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National variations in the implementation and enforcement of European food hygiene regulations

Comparing the structure of food controls and regulations between Scotland and the Netherlands*

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1 Introduction

Over the course of time the European Union has increased its powers considerably. New competences have been added and new policy domains included. In several domains European directives are being replaced by regulations. This can be interpreted as a strengthening of European law because, unlike directives, regulations can take effect without needing to be transposed into national legislation by the member states.

Currently, almost all food safety regulations in the member states of the European Union rest on European law. Despite this common legal base, several differences between member states still exist. Many scholars have studied the transposition and implementation of European directives in the member states. Most studies are limited to formal compliance or implementation by member states. Such studies investigate whether all mandatory legal and administrative steps have been taken. They offer explanations for different transposition rates¹ and infringement procedures,² and examine the transposition of European law (mostly directives) into the member states' national law.³ Only a limited number of studies have dug deeper to investigate the implementation or application and enforcement of the transposed directives.⁴ Even less research has been done on the implementation and enforcement of European regulations in the member states. It is important to consider how EU law is actually implemented and enforced to gain an insight into the powers of the European Union and the level of harmonisation.

This article compares the way Scottish and Dutch authorities deal with a particular item of European food law: the requirement that all food businesses in the European Union shall operate a food safety management system based on HACCP (Hazard Analysis and Critical Control Point) principles, and the provision that

* I am grateful for the advice and comments received from Christine Parker, Judith van Erp, Peter Mascini, Betty de Hart, Paul Verbruggen, and my colleagues from the Institute for the Sociology of Law.

1 Bursens 2002; Mastenbroek 2003.

2 Panke 2007.

3 Bovens & Yesilkagit 2010; Strik 2011; Zwaan 2007, 2008, 2011.

4 Falkner et al. 2007, 2008; Versluis 2007.

Member States shall encourage the development of national guides to good practice for hygiene and for the application of HACCP principles. While investigating the controls on food hygiene in Scotland, I was surprised to learn that these industry guides do not appear to be in common use. Given my familiarity with the situation in the Netherlands, where the majority of small and medium sized food businesses work with such an industry guide, I had just assumed that that would also be the case in Scotland. I was compelled to wonder why. In this paper I investigate the background of these different responses in order to explain the different routes chosen by the Dutch and Scottish authorities. Why is self-regulation by industry associations much more common in the Netherlands compared to Scotland? Or why do the UK authorities seem to rely much more on government regulation than the Dutch? A detailed examination of the use of national guides for good hygienic practice illuminates variations and the reasons for them in the implementation of even quite strict European regulation. In particular, it shows how different networks of governance in different jurisdictions interact with EU-level governance to produce different domestic practices.

Section 2 provides the theoretical background of the comparison. I briefly summarise the factors and conditions that are important when explaining patterns of implementation of EU law in member states. Section 3 outlines the methodology of this investigation. Section 4 provides the legal background (EU food law), followed by a more detailed treatment of the regulation of national guides to good hygienic practice that form the subject of this investigation (section 5). Sections 6-8 describe the use of guides in member states (6), the Netherlands (7), and Scotland (8). Section 9 compares the two countries.

2 Implementation in the member states of the European Union: review of the literature

A review of the available literature reveals many important factors and conditions that help explain the pattern of EU law implementation in member states. These factors include the degree of fit between EU law and domestic policy, legislation and organizational structures.⁵ The more structural, fundamental or costly are the changes needed for a member state to become compliant, the greater is the chance of incomplete or minimal transposition and implementation. Issue salience is another factor that influences the extent of transposition and implementation.⁶ The level of contestation and power balance of relevant actors involved in the domestic decision making process are also important in explaining transposition results. Domestic actors that have a powerful interest in the timely and full implementation of a given EU law may contribute to a rapid and correct transposition. Some domestic actors may use European legislation as a window of opportunity to achieve an existing goal. On the other hand, a powerful domestic actor that resists the directive may hinder the transposition process. Important influ-

5 Falkner et al. 2007, 2008; Liefverink et al. 2011; Versluis 2007.

6 Versluis 2007; Spendzharova & Versluis 2013.

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ences are the economic interests of the food industry in general, a particular sector of the food industry, or a powerful corporation.

Falkner, Hartlapp and Treib (2007, 2008) investigated the implementation and application of several EU directives in the domain of labour relations in many member states.⁷ Based on their empirical data, Falkner et al. (2008) distinguish between four 'worlds of compliance': law observance, domestic politics, dead letters, and transposition neglect. Each 'world' has its own particular factors that are most important in explaining what happens with EU law. In the *world of law observance*, compliance with EU law is more important than domestic concerns. Directives are generally transposed in a timely manner and correctly, and they are adequately applied and enforced. This cluster contains the Nordic countries Denmark, Finland and Sweden. Domestic concerns are much more important and may prevail in the *world of domestic politics*. It is socially acceptable in the national arena to break EU law. Transposition of EU law is likely to be timely and correct in the absence of political resistance, but might be hampered by domestic concerns. Transposed directives will generally be applied and enforced correctly. Austria, Belgium, Germany, the Netherlands, Spain and the UK belong in this world. In the *world of dead letters* the transposition is politicized and there are systematic shortcomings in enforcement and application. Directives may be transposed compliantly (or not, depending on domestic concerns), but monitoring and enforcement are not compliant. The Czech Republic, Hungary, Ireland, Italy, Slovakia and Slovenia belong in this world. In the *world of transposition neglect*, compliance with EU law is not a goal in itself. Transposition obligations are not recognized and the member state will do nothing until supranational pressure demands for action. Intervention by the European Commission often leads to a merely literal translation of EU directives, which is only superficially correct. France, Greece, Luxembourg and Portugal belong in this world. To conclude in both the Netherlands and Scotland domestic political issues are found the most important factors explaining the transposition and implementation of EU labour directives. We assume that these 'worlds of compliance' are also relevant in explaining different uptake of EU regulations. We will investigate whether domestic political issues can also account for the different response of the Netherlands and Scotland in the field of food law.

Domestic concerns that could help explain different application of EU policy on industry guides include national regulatory style, the relationship between government and industry, and the economic position of a country. However, both the Netherlands and Scotland are known for their consensual regulatory style and cooperative relationships between government agencies and industry.⁸ New regulations are often formulated after consulting and negotiating with the bodies to be regulated or their representatives. This may result in an agreement on what has to be done to tackle the problem at hand, and industry may even start to implement an agreement before it has passed into law. Both countries are afflu-

7 Falkner et al. 2007, 2008.

8 Van Waarden 1995, 1999.

ent Western European countries. So which domestic concern could explain the differences?

Building on Winter's work, Wilson, Petersen and Höll distinguish four sets of key variables to explain the implementation of European regulations: 1) the nature of the policy formation process prior to implementation; 2) organizational and inter-organizational implementation behavior; 3) street-level bureaucratic behavior; and 4) the target groups' response.⁹ This conceptual framework seeks to explain the differential implementation by member states as well as differential uptake by target groups. This model combines top-down, bottom-up, and 'in-between' approaches to implementation. This paper investigates whether the different use of industry guides can be explained by characteristics of the policy formation process, the organizational network, street-level food controls or target groups' behavior in both countries.

Zeitlin has argued that 'EU regulation in (...) food safety is characterized by extensive experimentalist features, if not a full-blown experimentalist architecture'.¹⁰ This approach is characterized by a recursive process, setting broad goals and leaving wide discretion to local entities to achieve them, evaluating success based on performance reports from the local units, followed by revision of the goals and approaches. Zeitlin presumes a deliberate design that allows a lot of freedom to member states, coupled with permanent evaluation and review. Whether or not this is deliberate policy is an empirical question that we investigate here.

Even if it is not deliberate policy, it is realistic to assume that member states do have considerable freedom in the transposition and implementation of EU law. To cite Shapiro: 'Everyone knows it would be a miracle if all Member States administrations were implementing most European regulations, let alone directives, in even approximately the same way'.¹¹ Not only at the member state level, but also at the level of regulatory agencies, decentralized government, street level bureaucrats and regulated entities actors will have some autonomy in the application and interpretation of European law. Rules do not have a stable, determinant meaning independent of the context of their use.¹²

A consequence for research is that investigating how member states try to do their job, what the results are, and what might explain the choices member states make is preferable to investigating and explaining compliance and non-compliance of the member states with EU law. A similar approach is advocated by Griffiths, who argues in favour of concentrating on the social meaning and effects of legislation in relevant social fields or sectors ('the social working of law').¹³ This approach contrasts with a top-down instrumentalist approach concentrating on whether the policymakers' objectives are realised.

9 Wilson et al. 1999.

10 Zeitlin 2013, p. 15. See also Sabel & Zeitlin 2012.

11 Shapiro 1999, p. 29.

12 Hawkins 1992; Zimmerman 1969.

13 Griffiths 1999.

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3 Methodology

In this paper I compare the responses in the Netherlands and in Scotland to European Union policy on guidelines for good hygienic practice developed by the industry (in consultation with public authorities). The Netherlands seems to be a frontrunner in the development and application of national industry guides to good hygienic practice, whereas Scotland (and the UK) seem to have chosen predominantly public guidance documents to assist small and medium sized businesses to comply with HACCP requirements. How can these differences be explained?

Food law is a good field to study the implementation of EU law because Europe has been involved in regulating the food industry for some time, and EU food law covers almost all issues in the food sector. The industry guides are an attractive topic because there are numerous SME food businesses, food hygiene is of vital importance; and relations between government and industry are at issue. The focus on one issue only leaves the policy field and characteristics of the particular piece of legislation outside the scope of the analysis (these have been found to account for differences between member states).¹⁴

It is interesting to compare the cases of Scotland and the Netherlands because of their similarities in the 'world of compliance' (domestic politics), their consensual regulatory style, the cooperative relationship between government and industry and prosperity. For those reasons we would expect a similar use of industry guides. So what can account for the differences? Is it the different institutional structure? Scotland is part of the United Kingdom and food safety controls are the responsibility of local authorities, whereas food safety in The Netherlands is solely a national responsibility. We investigate whether this or another (domestic policy) factors can explain the different responses.

The paper is based on various sources:

- documents from the European Union, the competent Scottish authorities, the UK Food Standards Agency (FSA), and the Netherlands Food and Consumer Product Safety Authority (NVWA). These provide information about the content of the regulations, the formal policy and its objectives, and the recognized guides;
- interviews in Scotland with representatives of the Scottish FSA and enforcement officers in four local authorities, and in the Netherlands with representatives of the NVWA and a private audit company to provide information on the use of industry guides and the practice of official controls on compliance with hygiene regulations;
- observations during inspection visits by four local authorities in Scotland and two inspection visits from the NVWA in the Netherlands to provide information on the actual behavior of food inspectors, their interaction with food businesses, and references to industry guides during inspections.

14 Haverland et al. 2010; Versluis 2007; Spendzharova & Versluis 2013.

4 Strengthening European food law

In 2002 the European Union strengthened its food safety legislation, changing its basis from Directives to regulations,¹⁵ and establishing the European Food Safety Authority. At the national level, the UK and several other European countries have established new regulatory agencies or reformed existing agencies to oversee national food control activities.

In the early years of the European Community, food policy had developed ad hoc both as part of the Common agricultural policy and as part of the common market. National food laws to combat adulteration, fraud and health risks are considered to constitute trade barriers, which is the rationale for harmonizing food regulations within the common European market. At first European directives only involved intra-Community food trade; the domestic food trade was kept out of the scope of European Community law. For example, the 1964 directive on fresh meat applied only to establishments producing fresh meat to be marketed in another member state.¹⁶ In 1991 this directive was amended to extend its application to all slaughterhouses, cutting plants, and cold stores involved in the production of fresh meat within member states.¹⁷ From that time on, producers producing for the domestic market also came under the scope of Community Law. The rationale is still the common internal market. Besides this extension, the number of issues covered by European food law has expanded considerably.

The BSE crisis is often mentioned as a turning point in European Union food policy.¹⁸ Around the same time, dioxin in Belgian chicken feed added to the sense of urgency. The awareness that the existing risk management and risk assessment systems in the EU had failed worked as a catalyst to reform the structure of EU food safety regulation. The Commission proposed radical reform in response to accusations of a lack of transparency and manipulation during the BSE crisis. The Commission adopted an approach that emphasizes food safety and consumer protection based on three general principles: separation of the responsibility for legislation and scientific advice; separation of the responsibility for legislation and inspection; and greater transparency and more information during decision-making and inspection. The changes in EU food policy have been characterized as a paradigm shift from emphasizing effective functioning of the internal market to protecting public health.¹⁹ EU Food law was born.²⁰ The 2002 General Food Law lays down the general principles and covers the entire food supply chain. Origin-

15 Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (also referred to as the General Food Law). The three basic EU food hygiene regulations are: Regulation (EC) 852/2004 on the hygiene of foodstuffs, Regulation (EC) 853/2004 laying down specific hygiene rules for food of animal origin, and Regulation (EC) 854/2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption.

16 Directive 64/433/EEC, OJ L121, 29.7.1964, p. 2012/64.

17 Directive 91/497/EEC, OJ L268, 24.9.1991, p.69.

18 Hutter 2011, p. 69; Marsden et al. 2010, p. 84 ff; Vos 2000.

19 Geslain-Lanéelle 2014, p. xvii.

20 Alemanno 2014, p. 1.

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nally, food law was seen as a set of food safety rules.²¹ Since then, the boundaries of EU food laws have been significantly extended to include not only food safety requirements but also issues of animal health, product quality, cattle feed, nutrition, lifestyle risks and sustainability.

Regulation (EC) No 852/2004 on the hygiene of foodstuffs²² lays down general hygiene requirements to be respected by food businesses in all links in the food chain. One of the major obligations on food business operators is that they have to 'put in place, implement and maintain a permanent procedure based on Hazard Analysis and Critical Control Point (HACCP) principles'.²³ The HACCP requirement is a form of enforced self-regulation:²⁴ food business operators are legally obliged to develop a risk management system. To comply with this requirement a food business operator has two options: develop and implement its own company-specific food safety management system or adopt an applicable Guide to Good Hygienic Practice (whether or not specially modified).

5 Guides to good hygienic practice

The option to develop guides to good hygienic practice was included in the law particularly to help small and medium (SME) sized food business operators to comply with the law. The previous law, directive EG/43/93, already contained this option (art 5.1). The transition from prescriptive food regulations towards more general obligations demands greater knowledge and competence from food business operators. SMEs are believed to have difficulty developing their own company food safety management system based on HACCP principles.²⁵

The Regulation prescribes that the procedure to develop a national guide to good hygienic practice has to be initiated by a sector of the food industry and must involve consultations with the competent national food enforcement agency and other parties whose interests may be substantially affected, such as consumer groups. National guides may be developed under the aegis of a national standards institute. The Guide must be approved by the competent government authority (Minister, agency, or the European commission).²⁶ Since the industrial association draws up the guidelines and the government has to approve them, the rules in such a guide are a form of co-regulation.

The Regulation provides for flexibility 'in order to ensure that solutions for specific situations are available without compromising food safety'.²⁷ The European

21 Alemanno 2014, p. 2.

22 OJ L 226, 25.6.2004, p. 3.

23 Article 5 of Regulation (EC) No 852/2004 of the European Parliament and of the Council on the hygiene of foodstuffs. HACCP stands for Hazard Analysis and Critical Control Point.

24 Braithwaite 1982.

25 Bernauer & Caduff 2006; Green & Kane 2014; Hutter 2011; Taylor 2001; Taylor & Kane 2005.

26 Article 8 of Regulation (EC) No 852/2004. The procedure for the development of Community Guides is different (art. 8.9), see Van der Meulen 2014. Council Directive 93/43/EEC of 14 June 1993 on the hygiene of foodstuffs article 5 contained similar provisions.

27 European Commission, Guidance document on the implementation of certain provisions of Regulation (EC) No 852/2004. On the hygiene of foodstuffs. 2012, 5.1.

Commission lays down three forms of flexibility: 1) member states may modify some requirements; 2) traditional methods of production that have proven to be safe may be used even though they are not fully in line with certain technical requirements of the regulation; and 3) the HACCP methodology is flexible by nature (because rules and procedures are adapted to the specific context of the food business). 'Guides to good practice for hygiene and for the application of the HACCP principles developed by the food business sectors themselves should help businesses to implement HACCP-based procedures tailored to the characteristics of their production.'²⁸ These guides may assist food business operators to apply requirements expressed in general terms (e.g. 'an adequate number of wash-basins', 'a sufficient frequency', 'where necessary', 'to take adequate measures, as appropriate'). In short, the regulation leaves broad discretion to member states, food businesses, and industry branches in line with an experimentalist approach. Member states are responsible for official risk-based controls with appropriate frequency, to verify that food business operators comply with the European food regulations. They should ensure the impartiality, quality and consistency of official controls at all levels. Official controls should be conducted with account taken of: (a) identified risks; (b) food business operators' past compliance record; (c) the reliability of any internal checks that have already been performed; and (d) any information that might indicate non-compliance.²⁹ Member States are supposed to 'encourage the development of national guides to good practice for hygiene and for the application of HACCP principles'.³⁰ Where a food business is using a recognized guide, the enforcement authority must take this into account when assessing compliance with hygiene requirements. National food enforcement agencies, such as the Dutch NVWA and the UK FSA, are responsible for controlling compliance with the guidelines. In the next sessions we will see how the provisions for industry guides are applied.

6 Use of guides in member states

To what extent are industry guides developed in the member states? The number of recognized industry guides can be used as a rough indicator of the use of industry guides in a country. However, it should be noted that it is only a rough indicator as it does not provide information on the extent to which the guide is actually applied. More careful investigation is therefore required; hence the two case studies described here.

With 43 recognized guides the Netherlands has a relatively large number, whereas only a small number of industry guides (14) are recognized in the United King-

28 European Commission, Guidance document on the implementation of certain provisions of Regulation (EC) No 852/2004. On the hygiene of foodstuffs. 2012, 5.3.

29 Article 3, Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

30 Article 7 of Regulation (EC) No 852/2004.

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Table 1 *Number of recognized National industry guides to good hygiene practice based on Regulation 852/2004 in member states (according to EU Register)*

Number of recognized guides in member state	Countries (listed in ascending order)
1-9	Estonia Ireland Luxembourg Finland Greece Poland Slovenia Lithuania Cyprus
10-19	Bulgaria Slovakia United Kingdom Romania
20-39	Hungary Latvia Portugal Austria Czech Republic Denmark Belgium Sweden
40 or more	France Netherlands Germany Spain Italy

dom. This is consistent with my observation that hygiene guides are less important in Scotland than in the Netherlands. In her study comparing the implementation of European hygiene directive 1993 in the Netherlands, Germany and England, Lugt concludes that in 1999 Guides for good hygienic practice were already a widely-used instrument in non-industrial food sectors in the Netherlands, whereas in England at the time only one guide had been approved (catering).³¹ Besides the national guides, five Europe-wide guides have been approved so far by the European Commission (bivalve mollusc, wholesale, packaged water, natural sausage casings, non-ready-to-eat egg-products).³²

As stated, the number of guides is just a rough indication of the guides' importance. Some guides cover more processes than others. For example, 10 of the 17 guides in Romania are issued by the bakery association. In other countries these issues are covered by 2 to 4 guides. In Spain and Italy many guides are issued by regional organizations, which adds to the relative large number of guides in these countries. Moreover, we do not know how much of the food industry is covered by a guide and how many food business operators actually use one. Furthermore, the number of recognized guides listed in the EU register is not consistent with the number of recognized guides mentioned in the Food and Veterinary Office (FVO) country reports.³³ For Germany and Italy the discrepancy is huge: the EU register lists 65 and 111 guides, whereas the Country reports only mention 18 and 3 respectively. The difference in the Netherlands and the UK is smaller: according to the FVO country reports the Netherlands has 30 and the UK 7 recognized guides.

The register of national guides also contains information on the guide's author. The authors of the listed guides in the UK are all industrial associations, while in the Netherlands they are industrial associations and commodity boards (*product-of-bedrijfschap*). In Germany and Ireland the national standards institute is author

31 Lugt 1999.

32 http://ec.europa.eu/food/food/biosafety/hygienelegislation/good_practice_en.htm.

33 The Food and Veterinary Office of the European Union publishes Country profiles of each Member State on its website. This profile is a compilation of key information including an review of how control systems are organized in the Member States, based on information supplied by them. http://ec.europa.eu/food/fvo/country_profiles_en.cfm (last consulted 6-6-2014).

of all or a substantial number of the guides. Surprisingly, in some countries the author is a government organization, such as the ministry of health (Austria, Cyprus, Lithuania), ministry of agriculture (Czech republic), or the national food authority (Greece).

7 Industry guides for good hygienic practice in the Netherlands

The next sections discuss the application of industry guides in the Netherlands and Scotland. The analysis of the empirical data is broken down in the four layers discussed in section 2: policy formation, organizational structure, street-level behavior and target group uptake to investigate whether an explanation for the different uptake can be found.

Policy formation process

In The Netherlands 33 Guides are currently recognized by the Minister of Health, Welfare and Sports, covering industries such as bakeries, butchers, supermarkets, food transport, sugar, catering industry, vineyards, breweries, dairy farming, and gas stations.³⁴

The policy formation process in the Netherlands is centralized at the national level and involves the ministries of Health and of Agriculture, the NVWA, and representatives of the food industry and a consumer organisation. Each draft guide developed by an industry organization is discussed in a meeting with experts in foodstuffs hygiene.³⁵ In the Netherlands these guides are called 'hygiene codes' and they have been in use for more than 25 years. As early as 1987 the Dutch government asked the industry to draft voluntary guidelines to indicate how foodstuffs in the sector can be hygienically manufactured.³⁶ For example, the first hygiene code for the catering industry dates from March 1992.³⁷ With the implementation of the European directive on food hygiene in a Dutch regulation in 1995, hygiene codes gained a legal basis.³⁸ In the Netherlands both the HACCP principles and the Guides to good hygienic practice are included in the regulations that implement the European directive. In 1996, 11 hygiene codes

34 1 March 2014, www.vwa.nl/onderwerpen/regels-voor-ondernemers-dier/dossier/haccp/overzicht-hygiencodes (consulted 1-8-2014).

35 Regulier Overleg Warenwet. Members include representatives of stakeholder organizations: government organizations (NVWA, department of Health, department of Agriculture, customs), other public organizations (Commodity Boards, COKZ), industry associations, and the consumer organization. All organizations responsible for a Guide to good hygienic practice are invited to the meetings.

36 Lugt 1999, p. 179. I am unaware of the first time a hygiene code was developed or when the idea was launched and who initiated it. The Secretary of State for Health mentions letters of her predecessors dated 23 June 1987 and 12 July 1988 about hygiene codes. The preface to the hygiene code for egg packing and wholesale also mentions 1987 as starting year (Productschap Pluimvee en Eieren, 'Hygiëncode verzamelaars, pakstation en grossiers, September 2002', p. 15), so their origin must be in or prior to 1987.

37 Bedrijfsschap horeca en Catering, Hygiëncode voor de horeca 2004, p. 5 (<http://comenius.100webcustomers.com/HygiencodeNederlands.pdf>, last consulted 11-06-2014).

38 Warenwetregeling Hygiëne van levensmiddelen, art. 31.

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were recognized by the Minister of Health.³⁹ Three years later their number had increased to 26.⁴⁰

From 2006 onwards, guides to good hygienic practice were based on the EG Regulation.⁴¹ As European regulations do not need to be transposed, the Dutch regulations only provide a basis to enforce the European requirements, with some further details about the recognition procedure. Most procedures and conditions did not change substantially between 1995 and 2006.⁴²

Industry guides for good hygienic practice must be developed in accordance with the EU regulations. The Dutch Ministry of Health published a document on the substantive criteria for the development of hygiene codes,⁴³ which summarizes the procedure and the mandatory elements that have to be included. In addition, the document contains some specific requirements. Industry guides that go beyond the set margins will not be recognized. For example, the Dutch government stipulated that each guide should contain sufficient microbiological criteria to enable effective enforcement.⁴⁴ Although the court did not accept these criteria, arguing that they are only an indicator and not a safety measure, the Dutch government threatened to make these criteria legally mandatory in case industry guides did not voluntarily include them.⁴⁵ Other points of discussion also arose, about some criteria being more stringent in the Netherlands compared to other Member States. For example, the Netherlands did set limits for the shelf life of self-made products that need to be chilled, whereas other member states transferred this responsibility to food operators.⁴⁶ Compared to private certification schemes, the review procedures are less clear and scheduled revision of the guides is not very frequent and is often delayed. Although in 1996 the explanatory memorandum stipulated that hygiene codes will be evaluated every three or five years, it was not clear that recognition could be withdrawn, nor on what grounds. Some stakeholders seemed to assume that a recognition was forever. Even after the

39 Announcement of the Secretary of State for Health dated 14 August 1996 (GZB/VVB/963136), *Staatscourant* 1996, nr 157, p. 7.

40 Announcement of the Secretary of State for Health dated 16 February 1999 (GZB/VVB/99551), *Staatscourant* 1999, nr 35, p. 5.

41 EC 852/2004 On the hygiene of foodstuffs.

42 There are two exceptions. In 2003 grounds for withdrawing recognition were included. The other major change is the introduction of the option to develop hygiene codes for primary food production and request the Minister of Agriculture to recognize the code. About 15-20 hygiene codes are recognised by the Ministry of Economic Affairs (competent minister for agriculture) for crop farming, grain and seed growing, cattle farming and poultry slaughtering. A complete list of recognized guides for primary production is not available. www.pve.nl/pve?waxtrapp=cicIsHsuOnbPTEcBbBM (consulted 1-8-2014) lists guides in animal primary production. Primary production falls outside the scope of this investigation.

43 Letter Department of Health 29 November 2006, VGP/VV 2734867 Inhoudelijke criteria bij het opstellen of herzien van een hygiëncode.

44 Warenwetregeling hygiëne van levensmiddelen, art. 31- 6a; Announcement Minister of Health 16 February 1999, Opstellen en aanpassen hygiëncodes, Stc 35 and Warenwetbesluit hygiëne van levensmiddelen 2005, art. 4-2c, Stb. 2005, 517.

45 *Staatscourant* 1996, nr 136, p. 9; *Staatscourant* 1999, nr 35, p. 5.

46 Bex et al. 2012.

grounds for withdrawing a recognition were included in the law,⁴⁷ regular review of industry guides has been slow.

Organisational implementation behaviour

The NVWA is involved in developing industry guides for industrial sectors and in their evaluation and updating. The NVWA has issued guidelines for the development of industry guides but no guidelines for food business operators have been developed. The NVWA merely refers food business operators to available EU and Codex guidelines and recognized hygiene guides.

The NVWA information on hygiene policy always refers to applying a recognized hygiene code as an option for food business operators to comply with HACCP requirements. The existence of hygiene codes is also implemented in inspection protocols.

Street-level bureaucracy

Food inspectors verify compliance with the hygiene code with which the food business works. Such inspections pay less attention to checking the food safety plan, because the hygiene code has already been checked prior to its recognition that it includes all relevant legal requirements and adequate critical control points. The inspector only has to verify that all processes are covered by the industry code and that the food business is working in compliance with the code.

Hygiene codes have some clear advantages for the government agency responsible for the official controls. It is much more cost efficient to engage in consultations about 33 industry hygiene codes (compared to auditing the adequacy of several hundred or even thousands of company food business hygiene plans). What is more, the verification of compliance with an industry hygiene guide is considered to be easier than controlling a food business operator with a company-specific food safety plan. For this reason the NVWA is engaged in forms of cooperation with private organizations to perform controls and audits at food businesses applying a hygiene code.⁴⁸ A NVWA official called a hygiene code in an interview 'an easy-to-use verification document' (*handzaam toetsdocument*).

Response by target groups

Industry associations and commodity boards in a wide range of industries have directed the development of a hygiene code for their industry. Initially in industry sectors with a high degree of organization and strong associations, more recently in industries where food is only a peripheral activity, and in organizations run by volunteers. Examples of the last type include traditional and volunteer millers, and small social service organizations. Many food businesses in the Netherlands do apply a hygiene code since working with one makes it easier for a food business operator to know what he or she should do to comply with the relevant food legislation.

47 Wijziging Warenwetregeling Hygiëne van Levensmiddelen, Stc 2003, nr 75.

48 Verbruggen & Havinga 2014.

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To conclude, from the very start both government and industry in the Netherlands have been engaged in the development of industry guides. Although there have been and are still some disagreements between the ministry/NVWA and (parts of) the industry, relations between government and industry have generally been cooperative. The various actors involved in the development of industry guides operate at the national level. Industry guides make it easier for both small and medium sized food business operators and food inspectors to do their job.

8 Industry guides for good hygienic practice in Scotland

Policy formation process

In the UK eight industries at the time of writing have developed a FSA recognized national guide to good hygienic practice (for bottled water, flour milling, mail order food, retail, sandwich manufacturing, vending, whitefish processing, and wholesale distributors).⁴⁹

In the UK the responsibility for the enforcement of food hygiene regulations is shared between the Food Standards Agency and Local Authorities. The actual food inspections are carried out by local authority enforcement officers; the FSA only inspects certain designated industries. Compared to the Netherlands, the organizational structure of official controls in the UK is more complex, with two additional layers: the Scottish government and the Food Standards Agency Scotland (FSAS) and local authorities (Councils). Since devolution the Scottish Executive and the Scottish Government have become involved in food safety policy. In 2013 when this research was conducted, the Scottish government was preparing for the establishment of a new Scottish food body (to replace FSAS).⁵⁰ The FSAS has a complex relation with the FSA. It is a hierarchical relation within an administrative organization, while at the same time the FSAS has some autonomy and has to be responsive to the Scottish government.⁵¹ The Scottish government is responsible for local government within Scotland.

Organisational implementation

The relationship between the FSAS and local authorities is rather complex. FSA is the key intermediary between European, national and devolved governments on the one side, and local governments on the other.⁵² Marsden et al.⁵³ conclude that the FSA 'has the authority (as the authoritative voice over food safety) but limited power over key delivery agents (local government)'. Second, Marsden et al. point to the overlapping functions of the FSA and LACORS (Local Authorities

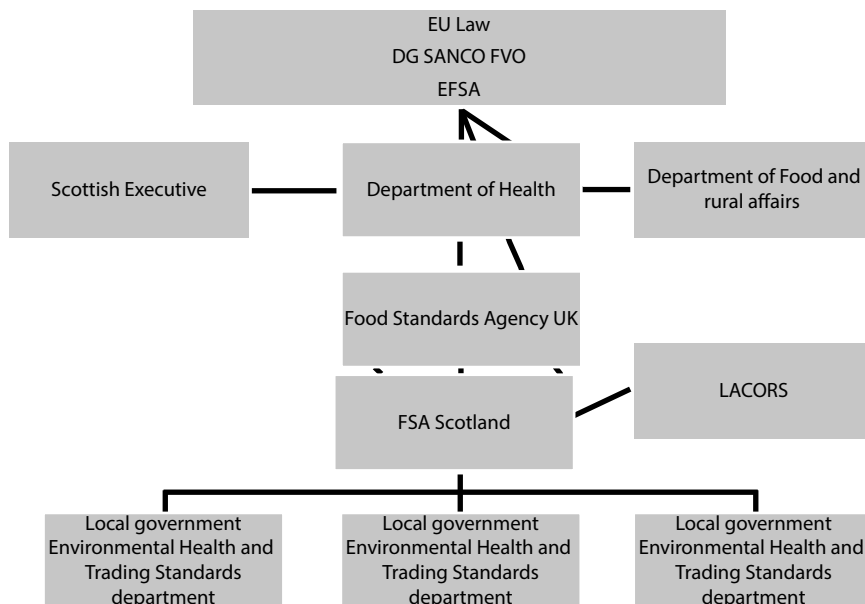
49 www.food.gov.uk/business-industry/guidancenotes/hygguid/food-industry-guides (consulted 24 May 2013). See also FSA Guidelines for the development of national voluntary guides to good hygiene practice and the application of HACCP principles in accordance with EC food hygiene Regulations, April 2013.

50 www.scotland.gov.uk/Topics/Health/Healthy-Living/Food-Health/NewFoodBody.

51 Figure from FVO country report. Compare Marsden et al. 2010, p. 215 and Hutter 2011, p. 70.

52 Marsden et al. 2010, p. 214.

53 Marsden et al. 2010, p. 214.

Figure 1 *Organizations involved in food safety enforcement in Scotland*

Coordinators of Regulatory Services); both issue guidance to local authorities to promote good practice and consistent enforcement practices, but they do so from a different perspective. The FSA is created by the national government whereas LACORS is a representative body of local government.

One of my respondents, a principal enforcement officer with a local council, told me that initially the relations between local authorities and the FSA were tense.

‘After the FSA was set up there were a lot of frictions with local authorities. They ordered us about, that is ridiculous. But they learned their lesson and we learned from them. They’ve got the political situation to deal with, we understand that. Now the relations are good. We see ourselves not as separate.

The big thing is to promote consistency. Some local authorities did hardly anything on food safety. Food hygiene was a low priority for them. That is a huge improvement. And we also value the support they give you: the guidance, coordinated approach, research, general approach. In the past it was completely fragmented. Now we have the framework agreement which specifies what each local authority has to deliver. Which service they need to provide. That is an element of consistency. We are audited against that framework by the FSA. The FSA has the power – if we don’t deliver that service they can take over. But so far that never happened.’

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The UK Food Standards Agency has developed guidance for food business operators called 'Safer food, better business' which is used in England, Wales and Ireland.⁵⁴ In 2005, the Scottish Food Standards Agency proudly presented its own Food Safety Assurance System: CookSafe. CookSafe was developed by the Scottish HACCP Working Group of the Scottish Food Enforcement Liaison committee on request of the Food Standards Agency Scotland (FSAS) because 'Safer food better business' was found to be insufficient ('a diluted version').⁵⁵ It was felt that caterers were unable to comply with HACCP requirements. FSAS received funds to assist the Scottish catering industry with the introduction of HACCP. Of 32 local councils, nine were represented in the working group responsible for drafting the original handbook. In addition to food enforcement officers from Scottish Councils an industry representative and an FSAS officer were members of the original working group. This makes the CookSafe project a joint project of local enforcement officers and the Scottish FSA. CookSafe can not only assist SME food businesses but also promotes consistency between the enforcement policy of local authorities throughout Scotland. A revised version was published in 2012, introducing new sections related to preventing cross contamination. In 2013 similar assurance systems were presented for the retail sector (RetailSafe) and the meat industry (ButcherSafe).⁵⁶

Street-level bureaucracy

The FSAS trained food enforcement officers of the local authorities in the principles of HACCP and CookSafe. After that the food enforcement officers went out to food businesses and distributed the CookSafe manual, helping food business operators to fill in the CookSafe forms. As the FSAS officer involved in developing the system said: 'Filling in the forms is difficult. Many businesses could not manage to do this.' The Food Law Practice Guidance for Scotland advocates that enforcement officers apply an educational and graduated approach. Guidance material should be broken down to enable the enforcer and food business to agree on the progress that should have been made by the next visit.⁵⁷

I observed an officer during an inspection of a small African retail shop as he helped the shopkeeper. At a previous visit the manual was handed out and the shopkeeper was instructed to fill in particular chapters and charts. The inspector

54 www.food.gov.uk/business-industry/caterers/sfbb/. 'Safer food, better business' packs have been designed to meet the specific needs of different food businesses: small catering businesses, small retail businesses, restaurants and takeaways serving Chinese or Indian, Pakistani, Bangladeshi and Sri Lankan cuisines, child minders, and a care homes supplement, designed for use with the caterer's pack. Some local authorities have produced adaptations to such packs, but the FSA advocates uniform guidance and wants local authorities to consider first if these modifications are really necessary. FSA, Guidance for local authorities on adapting Safer food, better business (<http://multimedia.food.gov.uk/multimedia/pdfs/guidancelaadaptingsfbb.pdf> consulted 16-7-2014).

55 All Food Liaison Groups are represented in SFELC, together with representatives from COSLA, FSAS, Public Analysts, Officers of Environmental Health, the Scottish Government, and the food industry.

56 www.food.gov.uk/scotland/safetyhygienescot (consulted 22-9-2014).

57 FSAS 2012, p. 210, 215.

checked this was done and complimented the shopkeeper. She was now asked to fill in the following chapters and the enforcement officer helped her, suggesting the answers she could provide. He told her she could call him with questions and he would drop in to see that she was making progress, working through the manual and applying the procedures for cleaning and temperature management. The other officers I accompanied on inspection visits also employed an educational approach: explaining what should be done and why it is important, and praising the food business operators (or their staff) for improvements and compliant behavior. This contrasts with Green and Kane who write that 'EHO should (...) take a more informal, consultative approach rather than the current adversarial stance; a 'social worker rather than a sheriff'.⁵⁸

Local authorities have a great deal of autonomy in performing their tasks. All authorities employ their own forms and formats for inspections. However, all respondents stressed that much progress has been made in achieving greater consistency. One of the four local authorities in Scotland that my research covered did not use CookSafe, since this council had its own food safety system. The enforcement officers told me they already applied their own system and they did not want to bother food business operators with another one after they had just applied and become acquainted with the council system.

Target groups' response

The foreword to the 2012 edition of CookSafe asserts that it is used in over 35,000 catering establishments. SME food businesses in the UK rely predominantly on information from the Environmental Health Officer and the FSA.⁵⁹ A representative of the Scottish Food and Drinks Association told me that the industry was quite happy with the FSA approach. They viewed it as an advantage that the guidance was drawn up by the same organization that also verifies compliance. Perhaps another advantage may be that developing and managing a guide for good hygiene puts the burden on the industry to provide experts and administration.

The Scottish (and British) competent authorities have chosen to develop their own guides (in consultation with industry associations) to assist SME food business operators to comply with hygiene and HACCP requirements. Instead of promoting guides developed by the industries, the Scottish (and UK) FSA produced a range of food safety management packs for different sectors of the food industry to help food business operators manage their food safety procedures.

9 Comparative analysis

The Dutch authorities have called on industry organisations to develop Guides for good hygiene ever since 1987. The guides are explicitly included in Dutch law and in the inspection protocols of the NVWA. In contrast, the Scottish Food Stan-

58 Green & Kane 2014, p. 262.

59 Campden BRI 2013; Hutter 2011; Fairman & Yapp 2005.

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dards Agency and the Scottish Local Authorities do not actively promote the establishment and application of industry guides for good hygienic practice. How can one explain these different routes chosen by the Netherlands and Scottish authorities to help SME food businesses comply with food hygiene and HACCP regulations? The following possible explanations are discussed below: relations between government and industry, traditional routines of food control, pressures on the food authorities, and the existing regulatory network.

Relations between industry and government in both the Netherlands and Scotland are quite cooperative and non-adversarial. The large number of industry guides and the prominent place these guides occupy in enforcement policy, regulations and communications in the Netherlands fits very well with such a consensual style. Although the UK is also known for its tradition of cooperation between government and industry,⁶⁰ this seems to be less prominent in relation to the industry guide strategy. So why industry guides are not frequently used in Scotland cannot be explained in terms of non-cooperative relations. However, experience during the BSE crisis made 'putting the consumer first' a top priority for the newly established FSA, and the 'old' food governance system was severely criticized for not acting adequately because of economic interests. In response to this criticism food authorities might wish to keep things in their own hands.

In both countries the strategy chosen fits into the existing routines of food control. In the Netherlands, industry guides already existed before they were included in EU law. Probably it was the Netherlands that proposed inclusion of the option of industry guides in EU law. In the UK the first industry guide was not recognised by the FSA until 2007.⁶¹ Moreover, the implementation of HACCP came earlier in the Netherlands than in the UK. The implementation of HACCP in small and medium sized businesses in Scotland has just recently started, whereas it has already existed for some time in the Netherlands.

The strategy chosen also fits into the more general policy objectives of the national governments and the food authorities. In the UK, food controls are the responsibility of the local authorities. After the BSE crisis the FSA was established to better coordinate these controls. The FSA has made a great deal of effort and achieved success in bringing local authorities together and harmonising their approach. For the Scottish (and UK) FSA there is a strong focus on getting local authorities on the same track and diminishing the fragmentation of food controls. The FSA is a relatively young organisation that has to earn its position and does not have many instruments to improve consistency among local authorities. The chosen option of government-provided packs helps to fulfil this function. The procedure chosen to develop the CookSafe handbook contributed to cooperation and alignment between the local authorities. The FSAs asked the HACCP working group of the Scottish Food Enforcement Liaison Committee to develop

60 Van Waarden 1995; Vogel 1986.

61 This guide covers the sale of perishable foods by mail order and is produced by the Mail Order Fine Foods Association, webarchive.nationalarchives.gov.uk/20120206100416/http://food.gov.uk/news/newsarchive/2007/feb/hygpractguide consulted 16-7-2014. This is inconsistent with Lugt's finding of one recognized guide in the UK in 1999, Lugt 1999, p. 189.

guidance. This made the handbook the result of a joint effort of enforcement officers of local authorities and the FSA. The Scottish (and UK) approach contributes to one of the main objectives of the FSA, to promote consistent local enforcement. Joint efforts with the industry seem to have a lower priority. Apparently the Scottish or British industry has not been very proactive in developing industry guides. In the Netherlands the focus of the government was on self-regulation by the industry, shifting responsibilities from government to private organisations, lowering the burden of regulation for businesses, and reducing public spending. The Dutch approach to promoting industry guides fits very well into this general policy. Furthermore, the Dutch NVWA has been involved in several mergers and reorganisations and much energy has been devoted to internal organisational issues. The most criticized part of official food controls in the Netherlands has concerned the meat sector (with hygiene and safety in manufacture and SME attracting less criticism).

The Scottish governance network is predominantly a multilevel, hierarchical government network (Brussels, London, Aberdeen, local councils); industrial and consumer representatives are involved in a consulting role in drafting regulations, guidelines and protocols. The Dutch network is dominated by the NVWA, which occupies a central position; the NVWA has different types of relations with other governmental and industry actors in the network related to drafting guidelines and auditing compliance (co-regulation, consultation, cooperation, delegation). In some situations private actors are allowed or mandated to set the standards or to monitor compliance.

Respondents in both countries referred to EU law frequently as the foundation of official controls and hygiene prescriptions. The results of this investigation are consistent with the conclusion of Falkner et al. that the implementation of EU law in both the Netherlands and the UK depends on domestic issues. The dominant domestic concern in Scotland (and the UK) is the objective of the FSA to bring consistent food controls and independency from industry. The prevailing issue in the Netherlands is making industry responsible for food safety. Path dependency and traditional routines and operating procedures play an important role in particular at the level of policy formation and organisational behavior. Falkner et al. find that political resistance is the main obstacle to compliance in the world of domestic politics. However in this study we did not find evidence of political resistance against industry guides in Scotland (and UK), but rather a lack of active support from both food authorities and industry.

The EU law on industry guides for hygiene shows characteristics of what Zeitlin et al. call an experimentalist approach, in that it provides flexibility for member states and food business operators in how to comply with the law. However, this investigation has not confirmed that this flexibility is used to evaluate and learn from different approaches. In both countries food inspectors seemed to be unaware of the approach in the other country and I did not come across comparative research on the results.

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10 Conclusion

Despite the common legal framework the application of industry guides for good hygienic practice is quite different in the Netherlands and Scotland. The different food governance networks in the Netherlands and Scotland produced different practices, using the flexibility of EU regulation either to maximize or minimize the use of industry guides. The Netherlands authorities called upon industry to develop these guides, the guides are widely used by food businesses and enforced by food inspectors. The Scottish authorities on the other hand choose to develop their own guides and to educate and instruct enforcement officers and food businesses in its use. The explanation is found in the domestic concerns in both countries. The main objective of the Scottish FSA is improving consistency between all local authorities that are responsible for official controls. Developing CookSafe together contributed to that goal. After the BSE crisis, independency from industry is also highly valued in Scotland and the UK. The Dutch government and ministry was mainly concerned with making the industry more responsible for food safety and improving efficiency in food controls. Promoting and applying industry guides is already an intrinsic element of Dutch policy for years. The industry guide option in the EU regulations fits in this policy very well.

The principle objectives of EU food law are to ensure a high level of consumer protection with regard to food safety and to reduce trade barriers contributing to the creation of the internal market. As to the first, this investigation does not allow to compare the results of Scottish and Dutch approaches because information on the level of hygiene in food businesses in both countries is unavailable. As to the second, the different use of industry guides leads to different choices available for food businesses in both countries. In the Netherlands most businesses can choose between using an industry guide or developing their own company food safety management plan. In Scotland most businesses can choose between using CookSafe, developing their own plan, or using some other guidance. SME in the Netherlands depend on their industry association, SME in Scotland depend on their local enforcement officers and the FSAS.⁶² In Scotland, food business operators usually work through the CookSafe manual (or other guide) and fill in the critical limits for temperatures (however, CookSafe and the food inspectors do provide suggestions). In the Netherlands these choices are already made in the industry guide and the food business operator only has to apply and record the temperature control measures.

The industry guides are more tailored to a specific sector of food businesses. Scottish and British SME find that the available guidance is not sufficiently specific.⁶³ Because the Scottish CookSafe manual is handed over by the food inspector and the food inspector also explains how to use it and assists in filling it in, the Scottish food inspectors are encouraged to use a very educational approach. CookSafe also functions as a communication instrument, informing food business operators about the requirements they have to comply with, and instructing them on

62 Hutter 2011; Fairman & Yapp 2005.

63 Hutter 2011.

how to do so. In Scotland food hygiene education and training of food business operators are organised by public bodies (local authorities, FSA or health institute), whereas in the Netherlands the industry associations are responsible. The NVWA provides only general information about the legal requirements (no tailored guidance is provided). The FSA Food Safety Assurance Systems are publicly available to all; the availability of the Netherlands industry guides ranges from a free download from the website to purchase (at cost). The FSAS can modify the assurance system when needed, whereas the Netherlands authority cannot easily and quickly change the industry guides. In the Netherlands, industry associations are much more closely involved in the detailed requirements.

As a consequence, the choices open to food business operators are not equal, which spoils the level playing field. In the end, therefore, the powerful tool represented by the European Union issuing Regulations that have a direct effect does not result in the harmonization of food hygiene prescriptions. It does, however, provide flexibility for member states and food authorities to choose the policy that contributes to their own main objectives. As Scotland and the Netherlands are similar in many ways, they are the least likely case for big differences in the implementation of the investigated provision. Now that we found a different pattern of implementation in this least likely case, we would expect the same level of variation or higher between less similar countries.

Most research on the implementation of EU law in member states has been restricted to directives and limited to their transposition into national law. The literature on European law too often assumes that regulations are straightforwardly implemented in the member states. This study shows that in order to understand what happens on the ground it is important to look beyond transposition or direct effect and also to investigate the implementation of regulations and to dig deeper than just their transposition.

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