



European Institute for Food Law

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New Official Controls Regulation

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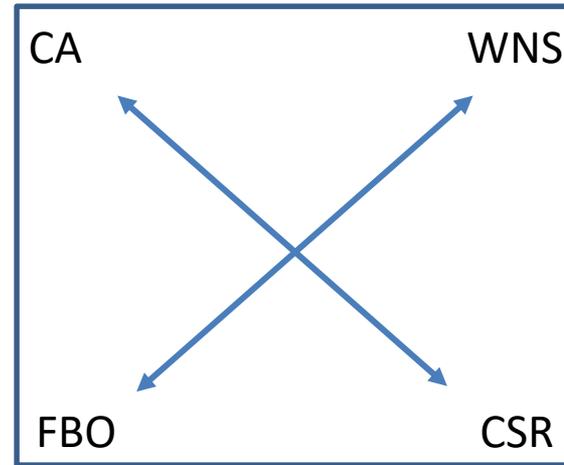
Overview

- Focus on primary process of enforcement: following the steps
 - Enforcement relations
 - Why a new OCR?
 - Scope
 - Controls
 - Investigation
 - Actions/measures
 - Penalties
- Special topics: recapitulations
 - Food fraud
 - Enforcement online
 - Position of operators: obligations, rights, compliance assistance, certification schemes
 - Position of witnesses/whistle blowers
 - Position of consumers
- Not discussed: fees, imports, laboratory infrastructure, audits, administrative cooperation and related systems



Enforcement relations

- FBO: norm addressee
- CSR: protected by the norm
- CA: competent authority
- WNS: witness
- Public: society at large



Public

Regulation (EU) 2017/625

- on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products
- OJ 7 April 2017
- In force: 27 April 2017
Applicable 14 December 2019 (Ref.Labs. 27 April 2018) (Plant health 29 April 2022)



Why a new OCR?

- Rec. 19 “In order to **rationalise** and **simplify** the overall legislative framework, whilst simultaneously pursuing the objective of better regulation, the rules applicable to official controls in specific areas should be **integrated** into a single legislative framework for official controls.”
- Rec. 99 “the objective of this Regulation, namely to ensure a **harmonised** approach with regard to official controls and other official activities performed in view of ensuring the application of Union agri-food chain legislation,”
 - **Internet**
 - **Food fraud**



Scope (Art. 1(2))

- official controls performed for the verification of compliance with the rules, whether established at Union level or by the Member States, to apply Union legislation, in the **areas** of:
 - **food** and food safety, integrity and wholesomeness
 - deliberate release into the environment of **GMOs** for food or feed
 - **feed** and feed safety
 - Animal health
 - Animal by-products
 - Animal welfare
 - Plant pests
 - Plant protection products
 - **Organics**
 - **Protected designations**
- **Addressees: Business operators (BOs)**

Elements of enforcement

- Official controls: risk based



- Suspicion: → Investigation



- Non-compliance is established → Actions



- Penalties: effective and dissuasive



- Union enforcement measures (Art. 141)



Official controls

- Art. 9 General rules on official controls
- 1. Competent authorities shall perform official controls on **all operators** regularly, on a **risk basis** and with appropriate frequency, taking account of:
 - (a) identified risks associated with:
 - (i) goods
 - (ii) activities
 - (iii) location
 - (iv) products, processes
 - (b) any information indicating the likelihood that **consumers might be misled**, in particular as to the nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production of food;
 - (c) operators' past record of **compliance**
 - (d) the reliability and results of own controls that have been performed by the operators, or by a third party at their request, including, where appropriate, **private quality assurance schemes**
 - (e) any **information** that might indicate non-compliance
- 2. identify possible intentional violations perpetrated through **fraudulent** or deceptive practices
- 4. Without prior notice, except when duly justified
- 5. minimum burden



Definition of risk

- Art. 3(24) 'risk' means a function of the **probability** of an **adverse effect on** human, animal or plant **health**, animal welfare or the environment and of the severity of that effect, **consequential to a hazard**;
- Art. 3(23) 'hazard' means any **agent or condition** with the potential to have an adverse effect on human, animal or plant health, animal welfare or the environment;
- Only partly helpful in understanding 'risk based': probability of non-compliance(?)

Instruments for official controls

- Member State designates competent authority
- OCR provides powers
- National law probably also provides powers



Methods and techniques for official controls

- Art. 14. shall include the following as appropriate:
- (a) an examination of the **controls that operators have put in place** and of the results obtained; (**only through the operator?**)
- (b) an **inspection** of:
 - Equipment
 - Animals, goods, ingredients, processing aids
 - Traceability, labelling, presentation
- (c) Hygiene
- (d) Assessment of procedures
- (e) Examination of **documents**
- (f) **interviews** with operators and their staff
- (g) verification of measurements and test results
- (h) **sampling**, analysis, tests
- (j) **any other** activity required to identify cases of non-compliance

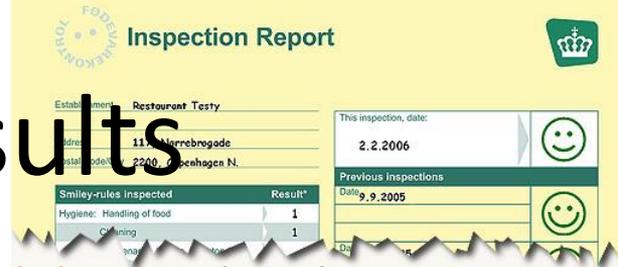
Official controls online

- Art. 15(5) BOs must provide info on online activities
- Art. 36(1) samples ordered from operators by the competent authorities without identifying themselves may be used for the purposes of an official control (**mystery shopping**)
- Art. 36(2) after possession of samples, operators are informed + right to second expert opinion

Written records

- Art. 13: written records of every official control
 - Purpose
 - Methods applied
 - Outcome
 - Required actions
- (2) Unless the purposes of judicial investigations or the protection of court proceedings require otherwise, the operators subject to an official control shall be provided **upon request** with a copy

Information on results



- Art. 11(3) Competent authorities may **publish**, or make otherwise available to the public, information about the **rating of individual operators** based on the outcome of one or more official controls, provided that the following conditions are met:
 - (a) the **rating criteria** are objective, transparent and publicly available; and
 - (b) appropriate arrangements are in place to ensure the fairness, consistency and transparency of the **rating process**.
- Art. 8(5) The confidentiality obligations shall not prevent the competent authorities from **publishing** information about the **outcome** of official controls **regarding individual operators**, provided:
 - (a) the operator concerned is given the opportunity to comment
 - (b) publication takes **comments** into account

Investigation

- Art. 137(2): In case of **suspicion** of non-compliance, the competent authorities **shall** perform an **investigation** in order to **confirm** or to **eliminate** that suspicion.
- No discretion?

Enforcement priorities

- Art. 137(1): the competent authorities shall give priority to **action** to be taken to **eliminate or contain risks** to human, animal and plant health, animal welfare or,
- i.e. actions/measures (Art. 138) before penalties (Art. 139)?

Actions in the event of established non-compliance

- Art. 138(1) Where the non-compliance is established, the competent authorities **shall** take:
 - a) **determine** origin, extent and responsibilities
 - b) appropriate measures to ensure that the **operator** concerned **remedies**
 - Measures selected: nature non-compliance; operator's past record
- Art. 138(4) All **costs** are borne by operators



Measures

- Art. 137(2): **any measure** they deem appropriate to ensure compliance with the rules referred to in Article 1(2), including, but not limited
 - Open and unrestricted competence base or is national competence required?
- Treatment of goods
- Information to be provided to consumers
- Restrict placing on the market
- Increase self-controls
- Order recall
- Closure of business
- Order cessation of activities including **internet sites**
- Withdrawal of registration
- Killing of animals

Recalls

- Art. 19 Reg. 178/2002: obligation of business
- CA can enforce this obligation
- Art. 138(2)(g) NOCR: beyond 19 GFL?

- Experience horsemeat scandal: some MS considered Art. 19 GFL applicable, others required additional competence

See: Van der Meulen et al. Fighting Food Fraud, EFL 2015, p. 1-12



Penalties

- Art. 139(1) effective, proportionate and dissuasive.
- (2) Member States shall ensure that financial penalties for violations of this Regulation and of the rules referred to in Article 1(2), perpetrated through **fraudulent** or deceptive practices, reflect, in accordance with national law, at least either the **economic advantage** for the operator or, as appropriate, a percentage of the **operator's turnover**.

Special topics

- How does all this look from the perspective of:
 - Food fraud,
 - The Internet,
 - Operators,
 - Private schemes,
 - Witnesses,
 - Consumers?

Fraudulent or deceptive practices

- No definition. Would have been better to focus on **intent**
- Art. 1(4) marketing standards are covered
- Art. 9 risk factor in setting priorities
- Art. 139(2) high financial penalties
- Art. 97 Designation of European Union reference centres for the authenticity and integrity of the agri-food chain

Enforcement online

- Art. 15 BOs must inform
- Art. 36 mystery shopping
- Art. 138(2) closing internet sites

Obligations of operators

- Art. 15(1)(a) **provide access** to premises, places, means of transport
- (b) **computerised** information management systems
- (c) animals, **goods**
- (d) documents, **information**
- (2) assist and **cooperate**
 - including obligation to speak when interviewed?
- (5) Name, legal, activities including internet, places



Rights of defence

- Art. 7 Right of **appeal**: (55) decisions on consignments; (66/67) destruction / detention of consignments; (137) investigations; (138) **action** in case of non compliance. Not included: **penalties**
- Art. 8(5) right to comment before publication
- Art. 11(2) right to rectification
- Art. 13(2) request copy of written record of controls
- Art. 35 right to a second expert opinion
- Art. 36(2) second expert opinion online

- Not included: right to **remain silent**

Compliance assistance?

- Not a single consideration....
- Great lessons to be learned from foreign examples

Private certification schemes

- Art. 9(1)(d) taken into account in risk-based priorities
- Art. 14(a) subject to official controls

Whistle blower

- Art. 140 Reporting of infringements
- 1. Member States shall ensure that competent authorities have effective **mechanisms to enable reporting** of actual or potential infringements of this Regulation.
- 2. The mechanisms referred to in paragraph 1 shall include at least:
 - (a) procedures for the **receipt of reports** of infringements and their **follow-up**;
 - (b) appropriate **protection for persons reporting** an infringement against retaliation, discrimination or other types of unfair treatment; and
 - (c) protection of **personal data** of the person reporting an infringement in accordance with Union and national law.





Rights of consumers...?

- Rec. 2: The TFEU also provides that the Union is to contribute to the attainment of a high level of **consumer protection**
- Rec. 74: ensuring **consumer confidence**
- Right to **complain** (request enforcement)?
 - Included in Art. 140(1) for whistle blowers?
- Right to be **heard**?
- **Access** to the file?
- Be informed of the **decision**?
- Right to **appeal** the decision?
- The consumer is **nobody** in the new OCR



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Thank you for your kind attention

Q&A

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