

## LAW FIRM FOR FOOD AND CONSUMER GOODS

### International Bar Association – IBA

#### Webinar 14 July 2020: Covid-19 lockdown impact on international agricultural trade

*A collection of reference material*

### COVID-19

#### Objective

Food security: Maintaining the food chain as a critical infrastructure and ensuring the free flow of goods

#### Problems for international trade

Documentation (paper copies, stamps), import licenses (quantity adjustments because of reduced demand), restructuring of the food supply chain, border closures, quantitative restrictions, export prohibitions, national measures for food security (safety of supply), dependency on imports, increased demand of local produce, etc.

#### World Trade Organisation – WTO

“Responding to the COVID-19 pandemic with open and predictable trade in agricultural and food products”, document dated 22/4/2020 (signed, among others, by the EU)<sup>1</sup>

Encouraging, inter alia, “to implement temporary working solutions to facilitate trade, such as allowing scanned copies or electronic copies of original certificates whenever it is not possible to present the original paper certificate, provided the authenticity of these certificates can be validated by competent authorities.”

EU-notifications of coronavirus-related [actions](#)<sup>2</sup> and [update](#)<sup>3</sup> [good overview]

#### European Union – EU

#### European Food Safety Authority – EFSA

“Coronavirus: no evidence that food is a source or transmission route” (9/3/2020)<sup>4</sup>

#### European Parliament

[Think Tank](#): Food Trade And Food Security In The Coronavirus Pandemics

#### European Commission

<sup>1</sup> [https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc\\_158718.pdf](https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158718.pdf)

<sup>2</sup> <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2131>

<sup>3</sup> <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2140&title=European-Commission-informs-WTO-on-new-set-of-coronavirus-measures>

<sup>4</sup> <https://www.efsa.europa.eu/en/news/coronavirus-no-evidence-food-source-or-transmission-route>

<sup>5</sup> <https://epthinktank.eu/2020/05/27/food-trade-and-food-security-in-the-coronavirus-pandemic>

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- COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 86 I of 16/3/2020, p. 1)
- Commission Communication on the implementation of the Green Lanes<sup>6</sup> under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 96 I of 24/3/2020, p. 1)
- European Commission Guidelines: Facilitating Air Cargo Operations during COVID-19 outbreak (C(2020) 2010 of 26/3/2020)

### European Commission – Directorate General “Health and Food Safety” (DG SANTE)

COVID-19 crisis and food – DG SANTE initiatives<sup>7</sup>

COVID-19 – Challenges for official controls<sup>8</sup>

COVID-19 and food safety Q&A<sup>9</sup>

- no ‘virus-free’ certificates

<sup>6</sup> Intra-Community ‘green lanes’: border crossings open to all freight vehicles carrying goods where any checks or health screenings should not take more than 15 minutes

<sup>7</sup> [https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp\\_plenary\\_20200508\\_pres\\_03a.pdf](https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_plenary_20200508_pres_03a.pdf)

<sup>8</sup> [https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp\\_plenary\\_20200508\\_pres\\_03b.pdf](https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_plenary_20200508_pres_03b.pdf)

<sup>9</sup> [https://ec.europa.eu/food/sites/food/files/safety/docs/biosafety\\_crisis\\_covid19\\_qandas\\_en.pdf](https://ec.europa.eu/food/sites/food/files/safety/docs/biosafety_crisis_covid19_qandas_en.pdf)

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### Official Controls Regulation – OCR (Regulation (EU) 2017/625)

Deviations:

Commission Implementing Regulation (EU) 2020/466 of 30 March 2020 on temporary measures to contain risks to human, animal and plant health and animal welfare during certain serious disruptions of Member States' control systems due to coronavirus disease (COVID-19)<sup>10</sup>

- recognises problems with operation of control personnel, examinations, sampling, issuing of veterinary certificates, limits of TRACES
- allows Member States to carry out control actions in a way compatible with movement restrictions to limit the spread of COVID-19
- for example electronic copies and attestations

Commission Implementing Regulation (EU) 2020/714 of 28 May 2020 amending Implementing Regulation (EU) 2020/466 as regards the use of electronic documentation for the performance of official controls and other official activities and the period of application of temporary measures<sup>11</sup>

### Deviations for hygiene regulations and food information law

DG SANTE, Directorate G “Crisis management in food, animals and plants” – Letter addressed to Chief Veterinary Officers of the Member States dated 29/4/2020

Encouraging risk-based adaptations during the COVID-19 crisis in hygiene regulations, gauging flexibility in Regulation (EC) No 852/2004, Regulation (EC) No 853/2004 (hygiene), Regulation (EC) No 2160/2003 (salmonella/zoonotic pathogens) and Regulation (EC) No 999/2001 (BSE) and also regarding Food Information to Consumers (Regulation (EU) No 1169/2011) and Regulation (EU) 2018/775 (country of origin/place of origin of the primary ingredient)

<sup>10</sup> OJ L 98 of 31/3/2020, p. 30

<sup>11</sup> OJ L 167 of 29/5/2020, p. 6

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### Non-COVID

*The excursion may be allowed because of its instructiveness*

#### **Case study 1: Impact of the “Mutagenesis Judgment” (Case C-528/16) of the Court of Justice of the European Union (CJEU) of 25/7/2018 on international trade**

Mutagenesis (incl. CRISPR/Cas9 methodologies) ⇔ Transgenesis (transfer of genes from a distinct species into an organism)

EU-GMO legislation:

- Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms (Release Directive)
- Regulation (EC) No 1829/2003 on genetically modified food and feed
- Regulation (EC) No 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms

GMOs: require pre-market authorisation subject to environmental and health risk assessment; traceability — labelling — monitoring — liability obligations

Judgment: CJEU held that organisms obtained by mutagenesis are genetically modified organisms (GMOs) and, in principle, subject to EU GMO regulations

“mutagenesis alters genetical material of organism not occurring naturally; risks of new mutagenesis techniques similar to transgenesis; precautionary principle applies”

→ GMO Directive in principle applies (Article 2 No 2 of Directive 2001/18/EC)

→ GMO Directive applies to organisms obtained by means of certain mutagenesis techniques that have emerged since 2001 (Article 3(1) in conjunction with Annex I B No 1 of Directive 2001/18/EC [mutagenesis exemption] not applicable) ≈ mutagenesis *in vitro* (directed/targeted)

→ GMO Directive does not apply to organisms obtained by means of certain mutagenesis techniques having conventionally been used with a long safety record (recital 17 of preamble to Directive 2001/18/EC) ≈ mutagenesis *in vivo* to entire plants (conventionally and random, by radiation or chemicals; established techniques of genetic modification (ETGM))

- ruling concerns scope of the mutagenesis exemption, not the scope of the GMO definition
- ruling provides process-based interpretation of GMO, no case-by-case approach
- ruling provides no conclusive and definitive interpretation of GMO and neither a tangible definition of mutagenesis

Contradiction: Organisms with a single mutation produced by using genetic scissors are classified as GMOs, while conventionally obtained mutants – which can have hundreds or thousands of mutations – are not subject to the strict regulation of GMOs

*Issues*

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Indistinguishable:	products of directed mutagenesis ⇔ products resulting from natural, spontaneous mutations
Unauthorised:	products of directed mutagenesis lack EU authorisation
Unmarketable:	products of directed mutagenesis cannot be marketed
Undetectable:	products of directed mutagenesis cannot (yet) been detected; functioning identity preservation system not in place (identification and quantification)

Trade disruptions because products derived from crops subject to EU GMO law:

- are not allowed for import into the EU unless they have been submitted for approval; labelling
- asynchronicity in approval regimes globally with EU representing an insular approach

Importers duties:

'Obtained by mutagenesis' part of the food law and contractual conformity check. Contracts to include safeguard clause not to purchase unauthorised GMO.

European Union Reference Laboratory for GM Food and Feed – European Network of GMO Laboratories: Detection of food and feed plant products obtained by new mutagenesis techniques<sup>12</sup>

EFSA tasked with (pending):

- Scientific opinion on in vitro random mutagenesis techniques (EFSA-Q-2020-00445)
- Public consultation on the GMO Panel scientific opinion on plants developed using type 1 and type 2 Site-Directed Nucleases and Oligonucleotide Directed Mutagenesis (EFSA-Q-2020-00098)
- Scientific opinion on plants developed using type 1 and type 2 Site-Directed Nucleases and Oligonucleotide Directed Mutagenesis (EFSA-Q-2019-00297)

### Case study 2: Import restrictions based on health reasons

Case T-429/18, BRF and SHB Comércio e Indústria de Alimentos v Commission, judgment of 9/7/2020

Action brought by two Brazilian meat producers seeking the annulment of the Regulation\* prohibiting, for public health reasons, the export to the EU of certain products of animal origin from establishments belonging to those producers

\*[Regulation \(EU\) 2018/700](#) amending the lists of third-country establishments from which imports of specified products of animal origin are permitted, regarding certain establishments from Brazil (OJ L 118 of 14/5/2018, p. 1)

<sup>12</sup> <https://gmo-crl.jrc.ec.europa.eu/doc/JRC116289-GE-report-ENGL.pdf>