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II Systematic analysis of food law

1. Introduction

Bernd van der Meulen and Bart Wernaart

1.1 The food sector and its law

The food sector is the largest production sector in the European Union. It is also heavily regulated. If fact, it may well be the most regulated industrial sector in the EU.[3] The motives for regulating the food sector have developed over time. Initially the focus was on creating a level playing field for a well-functioning internal market. Currently the emphasis is on protecting consumer interests, primarily life and health, but also the possibility to make informed choices and to be protected from misleading practices.

EU food law has an impact on the interests of many stakeholders: consumers, officials and civil servants at the European and national level in the Member States of the EU, candidate members and neighbouring countries, businesses in the EU or those trading with EU partners, legal and regulatory affairs managers, advisors, consultants and many more.

1.2 Multi-layered food law

Eating and drinking are necessities of life. From the beginning of time the gathering, production and distribution of food has been central to many human relations. And in all societies rules and regulations concerning this primary human activity have developed. As those relations have become more complex, stretched across borders and ecosystems, organisation has become increasingly necessary. Food law is now formulated and used at many levels: from the international community to several smaller parts of the world. The European Union plays a key role, as it provides the legal framework and substance for rules applied on a continental scale to societies that belong to the most developed in the world, coming from very differing economic and political traditions. It has had to develop a new infrastructure to accommodate the style and standard of the Union's food law. At the national level there is enough left to work on and assist the integration of EU law into national law. Even the private sector participates in regulation.

1.3 This book

This book gives an account of European Union (EU) food law. After 2000 an overhaul of European food law was undertaken. The blueprint was laid down in the White Paper on Food Safety (2000). The general concepts and principles have been enacted in Regulation 178/2002, known as the General Food Law. In 2003

[3] For details, see Chapter 7.

there followed a package of regulations regarding genetically modified foods; in 2004 a package regarding food hygiene and enforcement; in 2005 legislation on packaging[4] and allergen labelling; in 2006 a regulation on nutrition and health claims; in 2008 a package of regulations on food additives and other so-called food improvement agents; in 2011 a regulation on food information to consumers; in 2015 a new regulation on novel foods; and in 2017 on official controls.

This large-scale reformulation of food law in the EU is driven by several concerns, two of which stand out: the intimate connection between food law and the internal market, and the lessons learned from the major food scares of the 1990s. The innovated body of EU food law is at the centre of this book. It is described and analysed. It is situated in the midst of those elements of European Union law that determine the conditions and restrictions for food law in the Union and in the Union's Member States. Food law on the level of the European Union is flanked by many legal rules from the wider international plane, from the national legal systems of the Member States and from private regulation by the food sector. This book presents just a few excursions into these flanks. Our main attention is focused on the food law of the EU itself, whilst the excursions serve to fit EU food law to these surroundings, or to underline its specific characteristics.

The development of European Union food law can be traced back over the five decades of its history since the end of the transition period used to create the common market. Knowledge of certain aspects of this development is necessary to understand the present situation of the internal market, harmonisation of national legislation, and food law. Readers will learn how law is used as an instrument to achieve food safety and to deal with food safety problems.

1.4 Overview

The book is subdivided into three parts. The first part we call 'prerequisites'. It provides the background information that readers need to be able to understand the analysis of food law. Food law is a field in which law and science meet. It is practised just as often by professionals with a background in food sciences as by professionals with a background in law. For the benefit of those readers who do not have a background in law, we provide a short introduction to legal thinking and legal method in general (Chapter 2), to international (food) law (Chapter 3) and to the law and institutions of the European Union (Chapters 4 and 5). Against this background the turbulent development of food law in Europe from the beginnings of the European Community to the release of the White Paper on Food Safety in 2000 and subsequent developments are described in Chapter 6.

[4] For details, see Chapter 19.

The second part of the book – the systematic analysis of food law – forms the heart of the book. It sets out the analytical thinking underlying this book (Chapter 7) and goes on to apply this thinking in eight chapters. These address the general principles (Chapter 8), rules on the authorisation of products (Chapter 9), the chemical and physical safety of products (Chapter 10), the biological safety of products (Chapter 11), the processes to prevent and deal with food safety problems (Chapter 12), and communication from businesses to consumers (Chapter 13). These chapters largely take the perspective of the legislature (Chapter 8) and businesses (Chapters 9-13). Chapter 14 takes the perspective of public authorities and discusses their powers of enforcement and incident management. The final chapter of part II (Chapter 15) focuses on the position of the consumer in EU food law.

The third part of the book is labelled 'Selected topics'. It provides a collection of topics subjected to further analysis, in particular: the human right to adequate food in international law (Chapter 16); special foods – formerly known as PARNUTS (Chapter 17); import requirements (Chapter 18); food contact materials (Chapter 19); nutrition policy (Chapter 20); animal feed (Chapter 21); intellectual property (Chapter 22); private food law (Chapter 23); the law on organic food (Chapter 24); and the response by the legislature to food fraud (Chapter 25). A short conclusion is drawn in Chapter 26.

Writing about law is reciting, describing, comparing and analysing the law. In order to separate the original instrument of law from description, analysis and comments, the legal texts including articles from treaties, legislation, or case law appear in Law text boxes. In this way the reader is invited to look at the original and to develop personal views on the description and analysis made by the authors. To further stimulate recourse to the sources, references to the official documents are often made, especially to readily available sources on the World Wide Web. The account is supported by diagrams that give a more or less graphical image of these basics and provide some additional information in a nutshell.

2. Introduction to law

Bart Wernaart, Bernd van der Meulen and Menno van der Velde

Food law is a specialisation in law with many interdisciplinary characteristics. Since not all readers will be familiar with legal science, its vocabulary and methods, this chapter provides a brief introduction to the science of law. Readers with a background in law may want to skip it.

2.1 Introduction to legal science

The word 'law' refers to limits set on various forms of human behaviour. Legal science does not concern itself with so-called *descriptive* laws, such as those found in natural sciences and economics, which describe how people or natural phenomena usually behave. Legal science is concerned with *prescriptive* laws, which are rules governing how people ought to behave. The rule that food shall not be placed on the market if it is unsafe,[5] does not say that this does not happen but that it should not happen. It imposes a duty on those who put food on the market. Likewise, there are rules prescribing what is to be done if – despite this rule – unsafe food does appear on the market. Law in this sense is intended to prevent and resolve conflict by organising and describing the rights and duties in our society. Those rights and duties are overseen and interpreted by a system of courts, which is backed by the enforcement powers of police services.[6]

To a very large extent law is national. It is closely linked to the political structure of a given society. Political debates in parliaments, for example, often result in legislation. Obviously, this leads to different laws from one country to the next, even where such laws are intended to regulate or define the same fields of activity.

Most national legal systems in the world can be grouped into one of two basic systems: the common law system, used in England and most of the former British colonies, including the USA, India and Australia; and the civil law system, which is used across most of continental Europe and in its former colonies like parts

[5] Article 14(1) General Food Law. Discussed repeatedly in this book.

[6] Other means to promote the observance of the law, such as arbitration or mediation, are ultimately based on the public court system, for persons participating in these voluntary proceedings to apply the law know that ultimately the public powers will back up the decisions reached in the voluntary proceedings, unless they are blatantly unjust (in which case the public court system can provide a solution itself).

Diagram 2.1. Law as a multifunctional word.

Law, a word about a word

Readers may have noted that already in the few lines above we have used the word 'law' with two different meanings: one referring to a system or academic discipline and one to a text. Other languages have different words for these two meanings. Law as a system is called *ius* in Latin, *le droit* in French, *das Recht* in German, and *het recht* in Dutch. The law (the article is rarely used when referring to the system) as a text that forms part of legislation also known as 'act' or 'enactment' is *lex* in Latin, *la loi* in French, *das Gesetz* in German, and *de wet* in Dutch.

These other languages, however, may suffer from another language difficulty. Where English has separate words for law (as a system) and right; the expressions ius, droit, Recht and recht cover both meanings.

of Latin America.[7] English law is called common law because it was common to the whole of England. This uniformity was achieved at a very early stage. It began soon after the Norman Conquest of England in 1066, when King and Court travelled around the country hearing grievances. Because the same people sat in different courts, the same understanding of the law applied whichever court made the decision.

The common law system is based on the principle of deciding cases by reference to previous judicial decisions (known as 'precedent'), rather than by reference to written statutes drafted by legislative bodies. English law has evolved in this way from the 12th century onwards, through a body of reported cases that present specific problems out of which general points of law are extracted. Formulation of the law is bottom-up from a specific event to a general principle. Judicial decisions accumulate around a particular kind of dispute, and general rules or precedents emerge. These precedents are binding on other courts at the same or a lower level in the hierarchy. The same decision must result from each situation in which the material or relevant facts are the same. The law evolves when opinions change as to which facts are relevant and when novel situations arise. The role of the legislator is limited to filling in gaps in the common law or correcting it.

[7] While the distinction between common law and civil law is rather generally accepted, there are some nuances to be identified. First, some authors group the civil law countries into more subgroups. For instance, Zweigert and Kotz divide the civil law countries into three categories: the Romanistic, Germanic and Nordic legal system (see Zweigert, K. and Kötz, H., 1998. An introduction to comparative law. Oxford University Press, Oxford, UK). Second, some authors use a less Europe-focused approach, and also classify into religious legal systems, the socialist legal system, legal systems in the Far-East and so called mixed-systems with profound characteristics of more than one legal system (see for instance: Glenn, H.P., 2007. Legal traditions of the world. Oxford University Press, Oxford, UK; see also: Wernaart, B., 2017. International law and business, a global introduction. Noordhoff Uitgevers, Groningen, the Netherlands, Chapter 2).

3. International food law

Anna Szajkowska[59] *and Bernd van der Meulen*

3.1 Introduction

Most of the foods we eat today do not depend on local production and do not have a seasonal character. The products of globalisation constitute a great part of our diets. While various food products have been valuable commodities in international trade throughout history, the expansion of global trade in agri-food products has been particularly significant over the past several decades, in response to increasing populations, improved technologies, and rising incomes. This global interconnectedness, apart from having obvious benefits linked to exploiting comparative advantages, also comes with risks: it makes food safety concerns global, as unsafe food can be distributed far and wide, with the potential to rapidly change a local problem into an international emergency.

Food safety is one of the most regulated (and one of the most politically sensitive) areas. This also holds true at the international level, where several international organisations, such as the Codex Alimentarius Commission, established jointly by the Food and Agriculture Organization (FAO), the World Health Organization (WHO), and the World Trade Organization (WTO), play an important role in global food governance by developing international food standards and supervising and liberalising world trade. This chapter provides an overview of international food law and its impact on the EU and national laws and policies.

3.2 The World Trade Organization

3.2.1 Structure

The WTO is different things at the same time. It is a platform for negotiation on trade rules, but it is also a system of law. This system of law comprises a so-called 'single undertaking'. This means once accord has been reached on certain agreements, states have to accept the whole package or nothing at all. They cannot pick the cherries they like and leave the rest. There are three major domains: trade in goods, governed by the General Agreement on Tariffs and Trade (GATT); trade in services, governed by the General Agreement on Trade in Services (GATS); and intellectual property rights, governed by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[60] For food law, GATT is the most important of these agreements.

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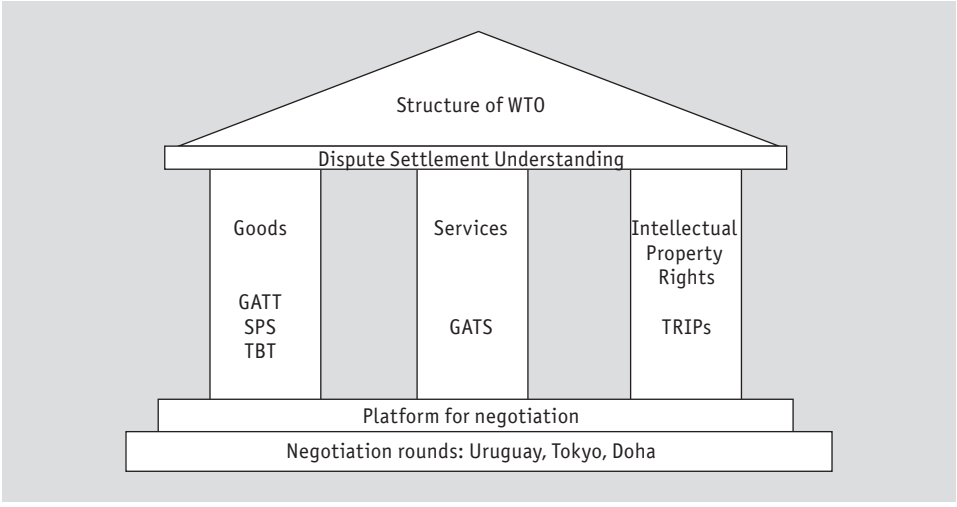
[59] Anna Szajkowska is an international relations officer at the European Commission in Brussels. The author is expressing her personal views only. The content does not necessarily reflect the views of the European Commission.

[60] On TRIPs, see Chapter 22.

To a certain extent the WTO is a supranational organisation. The agreements concluded between its members are binding. There is the Dispute Settlement Understanding, providing an arbitration procedure to resolve conflicts.[61] If a party decides to bring forward a conflict, a Dispute Settlement Body (DSB) decides on its outcome, based on the recommendations of a Dispute Panel and (if a party appealed) on a report of the Appellate Body (AB). The WTO does not have powers to enforce decisions taken in this arbitration procedure. It can condone, however, that if the decision reached is not implemented by the party found at fault, the winning party may implement economic sanctions. These sanctions usually take the form of additional import levies on goods from the state found at fault. If the levies are condoned by the DSB, setting them does not in itself constitute an infringement of WTO obligations. Diagram 3.1 presents the structure of the WTO.

The WTO is not a large international organisation with institutions like the EU. It only has a permanent secretariat in Geneva.

Diagram 3.1 Structure of the WTO. The Uruguay and Tokyo negotiation rounds took place before the WTO, under GATT.



[61] See the Understanding on Rules and Procedures Governing the Settlement of Disputes.

3.2.2 GATT

The General Agreement on Tariffs and Trade (GATT) predates the WTO. It entered into force in 1947. By means of the GATT 1994, the GATT 1947 was included as an annex to the WTO Agreement.[62] GATT aims to liberalise international trade by setting equal treatment of all trading partners as the norm.[63] GATT recognises, however, the necessity to make exceptions. The most important exceptions can be found in Article XX (general exceptions) and Article XXI (security exceptions). The main objective of food law, as we have seen previously, is to protect consumers' health. As a consequence, the most important exception to international free trade from a food law point of view is the protection of health. This exception can be found in Article XX(b) GATT. See Law text box 3.1.

Law text box 3.1. Article XX(b) GATT on (phyto)sanitary measures.

Article XX: General Exceptions
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) (…);
(b) necessary to protect human, animal or plant life or health;
(…)

In the food trade, differences in food safety requirements or technical standards, like quality requirements or labelling, may create trade concerns. To address them, two WTO agreements were concluded: the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

3.2.3 SPS and TBT Agreements

The SPS Agreement addresses a set of sanitary and phytosanitary measures – they are defined in its Annex A (Law text box 3.2). If a measure does not fall under the definition of sanitary or phytosanitary measure in the SPS Agreement, then the TBT Agreement may apply.[64]

[62] WTO Agreement, Annex 1A: Multilateral Agreements on Trade in Goods.
[63] Most favoured nation clause (Article I GATT).
[64] Another agreement with relevance for the food sector is the Agreement on Rules of Origin (AROO or ARO).

Law text box 3.2. Definition of sanitary or phytosanitary measure – Annex A to the SPS Agreement.

Annex A to the SPS Agreement

Sanitary or phytosanitary measure – Any measure applied:

(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

The TBT Agreement covers a wider range of products, not only foods, but also industrial products. Measures under the TBT Agreement are adopted to achieve different objectives, including the protection of human life and health, but also, for example, the protection of the environment or consumer information. The TBT distinguishes between three types of measures: mandatory technical regulations, voluntary standards and conformity assessments (procedures used to determine compliance with technical regulations or standards).

The SPS and TBT Agreements can be seen as complementing each other, depending on the purpose of a particular measure. Many national regulations can actually contain elements covered by both the SPS Agreement (e.g. banning the use of some additives in a product to protect human health) and the TBT Agreement (certain quality or labelling requirements to inform adequately consumers).

Both Agreements recognise the right of every country to establish rules for food safety or consumer protection. Such regulations, however, cannot constitute unnecessary or discriminatory barriers to trade. In judging whether national measures are justified, the SPS Agreement appeals to the authority of science as a supposedly independent arbiter. According to Article 2.2 of the SPS Agreement,

26. Conclusions

Bart Wernaart and Bernd van der Meulen

Food law cannot be understood in isolation from the general aspects of EU law. Nevertheless, in several countries food law as a functional area of law has become an academic specialisation in its own right. From the 2000 White Paper on Food Safety onwards, an impressive body of food (safety) law has come to fruition in the EU. The (2002) General Food Law provides the general principles. The most important of these is a duty of care for food safety resting on food business operators. Food business operators have to address the legal limits to their liberty in the choice of raw materials, their obligations in organising their production processes and trade relations and the rules concerning their communication with consumers.

To study EU food law in further detail, it is helpful to distinguish substantive food law and procedural food law. The main part of substantive food law addressing food businesses consists of three categories of rules: rules on the product, which is what the food should be; rules on the process, which is what the food business should do; and rules on the presentation of the food, which is what the food business says. Rules addressing public authorities grant these authorities responsibilities and powers of enforcement and incident management.

Substantive rules have to function within the legal system that produces them. For food law and food safety law the legal environment has become increasingly international, which increases the complexity of the law. The actions of the Codex Alimentarius Commission and other United Nations' organisations have been sketched to indicate the many rules and actions on food law that originate at the international level outside the EU. These inputs have to be channelled through the complex system of the Union and its Member States. Their internal relations in import, export, law-making and policy development and execution have been described and were found to be perpetually changing. The shift in legislative instruments after the White Paper from directives to regulations signals a centralisation of food law at the EU level with less room for national adaptation.

Substantive rules need procedures for their implementation. In this book some procedures have been discussed, mainly in the context of pre-market approval and authorisation of food. Attention has been given to enforcement, both under public law and private liability law.

Scholars and practitioners in food law may want to keep their eyes wide open for developments in the private sector. It may well be that private food law, in particular at the global level, will make a bid for the dominant position currently held by public food law as a framework for food business relations.