

The Netherlands

Unsafe Foods in the Netherlands: Strict Rules on Notification

*Ebba Hoogenraad and Bram Duivenvoorde**

I. Introduction

What should a food company do if it suspects that a food product is possibly unsafe? Rules on necessary action taken by food companies are provided by Article 19 of the General Food Law Regulation (178/2002). These rules are harmonized and apply throughout the EU. However, interpretation of the rules differs between Member States. In the Netherlands, one issue of interpretation is especially striking: the Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*, NVWA) seems to be particularly strict on notification. For many foreign food companies, this comes as a surprise.

II. General Food Law Regulation

Article 19 of the General Food Law Regulation (178/2002) lays down the food company's responsibilities in case of possibly unsafe foods. The food company must initiate appropriate procedures, such as withdrawing or recalling the food products and informing consumers. In some circumstances, the enforcement authorities should be informed. The Regulation provides general rules. What steps are appropriate and whether enforcement authorities

should be notified is to be determined by the risk analysis in the specific case at hand.

III. Dutch Interpretation and Practice: NVWA Guidelines

In the Netherlands, the NVWA published guidelines for notification in the form of a decision tree. The guidelines should clarify to food companies when they should notify the NVWA of a potential food safety issue.¹ The decision tree is not a formal legal document. Rather, it is the NVWA's interpretation of Article 19 of the General Food Law Regulation. Subject to only two exceptions, the NVWA expects to be notified by a food company as soon as the company believes that a food is possibly unsafe: see Figure 1 on the following page.²

As the decision tree shows, there are only two specific exceptions in which the food company does *not* have to notify the NVWA of a possibly unsafe product. They concern the following two circumstances:

1. if a product is possibly unfit for human consumption (and is not injurious to human health) and the product has *not* left the food company; or
2. if a product is possibly unfit for human consumption (and is not injurious to human health) and (i) the operator is not the first responsible in the chain in the Netherlands *and* (ii) the product is not sold under a private label.

Under *all* other circumstances, the NVWA expects to be notified. Compared to the NVWA's interpretation, the Regulation leaves more room for a risk assessment on the basis of the case at hand. In addition, there is one specific situation in which the Dutch interpretation is stricter than the Regulation. The NVWA expects to be notified of a possibly injurious product also if the product is not (yet) placed on the market by the food operator.³ The Regulation, however, only requires that enforcement authorities are

* Hoogenraad & Haak advocaten, www.hoogenhaak.nl.

1 NVWA, 'Meldwijzer onveilige levensmiddelen', available on the Internet at <https://www.nvwa.nl/txmpub/files/?p_file_id=21626> (in Dutch) (last accessed on 23 May 2016).

2 This translation is based on an earlier, published English version of the guidelines. It has been modified by the authors to the guidelines' current version.

3 See the box on the lower left side of the decision tree: "Notification with the NVWA in all circumstances by all types of feed business operators; even if the product is still under immediate control. Operator takes necessary measures."

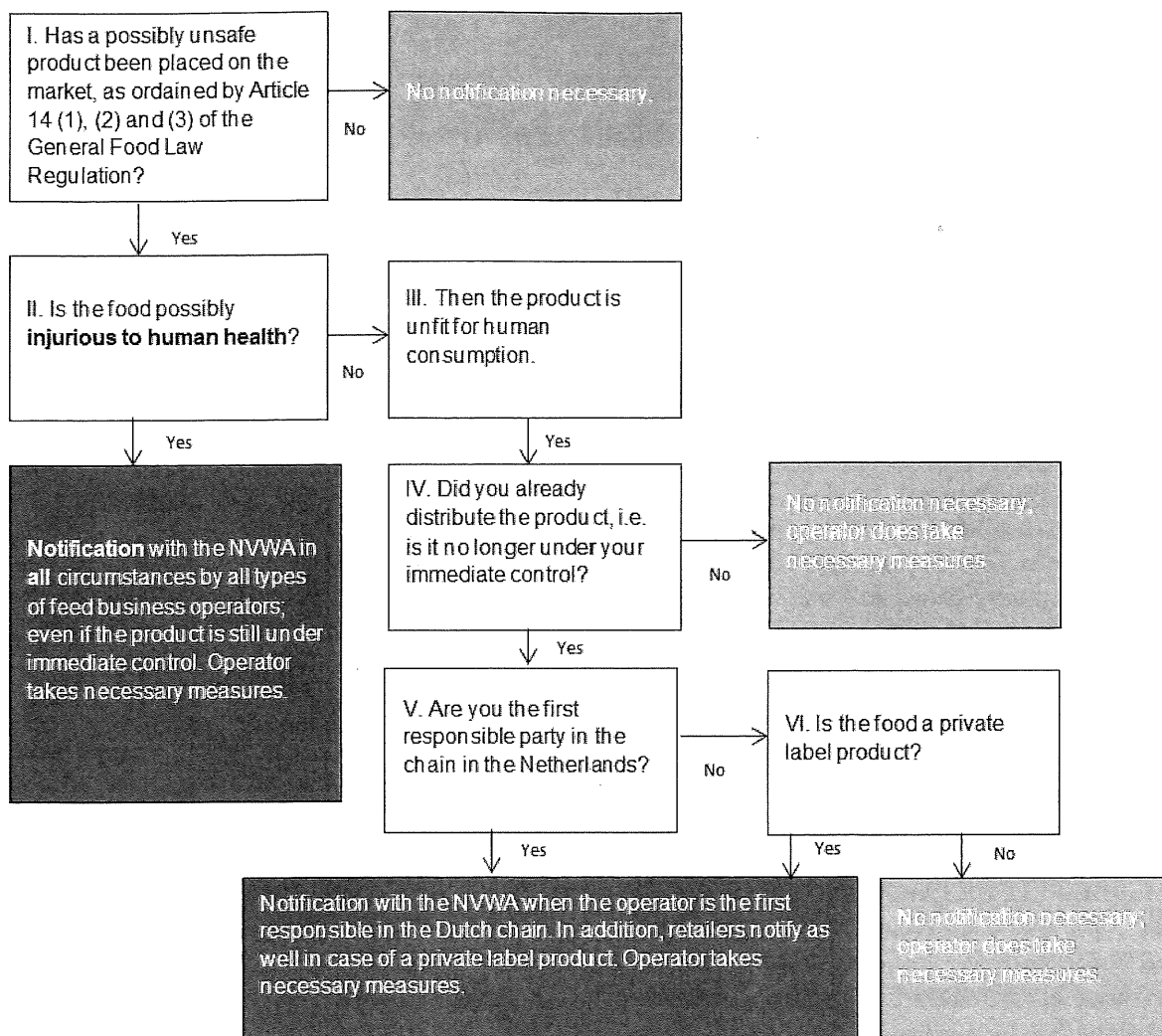


Figure 1. Decision tree.

informed if the product has indeed been placed on the market by the food operator.⁴

Foreign food companies are often surprised by the NVWA's strict approach. On the upside, the NVWA is generally willing to cooperate with food companies to discuss what steps are necessary. This cooperation generally takes place informally and quickly, rather than formally exchanging statements and documents.

IV. Conclusion

Although the NVWA guidelines are not binding law, they do make clear what the NVWA expects from

food companies in terms of notification of possibly unsafe products. Moreover, if the food company fails to follow the guidelines, it risks enforcement measures. These could include an official warning, but also an administrative fine.

It is questionable whether the NVWA guidelines are in line with the Regulation. The Regulation leaves room for interpretation in specific circumstances, but not for generally stricter rules. Although the guidelines have been in force for several years, they

4 See Article 19(3): "A food business operator shall immediately inform the competent authorities if it considers or has reasons to believe that a food which it has placed on the market may be injurious to human health".

could perhaps be challenged in the future. In the meantime, international companies are advised to take note of the Dutch interpretation of the Regula-

tion and to be prepared to take necessary steps. Although EU food law is harmonized, differences remain in force. No doubt, this story is to be continued.