

PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/140755>

Please be advised that this information was generated on 2018-01-21 and may be subject to change.

VARIATIONS IN THE IMPLEMENTATION OF EUROPEAN FOOD HYGIENE REGULATIONS BETWEEN SCOTLAND AND THE NETHERLANDS

by *Tetty Havinga, Institute for the Sociology of Law, Radboud University, Nijmegen, The Netherlands*

Introduction

Almost all food safety regulations in the member states of the European Union (EU) rest on European law. Despite this common legal base, several differences between member states still exist. In the Netherlands, the majority of small and medium (SME) sized food businesses work with an industry guide to good practice for hygiene. In Scotland, most of them work with CookSafe, the assurance system of the Food Standards Agency in Scotland (FSAS). How can we 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 Scottish 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 an European regulation. In particular, it shows how different networks of governance in different jurisdictions interact with EU-level governance to produce different domestic practices. It is important to consider how EU law is actually implemented and enforced to gain an insight into the powers of the EU and the level of harmonisation.

Section 2 outlines the theoretical and methodological background of the comparison. Section 3 provides the legal background focused on the EU regulation of national guides to good hygienic practice that form the subject of this investigation. Sections 4-5 describe the use of guides in the Netherlands and Scotland. Section 6 compares the two countries.

Methodology

This article compares the way Scottish and Dutch authorities deal with a particular item of European food law: the provision that member states shall encourage the development of national guides to good practice for hygiene and for the application of HACCP (Hazard Analysis and Critical Control Point) principles. 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 SME to comply with HACCP requirements.

A review of the available literature reveals many 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 organisational structures, issue salience and the level of contestation, and power balance of relevant actors involved in the domestic decision-making process.

Falkner et al. (2007, 2008) distinguish between four 'worlds of compliance' in the implementation and application of EU labour law directives in member states. Both the Netherlands and the UK belong in the world of domestic politics where 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. Can domestic political issues also explain the different response of the Netherlands and Scotland in the field of food law? We will investigate characteristics of the policy formation process, the organisational network, street-level food controls and target groups' behaviour in both countries.

Member states do have considerable freedom in the transposition and implementation of EU law. To cite Shapiro (1999, 29): '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'. Not only at the member state level, but also at the level of regulatory agencies, decentralised 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.

The paper is based on various sources:

- documents from the EU, 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 recognised guides;
- interviews in Scotland with representatives of the FSAS 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 behaviour of food inspectors, their interaction with food businesses, and references to industry guides during inspections.

European food law

The BSE crisis is often mentioned as a turning point in European Union food policy. 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 emphasising food safety and consumer protection instead of effective functioning of the internal market. The 2002 General Food Law lays down the general principles and covers the entire food supply chain. 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 853/2004 on the hygiene of foodstuffs 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'. This requirement is a form of enforced self-regulation (Braithwaite 1982).

SMEs are believed to have difficulty developing their own company-specific HACCP food safety management system (Taylor 2001). The option to develop industry guides to good hygienic practice was included particularly to help SME food business operators to comply with the law. The previous law, directive EG/43/93, already contained this option.

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. The guide must be approved by the competent government authority (minister, agency, or European Commission). Since the industrial association draws up the guidelines and the government has to approve them, these guidelines are a form of co-regulation.

The guidance document on the implementation of certain provisions of the regulation explains: '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.' These guides may assist food business operators to apply requirements expressed in general terms (e.g. 'a sufficient frequency', 'where necessary', 'to take adequate measures, as appropriate'). Member states are supposed to 'encourage the development of national guides to good practice for hygiene and for the application of HACCP principles'. In short, the regulation leaves broad discretion to member states, food businesses, and industry branches.

Member states are responsible for official risk-based controls with appropriate frequency, to verify that food business operators comply with EU food laws. Where a food business is using a recognised guide, the enforcement authority must take this into account when assessing compliance with hygiene requirements. National food enforcement agencies, such as the NVWA and the FSA, are responsible for controlling compliance with the guidelines.

Industry guides for good hygienic practice in the Netherlands

Policy formation process

In the Netherlands 33 guides are recognised by the Minister of Health, covering industries such as bakeries, butchers, supermarkets, food transport, sugar, dairy farming, and fuel stations. The policy formation process in the Netherlands is centralised 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. These organisations discuss each draft guide developed by an industry organisation. As early as 1987 the Dutch government asked the industry to draft voluntary guidelines to indicate how foodstuffs in the sector could be hygienically manufactured. From 1995, guides and the HACCP principles gained a legal basis. In 1996, 11 guides were recognised. Three years later their number had increased to 26.

The Ministry of Health published a document on the substantive criteria for the development of guides, which summarises 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 recognised. For example, the Dutch government stipulated that each guide should contain

sufficient microbiological criteria to enable effective enforcement. Other points of discussion also arose, about some criteria being more stringent in the Netherlands compared to other member states.

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

Organisational implementation

The NVWA is involved in developing guides and in their evaluation and updating. The NVWA has issued guidelines for the development of the 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 recognised guides. These guides 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 guides (compared to auditing the adequacy of several hundred or even thousands of company food business hygiene plans).

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

Street-level officials

Food inspectors verify compliance with the applied guide. The guide has already been checked prior to its recognition to include all relevant legal requirements and adequate critical control points. Therefore, the inspector only has to verify that all processes are covered by the guide and that the food business is working in compliance with the guide. The verification of compliance with an industry guide is considered to be easier than controlling a food business operator with a company-specific food safety plan.

Response by target groups

Industry associations and commodity boards in a wide range of industries have directed the development of a guide for their industry. Initially in industry sectors with a high degree of organisation and strong associations, and more recently in industries where food is only a peripheral activity, and in organisations

run by volunteers. Many food businesses in the Netherlands do apply a guide 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.

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. Guides make it easier for both SMEs and food inspectors to do their job.

Industry guides for good hygienic practice in Scotland

Policy formation process

In the UK eight industries have developed a FSA recognised national guide to good hygienic practice (for bottled water, flour milling, mail order food, retail, sandwich manufacturing, vending, whitefish processing, and wholesale distributors). In the UK the responsibility for the enforcement of food hygiene regulations is shared between the FSA and local authorities. Compared to the Netherlands, the organisational structure of official controls in Scotland is more complex, with two additional layers: the Scottish Government and FSAS, and local authorities. Since devolution the Scottish Executive and the Scottish government have become involved in food safety policy. The FSAS has a complex relation with the FSA. It is a hierarchical relationship within an administrative organisation, while at the same time the FSAS has some autonomy and has to be responsive to the Scottish Government responsible for local government. In 2015 a Bill was passed to establish Food Standards Scotland (to replace FSAS).

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. The actual food inspections are carried out by local authority enforcement officers; the FSA only inspects certain designated industries. Marsden et al. (2010, 214) conclude that the FSA 'has the authority (as the authoritative voice over food safety) but limited power over key delivery agents (local government)'. Second, they point to the overlapping functions of the FSA and LACORS

(Local Authorities Coordinators of Regulatory Services); both issue guidance to local authorities to promote good practice and consistent enforcement practices, but from a different perspective.

The FSA has developed guidance for food business operators called Safer Food, Better Business which is used in England, Wales and Ireland. In 2005, the FSAS 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 at the request of the FSAS. It was felt that caterers were unable to comply with HACCP requirements. CookSafe is a joint project of local enforcement officers and the FSAS. Of 32 local councils, nine were represented in the working group responsible for drafting the original handbook, together with an industry representative and an FSAS officer. CookSafe not only assists 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).

Street-level officials

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 businesses and distributed the CookSafe manual, helping operators to fill in the CookSafe forms. 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 be made by the next visit.

The officers I accompanied on inspection visits employed an educational approach: explaining what should be done and why it was important, and praising the food business operators (or their staff) for improvements and compliant behaviour. My observation contrasts with Green and Kane (2014, 262) who write that 'EHO should (...) take a more informal, consultative approach rather than the current adversarial stance; a social worker rather than a sheriff'.

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 had 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 already had its own food safety 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 (Fairman & Yapp 2005, Hutter 2011). A representative of the Scottish Food and Drinks Association thought it an advantage that the guidance was drawn up by the same organisation 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.

Comparative analysis

The Dutch authorities have called on industry organisations to develop guides for good hygiene since 1987. The guides are explicitly included in Dutch law and in the inspection protocols of the NVWA. In contrast, the FSAS and the Scottish local authorities do not actively promote the establishment and application of industry guides for good hygienic practice. Instead they themselves developed food safety management packs. 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?

Relations between industry and government in both the Netherlands and Scotland are quite cooperative and non-adversarial (Van Waarden 1999). 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, this seems to be less prominent in relation to the industry guide strategy. 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 criticised for not acting adequately because of economic interests. In response to this criticism independence from industry is highly valued.

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. In the UK the first industry guide was not recognised until 2007. Moreover, the implementation of HACCP in SMEs 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. 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. As a relatively young organisation, the FSAS has to earn its position and does not have many instruments to improve consistency among local authorities. Developing the CookSafe handbook contributed to cooperation and alignment between the local authorities. This 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, reducing public spending and improving efficiency in food controls. Promoting industry guides fits very well into this general policy. Furthermore, the NVWA has been involved in several mergers and reorganisations and much energy has been devoted to internal organisational issues. The most criticised part of official food controls in the Netherlands has concerned the meat sector (with hygiene and safety in manufacture and SME attracting less criticism).

Respondents in both countries referred to EU law frequently as the foundation of official controls and hygiene prescriptions. 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 which 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 their use.

As expected, the explanation is found in the domestic concerns in both countries. The dominant concern in Scotland (and the UK) is the objective of the FSA

to bring consistent food controls and independence 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 behaviour. 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 the 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 Sabel and Zeitlin (2011) 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.

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 (Hutter 2011). The Scottish CookSafe manual functions as a communication instrument, informing food business operators about the requirements they have to comply with, and instructing them on how to do so. In Scotland food hygiene education and training of food business operators is 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. The FSA manuals 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.

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 could not compare the results of Scottish and Dutch approaches because information on the level of hygiene in food businesses in both countries was not available. 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 businesses whereas in the Netherlands depend on their industry association, in Scotland they depend on their local enforcement officers and the FSAS. In Scotland, food business operators usually work through the CookSafe manual 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.

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 EU issuing regulations that have a direct effect does not result in the harmonisation 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 have 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. 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.

Footnote

Readers may contact me at t.havinga@jur.ru.nl if interested in the full paper including the references.