

Brief Opinion

Revision of Regulation (EC) No. 882/2004 (Officials Control Regulation) (Draft of 6.5.13, COM(2013) 265 final)

The German Federation of Food Law and Food Science (Bund für Lebensmittelrecht und Lebensmittelkunde e. V. – BLL), the leading association of the German food sector, represents that sector's entire food production chain, including its agricultural operations, industry, crafts operations, retailers, wholesalers and all supplier areas. With some four million employees and a total of some 767,000 companies, the food sector is one of Germany's most important economic sectors. The BLL's tasks include facilitating the development of German, European and international food laws and actively supporting the relevant scientific fields. The BLL's membership includes some 90 (specialised) associations, about 270 companies (covering a spectrum from small and medium-sized enterprises (SMEs) to multinational corporations) and over 190 individual members (primarily private analysis laboratories and law offices). The BLL engages in discussion with the political, administrative and scientific sectors, as well as with consumer organisations and the media, throughout the policy area of "consumer protection". The issues treated in such discussion include "official controls".

The German food related sector of economy has always welcomed the objective of Regulation (EC) No 882/2004 which acts as a basis for a uniform, transparent and effective execution of the food law on a European and national level. The implementation of the Regulation into practice has stabilised and strengthened food safety in Europe. The food sector is therefore now open for the discussion initiated on improvements to the legal framework for performing official controls using proven principles as this will further ensure a high level of consumer protection and a better functioning internal market throughout the European Union.

However, the whole food chain is critical of the proposals made during the development of the new version regarding the financing of official controls by the Member States and regarding the transparency of the outcome of official controls.

1. Maintaining the flexible financing of official controls

According to *the currently applicable principles for the financing of official controls*, the Member States should ensure that adequate financial resources are available for the official controls. It is the (finance-) political decision of the Member States how and '*by whatever means considered appropriate, including through general taxation or by establishing fees or charges*' the necessary financial volume will be provided — last but not least under consideration of the special administrative structures within the individual States.

The *new proposal for a regulation* breaks with this flexible system by laying down requirements according to which the Member States in the future are *obliged to solely*

**Bund für Lebensmittelrecht
und Lebensmittelkunde e. V.**

Postfach 06 02 50
10052 Berlin
Claire-Waldoff-Straße 7
10117 Berlin

Tel. +49 30 206143-0
Fax +49 30 206143-190
bll@bll.de · www.bll.de

Büro Brüssel
Avenue des Nerviens 9-31
1040 Brüssel, Belgien

Tel. +32 2 508 1023
Fax +32 2 508 1025

finance their official controls via fees. As a principle, mandatory fees shall then be collected based on pre-defined criteria for all official routine controls (Article 77). Moreover, it shall be possible to collect additional fees to cover costs occasioned by official controls other than those referred to above or by the delegation of specific control tasks (Article 76(2) and (3)). This means that the option of tax financing becomes explicitly impossible for the Member States regardless of the fact that it is their responsibility to provide appropriate means and resources.

Member States' responsibility for providing adequate financial resources

It is essential that the *Member States can keep their financial flexibility* in order to appropriately staff and equip the competent authorities and to ensure efficient and high quality food control and adequate distribution of the costs. The new financing model introduced in the proposal for a regulation, which is based on a complete recovery of all personnel and material costs (including indirect costs for equipment and qualification of the personnel, Article 78) through the collection of fees, seems to be too rigid and will not do justice to the different structures within the individual Member States. In any case, true cost recovery is hard to imagine.

In this respect, maintaining the infrastructure of the official food control is closely related to the question of a *sufficient or even additional provision of financial means* from public budgetary positions. The new financing structure should not support the possibility that official controls are only performed based on the budgets and fees situations. Moreover, measures for simplifying public administration tasks and for saving public costs must not be carried out on the back of those food companies complying with legislation.

Exclusive financing based on cost-covering fees will be counterproductive and will not stimulate the competent authorities to increase efficiency or improve the coordination of control measures. Therefore, such a systematic approach runs contrary to the objective of the regulation as a means to improve the control efficiency because there is no incentive for the monitoring authorities to increase their efficiency if the company pays all costs for the official controls.

Keeping the possibility of tax financing

It is expected, in particular for Germany, that this comprehensive change in the system will to a large degree affect the government and food industry. At this point, a realistic development of fees, the arrangements needed for fee collection and also the additional burden for the companies at the different levels cannot be quantified for the *German food related economy* because of the *federal structure*, the responsibility of the Federal States for enforcing the food law, and the various food control structures in the Federal States. It is apparent that additional burdens for the food sector, in particular for companies with numerous facilities, will be the result of such a system change and there is no objective justification for that.

The most important demand from the food sector for the formulation of the revised Regulation is that the Member States are given the general possibility of also using tax money for the financing of the official controls and that there is *no inflexible decision on exclusive financing via mandatory fees.*

According to the *principles of subsidiarity and proportionality*, it appears necessary — as has been carried out up until now — to standardise the appropriate provision of adequate funds on a European level in order to guarantee high quality food controls ('Whether' financing). However, the way of how the funds will be provided ('How' financing) must remain embedded with the Member States in order to respond fairly to the respective national situations and structures and to also ensure a sufficient amount of flexibility for the Member States.

Proven application of user-pays and risk principles

Today companies *pay (commercial) taxes, finance comprehensive self-control systems* and are confronted with *large amount of expenditure associated with industry certificates and/or audits*. They pay these enormous costs just to guarantee that their food products are safe.

The governmental level on the other hand performs random checks of the self-control measures and assesses their efficiency. This additional 'control of the control' conducted by the official food control authorities is indispensable. In the performance of the official food controls, *the risk and user-pays principles* have been well *proven*. Special purpose controls based on the user-pays principles are already payable by the company. Moreover, 'services' provided by the food control authorities such as approvals of an establishment, official certificates or veterinary services (meat analysis) are already subject to mandatory fees.

No fees for regular official controls

Extending the mandatory fees to regular official controls would result in companies having to pay for the control activities even if there were no grounds for performing the control in the first place and if there were no reasons for complaint. This does not seem appropriate nor does it make sense. Apart from the financial burden for companies, it would also be *detrimental to the acceptance of the official food control activities* if the feeling develops that the authorities will predominantly be financed via mandatory fees paid by the companies that comply with the food law.

In other settings, whether private or industrial, a *distortion of the obligation to bear the costs*, which goes along with the introduction of mandatory fees just for mere control activities, was also not accepted. This can be vividly illustrated by the example of a car driver who is stopped by traffic control and who is bound to pay for the mere control act conducted by the competent authority even though he has behaved lawfully.

Services for the public

The control of trade companies and the monitoring of the market regarding compliance with general and specific food legislation in order to protect consumers' health and prevent fraud *constitute substantial public interest and are the State's responsibility*. This justifies that public authorities are in charge of their performance and financing.

So-called regular controls including inspection, sampling and analysis, are *a primary task for the State within the scope of its services for the public*. As long as the company has given no reason for this control, it is a monitoring service for the food sector. The regular food control, which is not based on suspicion, is virtually an administrative action and with that a governmental task that has been financed with tax money and it must therefore stay this way in the future.

Encouragement for discussions on privatisation

The introduction of mandatory fees for regular controls would revive former discussions on whether and to what extent official control tasks for food and food companies could be carried out by private parties. In closing ranks with representatives from the control authorities, the food industry has always opposed such approaches because it feels, amongst others, that the official standard control as part of the service to the public is the right measure. However, with the introduction of mandatory fees for the official standard control, the situation would be different.

It seems to be likely that requests will now be made according to which a change of the financing system for regular controls involves further privatisation of official food control in order to give the companies the possibility of having these services done at their own choice. This applies in particular to expensive laboratory analyses, which could be performed at qualified private laboratories that are available and which could possibly participate as 'delegates bodies'. Such privatisation of the controls would also offer more potential cost savings for the public sector; it seems that these savings will increasingly become the decisive criteria for the development of the control structures.

2. No disproportionate expansion of transparency

The *transparency principle* has already been laid down in the *current Officials Control Regulation*. The provision of information by the competent authorities is linked to the *confidentiality requirements* laid down in Article 7. The information covered by professional secrecy is detailed in (2) and includes, amongst others, the confidentiality of preliminary investigation proceedings or of current legal proceedings, personal data as well as information protected by national and Community legislation concerning, in particular professional secrecy.

With the *new proposal for a regulation, the transparency aspect shall be extended* which, however, should not be done at the expense of the principle of proportionality. It is appreciated that the new Article 7 now includes the 'protection of commercial interests of a natural or legal person'. However, the confidentiality obligation is placed under the reservation that there is no overriding public interest in the dissemination of information.

Moreover, a new stipulation is that the *publishing of information about the outcome of official controls shall be extended* to naming the individual operators (Article 7(3)). According to Article 10(3), the competent authorities shall also be entitled 'to publish or make otherwise available to the public information the rating of individual operators based on the outcome of official controls, provided that the following conditions are met: (a) the rating criteria are objective, transparent and publicly available; (b) appropriate arrangements are in place to ensure the consistency and transparency of the rating process.'

Use available means for implementation tasks

In particular, the last requirement shows that there is a need for *implementing legislation on a national level* in order to execute the stipulation, for example in the form of a 'hygiene traffic light' or a colour/date scheme, within the individual Member States. Nevertheless, the food industry supports the use of existing — as well as possible supplementing — funds for official food control in performing the (existing) implementation tasks instead of financing costly new scopes of duties and their consequences.

The food sector is of the opinion that *applicable legislation already provides the competent authorities with the necessary instruments*, which can be used to respond to food law infringements in an appropriate way that does justice to the individual case, ranging from effective personal sanctions by fines or punishments to company closures. These instruments do not include publications which condemn companies, nor does it include the (evaluative) publication of official control results.

No extension of transparency at the expense of enforcement

For the food sector, the *trend towards shifting the authorities' instruments* from regulatory measures (strict enforcement of applicable laws) towards measures that aim at a change in behaviour by publications (on the Internet) is not useful and legally questionable.

The extension of *transparency must not be done at the account of enforcement*. It must also not be used as an alternative because it cannot replace the enforcement. The competent authorities are obliged to provide effective security, which means that they have to stop non-compliances once identified. Furthermore, they have the duty to protect all consumers in an effective way and not only those that have become aware of the information. On account of the massive, real effect that the 'condemnation' of individual companies has — information once published cannot be undone (High Administrative Court (VGH) Baden-Württemberg, autumn 2010) — this governmental instrument for information must only be used with the highest possible degree of care, based on the principle of proportionality and with thorough discretion.

Mandatory requirements for evaluative publications

Any evaluative publication of control results is only significant for the consumer if it is based on a uniform, comparable system. For Germany, this would require a uniform development of common criteria and more official controls throughout the Federal Republic. Ensuring meaningful, i.e. representative, control results requires that the companies that should be compared with each other must be controlled with *the same frequency and at shorter intervals*. Negative evaluations with their 'condemning' effect will result in significant economic consequences on the market. For this reason alone, in case of a negative outcome, a *post-control in a timely manner should be conducted to allow the companies to remedy the non-compliances giving them the chance for rehabilitation* without having to wait for the next regular control, which may be months or years away. The Federal States are currently not willing to conduct such timely post-controls, as are necessary according to the rule of law, because of the limited capacities available with the competent authorities.

Berlin, August 2013

Further Information:

Bund für Lebensmittelrecht und Lebensmittelkunde e. V. (BLL)
German Federation for Food Law and Food Science
Claire-Waldoff-Straße 7
10117 Berlin

Dr. Marcus Girnau
Vice General Director

Tel.: +49 30 206143-129
E-Mail: mgirnau@bll.de

Dr. Sieglinde Stähle
Manager Scientific
and Regulatory Affairs

Tel.: +49 30 206143-142
E-Mail: sstaehle@bll.de

Mirjam Sieber
Food Law Consultant

Tel.: +49 30 206143-155
E-Mail: msieber@bll.de