

EUROPEAN GENERAL FOOD LAW:

How EU Law fails to protect consumers from food scandals

July 2018

More than 15 years ago – in 2001 – the epidemic of “mad cow disease” (BSE) reached its peak for the time being. Consumers were given no chance to defend themselves or to recognise the risks they were taking by consuming beef. In the end, no one was held liable for this catastrophe. In Europe, the BSE crisis marked a turning point in consumer protection. The EU General Food Law (Regulation (EC) No. 178/2002)¹ was adopted, laying down the general principles and requirements of food law, and the European Food Safety Authority (EFSA) was established. The EU General Food Law (GFL) was drawn up with the aim of protecting European consumers from health hazards and fraud so that, in the future, scandals like the BSE crisis would no longer be possible.

Although its introduction was a very positive step, the General Food Law has failed to achieve many of its objectives and can therefore hardly be considered a success. Several provisions are too weak, many loopholes exist, and the regulation is not being adequately enforced by the Member States. This is why food scandals continue to plague Europe. But effective legislative solutions exist: foodwatch has identified 8 points that need to be realized in order to protect consumers from fraud and health hazards.

¹ The EU General Food Law Regulation (Regulation (EC) No. 178/2002) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002R0178>

FIPRONIL SCANDAL OF 2017: Lack of traceability



The fipronil-egg scandal broke in the summer of 2017. In the context of efforts to fight an outbreak of red mites, many pens used for egg-laying hens had been treated with a disinfectant containing the toxic insecticide fipronil, which is banned for use on food-producing animals in the EU. Public, private and organic inspections had failed to identify these illegal practices, which had been going on for months. As a result, the scandal reached mammoth proportions. Fipronil-tainted eggs had been exported to 45 countries, and the substance was unsurprisingly also found in processed foods, sometimes in high concentrations.² The authorities were unable to provide information

on the distribution of the contaminated eggs. Public authorities had to admit that the eggs were not fully traceable.³ The reason for this situation is that the General Food Law provisions requiring product traceability are not being enforced by the Member States. Furthermore, consumers were not adequately informed about the contaminated food, and there are no avenues of legal mechanisms are missing that could be taken against this failure. For example, there is no way for a consumer group or individual consumer to sue a Member State for failing to enforce traceability laws.

² See NLTime.nl on 05 September 2017 <https://nltimes.nl/2017/09/05/fipronil-contaminated-eggs-found-45-countries>

³ “[...] a definitive and reliable estimation of the number of eggs placed on the market should not be possible.”

Written answer of the German Government form 04 September 2017 <http://dip21.bundestag.de/dip21/btd/18/134/1813477.pdf>

LACTALIS SCANDAL OF 2017/18: Consumers are not being immediately and fully informed



Another current food scandal originated from the French baby milk producer Lactalis. News of salmonella-contaminated baby milk shook France in late 2017 and early 2018. The Lactalis scandal made it clear that crucial information concerning serious health risks is not being made public. Over a period of several months, the competent authorities and the company Lactalis had failed to provide transparent and comprehensive information about the salmonella problem in the infant milk factory and its products. As a result, 12 million boxes of contaminated baby milk were shipped to 86 countries worldwide, exposing countless infants to a preventable health risk.⁴

This situation could have been prevented if the existing European legislation on traceability had been properly enforced and if food businesses were required to test the safety of the products they sell. Furthermore, for cases involving risks to public health and safety, the relevant provisions of the General Food Law should explicitly require public authorities to fully and immediately inform the public. This is not yet the case. For cases of fraud, the public authorities currently have no disclosure obligations whatsoever.

⁴ See: <https://www.foodwatch.org/en/what-we-do/topics/transparency-and-food-safety/more-information/salmonella-contamination-scandal-in-france/>

HORSEMEAT SCANDAL OF 2013: Retail companies are rarely held liable for deceiving consumers and threatening their health



The horsemeat scandal of 2013 shocked consumers throughout Europe when horsemeat was discovered in beef lasagne. According to official sources, manufacturers had mixed at least 750 tonnes of less expensive horsemeat into their products, enabling them to significantly increase their profits through fraudulent means.⁵ Food scandals like this are able to reach such gigantic proportions because major retailers currently have no testing obligations for ensuring food quality and safety. They take advantage of this loophole to play the “ignorance” card. In the case of the horsemeat scandal, mandatory tests could have prevented the sale of fraudulent products and made it possible to hold the retailers liable and impose sanctions.

Individual Consumer information rights are completely missing in the General Food Law. Furthermore, the information laws passed by individual Member States are largely ineffective. The requested information is rarely made available in a timely manner, the information is redacted heavily, food producers’ names are anonymised, and the respective provisions usually contain numerous exceptions. Often, consumers are even charged considerable fees for the inquiry process. In the case of the horsemeat scandal, the competent authorities have never released the names of all affected products in spite of the fact that numerous information requests have been submitted.

⁵ See foodwatch-Germany website “overview of the horsemeat scandal”
<https://www.foodwatch.org/de/informieren/pferdefleisch/mehr-zum-thema/uebersicht-ueber-den-pferdefleisch-skandal/>

THE EU COMMISSION'S PROPOSAL FOR AMENDING THE GENERAL FOOD LAW: Green light for more food scandals

In 2014 the European Commission commenced a REFIT (Regulatory Fitness and Performance Programme) evaluation of the EU General Food Law. The stated aim of this programme is to ensure that EU laws deliver their intended benefits for citizens, businesses and society while removing red tape and lowering costs.⁶ As the first step of this process, the European Commission launched a "Fitness Check" of the regulation. Its findings were published in January 2018.⁷ Then the European Commission officially announced its plans to amend the EU General Food Law Regulation, presenting a legislative proposal to this effect.⁸

The conclusion from the European Commission was that the General Food Law Regulation has achieved its core objectives, namely a high level of consumer protection from health risks and fraud and the smooth functioning of the internal market. Accordingly, the Commission is putting forth a weak legislative proposal that focuses exclusively on an amendment to the EU risk-assessment model while ignoring the above-mentioned fundamental shortcomings of the General Food Law Regulation that are described in this paper. A more transparent risk assessment is definitely an important point but by no means the only issue that needs to be addressed for improving the protection of consumers' rights.

FOOD COMPANIES ARE BETTER PROTECTED THAN CONSUMERS!

To date, the European Commission, European Parliament, Council of the European Union and Member States have failed to effectively protect 500 million European consumers from health risks and fraud in the food market. And even worse: they are not doing anything to change this

situation. Instead, they continue to serve the interests of the large food corporations. In order to prevent future food crises, the following points must be addressed and enshrined in the EU General Food Law:

⁶ See https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

⁷ See https://ec.europa.eu/food/safety/general_food_law/fitness_check_en

⁸ See https://ec.europa.eu/food/safety/general_food_law/transparency-and-sustainability-eu-risk-assessment-food-chain_en

REVISION OF THE GENERAL FOOD LAW: FOODWATCH'S DEMANDS

ISSUES

DEMANDS

1.) TRACEABILITY The GFL provisions requiring traceability throughout the food chain are poorly enforced at Member State level.

Art. 18 of the GFL must be enforced at Member State level.

2.) PRECAUTIONARY PRINCIPLE (Art. 7 GFL): The implementation of preventive health-protection policies is inadequate. The precautionary principle is not being consistently applied.

The application of the precautionary principle in risk communication, risk management and the approval of potentially harmful substances must be made mandatory for the EU Commission, EFSA and the authorities of Member States. Art. 7 of the GFL must be amended accordingly.

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

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

ISSUES

DEMANDS

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

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

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

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

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

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

ISSUES

DEMANDS

7.) RIGHTS OF CONSUMERS TO BRING ACTIONS AGAINST COMPANIES:

It is difficult for consumers to sue producers owing to the burden of proof, the financial risk of litigation and the often small amount of individual damage suffered. Class action mechanisms for consumers are practically non-existent. They are not yet included in the GFL.

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

8.) RIGHTS OF CONSUMERS TO BRING ACTIONS AGAINST AUTHORITIES:

The GFL does not include effective legal provisions that allow consumer organisations to bring actions against public authorities. This situation has contributed to the inadequate enforcement of consumer protection laws.

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

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