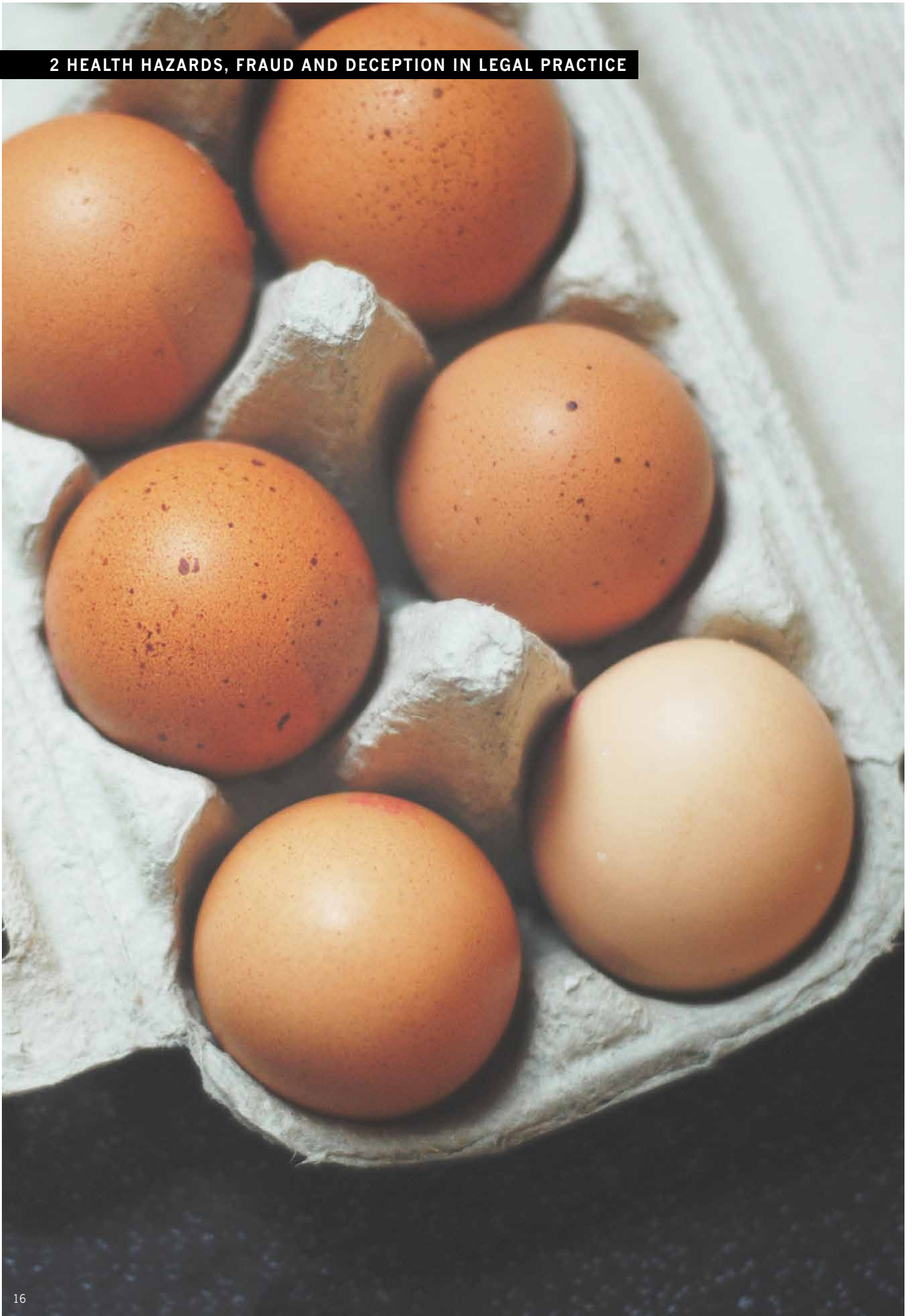
Food law provides for a much higher level of harmonisation than other areas of EU law. Even details are standardised under European law. National derogations from EU law that are aimed at establishing higher or stricter standards at national level – for example with respect to labelling regulations – are only permitted in rare cases and in compliance with strict requirements for their justification. This situation prevents competition for improved standards among Member States, in spite of the fact that such competition would have no negative effect on the functioning of the internal market.¹³

However, some areas are still regulated by the Member States. These include the organisation of food controls, the imposition of penalties for infringements of food regulations and information rights for consumers. Product labelling requirements specifying the information that manufacturers must provide on food products are harmonised in secondary law throughout the EU legislative process.

However, standardised formulations and product descriptions for processed foods are also defined at national and European level primarily without sufficient democratic legitimacy.

It is widespread practice that European industry associations agree so-called “codes of conduct” that include standardised formulations and their descriptions for packaged foods. These codes are then recognised by the European and national authorities, or by government-established committees, as quasi-legal provisions. The respective agreements between industry lobbyists and government authorities are neither public nor democratically legitimised. Unlike many other Member States, Germany has a so-called “Food Code Commission” that sets these standards. However, its decisions are also not made on a sufficiently democratic basis.¹⁴

In some cases, “voluntary” schemes are adopted at national level because mandatory regulations can only be enacted at European level. One example is the “Non GMO” (*ohne Gentechnik*) label, which manufacturers and retailers in Germany can put on products that do not come from animals fed with GMO feeds. Consumers can find this label primarily on eggs, dairy products and meat. Another example is the recent French law implementing a voluntary nutrition labelling scheme (5-C or Nutri-Score). However, these voluntary schemes have by definition a limited effect: only mandatory regulations can ensure that all producers and retailers play by the same rules and have an incentive to improve the quality of their food products, and that all consumers in Europe have access to the information they need to make healthier choices.



2 HEALTH HAZARDS, FRAUD AND DECEPTION IN LEGAL PRACTICE

2.1 INADEQUATE HEALTH PROTECTION

“Never before has our food supply been as safe as it is today; never have greater efforts been made in quality assurance at all stages of production and marketing.”¹⁵ This is the mantra of the food industry. The French food industry coalition ANIA has even claimed that most food companies are safer than some hospitals.¹⁶

But these claims only tell half the story. It is true that we are seeing fewer and fewer cases of direct and hazardous food contamination, for example from contaminated water. However, other clearly avoidable cases involving public health risks still occur. Examples are the 2010 cheese-related *Listeria* outbreak¹⁷ that led to eight deaths in Austria and Germany and the *E. coli* crisis in the spring of 2011, which resulted in a total of 53 deaths in Germany.¹⁸ In France, it is reported that, each year, more than 200 deaths are caused by foodborne pathogens, in particular *Salmonella* and *Listeria monocytogenes*.¹⁹

Moreover, the classic risks have been replaced by new kinds of hazards. These include dangerous substances that are not acutely toxic in small amounts but have long-term carcinogenic and mutagenic effects (e.g. dioxins and endocrine disruptors), a vast number of pesticide and veterinary drug residues (including antibiotic-resistant bacteria) and risks like overweight, obesity and diabetes, which can be caused by an unbalanced diet high in energy-dense, highly processed foods.

The fipronil-egg scandal broke in the summer of 2017. In the context of efforts to fight an outbreak of red mites, pens used for egg-laying hens had been treated with a disinfectant containing the toxic insecticide fipronil, which is banned for use on food-producing animals in the EU. The scandal reached mammoth proportions. Fipronil eggs had been exported to 45 countries, and the substance was unsurprisingly found in processed foods, sometimes in high amounts. The criminal act that caused the scandal was duly prosecuted, but the actions – and inaction – of the public authorities allowed it to spread widely. After the Dutch inspection body was informed about the illegal use of the toxic substance in the food chain, it launched a criminal investigation but failed to take action to stop any further contamination. When test results showed the presence of the forbidden insecticide in eggs months later, consumers were inadequately informed and protected.²⁰

The same applies to the Lactalis scandal. The news surrounding Salmonella-contaminated baby milk products, from a factory already contaminated in 2005, shook France in late 2017 and early 2018. Over a period of several months, the competent authorities and the company Lactalis, one of the world's largest dairy groups, had failed to provide transparent and comprehensive information about the Salmonella problem in the infant milk factory. As a result, the company was able to export 12 million boxes of potentially contaminated products to 86 countries, exposing countless infants to a preventable health risk.²¹

The following examples – by no means exhaustive – illustrate the inadequacy of the health protection provided to consumers.

>> FOOD ADDITIVES ASSOCIATED WITH CONTROVERSIAL HEALTH AND SAFETY ISSUES:

Food additives are used for a variety of purposes: preservatives extend the shelf life of products, colours make foods look more appetising, and flavour enhancers enable manufacturers to use smaller amounts of expensive ingredients without sacrificing flavour. However, safety concerns exist for about half of the around 390²² food additives that have been approved in the EU.²³ Their use is permitted in spite of their potential adverse health effects. For example, azo dyes (E 102, 110, 122, 124a and 129) and Quinoline Yellow (E 104) are suspected of contributing to ADHD (attention deficit hyperactivity disorder). However, instead of banning these potentially harmful substances from the market, the EU is merely requiring that manufacturers label their products with the warning “may have an adverse effect on activity and attention in children”. Companies are even allowed to hide this warning on the back of the package in fine print. These labelling requirements for food additives are not in line with the precautionary principle, which is enshrined in the GFL and the Regulation on the Authorisation of Food Additives.²⁴ In accordance with this principle, manufacturers and distributors should actually be required to prove that an additive is safe before it can be used (reversal of the burden of proof). However, this is not what occurs in legal practice. As illustrated by the example of azo dyes, even food additives associated with scientific evidence of potential adverse health effects are being authorised for use.²⁵

>> CONTAMINATED FEED:

Many major food scandals have been caused by animal feed contaminants (BSE, nitrofen, dioxin).²⁶ EU legislation on animal feed is incapable of protecting consumers from risks. The minimum sampling rate specified for feed business operators is too low to prevent the sale of feed with dioxin concentrations exceeding the maximum permissible levels. Furthermore, under the current provisions, feed manufacturers who discover that one of their feed batches contains unacceptably elevated levels of dioxin actually have an incentive to “blend down” the feed with non-contaminated batches in order to reduce the level of contamination to below the permitted limit for compound feed, in spite of the fact that this practice is illegal.²⁷ As a result, animal-derived food products with levels of contamination exceeding any (unavoidable) background contamination continue to appear on supermarket shelves even though the manufacturer was aware that the associated feedstuff was contaminated with dioxin. The blending down of contaminated feeds does not reduce the overall dioxin levels in the feed and food chain; instead, this practice simply distributes the contamination more widely and, in the case of bioaccumulative chemicals like dioxins, leads to the build-up of persistent, toxic and potentially hazardous substances in the bodies of millions of European consumers. Although illegal,²⁸ the mixing of feed batches for dilution purposes is very profitable because the likelihood of getting caught is extremely low.

>> INADEQUATE PROTECTION FROM TOXINS (PESTICIDES, DIOXINS, URANIUM) OWING TO LIMITS THAT ARE TOO LAX:

Consumers are not sufficiently protected from exposure to toxins, such as pesticides on fruits and vegetables, dioxins in animal feeds and uranium in water. This is primarily due to the fact that the existing maximum levels for contaminants in foodstuffs are too high. For example, the current maximum levels for dioxins²⁹ in the EU are much too lax to achieve the Europe-wide aim of reducing the average level of contamination.³⁰ In Germany the legal limit for uranium in drinking water is too high,³¹ and there is no maximum contaminant level for uranium in mineral water. The existing limits for pesticide residues on food are also unnecessarily high and could be significantly lowered. However, decisions regarding maximum contaminant levels and the approval of additives are based less on health protection and more on commercial considerations. For example, dioxin limits are set high enough to avoid having to take any products off the market. The maximum permissible level of dioxin in fish oil is many times higher than the limit for other fats or oils for the simple reason that fish oil typically contains high levels of these contaminants.³²

>> INADEQUATE PROTECTION FROM HEALTH RISKS ASSOCIATED WITH CONTAMINANTS (MINERAL OILS, ACRYLAMIDE) IN CASES WHERE NO MAXIMUM LEVELS HAVE BEEN SET:

Mineral oil in pasta, rice and chocolate or acrylamide in gingerbread, crisps and chips: numerous foods are contaminated with harmful substances. For some food contaminants, either no maximum levels have been set or the existing limits are inadequate. According to the European Food Safety Authority (EFSA), mineral oil aromatic hydrocarbons (MOAH), which can migrate into food from the printing inks in recycled paper packaging or other sources, damage DNA and may cause cancer. The French Agency for Food, Environmental and Occupational Health & Safety (ANSES) confirmed this analysis in a report released in May 2017.³³ Further risks are associated with mineral oil saturated hydrocarbons (MOSH): according to EFSA, they accumulate in human tissue, such as body fat, and can cause adverse effects in some organs. In spite of these clearly identified risks, no limits have been set at European or national level for MOSH/MOAH in food.³⁴ In addition, the acrylamide content of starchy foods is not being reduced in accordance with best practice. The so-called “indicative values” that manufacturers are not supposed to exceed were set to reflect the highest measured values, not the values that would minimise health risks.³⁵

>> ANTIBIOTIC RESISTANCE IN LIVESTOCK PRODUCTION:

Today’s livestock production practices are literally making a huge proportion of Europe’s farm animals ill. Scientists call these common animal-health issues “production diseases”, and their prevalence rates are either rising or stagnating at various high levels across the EU. Addressing the root causes of these diseases would require expensive and time-consuming changes in the living conditions of the livestock. Therefore, farmers are either simply accepting the losses associated with a certain number of diseased animals or using antibiotics to combat the symptoms. In 2011 a total of 8,481 tonnes of antibiotics were used on farm animals in the EU: 1,826 tonnes in Germany, 1,781 in Spain, 1,672 in Italy, 913 in France, 364 in the Netherlands, 107 in Denmark, 14 in Finland and 13 in Sweden.³⁶

The Scandinavian Member States were among the first to launch measures aimed at reducing antibiotic use. In 2008 the Netherlands followed suit, achieving a 70% reduction in livestock antibiotic use by 2012, albeit from a very high initial level. A law requiring farmers in Germany to submit detailed reports on the use of antibiotics in their herds and flocks entered into force in April 2014. However, this requirement only applies to livestock used for meat production (i.e. not to dairy cattle,

breeding sows or laying hens).³⁷ In addition, the use of this data for further scientific evaluation or the comparative analysis of various live-stock operations is expressly prohibited. However, this is exactly the type of research that would be necessary for determining why farmers and veterinarians at certain farms are using excessive levels of antibiotics while others use much less.

Excessive antibiotic use is not only an indication of poor animal health: it also contributes to the emergence of antibiotic-resistant bacteria, which can be dangerous for humans as well. The extent to which the increasing antimicrobial resistance in animals poses a threat to human health has yet to be scientifically established. However, the more antibiotics we give to livestock, the more we encourage the development of drug-resistant bacteria, which also increases the risk to humans – regardless of how close they live to the animals or what food products they consume.³⁸

>> BACTERIAL CONTAMINATION OF FRUIT AND VEGETABLES:

The E. coli outbreak in Germany in the spring of 2011 demonstrated that catching a life-threatening bacterial infection from seemingly healthy foods (like raw fruit and vegetables) is in no way an unrealistic scenario. Within just a few weeks, the outbreak in Germany claimed the lives of 53 people and sickened more than 3,800 others, many of them seriously. It subsequently emerged that the outbreak had begun to subside even before the public authorities had taken corrective measures to control the infection. The slow response time of the health authorities in determining the source of contaminated food was further exacerbated by the unsatisfactory implementation of the requirements for traceability. Owing to the fact that European food law only requires companies to know their direct suppliers and direct customers,³⁹ it can be extremely difficult or even impossible to reconstruct the contamination pathway in cases like the E. coli outbreak. The source of the infection – allegedly a horticultural farm in Lower Saxony that produced sprouts, including fenugreek sprouts – could have been identified sooner if the law had required comprehensive documentation of the entire production chain.⁴⁰ Also in June 2011, approx. 15 people in France – most of them children – became seriously ill after eating meat contaminated with E. coli.

>> HYGIENE RISKS FROM ROTTEN MEAT AND ANIMAL BY-PRODUCTS:

One direct result of the measures to combat BSE in Europe is the legal framework that was created not long after 2000 to establish transparency and accountability for a largely unregulated trade in slaughterhouse

waste products. Prior to the BSE crisis the meat industry (at least in Germany) was required by law to dispose of the majority of its slaughterhouse wastes. This requirement was associated with costly disposal fees. However, in a coup-like manoeuvre, the meat industry took advantage of the European BSE crisis in order to push through EU legislation allowing for the free tradability of roughly 80% of all slaughterhouse waste products, which are now referred to as “animal by-products”.

This means that, paradoxically, today’s consumers are even less protected from health hazards and food fraud involving the sale of animal by-products that have been recycled back into the food chain than they were prior to the BSE crisis.

As a result of the BSE control measures, the European meat industry has become even more difficult to monitor and more susceptible to fraud. This is evidenced by not only the various scandals involving rotten meat, but also the introduction of absurd regulations, such as the requirements for marking legally tradable slaughterhouse products with a special “dye” that is neither visible nor detectable by its olfactory properties.⁴¹

>> RISKS ASSOCIATED WITH NUTRITIONALLY UNBALANCED DIETS:

Processed foods are often high in salt, fat and sugar, contributing to poor nutrition. The increasing prevalence of overweight and obesity is associated with the widespread availability of unhealthy food products like soft drinks, most of which are high in sugar. The health costs of diet-related diseases in Germany amount to approx. €70 billion per year.⁴² According to the French Ministry for the Economy and Finance, overweight and obesity cost the country around €20.4 billion annually.⁴³ In the Netherlands the number of type II diabetes patients increases by 1,200 every week.⁴⁴ Owing to the EU’s incomprehensible and often misleading mandatory nutrition labelling scheme, consumers are unable to understand and compare the actual nutrient contents of products at a glance. Since December 2016 manufacturers have been required to use food labels that include information on the seven key nutrients (energy value, fat, saturated fatty acids, carbohydrates, sugar, protein and salt). However, they are allowed to hide this information on the back of the package in fine print. On the front of the package they can use unrealistically small portion sizes and misleading reference values for “guideline daily amounts” to make the products appear healthier with lower values for sugar, fat and salt per portion.⁴⁵

>> **CARDIOVASCULAR DISEASES CAUSED BY TRANS FATS:**

Research shows that industrial trans fats increase the risk of cardiovascular diseases. Trans fats are produced primarily through the hydrogenation (hardening) of vegetable oils and can therefore be found in high quantities in products like doughnuts, croissants, chips and popcorn. However, the trans-fat content is not listed on food labels. According to the German Federal Institute for Risk Assessment (BfR), approximately eight million consumers in Germany exceed the daily trans-fat intake recommended by the World Health Organisation (WHO) and the German Nutrition Society (DGE).⁴⁶ In 2016 the German Nutrition Society reaffirmed that further efforts were needed.⁴⁷ Nevertheless, there are still no legislative limits on trans-fat content – at national or EU level.

>> **RISKS ASSOCIATED WITH THE GLOBAL TRADE IN FOOD:**

Products with levels of pesticide residues exceeding the allowable limits are found regularly, especially in shipments of fruit and vegetables from third countries.⁴⁸ However, pesticide residues are not the only type of contamination commonly seen in globally traded food. For example, in 2008 baby formula contaminated with melamine killed six and sickened 300,000 children in China. Melamine was also found in milk powder in Germany.⁴⁹

In addition, the “new generation” of free trade agreements, such as CETA (EU – Canada) and TTIP (EU – USA), could have a major impact on Europe’s food regulations and their implementation. For example, a 2016 study commissioned by foodwatch concluded that the CETA and TTIP agreements do not sufficiently safeguard the EU precautionary principle and its future application.⁵⁰ The same applies to a number of other trade agreements currently being negotiated by the EU.⁵¹

2.2 INADEQUATE FRAUD PREVENTION

Consumer deception in the manufacturing and marketing of food are the order of the day – on both a large and a small scale. In February 2013 the horsemeat scandal shocked consumers throughout Europe. Lasagne and other ready meals labelled and distributed as beef products were found to contain horsemeat in varying quantities. According to official sources, manufacturers had mixed at least 750 tonnes of less expensive horsemeat into their products, enabling them to significantly increase their profits through fraudulent means. Horsemeat was found not only in products from small and medium-sized companies, but also in private-label products from major retailers, such as Kaiser’s Tengelmann, REWE and Aldi in Germany.⁵²

Although the horsemeat scandal became one of the most high-profile examples of food fraud in recent times, the underlying situation is not uncommon, and meat is by no means the only food product susceptible to fraud, deception and misrepresentation. Unsuspecting consumers are being deceived on a daily basis, but most of these fraudulent practices remain unknown to the public and receive too little attention from the authorities in charge. Other food products that are just as commonplace as meat can be much more susceptible to fraud. According to an explanatory statement published in 2013 by the EU parliament,⁵³ olive oil ranks first among the foods that are most at risk of fraudulent practices, followed by fish, organic foods, milk, grains, honey, coffee and tea, spices, wine and fruit juices. The new Official Controls Regulation (EU) 2017/625 set to enter into force in late 2019 is aimed at establishing a harmonised framework for official food and feed controls throughout Europe.⁵⁴ Although this regulation will also deal with the issue of food fraud for the first time, it is doubtful that its provisions will actually strengthen the rights of consumers. Instead, Europe has missed an opportunity to adopt legally watertight provisions at EU level requiring competent authorities to immediately inform the public about cases of deception, fraud or deplorable conditions. The new regulation makes explicit reference to the “protection of commercial interests of an operator”.⁵⁵ Businesses could invoke this article in order to prevent the authorities from publishing information on unlawful acts. This means that, in the future, it is possible that officials could choose to err on the side of confidentiality for fear of lawsuits, even in cases involving potential health hazards.

2.3 “LEGAL” FRAUDULENT LABELLING

In addition to the widespread illegal practices of consumer deception, there is also the phenomenon of “legal fraudulent labelling”: i.e. packaging, product presentation, product names and sales descriptions that are not legally objectionable but nevertheless mislead consumers. This perfectly legal form of deceptive labelling makes it impossible for consumers to quickly, easily and accurately assess and compare the quality of products. It is also one of the reasons why competition on the food market is based more on price than on quality – to the detriment of the companies that supply genuinely high-quality products.

Article 8 of the General Food Law and Article 7 of Regulation (EU) No 1169/2011 on the provision of food information to consumers state unequivocally that food business operators are not permitted to mislead or deceive consumers with the presentation, packaging or advertising of their products. However, these provisions are apparently inadequate, as demonstrated by the following real-life examples of “legal fraudulent labelling”.

EXAMPLES OF LEGAL FRAUDULENT LABELLING:

- >> A food can be sold with the claim “no flavour enhancing additives” even if it is made with yeast extract, which contains the flavour-enhancing substance glutamic acid. The trick: food law differentiates between ingredients and additives. Yeast extract is considered an ingredient. Therefore, the claim “no flavour-enhancing additives” is legally correct. Nevertheless, when consumers read this claim, they automatically assume that the product contains no flavour enhancers whatsoever – neither as additives nor as ingredients.

- >> With the current EU labelling scheme, consumers are not able to see at a glance how much fat or sugar a product contains, nor can they easily compare the nutritional contents of two different products. Manufacturers are allowed to hide the legally required nutrition table, which provides information on the amount of fat, sugars and carbohydrates, on the back of the package in fine print. On the front of the package, they can use the so-called GDA (Guideline Daily Amount) labelling system with unrealistically small portion sizes and misleading percentage figures to make the product look healthier than it actually is.

- >> “With 9 essential vitamins” – in Europe, it is perfectly legal for food companies to use statements like this for marketing their sweets and sugary drinks. The reason: there are still no adequate legal restrictions on the types of foods permitted to carry nutrition and health claims. The aim of the 2006 European Nutrition and Health Claims Regulation (NHCR) was to stop companies from using misleading health claims. However, just the opposite has occurred: although food manufacturers are now (since 2012) required to have their health claims approved by the EU – and some 250 of these claims have already been authorised – there are still no restrictions on the types of products that manufacturers are allowed to advertise with these claims. Therefore, it is still perfectly legal to use health and nutrition claims for marketing high-fat, high-salt and high-sugar products as healthy.⁵⁶ These marketing strategies mislead consumers and torpedo their efforts to make healthier food choices.⁵⁷
- >> The illustrations and names used on the front labels of packages often suggest inaccurate ingredient proportions or include images of ingredients that are not even found in the product. The French brand Coraya has used particularly misleading marketing practices. Its surimi product “Suprêmes” displays the word “lobster” in large letters on the front of its packaging but does not contain the slightest trace of lobster, not even in the form of a flavouring.⁵⁸ The product costs twice as much as Coraya’s classic surimi.
- >> Manufacturers are allowed to market their products with a specified origin (“locally grown”, “regionally produced”) even if the ingredients do not come from the respective region. The EU has even developed its own misleading designation-of-origin label: “Protected Geographical Indication” (PGI). One product that uses this “quality label” is Black Forest ham. Although these popular products must be processed in the Black Forest region, the meat can be imported from other countries, meaning it can come from pigs that never set foot in the Black Forest region. Another example is the misuse of the “Made in France” label and French flags on products whose ingredients actually come from all over the world.⁵⁹
- >> There is no EU law requiring origin labelling for processed food – only for unprocessed food – as a result, consumers are being systematically misled. For example, companies do not have to specify the origin of the fruit used in their jam products. France is implementing a two-year trial of mandatory country-of-origin labelling (COOL) for meat and milk, and a few other European countries are testing similar COOL schemes.⁶⁰
- >> The “natural flavouring” referenced on a jar of strawberry yoghurt may have nothing at all to do with strawberries. A flavouring can be referred

to as “natural” if it is derived from any substance of natural origin. Not even the “strawberry flavouring” has to be made from strawberries: it just has to taste like them.

- >> High-oxygen packaging systems are used for raw meat products, such as minced beef, in order to preserve the meat’s bright-red colour so that it looks fresh for several days. This so-called modified atmosphere not only deliberately misleads customers, but also results in significant quality deterioration.⁶¹

The fact that consumers feel deceived by legal forms of product information, presentation and packaging has been well documented by numerous sources, including foodwatch’s campaign against legal fraudulent labelling⁶² and the associated surveys.



3 LEGAL SHORTCOMINGS OF HEALTH-PROTECTION AND FRAUD-PREVENTION POLICIES

3.1 INADEQUATE IMPLEMENTATION: PRECAUTIONARY PRINCIPLE, FRAUD PREVENTION AND TRACEABILITY

This section describes several shortcomings of health-protection and fraud-prevention policies caused by the inadequate food laws, their inadequate enforcement or their loopholes and weaknesses. However, shortcomings can also be found in other branches of law that are relevant to the effective implementation of health-protection and fraud-prevention policies, including criminal law, liability law and consumer protection law (e.g. rights of consumers to take legal action against unfair or deceptive business practices). In addition, official food control systems undermine consumers' right to be protected from health hazards and fraud.

The GFL explicitly requires businesses to be able to identify at least their immediate suppliers and customers, i.e. trace their products “one step back and one step forward” in the supply chain. However, this requirement has never been enforced by the EU Member States. This fact is evidenced, for example, by the inability of the food safety authorities to determine the whereabouts of contaminated products in the wake of the fipronil scandal. As a result of these difficulties, it was impossible for them to issue the necessary product warnings and recalls in a timely and effective manner.

Another problem is that the precautionary principle is not being effectively applied as required by EU law. Evidence of its inadequate implementation can be seen in numerous pieces of secondary legislation: e.g. the EU regulations on food additives, on establishing limits for contaminants and toxins, on mandatory testing for animal feeds and on the disposal of animal by-products. The precautionary principle is also not adequately applied in the legislation covering the authorisation of pesticides and genetically modified organisms (GMOs). Its consistent application in this context would call for a reversal of the burden of proof, meaning that all studies on the health effects of plant protection products would have to be published. However, this approach has not been taken to date.

The GFL also explicitly prohibits fraudulent, deceptive and misleading practices. Nevertheless, “legal fraud” is widespread owing to weak provisions in the GFL and shortcomings in the corresponding secondary legislation, such as the European Food Information to Consumers Regulation,⁶³ in particular the requirements for origin labelling and for nutrition information on processed foods.

While the majority of decision on food-labelling rules are taken by the EU, the all-important “sales descriptions”, along with the associated compositional requirements that specify food-quality standards, are decided in secrecy and without sufficient democratic control. Many of these standards – including the so-called codes of conduct – are defined by industry associations and acknowledged by the European or national authorities as legally binding in spite of the fact that they have never been democratically approved. In the Netherlands and France the codes are adopted by the responsible ministries.⁶⁴ In Germany a committee known as the German Food Code Commission (DLMBK) defines this type of “generally accepted trade usage” through so-called Leitsätze (guidelines).

3.2 INADEQUATE ACCOUNTABILITY OF FOOD OPERATORS/RETAILERS

The General Food Law gives food business operators primary responsibility for ensuring that consumers are protected from health hazards and fraud. However, this principle is only effective if the respective companies can also be held liable. This is not sufficiently the case, particularly with retail businesses. The market power of food retailers has continued to grow since the introduction of the General Food Law. Owing to a number of mergers and acquisitions, today's food market is dominated by a handful of large firms. These retail groups are also responsible for the majority of the food products that are imported into the EU from third countries. In spite of this great market power, retailers are rarely held accountable for their products, services and actions. Under the GFL, primary responsibility for ensuring compliance rests with the producers, processors and manufacturers, not the retailers. A retailer is only liable "within the limits of its respective activities".⁶⁵ This means that retailers are only minimally liable for the safety and authenticity of the foods they sell. Retail businesses are only subject to the same liability as producers when they import products directly from third countries.

This is the main reason why scandals like the horsemeat crisis have been able to assume such gigantic proportions. Retailers are not legally required to carry out their own testing for ensuring food quality and safety. In the case of the horsemeat scandal, a mandatory programme like this could have prevented the sale and consumption of numerous contaminated products, because the retailers, who became aware of the fraudulent products long before the information was made public, would have been required to disclose the information. Furthermore, if testing programmes were mandatory, retailers could be held liable for their actions because they would be required to verify the quality of the products they sell. Without this requirement, retailers cannot be held accountable and even have an incentive to "look the other way" so that they can claim ignorance if any of their products are shown to be hazardous or fraudulent.⁶⁶

3.3 INADEQUATE DISCLOSURE REQUIREMENTS FOR BUSINESSES AND PUBLIC AUTHORITIES

In addition to the clear GFL requirements that are not effectively applied and enforced, the law also has systematic weaknesses, including in particular the inadequate disclosure requirements for businesses and public authorities in cases of fraud and health hazards.⁶⁷ Owing to numerous loopholes and exceptions in the GFL Regulation, neither businesses nor public authorities are informing consumers early and effectively enough to protect them from health risks and fraud. The provisions on the recall of unsafe products are also inadequate. As a result, hazardous and fraudulent products continue to find their way into the food chain and remain there for long periods of time.

The immediate disclosure of information on health hazards and fraudulent products enables consumers to protect themselves. Therefore, the disclosure of information by the public authorities in combination with an effective traceability system is an essential factor in the protection of consumers from fraud and health risks.

However, the requirements of the GFL are vague. For cases involving risks to public health and safety, the relevant provisions do not require public authorities to fully and immediately inform the public. Instead, these provisions only refer to “appropriate steps”. When it comes to fraud, there are no disclosure obligations in the GFL whatsoever. This is why, for example, the Dutch authorities did not inform the general public about the fipronil scandal until the summer of 2017 in spite of the fact that they had learned of the issue – the use of a banned insecticide to disinfect chicken pens – as early as November 2016. Dutch officials explained that they had not released the information for fear of compromising their criminal investigation. Even if the authorities had not given a reason for keeping the information secret, they would not have been punished, as there is no law in the European Union that would make it possible to sanction public authorities in such cases.

This unfortunate situation stems in part from the fact that the primary responsibility for informing the public and recalling products rests with the respective business. Fearing potentially costly compensation claims from businesses, the authorities are hesitant to take action. To make matters worse, businesses enjoy a great deal of freedom to disclose information at their discretion in cases of health hazards. They are only required to inform the public if they have “reason to believe” that the products are unsafe. This is an ambiguous phrase that protects businesses from sanctions in cases of uncertainty, because “reason to believe” means that companies have knowledge of certain facts. The law does not place any obligations on businesses to gather these facts through monitoring activities. Furthermore, in cases of fraud, neither the authorities nor businesses are subject to any mandatory disclosure requirements underpinned by sanctions. This regulatory shortcoming is the main reason why the horsemeat scandal was able to assume such gigantic proportions.

The following example illustrates how inadequate the legal transparency requirements are for consumers in cases of product recall. If pieces of glass are found in a jar of jam or Listeria in a certain cheese, the respective product – if it has already been sold to consumers – is normally recalled, at least if there is any possibility that the issue is not an isolated incident. The primary and sole responsibility for the recall is borne by the food manufacturer or distributor.⁶⁸ Although the competent authority is generally informed about the incident, it can only initiate a product recall and warn consumers of health hazards if the respective company does not take appropriate action.⁶⁹ Fearing potential lawsuits by companies, the authorities only rarely take the initiative to warn the public of food products that are not fit for human consumption.⁷⁰ Safety issues that could potentially affect other European countries are reported to the Rapid Alert System for Food and Feed (RASFF) by the country in which the potential health threat has been identified. However, the authorities are not required to disclose the product name or information on the manufacturer. So they don't.

3.4 INADEQUATE INFORMATION RIGHTS FOR CONSUMERS

In the EU the consumer's right to access information held by public authorities or businesses remains underdeveloped and is not covered by the GFL. Traditionally, Scandinavian countries, such as Sweden, have done much more to strengthen consumer information rights in all areas. These countries apply the principle of "disclosure over secrecy", meaning that justification is required for keeping information confidential but not for disclosing it. In most of the other EU Member States, the opposite rule applies. Even in countries where the authorities are obliged by law to disclose such information to the public, lengthy court cases are often required to force them to meet their obligations.

To make matters worse, the new rules introduced by the Official Controls Regulation (see Section 2.2 above), as well as the Trade Secrets Directive, may further limit the provision of information to consumers.

Germany has not only a Freedom of Information Act (Informationsfreiheitsgesetz) and an Environmental Information Act (Umweltinformationsgesetz), but also a Consumer Information Act (Verbraucherinformationsgesetz) that entered into force in 2002 and has since undergone several amendments. However, many years of experience with this law has shown that, in practice, the information rights of consumers are still severely restricted. Business and trade secrets are defined in great detail, fees are charged for the release of information, and information is rarely disclosed in a timely manner. Several cases demonstrating the absurdity of the situation have been reported.

In France there is no freedom of information law that applies to the agri-food sector. Accordingly, the consumers' right to information is not respected in practice.

In the Netherlands the Government Information (Public Access) Act (Wet Openbaarheid Bestuur – WOB) covers public access to government information. The law incorporates a number of exceptions (Article 10, Paragraphs 1 and 2) and views "the interests of third parties" as a very broad exception to access to government information (Article 10 (2) (g)). For example, access should not lead to disproportionate benefits or disadvantages for third parties. If the interests of third parties are disproportionate to the benefits of access, data is not shared. The argument of "disproportionate reputational damage" has been used on many occasions (without further justification or evidence) by the Netherlands Food and Consumer Product Safety Authority (NVWA) to reject information requests. The verdict in the Selten horsemeat lawsuit established new jurisprudence, according to which, under the circumstances

of the horsemeat crisis, the authorities could not argue that third party interests take precedence over the benefits of access to information/disclosure of data. Although there are time limits for information sharing under the Wet Openbaarheid Bestuur, requests for access are not always answered within the required time frame, and the process generally takes too long for food products. Given the nature of food, which is often consumed not long after its purchase, time delays mean that it is nearly always too late by the time the consumers receive the information.

3.5 TOOTHLESS FOOD CONTROLS AND “SMILEY” SYSTEMS

According to the European General Food Law, the Member States are responsible for verifying that the requirements of food law are fulfilled at all stages of production. Article 17 (2) reads:

“For that purpose, [Member States] shall maintain a system of official controls and other activities as appropriate to the circumstances, including public communication on food and feed safety and risk, food and feed safety surveillance and other monitoring activities covering all stages of production, processing and distribution. Member States shall also lay down the rules on measures and penalties applicable to infringements of food and feed law. The measures and penalties provided for shall be effective, proportionate and dissuasive.”

In other words, Member States are responsible for carrying out official controls, imposing sanctions for infringements and informing the public.

The food control systems in most EU Member States are inherently inefficient. The competent authorities are not organised in such a way as to guarantee independence from political interference. Accordingly, they are not immune to conflicts of interest (e.g. their responsibilities for increasing business tax income and promoting job creation) and cannot enforce food law with the necessary focus and consistency. In addition, they lack the personnel and equipment required for performing their duties as mandated by law. This has a negative impact on consumer protection.

The food control systems in France, the Netherlands and Germany are organised differently, and none of the systems have shown to be very effective. In France the responsibility for food control is mostly shared between the Ministry for the Economy and Finance (DGCCRF) and the Ministry of Agriculture (DGAL), and is decentralised in the various regions and departments. Only very general information and indicative figures are published, not reports on the control authorities' findings or activities. The country has been testing a voluntary "smiley" system since early 2017.⁷¹ However, it only publishes a rating on hygiene controls, which is insufficient. Furthermore, the information is only available for one year.

The situation is similar in the Netherlands. The country's food control system is also ineffective. However, the situation might improve thanks to a new law that was passed on 1 November 2016 (Wijziging van de Gezondheidswet en de Jeugdwet teneinde een Mogelijkheid op te nemen tot Openbaarmaking van Informatie), which will make it legal for the Netherlands Food and Consumer Product Safety Authority (NVWA) to publish its inspection results but will not provide for the disclosure of information on fraud cases. The underlying regulation (Algemene Maatregel van Bestuur, AMvB) that will dictate what information can be shared and in what manner still needs to be approved. Therefore, it is still too early to predict how effective this law will be in terms of consumer protection.

In Germany the responsibilities for controls are not centralised at a federal state authority, but instead allocated to various levels of state administration. Authorities at local level, meaning in the districts or in cities with district status, are responsible for carrying out the inspections. As a result, around 400 different authorities in Germany are tasked with the control of foodstuffs. In most cases, the directors of these district authorities are also responsible for the economic development of their district, i.e. for job creation and tax revenue. This places them in a permanent, structural conflict of interest. In addition, many of the control authorities are understaffed and underfunded.

The new EU regulation on official controls stipulates the following:

"For the performance of official controls aimed at verifying the correct application of Union agri-food chain legislation, and of the other official activities entrusted to Member State authorities by Union agri-food chain legislation, Member States should designate competent authorities which act in the public interest, are appropriately resourced and equipped, and offer guarantees of impartiality and professionalism."⁷²

But in reality, the resources allocated to the national authorities in charge of these controls are far from sufficient. Instead, the Member States tend to rely on the self-control systems of the food and feed business operators. This is a clear violation of EU law, as it is ultimately the responsibility of the Member States to

“enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution”,

as stated in Article 17 of the General Food Law.

Without public disclosure, controls are primarily remedial in nature. Controls can only be carried out on a random basis, and penalties are often so low that companies can, to a certain degree, budget for them – nothing like the “effective, proportionate and dissuasive” penalties required by Article 17 of the GFL. Therefore, more controls and higher fines are necessary, but, in order to effectively induce manufacturers and retailers to act preventively with respect to health hazards and fraud, public information is absolutely essential. A “smiley” system requiring the results of all official food-related controls (on the products as well as in the production environment) to be published could prevent many potential infringements before they occur.



4 STRUCTURAL / POLITICAL REASONS FOR INSUFFICIENT CONSUMER PROTECTION

There are several structural reasons why, in practice, consumer protection does not work as well as it should for a properly functioning internal market for food in Europe. These range from the fundamental inequality in the level of protection for companies in comparison to consumers (4.1) to essential problems in both criminal and civil law or the very limited rights of consumer organisations to bring collective actions with any significant impact (4.2). Other structural issues include the democratic deficits of food legislation at both national and EU level (4.3), the powerful industry lobby that blocks measures aimed at preventive consumer protection (4.4.) and the relevant trade policy of the EU (4.5).

4.1 UNEQUAL PROTECTION FOR CONSUMERS AND COMPANIES

In the previous sections, we discussed a number of problems associated with the inadequate implementation of the General Food Law. This situation is exacerbated by the fact that the legal structures afford more protection to companies than to consumers. If companies feel that certain government measures are illegally interfering with their fundamental rights, particularly their entrepreneurial freedom, it is possible for them to use legal means and, in individual cases, force a high-court decision all the way to the national constitutional courts or, in cases involving EU law, the European Court of Justice. Consumers and consumer groups, on the other hand, have very few effective options for enforcing their fundamental rights against food companies, either directly or indirectly (for example, via civil law).

Consumers would only have an advantage over companies if, for example, consumer organisations were given the right to bring legal action against companies and public authorities, both at national and EU level. This would make it possible to sue companies for violations of food law without having to wait for the infringement to cause individual harm. In addition, a more level playing field would be created between consumers and companies.

4.2 CRIMINAL LAW, CIVIL LAW AND RIGHT OF ACTION

CRIMINAL LAW

The public's initial response to food scandals, be it fraud or health hazards, is always: "More severe penalties!" However, those who defend the status quo argue that the maximum penalties available under the law are not even being used. If we consider Article 17 of the GFL, the situation seems clear:

*"Member States shall also lay down the rules on measures and penalties applicable to infringements of food and feed law. The measures and penalties provided for shall be effective, proportionate and dissuasive."*⁷³

There is a fundamental reason why the penalties do not have a deterrent effect and the maximum penalties are rarely used: if the responsibilities are not clearly defined in law (which is the case, for example, with the vague disclosure requirements in cases of fraud committed by businesses), then it is impossible to determine who is at fault, and no dissuasive penalties can be applied.

Furthermore, it is particularly difficult to prove guilt in cases involving damage to health. The potential adverse health effects of some hazardous food contaminants like dioxin are normally not acute, but instead can occur many years after exposure. This often makes it impossible to establish a clear cause-and-effect relationship. The position of consumers could be improved by a reversal of the burden of proof (i.e. instead of requiring the harmed individual to prove that a product is harmful, the responsibility is placed on the manufacturer or distributor to prove that it is safe).

In other words, the demand for more severe punishments is growing, but it is often used for defending the unsatisfactory status quo, as long as the underlying causes for the absence of deterrent penalties imposed by the courts are not being named.

Fraud cases are difficult to prosecute owing to the vague liability rules, particularly at the retail level. For example, if the large retail firms were legally required to carry out specified self-monitoring and testing programmes, it would be easier to establish guilt. These legal shortcomings were particularly apparent during the horsemeat scandal: although many of the mislabelled products were sold by large retail chains as private-label products, it was impossible to prove that the chains had acted with wilful intent or gross negligence because there are no special testing obligations imposed by law. Therefore, the retail chains managed to avoid being held legally liable (see

Section 3.2).⁷⁴ France and the Netherlands have corporate criminal liability laws, whereas Germany still adheres to the principle of individual criminal liability. However, the difficulty of establishing guilt in cases involving damage to health would not be solved by the introduction of corporate criminal liability.

Nevertheless, the proof of guilt is even more difficult on the basis of individual criminal liability. Owing to the requirement to prove individual breach of duty, only individuals from the company can be held accountable for wrongdoing; the structural shortcomings of the corporate entity itself cannot be sanctioned under criminal law. Significant fines can only be imposed on companies in the context of the Administrative Offences Act (OWiG) and only under certain conditions. For example, in late 2009 and early 2010 several people died after German Lidl supermarkets and Austrian retailers had sold *Listeria*-contaminated Harz cheese from the company Prolactal. The court ruled that Lidl had waited too long before recalling the product, and the company was forced to pay a fine of €1.5 million.⁷⁵

In the absence of a corporate criminal liability law, the fine was imposed under the German Administrative Offences Act (OWiG). However, this instrument is less effective in criminal cases because the competent authorities are not required to prosecute administrative offences; instead, they are allowed to apply their own discretion in these matters.⁷⁶ This situation also makes it more difficult to impose a fine on the company,⁷⁷ or to take action against the administrative authorities' failure to enforce laws or conduct inspections.⁷⁸

CIVIL LAW

Under civil law, it is also very difficult for consumers to hold manufacturers and retailers responsible for health damages. The reasons are similar to the ones discussed above in the context of criminal law. Therefore, consumers also have little prospect of being awarded compensation under civil law, not to mention how difficult it is to put a monetary value on damages to health. Actions for damages are only successful if causation can be established between the consumed food and the health damage. However, a direct causal link is very difficult to prove in cases involving foodstuffs.

The civil law liability of manufacturers and retailers for fraudulent offences is negligible. It is limited to the taking back of the mislabelled product – which, by then, has usually already been consumed – and the reimbursement of the purchase price.

RIGHT OF ACTION

The difficulties associated with the enforcement of consumer rights under criminal and civil law are also reflected in the lack of options for consumers to bring an individual or collective action against businesses or public authorities. Above all, the difficulty in proving a causal relationship between damage to health and contaminated food is a major reason why consumers are so rarely able to successfully defend themselves (see above).

A reversal of the burden of proof in cases where the manufacturer has violated existing legal provisions would significantly strengthen the rights of plaintiffs. Then, it would no longer be the consumers' responsibility to prove that the manufacturer's unlawful action caused their adverse health effects. Instead, the manufacturer would have to prove that the plaintiff's health was not damaged as a result of its illegal practices in the manufacture of its food products.

The existing laws that allow consumer associations to bring actions alleging fraudulent or deceptive business practices are largely ineffective. One example is the German Law against Unfair Competition (UWG).⁷⁹ Lawsuits for unfair business practices can be filed by consumer organisations like foodwatch or the Federation of German Consumer Organisations (vzbv), as well as companies. For example, the Federation of German Consumer Organisations sued the company Teekanne on the basis of the UWG for the misleading labelling of its raspberry-vanilla tea (see Section 1.1) and won the case. However, other teas with similar labelling are still being sold – some even by the company Teekanne. These results show that successful lawsuits against unfair business practices only have an isolated impact, namely on the two litigating parties. They cannot remedy the problem on a large scale and subsequently will not change the market. Therefore, they have to settle for example-setting intervention in individual cases. Deception is profitable for companies because fines are rarely imposed and simply not high enough to serve as effective deterrents.

An effective law allowing consumers to bring actions against private businesses or the state alleging violation of national or EU laws, or against secondary legislation that breaches the requirements of primary law, would help level the playing field between consumers and companies.

The Dutch have taken an interesting approach to “levelling the playing field” between citizens on the one side and the state and companies on the other. Here, interest organisations like foodwatch have legal standing to bring lawsuits (Art. 3:305a Dutch Civil Code – Burgerlijk Wetboek). Consumer rights organisations can bring consumer actions for a wide range of cases (not only unfair business practices). An interest organisation can initiate a lawsuit on behalf of its supporters if the organisation's aim, as stated in its statutes,

corresponds with the aim that is served by the case. This means that, in the Netherlands, foodwatch could launch a civil lawsuit against any party it feels has engaged in wrongdoing – a food company, the state etc. This also applies to administrative law, which likewise requires a party to have an interest in order to appeal a public decision. An organisation is considered to have an interest if its statutes state that the organisation serves this interest. The Urgenda Climate Case was a civil case filed in this manner.⁸⁰ The plaintiffs accused the Dutch government of failing to fulfil its legal duty to reduce greenhouse gas emissions.

4.3 THE POWER OF THE INDUSTRY LOBBY: REMEDIAL INSTEAD OF PRECAUTIONARY MEASURES

The numerous legal shortcomings of fraud prevention and health protection have one key consequence: the health of consumers is being gambled with on a daily basis instead of protected through preventive measures. At the same time, the deception of consumers is an everyday phenomenon of food law. Violations of fraud-prevention and health-protection provisions are being identified too late – if at all. Most of these cases are irreversible because, as a general rule, the corpus delicti has already been consumed by the time the issue is discovered: i.e. the consumer's health may have already been impacted, and a fraudulent product can no longer be returned. The damage caused by harmful food products is difficult to establish and cannot be subsequently attributed to the violation, let alone repaired. Thus, the regulatory framework would have to be shaped so as to ensure that there are effective incentives for companies and public authorities to prevent health hazards and fraud from the start. In practice, however, the market-regulation mechanisms are not preventive, but instead remedial.

The lack of preventive consumer-protection measures in the practice of food law constitutes a violation of the policies and principles of European food law, in which the precautionary principle (the prevention of risks for consumers) plays a central role. This development of European food law is not accidental, nor did it result from any ignorance on the part of the legislature. Instead, it is the direct result of the food lobby's success in influencing legislation. Preventive consumer protection is beneficial for consumers and cost-saving for society. At the same time, it increases costs for the food industry, and while these costs could be passed on to consumers in the form of somewhat higher prices, they nevertheless represent a burden for each individual company.

For example, requiring feedstuff companies to test every batch of feed would, on the one hand, mean higher costs for the individual companies, potentially endangering their viability but, on the other hand, greatly reduce costs for society through the prevention of feed scandals. The retail price for meat products would only increase slightly, if at all.⁸¹ Feed companies that are unable to shoulder the additional burden of stricter testing requirements and could therefore not guarantee sufficient safety would not survive, but the exit of these companies from the market constitutes an important and desirable weeding-out process.

However, the strong lobby of the feed industry is not focused on the interests of consumers; instead, its main objective is to keep operating expenses low – regardless of the resulting costs to society. Accordingly, precautionary measures for protecting consumers – in both the animal feed and food sectors – go against the interests of the food industry. It is not without significance that, in the drafting and implementation of the pioneering, preventive principles of food law, it was primarily the interests of the food industry that prevailed. The state was incapable of opposing these interests.⁸²

The political influence of the food industry is omnipresent. It manifests itself on all levels of legislation, including the rules for the control of foodstuffs. The food industry even dominates the executive branch. Furthermore, the persistent preponderance of commercial interests at the expense of the legal protection of consumers is reflected not only in the personal ties that can be seen between the food industry and the formally independent state institutions for consumer protection but also in the dominance of the food industry in government-sponsored cooperative projects.

The manner in which the fundamental principles of European food law have been inadequately implemented – or even turned upside down – illustrates how governments have to a significant extent surrendered their mandate of governance to the food industry.

The BSE crisis allowed some insight and good intentions to return, but only for the short term. There was broad public agreement that a catastrophe like this should never happen again. However, if the worst comes to the worst, the existing regulations would most likely not be able to deliver on this promise. And the necessary measures have been blocked by the very groups who were responsible for the catastrophe in the first place.

4.4 THE EU'S TRADE AGREEMENTS

The trade policy of the European Union poses a threat to consumer protection. This threat has been clearly documented by the critics of the free trade agreements. Important elements of this criticism have resulted in the submission of a constitutional complaint to the German Federal Constitutional Court, in the Belgian government's decision to request an opinion from the European Court of Justice and in a constitutional complaint filed by French members of parliament. One of the most unacceptable developments is the systematic undermining of the precautionary principle in the trade agreements.⁸³ The precautionary principle, which is enshrined in both EU primary law and food law, is not adequately safeguarded in the EU's free trade agreements, e.g. CETA, the currently shelved TTIP deal and several other trade agreements presently being negotiated by the EU.⁸⁴ These agreements, if allowed to enter into force in their current form, would make it significantly more challenging – if not impossible – to further raise food law standards.



5 AMENDMENT OF THE GENERAL FOOD LAW

5.1 “REFIT” AND FITNESS CHECK OF THE GENERAL FOOD LAW

This report proves that, although its introduction was a very positive step, the General Food Law has failed to achieve many of its objectives and can therefore hardly be considered a success. Several provisions are too weak, many loopholes exist, and the regulation is not being adequately enforced by the Member States. This is why food scandals continue to plague Europe.

In 2014 the European Commission commenced a REFIT (Regulatory Fitness and Performance Programme) evaluation of the EU General Food Law. The stated aim of this programme is to ensure that EU laws deliver their intended benefits for citizens, businesses and society while removing red tape and lowering costs. As the first step of this process, the European Commission launched a “Fitness Check” of the regulation. Its findings were published in January 2018.⁸⁵

In the context of its Fitness Check, the Commission came to the conclusion that the General Food Law has achieved its core objectives, namely high protection from consumer health risks and fraud and the smooth functioning of the internal market.

In the Commission’s opinion, several significant improvements have been made, including better traceability, more clearly defined responsibilities for businesses in the market, greater transparency of the EU decision-making process and the systematic implementation of the risk analysis principle. The Commission also claimed that consumer information obligations are now better integrated into food law and that the food and drink industry has strengthened its position as one of the leading economic sectors in the European Union. Overall, it concluded that there is greater food safety and fewer food crises. Furthermore, the competitiveness of the EU food and drink industry has increased, and the Rapid Alert System for Food and Feed (RASFF) has helped ensure that information could be exchanged quickly between countries in the increasingly globalised food market.

Accordingly, the Commission put forth a weak legislative proposal in April 2018 that fails to address the fundamental problems described in this report.⁸⁶ The European Commission is concentrating on changes to the EFSA risk-assessment process – which is certainly an important point but by no means the only issue that needs to be addressed.

In foodwatch’s opinion this assessment of the past is completely detached from reality and actual needs. The numerous food scandals that have plagued Europe since the General Food Law entered into force, e.g. dioxin-contaminated food, the E. coli scandal with over 50 fatalities, the horsemeat scandal, the fipronil scandal involving eggs contaminated with insecticide and the Lactalis scandal (just to name a few), are proof that neither has the scope and frequency of food scandals decreased nor is it reasonable to claim that consumers are now better protected from health risks and fraud than they were in the past.

As evidenced by the recent fipronil and Lactalis cases, the traceability system required under the GFL has not been implemented, in spite of its limited scope of “one step back and one step forward”.

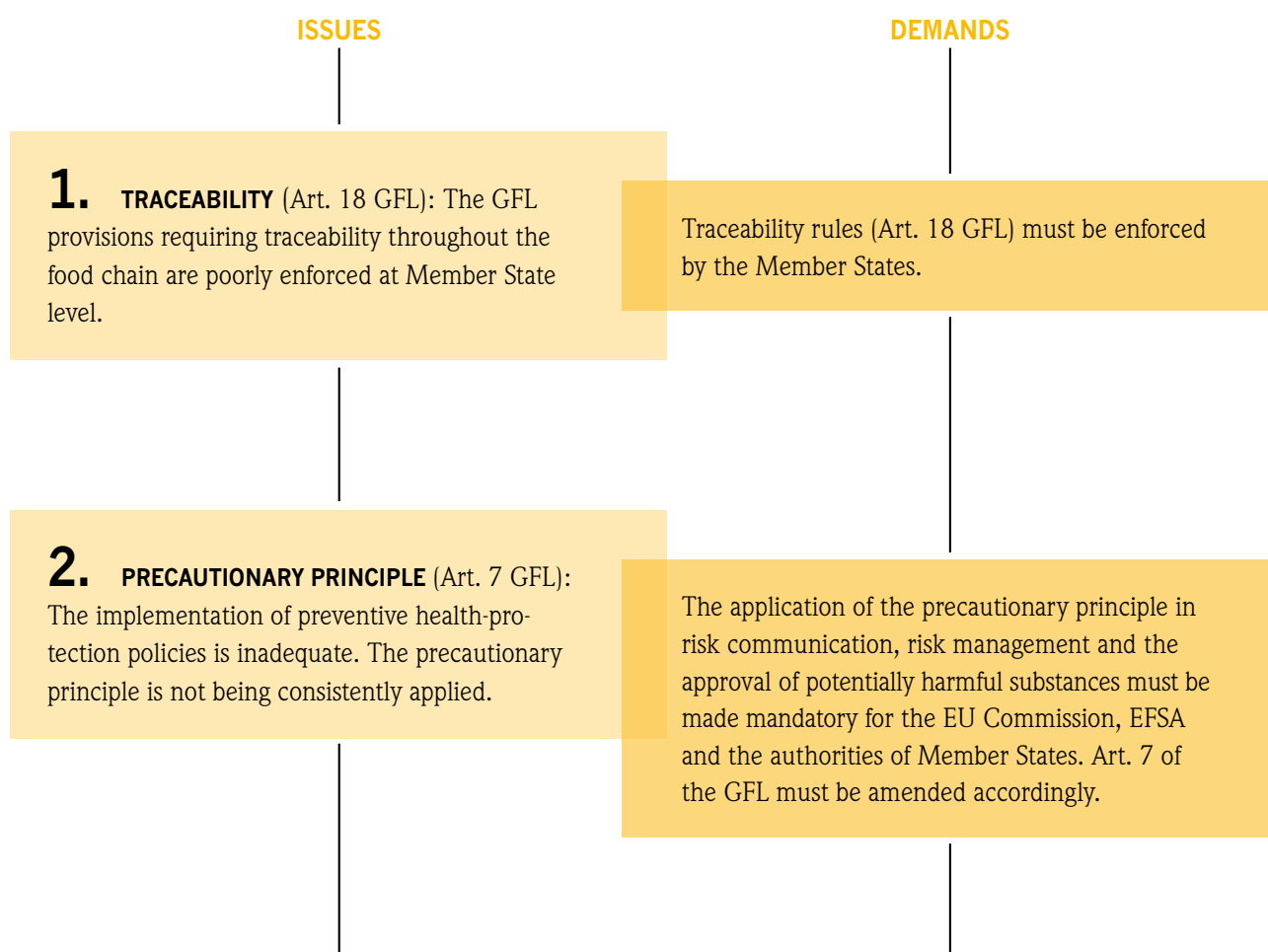
In cases involving health hazards and fraud, consumers have not been informed quickly enough. As a result, fipronil-contaminated eggs were exported to 45 countries, and potentially contaminated infant milk from Lactalis to 86 countries, before the true scope of the respective food scandal came to light. During the horsemeat scandal, the majority of the contaminated products had been sold and consumed before the public was informed, owing to inadequate laws and insufficient measures taken by the authorities.

These unacceptable scandals are only the tip of the iceberg. However, they provide visible and officially acknowledged proof that the legal framework for health protection and fraud prevention under the GFL has not passed its field trial. Even disregarding the large-scale scandals, the GFL’s promise to protect public health and prevent fraud is being broken, day after day, as amply documented by this report.

5.2 FOODWATCH’S DEMANDS WITH RESPECT TO THE AMENDMENT OF THE GENERAL FOOD LAW

To date, the European Commission, European Parliament, Council of the European Union and Member States have failed to effectively protect 500 million European consumers from health risks and fraud in the food market. And even worse: they are not doing anything to change this situation. Instead, they continue to serve the interests of the large food corporations. Although in some cases the Member States may be able to lead the way and adopt stricter legal requirements, the General Food Law Regulation must be fundamentally improved in order to guarantee a high level of protection for all European citizens. In order to prevent future food crises, the following points must be addressed and enshrined in the EU General Food Law:

REVISION OF THE GENERAL FOOD LAW: FOODWATCH’S DEMANDS



ISSUES

DEMANDS

3. MISLEADING LABELLING (Art. 8 and 16 GFL): The GFL prohibits any product label or presentation that *misleads* consumers. But in reality, the deception of consumers in the food market is the rule, not the exception.

Articles 8 and 16 of the GFL must explicitly prohibit any product label or presentation *that has the potential* to mislead consumers.

4. DISCLOSURE OBLIGATIONS FOR PUBLIC AUTHORITIES (Art. 10 GFL): The provisions on disclosure obligations in cases of potential health risks are vaguely worded, and there are no provisions whatsoever requiring public disclosure in cases of fraud and deception.

Public authorities must be required to provide the public with immediate and comprehensive information (full transparency) not only in cases involving potential health risks, but also in cases of fraud. Art. 10 of the GFL must be amended accordingly.

5. TESTING OBLIGATIONS FOR BUSINESSES (Art. 19 GFL): Food operators are responsible for making sure that the products they put on the market are safe and not fraudulent. Currently, they are failing to do so. Hazardous and fraudulent food products are often not identified until after they have been sold and consumed.

Businesses, including retailers, must be required to test and verify the quality and safety of the products they sell. Concrete obligations based on mandatory testing programmes (with respect to both food safety and fraud) for producers and retailers must be imposed through an amendment to Art. 19. These obligations are also necessary in order to hold businesses accountable.

ISSUES

DEMANDS

6. CONSUMER INFORMATION RIGHTS: Effective rights for consumers to access information from public authorities are not yet included in the GFL.

Effective legislation enabling individual consumers to access all information held by public authorities regarding food is still needed at EU level and in most Member States. A relevant article must be added to the GFL.

7. RIGHTS OF CONSUMERS TO BRING ACTIONS AGAINST COMPANIES: It is difficult for consumers to sue producers owing to the burden of proof, the financial risk of litigation and the often small amount of individual damage suffered. Class action mechanisms for consumers are practically non-existent. They are not yet included in the GFL.

- a) The GFL must be amended to provide for class actions.
- b) The GFL must be amended to give consumer organisations the right to sue companies for failure to comply with legal requirements.

8. RIGHTS OF CONSUMERS TO BRING ACTIONS AGAINST AUTHORITIES: The GFL does not include effective legal provisions that allow consumer organisations to bring actions against public authorities. This situation has contributed to the inadequate enforcement of consumer protection laws.

- a) The GFL must be amended to give organisations the right to sue public authorities for failure to fulfil their duty of enforcing regulations.
- b) The GFL must be amended to give consumer organisations the right to go to court to have secondary legislation checked for compatibility with higher-ranking law.

- ¹ See Art. 191 Treaty on the Functioning of the European Union (TFEU)
- ² See Communication from the Commission on the Precautionary Principle, COM (2000) 1 final; see also Section 1.2
- ³ ECJ Case C-210/96 [1998], I-4657 – “Gut Springenheide GmbH/Oberkreisdirektor des Kreises Steinfurt”, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130d5c1a7b0204e0143ccb173b14d540c7a89.e34KaxiLc3eQc40LaxqMbN4PaN0Qe0?text=&docid=44018&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=751126>
- ⁴ Actual German slogan: “So wichtig wie das tägliche Glas Milch”
- ⁵ foodwatch website “BGH-Urteil: Monsterbacke-Slogan nicht irreführend” (“Federal Court of Justice judgement: Monsterbacke slogan not misleading”), <http://www.foodwatch.org/de/informieren/gesundheitswerbung/aktuelle-nachrichten/bgh-urteil-monsterbacke-slogan-nicht-irrefuehrend/>
- ⁶ Actual German product name: “Felix Himbeer-Vanille Abenteuer”
- ⁷ ECJ, ruling 4 June 2015, Case C-195/14 – Teekanne, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=751800>
- ⁸ See foodwatch-Germany website on “hidden animals”, <https://www.foodwatch.org/de/informieren/versteckte-tiere/mehr-zum-thema/hintergrund/>
- ⁹ Hereinafter “GFL”
- ¹⁰ In the Member States, the provisions of the GFL, including the numerous acts of secondary legislation, were fully transposed into the national legal system as a complement to existing legislation: e.g. the Code de la Consommation and Code rural et de la pêche maritime in France and the Dutch Commodities Act (Warenwet) and Commodities Act Decree on Food Information (Warenwetbesluit informatie levensmiddelen) in the Netherlands. The German Food and Feed Code (LFGB) came into force on 7 September 2005, replacing the former German Food and Commodities Law (LMBG)
- ¹¹ Summary in the Commission’s White Paper on Food Safety from 12 January 2000, COM (1999) 719 final; see also the Commission Green Paper on the General Principles of Food Law in the European Union from 30 April 1997, COM (1997) 176 final
- ¹² See Cornelia Ziehm, “Vorsorgeprinzip – Handlungsgebot und Beweislastumkehr” (“Precautionary Principle – Requirement to Act and Reversal of the Burden of Proof”), expert report (unpublished) for foodwatch, September 2011
- ¹³ See Sabine Schlacke, “Rechtliche Möglichkeiten und Grenzen der Angabe von Nährwerten durch eine ‘Ampelkennzeichnung’” (“Legal possibilities and limitations of the ‘traffic-light’ system for labelling nutritional values”) in the context of the EU Commission regulation proposal COM (2008) 40 final; expert report commissioned by foodwatch, Berlin, 2009, http://www.foodwatch.org/uploads/media/Rechtsgutachten_Ampel_Schlacke_20090717.pdf
- ¹⁴ See Rixen, “Legitimationsdefizite des Lebensmittelrechts – Zur demokratischen Legitimation der Deutschen Lebensmittelbuch-Kommission” (“Legitimacy deficits in food law – On the democratic legitimacy of the German Food Code Commission”), Deutsches Verwaltungsblatt, No 15/2014, pp. 949 ff.
- ¹⁵ Jürgen Abraham, chairman of the Federation of German Food and Drink Industries (BVE) at the time of the article’s publication, in: “Qualität ist in aller Munde”, Consumers’ Choice ‘11 (publication of the BVE on the occasion of Anuga 2011)
- ¹⁶ See <http://www.prodimarques.com/documents/payant/84/transparence-storytelling.php>
- ¹⁷ See foodwatch website “Bakterien-Käse: foodwatch stellt Strafanzeige” (“Bacteria cheese: foodwatch reports offence”), https://www.foodwatch.org/de/informieren/informationsgesetz/aktuelle-nachrichten/bakterien-kaese-foodwatch-stellt-strafanzeige/?sword_listBOD=listerien&sword_listBID=strafanzeige
- ¹⁸ See foodwatch E. coli report “Im Bockshorn – Die EHEC-Krise im Frühsommer 2011” (“In the Seeds – The E. coli Crisis in the Spring of 2011”), http://www.foodwatch.org/fileadmin/Themen/EHEC/2012-05-04ImBockshorn_DieEHEC-Krise2011_foodwatch-Analyse_ger.pdf
- ¹⁹ See Santé publique France, May 2017, http://www.rencontresantepubliquefrance.fr/wp-content/uploads/2017/06/VAN_CAUTEREN.pdf
- ²⁰ See foodwatch website “Action plan on Fipronil contaminated eggs”, <https://www.foodwatch.org/en/what-we-do/topics/transparency-and-food-safety/more-information/action-plan-after-the-fipronil-scandal/>
- ²¹ See foodwatch website “Lactalis: Salmonella contamination scandal in France”, <https://www.foodwatch.org/en/what-we-do/topics/transparency-and-food-safety/more-information/salmonella-contamination-scandal-in-france/>
- ²² See https://ec.europa.eu/food/safety/food_improvement_agents/additives/database_en
- ²³ See Consumer Centre of Hamburg (VZHH), “Was bedeuten die E-Nummern?” (“What do the E numbers mean?”), 2015
- ²⁴ See Commission Regulation (EC) No 1333/2008
- ²⁵ See Commission Regulation (EC) No 1333/2008; see Section 1.2., fn. 5
- ²⁶ See foodwatch’s animal feed report “Lug und Trog” (German), Berlin, 2005, https://www.foodwatch.org/uploads/media/foodwatch_Futtermittelreport_komplett_0405.pdf
- See foodwatch report “Die Tiermehlschmuggler” (“The smuggling of carcass meal”), Berlin, 2007, https://www.foodwatch.org/uploads/media/Kurzfassung_Tiermehlschmuggler_fin_korrigiert_270207_mit_Umschlag_01.pdf
- ²⁷ See foodwatch’s dioxin report “Chronisch vergiftet” (“Chronically poisoned”), Berlin, 2011, https://www.foodwatch.org/uploads/tx_abdownloads/files/foodwatch_report_chronisch_vergiftet_20111212.pdf
- ²⁸ Violation of the dilution ban
- ²⁹ See foodwatch website “Dioxin-Grenzwerte nach Belastung festgelegt” (“Dioxin limits set according to contamination levels”), <https://www.foodwatch.org/de/informieren/dioxine-und-pcb/mehr-zum-thema/hintergrund-grenzwerte/>
- ³⁰ The Europe-wide aim is to reduce the average level of contamination from 2 picograms per kilogram of body weight to 1 picogram per kilogram of body weight.
- ³¹ See foodwatch website “Wie hoch muss ein sicherer Grenzwert sein?” (“How high does a safe limit have to be?”) <http://www.foodwatch.org/de/informieren/uran-im-wasser/mehr-zum-thema/grenzwertdebatte/>
- ³² See foodwatch website “EU erlaubt noch mehr Dioxin im Fisch” (“EU allows even more dioxin in fish”), <http://www.foodwatch.org/de/informieren/dioxine-und-pcb/aktuelle-nachrichten/eu-erlaubt-noch-mehr-dioxin-im-fisch/>
- ³³ See <https://www.anses.fr/fr/content/l%E2%80%99anses-%C3%A9met-des-recommandations-pour-r%C3%A9duire-la-contamination-des-denr%C3%A9s-alimentaires-par>
- ³⁴ See foodwatch website “Mineral oil in foods”, <https://www.foodwatch.org/en/what-we-do/topics/mineral-oil-in-foods/2-minute-info/>
- ³⁵ See foodwatch website “Unnötig hohe Acrylamid-Werte in Chips, Gebäck & Co.” (“Unnecessarily high acrylamide levels in crisps and baked goods”), <https://www.foodwatch.org/de/informieren/acrylamid/2-minuten-info/>
- ³⁶ See report “Maßnahmen gegen Antibiotikaresistenzen in der Tierhaltung in ausgewählten europäischen Mitgliedstaaten” (“Measures to combat antimicrobial resistance in livestock farming in selected European Member States”) from the Research Services (WD) of the Deutscher Bundestag, 2015, p. 14, <https://www.bundestag.de/blob/405856/b34288d3af75b844052a75dfdf461202/wd-5-035-15-pdf-data.pdf>
- ³⁷ See German Federal Ministry of Food and Agriculture (BMEL), http://www.bmel.de/DE/Tier/Tiergesundheit/Tierarztneimittel/_texte/Antibiotika-Dossier.html;jsessionid=BD483EFEC3E9869AFBF425EAB3445E632_cid358?nn=539690¬First=true&docid=2661834

- ³⁸ See report from the Scientific Advisory Board on Agricultural Policy, Food and Consumer Health Protection of the Federal Ministry of Food and Agriculture (BMEL), “Wege zu einer gesellschaftlich akzeptierten Nutztierhaltung” (“Pathways to a socially accepted livestock husbandry in Germany”), 2015, pp. 145–149, http://www.bmel.de/SharedDocs/Downloads/Ministerium/Beiraete/Agrarpolitik/GutachtenNutztierhaltung-Zusammenfassung.pdf?__blob=publicationFile
- ³⁹ See Art. 18 Section 2 of the General Food Law Regulation (EC) No 178/2002
- ⁴⁰ See foodwatch E. coli report, loc. cit. The fact that the infection was able to spread at all was due in part to a lack of adequate hygiene and monitoring standards for sensitive fresh fruit and vegetables; http://www.foodwatch.org/fileadmin/Themen/EHEC/Dokumente/2012-05-04_Im_Bockshorn_Die_EHEC-Krise_2011_foodwatch-Analyse.pdf
- ⁴¹ Instead of the originally planned visible marker, a colourless and odourless agent is being used for Category 1 and 2 animal by-products
See foodwatch website “BSE-Politik in Europa hat Gammelfleischfälle erst ermöglicht” (“BSE policy in Europe has made rotten meat scandal possible in the first place”), <http://www.foodwatch.org/de/informieren/bse-und-tiermehl/>
- ⁴² See foodwatch website “Deutscher Gesundheitssektor fordert die Nährwert-Ampel” (“German health sector demands traffic-light nutrition labelling”), [http://www.foodwatch.org/de/informieren/ampelkennzeichnung/aktuelle-nachrichten/deutscher-gesundheitssektor-fordert-die-naehrwert-ampel/?sword_list\[0\]=milliarden](http://www.foodwatch.org/de/informieren/ampelkennzeichnung/aktuelle-nachrichten/deutscher-gesundheitssektor-fordert-die-naehrwert-ampel/?sword_list[0]=milliarden)
- ⁴³ See French Ministry for the Economy and Finance, DG Trésor, Lettre 179, September 2016, “Obésité: quelles conséquences pour l’économie et comment les limiter?”, <https://www.tresor.economie.gouv.fr/Ressources/File/427684>
- ⁴⁴ See <https://www.volksgezundheidenzorg.info/onderwerp/diabetes-mellitus>
- ⁴⁵ See foodwatch website “What is the difference between a ‘healthy’ and an ‘unhealthy’ food?”, <https://www.foodwatch.org/en/what-we-do/topics/sugar-fat-and-salt/more-information/healthy-or-unhealthy/>
- ⁴⁶ German Federal Institute for Risk Assessment (BfR): currently the average daily intake of trans fats in Germany is below the recommended limit
Opinion 028/2013 of the BfR, 6 June 2013, <http://www.bfr.bund.de/cm/343/hoehede-der-derzeitigen-trans-fettsaeureaufnahme-in-deutschland-ist-gesundheitlich-unbedenklich.pdf>
- ⁴⁷ German Nutrition Society (DGE): “trans-Fettsäuren und ihr Einfluss auf die Gesundheit Teil 1 – Entstehung und Vorkommen” (“Trans fats and their effects on health, Part 1 – Development and incidence”). DGEinfo (05/2016) 66-68; “German Nutrition Society (DGE): trans-Fettsäuren und ihr Einfluss auf die Gesundheit – Teil 2” (“Trans fats and their effects on health – Part 2”). DGEinfo (06/2016) 86-89
- ⁴⁸ Federal Office of Consumer Protection and Food Safety (BVL), control and inspection programmes, analyses and reports on pesticide residues in food, quarterly analyses, http://www.bvl.bund.de/DE/01_Lebensmittel/01_Aufgaben/02_AmtlicheLebensmittelueberwachung/07_PSMRueckstaende/Im_nbpsm_node.html
- ⁴⁹ Süddeutsche Zeitung, 17 May 2010, <http://www.sueddeutsche.de/panorama/milchskandal-in-china-zum-machterhalt-sollen-koepfe-rollen-1.474018>
- ⁵⁰ Douma and Prof. Dr Nicolas de Sadeleer, “CETA, TTIP and the EU precautionary principle”, June 2016, https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2016-06-21_foodwatch-study_precautionary-principle.pdf
- ⁵¹ See foodwatch report “Trade at Any Cost?”, February 2018, <https://www.foodwatch.org/en/what-we-do/topics/free-trade-agreements-ttipceta/more-information/report-trade-at-any-cost/>
- ⁵² See foodwatch website “Übersicht über den Pferdefleisch-Skandal” (“Overview of the horsemeat scandal”), <https://www.foodwatch.org/de/informieren/pferdefleisch/mehr-zum-thema/uebersicht-ueber-den-pferdefleisch-skandal/>
- ⁵³ See “Top 10 products that are most at risk of food fraud”, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0434+0+DOC+XML+V0//EN#_part2_def2
- ⁵⁴ New EU Official Controls Regulation, replacing Regulation (EC) No 882/2004, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R0625>
- ⁵⁵ Art. 8 of the Official Controls Regulation (EU) 2017/625
- ⁵⁶ See foodwatch website “Schwindel mit Gesundheitswerbung” (“Deceptive use of health claims in advertising”), <http://www.foodwatch.org/de/informieren/gesundheitswerbung/2-minuten-info/>
- ⁵⁷ See foodwatch website “Food Industry Misleading Consumers with Vitamin-Fortified Junk Foods”, <https://www.foodwatch.org/en/what-we-do/topics/misleading-product-labelling/2-minute-info/> and foodwatch
- ⁵⁸ See foodwatch website “Coraya au ‘goût homard’? Une arnaque au goût amer” (“Coraya with ‘lobster taste’? A bitter tasting scam”), <https://www.foodwatch.org/fr/s-informer/topics/arnaque-sur-l-etiquette/dernieres-actus/coraya-au-gout-homard-une-arnaque-au-gout-amer/>
- ⁵⁹ See foodwatch website “Arnaques Made in France” (“Scam Made in France”), <https://www.foodwatch.org/fr/s-informer/topics/arnaque-sur-l-etiquette/dernieres-actus/arnaqes-made-in-france/>
- ⁶⁰ See <https://www.economie.gouv.fr/dgccrf/produits-transformes-mise-en-place-letiquetage-lorigine-lait-et-viande>
- ⁶¹ See foodwatch website “Alternativen nutzen, Sauerstoff-Behandlung verbieten” (“Use alternatives, ban high-oxygen packaging systems”), http://www.foodwatch.org/de/informieren/schutzatmosphaere/mehr-zum-thema/forderungen/?sword_list%5B0%5D=schutzatmosph%C3%A4re
- ⁶² Since 2009, in the context of its campaign against misleading labelling, foodwatch has been exposing the misleading labelling practices of the food industry in Germany, the Netherlands and France and fighting for legislation that would make it illegal for companies to deceive consumers
See foodwatch website “Misleading product labelling”, <http://www.foodwatch.org/en/what-we-do/topics/misleading-product-labelling/2-minute-info/>
- ⁶³ See Regulation (EU) No 1169/2011, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011R1169>
- ⁶⁴ See foodwatch International research paper “The international dimensions and slow deterioration of food recipe and composition standards” (internal paper, Hilde de Vries, December 2017)
- ⁶⁵ See Art. 19, 2 of the General Food Law Regulation (EC) No 178/2002
- ⁶⁶ See Article 19 of the General Food Law Regulation (EC) No 178/2002. Furthermore, the requirements for passing on information on unsafe products as laid down in Article 19 are very vague. See also next section
- ⁶⁷ See Art. 1a, 10 and 20 of the General Food Law Regulation (EC) No 178/2002
- ⁶⁸ See Art. 19 of the General Food Law Regulation (EC) No 178/2002
- ⁶⁹ See Section 40 (2) of the German Food and Feed Code (LFGB) and Article L. 232-1 of the French Code rural
- ⁷⁰ The website <http://www.lebensmittelwarnung.de/> (http://www.lebensmittelwarnung.de/), which is maintained by the German Federal Office of Consumer Protection and Food Safety (BVL) in cooperation with the state ministries, provides information on products that have been recalled by companies
Only very rarely do the authorities use this website for issuing their own warnings
- ⁷¹ See the French government website: <http://alim-confiance.gouv.fr/Plus-d-infos>
- ⁷² See Recital 27 of Regulation (EU) 2017/625, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0625>
- ⁷³ See <http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32002R0178&qid=1497011694768>

- ⁷⁴ See foodwatch website “Übersicht über den Pferdefleisch-Skandal” (“Overview of the horsemeat scandal”), <http://www.foodwatch.org/de/informieren/pferdefleisch/mehr-zum-thema/uebersicht-ueber-den-pferdefleisch-skandal/>
- ⁷⁵ See foodwatch website “Lidl zahlt Millionen-Strafe nach tödlichem Listerienfall” (“Lidl pays fine of over one million euros after deadly case of Listeria infection”), [https://www.foodwatch.org/de/informieren/informationsgesetz/aktuelle-nachrichten/lidl-zahlt-millionen-strafe-nach-toedlichem-listerienfall/?sword_list\[0\]=listerien](https://www.foodwatch.org/de/informieren/informationsgesetz/aktuelle-nachrichten/lidl-zahlt-millionen-strafe-nach-toedlichem-listerienfall/?sword_list[0]=listerien)
- ⁷⁶ So-called “opportunity principle”, see Sect. 47 Paragraph 1 of the German Administrative Offences Act (OWiG)
- ⁷⁷ See “small” company fine as per Section 30 of the German Administrative Offences Act (OWiG)
- ⁷⁸ See Section 130 of the German Administrative Offences Act (OWiG)
- ⁷⁹ See https://www.gesetze-im-internet.de/uwg_2004/BJNR141400004.html
- ⁸⁰ See <http://www.urgenda.nl/themas/klimaat-en-energie/klimaatzaak/>
- ⁸¹ This is because the cost of animal feed accounts for only about 10-15% of the total meat-production costs in terms of the final retail price. For a pork cutlet that sells for €8 per kilogram at the supermarket, a 10% increase in the feed price would amount to a barely noticeable additional cost of €0.12/kg for consumers. See foodwatch’s animal feed report “Lug und Trog”, loc. cit.
- ⁸² Two examples of how the food industry has asserted itself, even against broad majorities of the population, are traffic-light labelling and the “smiley” system. Eighty per cent of the German population wants these transparency regulations. Nevertheless, the state has yet to go against the wishes of the food industry and implement the will of its citizens.
- See foodwatch website: “Emnid: Ampel-Unterstützung wächst – Bürger für Öffnungsklausel” (“According to Emnid: Support for the traffic-light label is growing - citizens want exemption clause”), 2009, [https://www.foodwatch.org/de/informieren/ampelkennzeichnung/aktuelle-nachrichten/emnid-ampel-unterstuetzung-waechst-buerger-fuer-oeffnungsklausel/?sword_list\[0\]=emnid](https://www.foodwatch.org/de/informieren/ampelkennzeichnung/aktuelle-nachrichten/emnid-ampel-unterstuetzung-waechst-buerger-fuer-oeffnungsklausel/?sword_list[0]=emnid)
- See foodwatch website: “Emnid-Umfrage: Riesenmehrheit für Smileys in Deutschland” (“Emnid survey: Vast majority in favour of Smileys in Germany”), April 2010, [https://www.foodwatch.org/de/informieren/smiley-system/mehr-zum-thema/emnid-umfrage/?sword_list\[0\]=emnid](https://www.foodwatch.org/de/informieren/smiley-system/mehr-zum-thema/emnid-umfrage/?sword_list[0]=emnid)
- ⁸³ See study authored by Prof. Dr Peter-Tobias Stoll, Dr Wybe Th. Douma and Prof. Dr Nicolas de Sadeleer, “CETA, TTIP and the EU precautionary principle”, June 2016, https://www.foodwatch.org/fileadmin/Themen/TTIP_Freihandel/Dokumente/2016-06-21_foodwatch-study_precautionary-principle.pdf
- ⁸⁴ See foodwatch and PowerShift report “Trade at Any Cost?”, February 2018, <https://www.foodwatch.org/en/what-we-do/topics/free-trade-agreements-ttipceta/more-information/report-trade-at-any-cost/>
- ⁸⁵ See https://ec.europa.eu/food/safety/general_food_law/fitness_check_en
- ⁸⁶ See https://ec.europa.eu/food/safety/general_food_law/transparency-and-sustainability-eu-risk-assessment-food-chain_en



foodwatch e. V. · Brunnenstraße 181 · 10119 Berlin · Germany · Telephone +49 (0) 30 / 24 04 76 - 0
Fax +49 (0) 30 / 24 04 76 - 26 · Email info@foodwatch.international · www.foodwatch.org
