

## **A Complete Revision of EU Regulation Organic Farming intended – the EU-Commission puts a well established law at risk**

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Under the date of 21st December 2005, the EU-Commission in Brussels tabled a proposal for a completely revised EU-regulation organic farming. The revised regulation is to be passed and implemented soon. Under the headlines of “Overall principles” (Art. 4) and “flexibility” (Chapter 4, Art. 16), which cover topics demanded by the organic farming representatives, the Commission acts against organically grown traditions, grass roots’ expertise and it misses completely the goal of reducing red tape in the administrative procedures for organic operators.

### **1. Legal certainty lost**

In the 15 years since the presently valid EU-regulation organic farming from 24 June 1991 was passed, all the actors concerned with the regulation – farmers, processors, importers, inspection bodies, competent authorities and ministries and the European Commission - have worked out common interpretations and procedures, which provide legal certainty in the market among the operators as well as for the consumers. The total revision, which is now suggested, turns the regulation upside down, changes its systematics and shifts the responsibilities for its implementation and further development from operator involvement to the administration in Brussels. This creates considerable legal uncertainties and generates costs for clarification for all the actors, which are unnecessary and should be avoided.

### **2. Blurred scope**

The presently valid EU-regulation organic farming defines the scope, which is essential for the actual effectiveness of a regulation, firstly with product related criteria – it places vegetable and animal agricultural products, which are labeled in a defined way, under the rules of the law. It then adds, that the impression of the consumer, who reads a label on an agricultural product, is the other criterion for whether the regulation is applicable or not.

The scope covers a wide range of products and is thus comparatively strict. Attempts of an unfriendly takeover of the goodwill and good name of organic products by environmentally friendly or otherwise “green” labels are prevented.

The criterion which relates to the consumer impression is lost in the revised text. There are still the product related criteria (Article 1), but they refer only to the designation for marketing a product as organic.

The legal text subjects a range of economic operators under the regulation and does not name others like the competent authorities (Art. 1 no. 3). Read literally, this would allow the authorities to market fake organic products.

The regulation mentions products and economic operators for which it applies. It states that the regulation contains objectives, overall principles and rules, which are to be applied to specific actions with organic products and to the use of labels for organic production in labeling and advertisements. It does not say for whom or for what these objectives, principles and rules are valid, whose activities they are meant to lead (the law-giver or the farmer?) and what the consequences for the operators or their actions are, who are subject to the law. The scope of the regulation is blurred and watered down. An improved protection in the field of organic farming and processing and for the consumers is not reached, on the contrary.

### **3. Essential elements of organic farming missing**

Article 3 intends to define “objectives” of organic farming in a general way. It catches the eye, that farming or agriculture are practically absent from the clauses. It is said that “the organic production system shall pursue” certain “objectives”. Organic production is defined in Article 2 (a), but not as a special kind of agricultural production, which is understood as a holistic system.

The terms used to describe the objectives to be pursued are practically devoid of contents. The text speaks about “a practical, economically viable management system”, that is to be established. The keeping up or enhancing of soil fertility is not mentioned as an objective.

“Negative effects on the environment” are to be minimised. Such a goal could equally be valid for a car factory. A “high level of biodiversity” is to be maintained, a goal, which belongs among aims of organic farming, but does not stand in their center. The production of food for humans in a sustainable and clearly defined way, which protects the environment, conserves resources and strictly limits foreign inputs, should be in the center. The “objectives” list elements, which are not wrong, but it seems as if the authors forgot, they were writing a text about legal norms pertaining to organic farming and farmers.

Equally, the “overall principles” in Article 4 remain unclear with regard to the question for whom they apply. In Article 4 (a) it is said that “the use of living organisms and mechanical production methods shall be preferred to the use of synthetic materials”. Does everyone, who handles organic products, have to follow this principle, i.e. must they check and find out, whether this principle is applied in the best possible way in each individual case? Do the inspection bodies have to check, whether this question had been asked and followed for each action? What would this mean for the use of plant protection products, for instance?

Article 4 (b) requires that “natural substances shall be used in preference to chemically synthesised substances”. Chemically synthesised substances may only be used, if natural substances are not commercially available. Does this mean a farmer must use organic fuel for his tractor if this is available? Would it mean that a farmer

may use plant extracts, but not calcium chloride when treating the leaves of apple trees against scab? Where would the limits of applicability of this principle lie?

Article 4 (c) contains an objective, which is unmistakably an order: Genetically modified organisms and “products produced from or by GMOs may not be used, with the exception of veterinary medicinal products”. This formulation indicates that the “overall principles” of article 4 do not address the law-giver for future additions to the law only, and it is not addressed to the EU-Commission, which has to implement the regulation in its administrative procedures. This clause directly addresses the individual farmer and processor of organic products.

Article 4 (d), however, contains a principle which does clearly not address farmers and processors, but those who formulate the legal norms. It is required that adaptations of the rules of organic production must be made “while maintaining the common concept of organic production”.

The mixture of prohibitions and programmatic sentences leads to unclarity. It needs to be clarified, whether the principles are irrelevant for the daily farming practice and are only meant as a guideline to the law-giver for future amendments of the regulation. At any rate, a systematic editing, a logic and systematic hierarchy of the aspects and due consideration to the weight of each principle must be given.

#### **4. System’s approach and essential element of positive lists not mentioned**

Neither in the objectives and overall principles (Articles 3 – 6) nor in the rules of production (Articles 7 – 15) – meant for both agricultural production and processing of products – there are clear indications that organic farming is a system of agricultural production, which is fundamentally different from conventional production. Rather, some agricultural procedures are mentioned and only a few areas of organic production are characterized. It is not said, that the system aims at the production of organic foodstuffs in a system managed sustainably, where foreign inputs may only be used if selected from strictly limited positive lists.

The overall principles in Article 4 do not refer to this element that characterizes organic farming world-wide, i.e. the principle that foreign substances may only be used if explicitly admitted for use. The system of organic farming follows strict rules. For its definition the positive lists are of essential importance. Only if conditions of use are mentioned, the substances listed in the positive list may be applied. This practice guarantees a clear border to other agricultural practices. The principles mentioned in this article are quite general. Sometimes they lose their content completely. It is said, that “farming shall aim at producing products of high quality instead of maximising production”. It is unclear, which kind of quality would be addressed as a “high” quality and what kind of maximisation in production should not be preferred to quality.

The principle mentioned in Article 5 (h) requires that “the highest level of animal welfare shall be observed”. The highest level is that level, which is best for the animal in every way. In practical circumstances, the realisation of the highest level would compete with a whole range of other purposes, particularly economic objectives, but

also the abilities and knowledge of the farmer. This principle taken literally clearly cannot be followed in practice.

It is unclear, whether the principles mentioned in Article 5 are directly applicable legal norms for farmers and processors or whether they are programmatic sentences guiding the law-giver for future amendments of the regulation. The principle in article 5 (p), which excludes the keeping of polyploid animals, acts like a direct prohibition, not as a programmatic sentence for the law-giver. Article 6 contains principles for processing. Paragraph (c) contains a prohibition addressing the operators to use ionising radiation.

“Additives and processing aids shall be used to a minimum extend”. However, it is not said, that they may only be used, if explicitly approved for use in positive lists.

The “principles applicable to processing” do not say that organic foodstuffs usually show a lesser degree of processing than foods from conventional sources.

The principles as formulated in the proposed regulation do not give a clear picture, how the processing of organic foodstuffs shall be different from processing of conventional foodstuffs.

## **5. Further development in the hands of the Commission**

Article 8 contains rules for a positive list, which is to be set up according to Article 11. The purposes, for which the substances must be listed, are not clearly defined. Such a definition should say for which kinds of use of substances a positive listing is necessary.

In Article 8 paragraph 1 (c) the approval for fertilizers and soil conditioners is required, in (g) for plant protection products. For plant tonics there is no such requirement. Neither is it contained in Article 11. However, in Article 11 paragraph 1 (f) a clause is found, that the EU-Commission may set up in an administrative procedure specific criteria for the admission of “other substances”. This would mean that the Commission could define in an administrative procedure that the use of certain fuels and lubricants, substances for hygienic purposes etc. may be made subject to listing requirements.

Article 8 paragraph 1 (e) requires, that all farming procedures must help prevent environmental contaminations or keep them as low as possible. It is unclear, why this is emphasised, this would apply to all farming procedures. Is that an objective or a rule? In case it is a rule, how should the inspection body check if it was applied? How should a farmer document his activities, if he does not use a certain optimal date to till his field or to plough up a meadow? Does he have to prove the relative preferability of one action against other options?

On the one hand side, the “objectives” and “principles” in the proposed regulation contain formulations, for which it is not clear, whether are they direct prescriptions. On the other hand, the “rules” contain formulations, which could only be goals and aims, but at the same time might be understood as hard legal obligations, which require documentation and inspection by the inspection bodies.

Article 8 paragraph 1 (h) requires, that even listed substances, for instance plant protection products, may only be used, if conditions for their use, applied amounts and defined plants are set up. This is a rule, not an order to the Commission as the highest administrative authority. Who is to define, for which plants, in which way, with which dosage and during which times of the year a certain substance may be applied?

Article 9 introduces as a completely new element in “livestock production rules”, that organic farmers must have the necessary knowledge and competence for keeping animals and caring for their welfare. Such a proof of knowledge is not required until now.

Article 9 (b) (iii) requires that animals must have “permanent access” to free range areas, whereas until now this was required “regularly”. The requirement for the places, where beehives may be situated, given in Article 9 (b) (ix) has been made more strict so that now it is practically impossible in Central Europe to follow these rules.

Article 9 (c) (iii) requires “an appropriate choice of breed shall contribute to the prevention of suffering and to avoiding the need for mutilation of animals”. This would lead to the requirements for farmers to only use genetically polled breeds of cattle, since the dehorning of cattle is without doubt a mutilation.

A reader not familiar with the inspection practice must understand that lawyers interpret legal texts according to the letter. It is a big difference, if something is to be preferred or if the use of a certain practice is forbidden, unless it is not proven, that its alternative is not suitable.

## **5. GMO-exclusion unclear**

In the definition of terms in Article 2 (p), (q), and (r) GMOs are mentioned. A definition is given for “produced from GMOs”, also one for “produced by GMOs”. It seems, however, that the case, where something is produced with the help of GMOs, is not addressed. This would have the consequence that the production of organic milk with genetically modified cows would not be subject to the GMO exclusion. And the term “produced by GMOs” would not apply to organic milk, since the feeding of soy meal from GMO plants to a cow, producing the milk, would not be covered by the clause, because ground soy is not a GMO anymore; it is not intact and cannot reproduce, i. e. is not an organism any more.

Article 7 paragraph 2 sentence 1 requires, that farmers may “not use GMOs or products produced from GMOs where they should have knowledge of their presence due to information on any label”. This wording is not helpful, because it refers to the actual labeling, not to the legal obligation for indicating GMO traces in a product. The definition of what an organic product is, is transferred to the rules for labeling requirements for genetically modified organisms.

The wording in the rules for production of feedstuffs in Article 13 no. 4 and in the general rules for processing of processed foods in article 14 no. 3 contains similar

phrases. These unclear and incomplete rules for exclusion of GMOs and GMO-derivatives from use in organic farming and food processing are not helpful; they present a danger for the future legal practice.

## **7. Too much weight on secondary aspects**

When listing the objectives and principles in Article 3 ff, the law-giver forgets to address central aspects of organic agricultural production and puts secondary aspects in the foreground. Negative effects on the environment must be kept low (Article 3 (a) (i)), biological variety must be kept on a high level and must be furthered (ii), natural resources like water, soil, organic substance and air must be preserved (iii) and a high animal welfare standards (iv) must be guaranteed. A few pages further down, in Article 5 (i), the highest level for animal welfare is required.

## **8. State inspection system**

Under the title “inspection” Article 22 requires, that the member states introduce a system of control according to regulation EG no. 882/2004. Inspections have to cover activities, which are regulated in the present proposal for the norm. EU-regulation 882/2004 serves the harmonisation of the official food and feed inspections in the European Union. This makes clear, that the activities of the inspection bodies for organic farming are activated within the frame of the official food control system of the EU, not a separate and especially regulated area of norms for supervision of quality assurance in certain operations through state admitted inspection bodies, which operate under state authority, but which do not belong to the state system itself. Today, a system of public-private partnership prevails between operators, inspection bodies and competent authorities in a system of quality assurance for organic production systems.

In Article 22 paragraph 3 it is regulated that member states appoint competent authorities in the frame of the control or inspection system according to article 4 of regulation 882/2004. Its Article 42 obliges member states to set up multi-annual national inspection plans. The categorisation of risks and also the possible assignment of tasks to inspection bodies belong to these inspection plans.

Article 24 of the proposed revised EU-regulation organic farming addresses certification. The article can be read in such a way, that each inspection body is obliged to hand out a certificate for lots, even if they had been certified by another inspection body. This would make it difficult to see who actually inspected and certified an operator. Following the wording of the proposal, this would also apply to certification in third countries.

Article 25 requires the competent authority to act if it states an irregularity regarding the rules of this regulation. It must then prohibit the whole lot, which is affected by the irregularity, from being marketed as organic. It is not defined what an irregularity is.

At present, “deviations” are admonished and their correction is required, but deviations are distinguished from “irregularities”. The proposed revision of the regulation continues to use these unclear formulations. The regulation leads courts

and authorities to think that even in the case of a small deviation they do not have the choice but to decertify a certain production lot, i. e. to state an irregularity. This might even lead to the loss of subvention moneys for farmers or operators.

## **9. Proposed flexibilisation unsuitable**

The proposed total revision of the EU-regulation organic farming gives the European Commission far reaching powers to further develop and amend the regulation. Practically all amendments are to be set up by way of an administrative procedure. The procedure does not require the inclusion of experts from the agricultural ministries of the member states and even less so organic farmers, their organisations or inspection experts.

Even the possibility for granting flexibility is given to the Commission (Article 16). The facts to be considered should rather be viewed by those who know them, i. e. the inspection bodies. Instead, a tedious and cumbersome procedure has been chosen, that gives the Commission this task.

The privilege to allow deviations from the law could be understood in a way that exemptions might be granted for the whole EU under certain conditions. However, this is probably not what is meant instead it should be possible to allow deviations in certain regions. The text leads to a situation where the Commission grants the deviations. There is no legal right that such a deviation is granted, even though an administrative procedure is described. The Commission is not obliged to grant exemptions, even if this were necessary for economic reasons.

If the task to decide about flexibility were delegated to the inspection bodies, the decision would be taken by people who know about concrete cases which they themselves see and evaluate.

Article 16 (f) makes exemptions possible regarding the production of traditional products. This clause seems to indicate that traditional products may be labeled as organic products, even if they are made from conventional ingredients and even though other products with conventional ingredients may not be labeled as organic products. This clause describes exemptions, which are suited to destroy the goodwill of traditional products as well as organic products in the eye of the consumers.

## **10. Inspectors obliged as official statisticians**

Article 30 foresees that statistical data, which the member states have to supply to the Union must to be defined by the member states. Statistical data, which pertain to the flow of products, have to be collected from the operators, who are subject to inspections. The definition and the collection of statistical data has deep impact on the rights of operators and the practice of inspection bodies.

Discussions have shown that there are different ideas about the statistical data. There are people and institutions who think, it is quite o.k. that operators must supply data to allow a detailed market overview, whereas others hold, that such information is not a valuable instrument for orientation on the market, because the data would

only be available at a point in time when the market looks different again. Article 30 allows the bureaucracy to collect data to a wide extent which are practically useless for the operators in the field.

## **Conclusion**

These are just some examples for the inconsistent use of terms, the unclear structure and the dangerous new procedures and appointments which go along with the totally revised EU-regulation organic farming. It would not be difficult to find further problematic areas.

We urge the administration, to put this unsuitable attempt for a total revision aside and to turn to the presently valid regulation from 1991 instead. There, passages may be weeded out, which have caused over-regulation and made the application of the regulation tedious and cumbersome and more loaded by administrative procedures than necessary. After that, a workable regulation would be available.

### Questions might go to the authors:

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