

Regulation (EU) 2018/848 – The New EU Organic Food Law

War in the Villages or a New Kind of Coexistence

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There is a new EU organic food law. It will go into effect as of 2021 and requires deep changes to the practice of organic farmers. It provides for complex rules for dealing with traces of agrochemicals in organic products. Organic farmers are now to draw up and maintain “precautionary measures” against pollution from conventional agriculture. Regulation (EU) 2018/848 introduces a Trias of legal consequences for each case where a pesticide trace is reported in an organic food product, however low this may be: (a) an official investigation; (b) a provisional marketing stop; (c) or permanent organic decertification, where the newly required measures to avoid the contamination from conventional organic farming have not been implemented. A new organic trade culture will be needed.

I. The Political and Legal Process

In June 2018 Regulation (EU) 2018/848¹ was published in the Official Journal of The European Union as a new Basic Regulation governing the law of organic food products.² The first EU organic food law had been a regulation passed in 1991.³ In 2007 it was revised and split into three regulations.⁴ Thus, Regulation (EC) No. 834/2007 was generated as the present Basic Act governing organic food. In 2018 the

EU organic food law was again revised and is now about to be split into possibly more than 30 Commission regulations with implementing rules. Fundamental changes are, however, already fixed in Regulation (EU) 2018/848.

1. Applicable in 2021

The new regulation has already “entered into force” on the third day after publication but will “apply” from 1 January 2021⁵ only. Having “entered into force” means that it provides for legitimation for the EU Commission to use the “implementing powers conferred on the Commission”.⁶ “Apply” means to set binding rules for organic operators. Products produced in accordance with the current organic Regulation (EC) No. 834/2007 before 1 January 2021 may be placed on the market after that date until stocks are exhausted.⁷

2. Commission Proposal and Secret Trilogue

In March 2014, only five years after the first full revision of the EU organic food law of 2007 became applicable, the European Commission presented its draft

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1 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No. 834/2007 (OJ L 150, 14.6.2018).

2 Further, also addressed as the “EU organic food law”. The term reflects the main area of the scope of application of the regulations discussed, but is too brief, since they apply to feed and to unprocessed agricultural products as well.

3 Council Regulation (EEC) No. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs.

4 Council Regulation (EC) No. 834/2007 (“Basic Act”); Commission Regulation (EC) No. 889/2008 (production rules and “positive lists” of authorized substances); Commission Regulation (EC) No. 1235/2008 (on imports of organic products from third countries).

5 Art. 61 of Regulation (EU) 2018/848.

6 Considerations 110 ff. of Regulation (EU) 2018/848.

7 Art. 60 of Regulation (EU) 2018/848.

for another total revision.⁸ The Council decided to demand changes to this draft in June 2015 and the Parliament in October 2015. Here, a secret “Trilogue” began. Only a handful of persons for each institution (Parliament, Commission, and Council) negotiated to avoid the several readings of the regular law making process and to strike a quick deal.⁹ This “Trilogue” took a record number of 18 Trilogue sessions until June 2017. The European Ombudsman, Emily O’Reilly, questions the legitimacy of Trilogues as they violate the transparency of the legislative process, thus suppressing the input of a public discourse on the issues discussed in the secrecy of the Trilogue.¹⁰ The three years of organic Trilogue are a prime example for such breach of constitutional rules within the process of law making.¹¹

3. Restatement of the Present Law

Regulation (EU) 2018/848 is a “Basic Act”, which means that many details are to be laid down in Delegated Regulations and Implementing Regulations. However, this “Basic” Regulation is not “slim”: 16 pages with 124 considerations are followed by 39 pages with 61 articles, plus Annexes totalling another 37 pages. For the most part, these pages restate the present EU organic food law, for example Annex II of Regulation (EU) 2018/848 includes a restatement of the present rules for organic production: Part I Farm-

ing, Part II Livestock, Part III Aquaculture, Part IV Processing Food, Part V Processing Feed, Part VI Wine, and Part VII Yeast. The fundamental changes are in the Articles 28 and 29 of Regulation (EU) 2018/848.

4. 2014 Decertification Threshold Proposal

The 2014 Commission proposal suggested to ban organic food produced organically from being marketed as “organic”, if traces of plant protection products were detected above 0.01 mg/kg.¹² The Commission suggested to use the legal thresholds of the baby food legislation. Organic farmers opposed this, pointing to the fact that baby food manufacturers meet such requirements only by contract farming in specifically suitable areas removed from conventional farming. To require the same from organic farming would drive it into niches and put an end to the coexistence.¹³ It was argued that baby food manufacturers sell raw materials, where the analysis has shown problems, off to the general food market with limited losses. Critics argued a violation of the “Verursacherprinzip” which holds the polluter accountable: 96% of the EU arable land is conventionally farmed¹⁴ agrochemicals used there are unavoidably present in organic products as traces.¹⁵ The Trilogue abandoned the Commission decertification threshold and replaced it with a revolutionary new approach.

8 COM (2014) 180 final, 2014/0100 (COD), 24.3.2014; <https://www.gfrs.de/fileadmin/files/Vorschlag_neue_EU-OEKO-VO_2014-03.pdf>.

9 In practice, the informal Trilogue has replaced the regular legislative process: What has been negotiated in secret is not questioned in the Parliament: In the legislative period 2009/2016 82% of the Commission’s drafts were passed after a secret Trilogue with no further debate in Parliament and Council on the changes.

10 Decision of the European Ombudsman OI/8/2015/JAS concerning the transparency of Trilogues, 12.07.2017; <<https://www.ombudsman.europa.eu/de/cases/summary.faces/de/69213/html.bookmark>>.

11 Organic baby food may now be substituted by synthetic vitamins and minerals, just as this is permitted for conventional baby food. The principle to restrict any synthetics to the absolutely necessary was abandoned. Annex II Part IV 2.2.2: “in the processing of food, the following products and substances may be used: ... (7) minerals (trace elements included), vitamins, amino acids and micronutrients” not only where “directly legally required” (i) but for organic baby food with no restriction compared to conventional baby food quantum satis (ii). This had not been part of the Commission draft, but was introduced in secret in the Trilogue with no societal discussion.

12 For each substance. For some substances lower limits would have applied. Delegated Regulation (EU) 2016/127 amends Regulation (EU) No. 609/2013. In Deviation from the general PPP maximum level of 0.01 mg/kg for infant formula and follow-on formula it

sets in Annex IV lower levels for some substances: 0,008 mg/kg for ethoporphos and 0.004 mg/kg for fipronil. Annex III requires not to exceed 0.003 mg/kg for substance listed there, such as dieldrin, endrin, haloxypop, and hexachlorbenzen.

13 As in the South of Germany where organic vineyards and orchards are being cultivated side-by-side.

14 In 2016 in Germany organic farmers had a share of 4% of the arable farmland, <https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2017/08/PD17_286_411.html;jsessionid=122976BE6E7CCA6EF44C1C74AD4CD84B.cae2>.

15 Italy indicated to have no problem with the Commission proposal: Since November 2011 a Ministerial Decree decertifies organic products with a PPP trace of more than 0.01 mg/kg, whatever the source and whatever the cause. Belgium pointed to a similar national practice. Organic produce from Italy sampled in Germany continue to show PPP traces as if no such national Italian rule had been applied. Article 29(5) of Regulation (EU) 2018/848 permits Member States where similar national rules are “in place” in June 2018, when this regulation entered into force, to continue to apply those rules. However, only so that the marketing of organic produce from other Member States is not impaired, which implies that organic produce from non-EU countries are subject to these national requirements. Article 29(5) was needed to legitimize the respective national practices since they had violated EU organic food law, which fully harmonizes all requirements to be met by organic produce to be marketed as such. Italy had tried to defend its ministerial directive as merely a cultural measure to imply that the national authorities are free beyond the minimum control requirements.

II. Profound Transformation necessitated by a New Balance of Interests

The Trilogue consensus developed a completely new way of balancing the interest of organic and conventional farmers and thus requires a new kind of coexistence. This consensus was put into law. While the present EU organic food law does not prevent conventional and organic farmers from working side-by-side, this coexistence of mutual neutrality is abandoned by Regulation (EU) 2018/848: Organic farmers are for the first time required to “avoid risks of contamination” of “organic production and products”.¹⁶ The presence of any trace of any PPP not permitted in organic farming in an organic product triggers “an official investigation”¹⁷ and a provisional prohibition of marketing the product as organic, which is maintained until the end of the investigation.¹⁸ This provisional prohibition turns into a permanent prohibition¹⁹ if the investigation establishes that there has been a lack of “precautionary measures” in the practices of the organic operator to avoid risks of contamination.

1. Organic Farmers Shield their Fields

The rapporteur of the Parliament, Martin Häussling (German Green Party and BIOLAND dairy farmer),

emphasised on his website in November 2017 this new responsibility of organic farmers:

I see in the future regulation enormous progress for organic farmers, also for the organic sector as a whole and not the least of course for consumers. ... The point is that farmers, but also processors shield their organic goods better against undesirable contamination by pesticides from conventional agriculture.²⁰

The rapporteur correctly pointed to the paradigmatic shift imposing on organic farmers the legal obligation to defend their fields against pollution from their conventional competitors.²¹ The rapporteur expects organic farmers to shield their plant crop against spray drift. By which physical and legal means? To what extent?

2. Defensive Measures by Organic Farmers

Mutual silent respect between conventional and organic farmers will no longer do. A rather conflict-ridden dialogue is imminent. Regulation (EU) 2018/848 replaces the current mutually neutral coexistence of conventional and organic farming by a more belligerent kind of coexistence. It requires organic farmers to defend their cultures and products against spray drift from their conventional neighbours to “avoid risks of contamination of organic production and products with non-authorized products”.²² Organic farmers will need to discuss with their conventional neighbours preventive measures to avoid contamination. They will be required to document this neighbour dialogue and to have the documentation checked by their organic certification body as a necessity to obtain the organic certificate for their operation. Their conventional farming colleagues will not take this well. Even if there are limits to what organic farmers have to discuss with their neighbours, merely starting this discussion will already lead to deep social friction. War in the villages is likely.

3. Legal Consequences of Lacking Preventive Measures

Organic products that show traces of agrochemicals not authorized to be used in organic production will

16 Art. 28(1)(b) of Regulation (EU) 2018/848.

17 Art. 29(1) (a) of Regulation (EU) 2018/848: “In order to avoid contamination with products ... that are not authorised ... for use in organic production, operators shall take the following precautionary measures at every stage of production, preparation and distribution: ... (b) put in place and maintain measures that are proportionate and appropriate to avoid risks of contamination of organic production and products with non-authorized products ...”

18 Art. 29(1)(b) of Regulation (EU) 2018/848: “... (b) it shall provisionally prohibit both the placing on the market of the products concerned as organic or in-conversion products and their use in organic production pending the results of the investigation ...”

19 Decertification and thus loss of the organic status of the product.

20 <<https://www.martin-haesusling.eu/presse-medien/pressemitteilungen/1778-neue-oeko-verordnung-entscheidende-huerde-genommen.html>>. Translation from German by the author: “Ich sehe in der künftigen Verordnung einen enormen Fortschritt für die ökologisch arbeitenden Landwirte, aber für die Bio-Lebensmittelbranche insgesamt und nicht zuletzt natürlich für den Verbraucher. ... Dabei geht es etwa darum, dass die Landwirte, aber auch die Verarbeiter ihre Öko-Ware besser vor ungewollten Kontaminationen durch Pestizide aus der konventionellen Landwirtschaft zu bewahren”.

21 The rapporteurs’ quote makes clear that this is not present in the given EU organic food law but will come with the new law in 2021.

22 Art. 28(1) of Regulation (EU) 2018/848.

be decertified,²³ regardless of however low the detection levels of the ever better analytical techniques will sink, whenever the official investigation shows a lack of preventive measures to avoid contamination risks by any of the organic operators in the chain of production.²⁴

4. Traces Trigger Provisional Marketing Stop

All PPP traces²⁵ not only allow but require the control authorities in the Member States to open an official investigation and to provisionally prohibit the marketing of the product as organic until the investigation is closed. There is no room for discretion. The provisional marketing stop turns into a permanent marketing stop, when the investigation concludes that there was a lack of contamination prevention on one of the stages of organic production of the particular product.²⁶ The marketing stop is only lifted when the official investigation concludes both that (a) the traces had not been caused by an active illegal application by one of the operators in organic production and (b) there has been no lack of preventive measures to avoid contamination. At this point there is administrative discretion to decide that both (a) and (b) are reasonably clear and thus the official investigation ends. However, Regulation (EU) 2018/848 also allows to close the investigation soon after it opened. Administrative practices will widely diverge between the Member States.

5. A New Organic Trading Culture

There is only one way for organic operators to end the provisional marketing stop. This is to speed up the official investigation by providing proof that on all preceding steps of the organic production the preventive measures had been taken as required by Regulation (EU) 2018/848. Preferably, such proof is on the table as soon as the official investigation has opened, so that it can be closed instantly again. One way to provide for such proof is to present the organic certificates of the operators on the previous stages of production. These organic certificates demonstrate that the organic certifiers on the previous stages of the organic production had found the operators there to meet the requirements of Regulation

(EU) 2018/848, which includes the preventive measures. This will do in some Member States. In other Member States the authorities will ask for more. Thus, it will be useful to develop a new organic trading culture where buyers of organic raw materials not only buy organic raw materials, but also buy with the goods a portfolio of proof that the preventive measures have been fully implemented on all stages of the organic production. This will de facto require organic food processing and trading companies to know more about the origin of the organic raw materials they buy in order to pro-actively avoid lengthy provisional marketing stops.

6. Food Waste: Provisional Stops are Permanent Stops

Instant proof of preventive practices on all stages of the organic production will be a necessity in order to avoid having to discard organic produce from the shelves of the shops whenever a PPP trace (however low) was detected. For organic products in end consumer packaging the provisional stop of marketing means a permanent stop, when they are already in the shops. The causality mechanism for this legislatively imposed food waste is well known: The supermarkets do not command over quarantine facilities, where they could keep blocked products for weeks or months until the official investigation is closed and the provisional marketing stop is lifted. Marketing such organic products as conventional is not possible: This would require numerous changes in the labelling to strike out references and to organic production and is thus not viable. It is as a rule also not viable to repack these products due to hygienic rea-

23 Further "PPP", short for plant protection products, is further used representative for all substances whose use in organic production would need authorization but are not authorized for such use, such as fertilizers and pesticides.

24 Article 29(2)(b) of Regulation (EU) 2018/848 does not clarify whether there is to be a causal link between the trace and the specific neglected preventive measure. However, it appears a correct teleological interpretation that when there is no such causal link any insufficiency of preventive measures will be of no relevance to the organic status of the product.

25 Even those that are only qualitatively reported, not quantitatively identified.

26 And, this is not new, it also turns into permanent decertification, of course, when the investigation concludes, that the trace was caused by an application by one of the organic operators of the production chain in breach of organic production rules.

sons and high labour costs. Products stored at the premises of the organic processor, for which *best before date* has come close in the course of the official investigation, will no longer be accepted by the large food retailers.²⁷

III. Dealing with Traces: Old and New Law

It is new that Regulation (EU) 2018/848 will require not only those who store organic products, mills and others, who deal with organic produce after the harvest and after delivery from the organic farm, but also organic farmers to shield organic produce against pollution. They all have now drawn up “a systematic identification of critical procedural process steps”²⁸ in the organic production with a threat of contamination with substances not authorized for application in organic production. Thus, organic farmers will have to defend themselves against spray drift and run off from conventional farming. This is a game changer. Surprisingly, there has been little public discussion on this change. The new concept of coexistence was developed in the secrecy of the Trilogue.

1. The Present Irrelevance of Spray Drift

Presently, under the EU organic food law from the 2007 revision, traces in organic food of agrochemi-

cals not permitted for use in organic production trigger an investigation which will be closed with no legal consequences to the organic status of the product, when the investigation has not demonstrated an active use of the prohibited PPP by the organic farmer.²⁹

Traces of spray drift originating from conventional agriculture are presently irrelevant for the organic status of the fields and for the status of their crop products.³⁰ Regulation (EC) No 889/2008 provides in its Chapter 3 on “Preserved and processed products” for the requirement to “take precautionary measures to avoid the risk of contamination by unauthorized substances or products” only as “Rules for preserving products and for the production of processed feed and food” in Art. 26(2)(a). This rule does not apply for organic production at farm level up to the point where the harvested product has left the farm and starts to be processed. Article 63 is a procedural control requirement as opposed to the substantive minimization requirement in Art. 26. Article 63 is a rule on the manner in which meeting the material requirements of Art. 26 is to be controlled and it does thus not impose an abstract obligation to “reduce the risk of contamination by non-authorized products”. Article 63 does not impose on organic farmers the obligation to fight pollution from conventional farming by reducing the risk of contamination by PPP drift.³¹

The reason not to impose an obligation to avoid contamination from conventional aquaculture under the present EU organic food law was to maintain a practical and peaceful coexistence between organic and conventional farmers especially in areas, where the fields are small and cultivated side by side in accordance with conventional and organic rules.

2. Minimization of Pollution from Conventional Agriculture

Article 29 of Regulation (EU) 2018/848 applies to substances that need authorization to be used in organic production. There are many substances used in organic production which do not require authorization: The gas used in flame weed control does not require authorization under the EU organic food law. Only those substances do that are used for purposes covered by Art. 9(3), 24f. and Annex II, such as pesticides require authorization.³² Traces of substances not used as a plant protection product, but as a bio-

27 Often prepacked organic food subject to an organic marketing stop cannot even be donated where donated products are considered to be subject to the same strict regime of organic labelling requirements as organic products sold in the shops.

28 Art. 28(1)(b) of Regulation (EU) 2018/848.

29 Such obligation is only now introduced into the EU organic food law by Regulation (EU) 2018/848.

30 So decided by the Administrative Court of Koblenz, Judgement of 15 March 2017, 2 K 885/16.KO on PPP traces in organic vineyards originating from PPP application by helicopter on adjacent conventional vineyards.

31 While Art. 26 imposes the requirement to take precautionary measures, Art. 63 rules on control measures, to check whether this requirement has been met. This is under Title IV on “Controls” in Chapter 1 under “Minimum Control Requirements”. Article 63(1) requires corresponding to the substantive requirement of Art. 26 that organic operators shall draw up: “(a) a full description of the unit ... ; (b) all the practical measures to be taken ... ; (c) the precautionary measures to be taken in order to reduce the risk of contamination by unauthorised products ... and the cleaning measures to be taken in storage places and throughout the operator's production chain”.

32 On the level of organic plant cultivation these are plant protection products, fertilizers, soil enhancers and nutrients.

cide for the personal protection of harvest workers against mosquito bites, such as DEET,³³ are not subject to the authorization requirement. Thus, traces of these substances do not require “preventive measures” (of minimization) in the organic production, and they do not trigger the official investigation nor the marketing stop. This applies presently *mutatis mutandis* to chlorate used as a cleaning agent in food processing facilities, since there is no authorization requirement for the use of these substances on this level of organic production.

3. Minimization of Pollution from General Environmental Sources

Regulation (EU) 2018/848 does not impose a new obligation on organic operators to minimize the risk of traces of general environmental pollution such as pollution from toxic waste incinerators or highways. Traces transported from these sources into organic cultures remain fully irrelevant for the organic certification of the crop products. However, the regulation requires minimization of pollution stemming from conventional farming.

4. No Minimum Trace Intervention Level

The solution finally chosen in the Trilogue was decertification in case of any PPP trace, if there was a lack of preventive measures to avoid the risk of contamination. This is what Regulation (EU) 2018/848

now puts into law. Unlike the 2014 Commission draft, however, there is no analytical lowest level, below which this mechanism would not be triggered. It is now irrelevant whether the PPP trace reported in an organic product is above or below 0.01 mg/kg. Article 29(1) of Regulation (EU) 2018/848 instructs for an official investigation, accompanied by a marketing stop whenever any trace (however low) of a PPP is reported in an organic product. It is up to the Member States to develop administrative practices that meet these requirements in a proportionate and practically useful manner within the scope of the wording, taking into account the necessity to provide for the “*effet utile*” in applying the new EU organic food law. When analytical techniques improve to the ever lower trace levels more and more official investigations accompanied by marketing and processing stops will be triggered. This will cause more and more organic products subject to the regular taking of samples in shops in the course of the general food inspection to show PPP traces and thus will need to be removed from the shelves.³⁴

There is no requirement that this mechanism should apply only when a certain trace level is reached, nor is there any requirement of any quantitative and not just qualitative reporting.³⁵

5. Traces in Organic Produce

One-third of the organic products sampled and tested by the authorities in Germany show traces of plant protection products.³⁶ Regulation (EU) 2018/848 is

33 N,N-Diethyl-meta-toluamide (DEET).

34 In autumn 2017 some observers argued that the Commission will set a minimum threshold to make the new rules more workable. This is highly unlikely. Highly unlikely is a Commission Implementing Act that would set a minimum qualitative PPP trace level so that the official investigation of Art. 29 of Regulation (EU) 2018/848 would only be triggered by sample results above this level. Such act, however, is not one of the necessities imposed on Commission to be taken care of until 2021: It is not a “must”, but only a “can”. The Commission is likely to avoid the political minefield of discussing and implementing such a minimum threshold, but rather expect the individual Member States to develop a reasonable practice.

35 Many Member States will practically ignore the new provisions; others, like Germany are likely to put every single letter to very best practice. When national administrations do not test, there are no results that would trigger the new Trias of legal consequences. The same applies when methods are used that have been put on the market 20 years ago and not the house methods at the very top of the state-of-the-art of some (very few) national laboratories, such as the CVUA Stuttgart.

36 The national report of the German Federal Office of Consumer Protection and Food Safety (BVL) for the year 2016 on pesticide residues in foodstuffs has 2207 samples from organic food taken by the supervisory authorities. No traces of pesticides were found in 70.9% of the samples. 30.1% of the samples of organic products showed traces of pesticides and would thus have triggered the Trias of legal consequences under Art. 28f. of Regulation (EU) 2018/848. The 2017 organic monitoring in Baden-Württemberg reported 7.0% of the samples of processed organic products that exceeded 0.01 mg/kg. Some official samples might have been taken also in cases of suspicion and they were not taken representatively at random. Thus, they do not show a perfect picture, but one which is pretty close to what one may expect, when organic end product testing becomes a regular means of general food authorities to check in organic products. The share of organic produce with PPP traces will rather be larger when testing includes not only with multi-methods, but with specific methods also required for example for the halm shortener chlormequat, the herbicide glyphosate, or the fungicide kaliumphosphonate, that had until 2013 been considered a plant strengthening agent and thus permitted for use in organic agriculture.

likely to trigger for 10 to 25% of the tested products the Trias of official investigation accompanied by a provisional marketing prohibition and decertification in cases where the investigation shows a lack of preventive measures to avoid the risk of contamination, such as with traces from conventional agriculture. Even if the share would be less, maybe 5%, this will put a high economic burden on marketing organic products.

Authorities will fully concentrate on handling this situation. They will be overwhelmed by tens of thousands of reports that lead to tens of thousands of official investigations accompanied by tens of thousands of marketing stops. In February 2017 two experts wrote:

A practical case: an existing organic operator is taking full responsibility by doing around 8.500 organic samples with each 700 parameter a year. In close to 50% of the samples minor traces can be found. 90% of them are giving no relevant indication that something was going wrong in organic agriculture. When this operator is transferring, as proposed in the presidency text, 4.250 analytical reports to the competent authorities in the member state, this CA [competent authority of a Member State] will be already completely blocked. But please do not forget, that there are hundreds, may be thousands of other operators in the same member state. It will definitely not work to handle all these investigations and focus from relevant cases concerning the organic integrity will get lost due to the huge amount of notifications.³⁷

The authors feared for a collapse of organic controls even under the concept still discussed in February 2017 that a PPP trace report would trigger some action that could be in the discretion of the national public authority or the organic certifier and thus open to the possibility to find some adequate way to deal with the situation. This is no longer the case. Now the rules of play have been changed even further to the wrong side.

37 Alexander Beck (AöL)/ Bavo van den Idsert(Bionext), <<https://www.aeel.org/wp-content/uploads/2017/09/Organic-Integrity-Why-a-two-step-procedure-is-needed-2017-02-24.pdf>>.

38 200-g-consumer-boxes taken as samples by the local food authorities in the course of their regular control of food shops.

6. Representative Sampling of Non-Homogenous Organic Produce

Representative sampling of non-homogenous organic produce is not an effective risk management tool. There are many commodities, produced in the European Union and outside, where produce of organic origin shows traces of conventional chemicals. They are practically technically unavoidable even where an organic operator applies a rigorous buying policy for organic raw materials with their previous representative testing. This will not prevent trace detection in samples taken from products in the food shops when the organic raw materials are not fully homogeneous, as many are not. Apple juice is and peanuts are not. There is no practical way to distinguish batches of raw materials with PPP traces from those that have none, when the lots are not fully uniform. For many products homogenization is not possible. Representative sampling of the organic raw material cannot prevent that a considerable number of prepacked consumer goods³⁸ will show PPP traces, which trigger the new Trias of legal consequences and thus finally require the destruction of the goods.

IV. Scope of Organic Farmers New Preventive Obligations

1. Preventive Measures in Organic Controls

The obligation newly introduced by Art. 28(1) of Regulation (EU) 2018/848 to apply preventive measures is limited by its wording to avoid contamination with substances not authorized for use in organic production. However, there is no obligation of organic operators to implement all those measures that fall into the scope of the grandiose and thus rather meaningless definition of “preventive measures” in Art. 3(4) of Regulation (EU) 2018/848:

Measures that are to be taken by operators at every stage of production, preparation and distribution in order to ensure the preservation of biodiversity and soil quality, measures for the prevention and control of pests and diseases and measures that are to be taken to avoid negative effects on the environment, animal health and plant health.

Thus, organic controls are not to check, whether the preventive measures defined in Art. 3(4) have been applied, but whether those of Art. 28(1) have been implemented.

2. Systematic Identification of Critical Procedural Steps

Article 28(1) (a) requires organic operators to provide for a “systematic identification of critical procedural steps”. This means steps in the organic production that are relevant “to avoid risks of contamination of organic production and products with non-authorized substances”. The “systematic identification of critical procedural steps” will require an approach similar to those used in the HACCP approach (Hazard Analysis and Critical Control Points) for hygienic prevention: Identify contamination hazards, determine and implement steps to reduce hazards to an acceptable level, and to validate and monitor the success of such measures. This may be called an Organic Systematic Contamination Hazard Identification of Critical Steps (OSCHICS).

Organic inspection will have to verify in 2021 and thereafter whether there has been such systematic identification of critical procedural steps and which preventive measures have been taken and are maintained by the organic operator in order to avoid the risk of contamination with substances that would have needed authorization for use in organic production, but were not authorized for this purpose. All this is not about general environmental pollution and not about contaminants originating, for example, from cardboard used to package products or from the paint in storage facilities, but only about pollution with agrochemicals and other substances, controlled by the authorization requirement of the EU organic food law.

3. Avoiding the Risk or Avoiding Contamination

Some observers argued that Regulation (EU) 2018/848 provides for limits to what is expected from organic farmers by not requiring them to “avoid contamination” but to merely “avoid the risk of contamination”. Article 28(1) of Regulation (EU) 2018/848 indeed requires “to avoid the risk of contamination of organic production and products with non-authorized products”.

“Avoiding such contamination”, however, it is the very same thing: The instrument to avoid contamination is to avoid risks of contamination. To point to the wording “avoiding risk” instead of “avoiding contamination” does not contribute to a reasonable and proportionate interpretation and application of the new rules. It is not helpful at all to think that good practices manage to avoid all risks of contamination but not all contaminations. This is not logical since traces of contamination are detected when risk has turned into fact.

4. “Proportionate” and “Appropriate”

Article 28(1) (a) and (b) requires “measures that are proportionate and appropriate”. “Proportionate” is what does not go beyond what is needed to achieve the purpose pursued. “Appropriate” is what is useful to do so. By these terms the extent of preventive measures expected to be taken by organic operators is limited. These open terms are subject to full judicial scrutiny. They are barriers against subjecting organic farmers to unlimited efforts to fight pollution from conventional agriculture. However, they are wide open to highly divergent national administrative practices. The fundamental right to be subjected to governmental action only insofar as the principle of proportionality is observed is repeated here, however in very general terms. They give a chance for shaping a common and uniform practice in the European Union to deal with pesticide traces in organic food in 2021 and thereafter, but they by no means force national authorities to do so.

5. The “Operator Concerned”

Article 29(2) of Regulation (EU) 2018/848 names the “operator concerned” as the subject of official investigation. This particular wording may be read to imply that only the operator who now has the organic product in hand is investigated as to whether there was an illegitimate PPP application or a lack, only in the operation of this particular operator, of preventive measures to avoid the contamination of the product. The argument against this is that Art. 28(1) explicitly targets the obligation to use precautionary measures “at all stages of production, preparation and distribution”. Some German *Länder* authorities

already indicated that this consideration will not limit their scope of investigation to the organic operator for whom they are directly responsible. They intend to always check in their official investigations not only the organic certificates of organic operators on the previous steps of organic production but also whether all of the operators in the chain have provided for the “systematic identification of critical steps”. They also intend to check whether all these operators have implemented the necessary “preventive measures”. These German *Länder* have voiced their intention to require more detailed proof of preventive measures taken on the previous stages of the organic production reaching back to the farm level.³⁹

6. “Under their Control”

The rapporteur of the EU Parliament explained, that organic farmers cannot be expected to require their conventional neighbours not to apply plant protection products. He pointed to the fact that very late in the Trilogue discussion, new wording had been introduced by Consideration (68),⁴⁰ that only measures “which are under their control” are to be taken by organic farmers in order to avoid the contamination. The term “under their control” was thus also introduced by Consideration (24).⁴¹ “What is under their control” is in the non-binding, merely explanatory part of Regulation (EU) 2018/848. In any case, it would not suffice to limit the scope of organic farmers’ new obligation to shield their fields from pollu-

tion from conventional agriculture. The wording “what is under their control” in the Considerations fails to achieve this purpose.

7. The Legal Powers of Organic Farmers

The drafters of the new EU organic food law in the secret Trilogue obviously knew little about the extensive legal powers of organic farmers to defend themselves against spray drift and run off from their neighbours. The extent of the legal power of organic farmers to require conventional farmers to abstain from polluting their fields and their products varies among the Member States.⁴² The *actio negatoria* as a lawsuit for judicial injunction against pollutants coming from one property onto another one has a long legal tradition in Europe. Ulpian wrote on the defence against smoke from a cheese dairy.⁴³ Thus, the *actio negatoria* between neighbours is a basic feature of the legal systems in the Member States on the European continent.

In Germany it is the Civil Code in Sections 1004 and 906 that empowers organic farmers to demand their conventional neighbours to avoid PPP spray drift by “measures ... which are economically feasible⁴⁴ for users of their kind”.⁴⁵ If there is spray drift likely from an orchard, the organic farmer has the right to demand from the conventional neighbour to use tunnel spray equipment, when this is an appropriate way to reduce the spray drift – but only insofar as the costs of this, either renting or buying the

39 Where this concerns reaching back to the farm level in the third countries, national authorities will tend to act *ultra vires* and violate the domain of the European Commission since it is the Commission that is solely responsible for checking that organic farming in third countries observes the European Union rules.

40 Consideration (68) of Regulation (EU) 2018/848: “In order to avoid the contamination of organic production with products or substances that have not been authorized by the commission for use in organic production for certain purposes, operators should take proportionate and appropriate measures which are under their control to identify and avoid risks of such contamination”.

41 Consideration (24) of Regulation (EU) 2018/848 refers to organic operators in the second sentence: “They should also take, where appropriate, proportionate precautionary measures which are under their control to avoid contamination with products or substances that are not authorized for use in organic production in accordance with this Regulation and to avoid commingling organic, in-conversion and non-organic products”.

42 Saskia Kirchgeßner, *Abwehr und Ausgleich von Eigentumsstörungen unter Nachbarn*, Die §§ 1004, 906 Abs. 2 S. 2 BGB und *die théorie des troubles anormaux de voisinage* im Vergleich, Jena 2018; Hanspeter Schmidt, *Der privatrechtliche Rahmen der Koexistenz*, S. 58 bis 111, in *Grüne Gentechnik und ökologische Landwirtschaft*,

UBA Texte 01/03, Berlin 2003, <<https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/2240.pdf>>.

43 Ulp. 70 ad ed. D. 8, 5, 8, 5.

44 Such “economic feasibility” is not determined by the financial means of the particular neighbor, but by the typical economic performance and ability to invest in new equipment or to change practices of a farmer of the same kind.

45 Section 906 Civil Code: “Introduction of imponderable substances, (1) The owner of a plot of land may not prohibit the introduction of gases, steam, smells, smoke, soot, warmth, noise, vibrations and similar influences emanating from another plot of land to the extent that the influence does not interfere with the use of his plot of land, or interferes with it only to an insignificant extent. ... (2) The same applies to the extent that a material interference is caused by a use of the other plot of land that is customary in the location and cannot be prevented by measures that are financially reasonable for users of this kind. Where the owner is obliged to tolerate an influence under these provisions, he may require from the user of the other plot of land reasonable compensation in money if the influence impairs a use of the owner's plot of land that is customary in the location or its income beyond the degree that the owner can be expected to tolerate”, <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3710>.

equipment, could be financed in a conventional orchard without substantial threat to its economic well-being. The same applies to changes in practice, such as spraying earlier or later, alternating crop rotation to lower the risk of contamination of the organic cultures, or replacing the use of synthetic plant protection products with, for example, pheromones.

Many legal systems in Europe provide for similar remedies by *actio negatoria*, such as France, Austria, or Catalonia.⁴⁶ German *Länder* authorities indicated that they expect organic farmers to write letters to their conventional neighbours and to discuss with them their conventional practices as well as alternatives. Such communication is to be documented and to be inspected by organic control bodies. Possibly, even in Germany, the administration will abstain from requiring organic farmers to sue their neighbours or to request them to collect cease-and-desist letters with contractual penalties.

8. The Lowest Common Denominator

A narrow interpretation of the concept of what organic farmers have “under their control” may be considered, that organic farmers in the European Union have only under “their” control, what organic farmers have “under their control” in the Member State which gives organic farmers the weakest legal powers to defend themselves against pollution from their neighbours. Such narrow interpretation would provide for an equal level playing field and for a uniform application of the EU organic food law. However, this very narrow interpretation of “their” in “under their control” is hardly in line with the case law of the Court of the European Union that requires Member States to provide for *effet utile* in the application of regulations.

9. Violation of the Principle of Subsidiarity

EU organic food law disregards the principle of subsidiarity since it rules on very many details where quite diverse regional geographic and socioeconomic circumstances of organic farming and animal husbandry need to be taken into account. The legal capacity of organic farmers to use the law as a preventative measure to avoid the risk of contamination from their conventional neighbours is diverse among

the Member States as well. A regulation such as the EU organic food law necessitates derogations to meet the diversity of circumstances in the Member States. A directive would do better. A regulation has the advantage of providing for full uniformity but is not apt to deal effectively with the heterogeneity of the highly diverse circumstances of organic production in the 27 Member States. Thus, a Directive would also do better in regulating the coexistence of organic and conventional farmers. It would be the right choice to have the next revision of the EU organic food law in 2020's as a Directive. Directives need implementation into national law. The national lawmakers will tend to be more careful to provide for balanced rules exactly adapted to the particular circumstances of organic production in their country.

10. Very Many Neighbours and a Lot of Discussion

In areas with fragment structure of farmland, there are many neighbours to talk to: An organic vegetable farmer in the Valley of the Rhine not far from Freiburg may typically cultivate 50 small separate fields and there will be more than 50 neighbours to talk to as well as a number of service providers who apply fertilizers and spray the conventional fields.⁴⁷

V. The New System of Legal Response to Non-Compliances

1. Non- Compliances

A “Non-Compliance” is whatever does not fully meet the rules of Regulation (EU) 2018/848, even where this concerns only formalities and side aspects.⁴⁸ This broad definition leads to the question, how the legislative response to non-compliances takes into ac-

⁴⁶ Schahin Seyed-Mahdavi Ruiz, Die rechtlichen Regelungen der Immissionen im römischen Recht und in ausgewählten europäischen Rechtsordnungen, Göttingen 2000.

⁴⁷ The *Länder* authority in Karlsruhe is likely to require such organic farmers to present to the organic certifier evidence that discussions on preventive measures with respect to the conventional practices of the neighbours have taken place with all of their neighbours and with the considerable depth inherent in Civil Code defence powers of German organic farmers.

⁴⁸ Art. 3(57) of Regulation (EU) 2018/848.

count the fundamental guarantee that all government actions meet the test of proportionality.

2. The Present and the Future System of Proportionality Controls

Article 30 of Regulation (EC) No 834/2007 allows for the decertification of an organic product only insofar as

this would be proportionate to the relevance of the requirement that has been violated and to the nature and particular circumstances of the irregular activities.

Regulation (EU) 2018/848 deals with the issue of proportionality less straightforward in a more complex pattern of distributed rules. In practice there is controversy, whether and when closing the exit for laying hens to an open air pit in there it is relevant for the marketing of the eggs. The present EU organic food law rephrases the general rule of proportionality in Art. 30(1) of Regulation (EC) No. 834/2007. Regulation (EU) 2018/848 has no comparable text due to the fact that the general rules covering organic controls are now in the Food Control Regulation (EU) 2017/625 while Regulation (EU) 2018/848 only sets some specific rules for organic controls as *lex specialis*. Thus, the few rules of Regulation (EU) 2018/848 on organic controls are to be read on the background

49 Regulation (EU) 2017/625 emphasizes the principle of proportionality in its Consideration (90): “Infringements of the rules of the Union agro-food chain legislation and of this Regulation should be subject to effective, dissuasive and proportionate penalties ...” This is also found in Art. 139(1): “... The penalties provided for shall be effective, proportionate and dissuasive”. All of this implements Art. 52(1) of the Charter of Fundamental Rights of the European Union.

50 There is a structure in Regulation (EU) 2018/848, and to argue that there is none would be too simple. However, the structure was already not very clear in the Commission Draft of 2014, which became even more complex when the new rules of the Trilogue compromise of June 2017 were introduced.

51 Where the suspicion does not concern a PPP trace Art. 27 applies where the organic operator has such suspicion, while the final decision to decertify or not by the control body or the public authority is determined under Art. 41(2) and Art. 42(1). Article 42(1) applies to the decertification decision in both cases, general non-compliances and non-compliances connected with PPP traces. When the public authorities start an official investigation under Art. 29(1) of Regulation (EU) 2018/848 it closes the investigation when there is no firm evidence for either an illegal application by the organic operator or a lack of preventive measures to avoid the risk of contamination with no unauthorized products as required by Art. 28 of Regulation (EU) 2018/848. The authority carries the burden of proof.

of Regulation (EU) 2017/625. What is presently in Art. 30 of Regulation (EC) 834/2007 is practically a repetition of the fundamental principle of the proportionality of all governmental and administrative action.⁴⁹

3. The Structure⁵⁰ of Legal Consequences of Non-Compliances

Now, there is a normative hierarchy of general and special legal consequences of non-compliances. This starts with very similar wording in Art. 29 and Art. 41 of Regulation (EU) 2018/848. Article 29 is the more specific norm for PPP traces, Art. 41 applies only “subject to Art. 29”. Insofar as Art. 29 applies, Art. 41 does not. The scope of application of Art. 41 does not encompass PPP traces in organic products. This provides for an intricate interplay between the general and the specific rules for legal consequences.

Table 1: ...

<p>Article 41 of Regulation (EU) 2018/848 is the general norm that applies, when there is a suspicion of non-compliance with organic production rules but when facts are uncertain.</p>	<p>Article 29 is <i>lex specialis</i> in relation to Art. 41 that applies when a trace of product is detected in organic produce that would need authorization to be applied in organic production, which has not been authorized for that purpose.</p>
<p>The organic status of the product is lost when the official investigation determines that the non-compliance was intentional or repeated, or when the effect of the non-compliance is evident in the end product</p>	<p>The organic status of the product is lost, when the official investigation determines that there was a lack of preventive measures to avoid the risk of contamination, including contamination from conventional agriculture, with no unauthorized products.</p>

Article 29 requires the public authorities to start an official investigation in cases where traces of an unauthorized substance are detected in an organic product. Article 28(2) governs as *lex specialis* what organic operators have to do when there is suspicion that organic production rules have not been observed, which is based on a PPP trace in an organic product. All other cases of suspicion of the non-compliance are covered by Art. 27 of Regulation (EU) 2018/848.⁵¹

Table 2: ...

	Laying hens lacked access to an outside pen with no consequences for the eggs	Wheat with PPP traces
The organic operator has a suspicion and provisionally seizes the buyer marketing of the lot	Art. 27 of Regulation (EU) 2018/848	Art. 28(2) of Regulation (EU) 2018/848
The authority has a suspicion, starts an official investigation accompanied by a provisional organic marketing stop	Art. 41(1) of Regulation (EU) 2018/848	Art. 29(1) of Regulation (EU) 2018/848
The authority has certainty and de-certifies the lot	Art. 42(1) of Regulation (EU) 2018/848	Art. 42(1) of Regulation (EU) 2018/848
The authority has certainty and de-certifies the organic operator	Art. 42(2) of Regulation (EU) 2018/848	Art. 42(2) of Regulation (EU) 2018/848

4. Suspicion of the Organic Operator and the Burden of Proof

The burden of proof is different under Art. 27 of Regulation (EU) 2018/848 in general and under Art. 28(2) for PPP traces, when the organic operator has the suspicion that the organic product does not meet the rules. The own suspicion of the organic operator has the legal consequence that the suspicion must be investigated and marketing ceased “unless the suspicion can be eliminated”. The “eliminate” means to prove the suspicion unsubstantiated. The organic operator has the burden of proof. The suspicion which she or he considers triggers the legal consequence that the marketing stop is permanent, when the suspicion cannot be proven wrong. When the organic operator has the suspicion that a PPP trace detected in the organic product has been caused by non-sufficient preventive measures to avoid the risk of contamination, the operator has the burden of proof that the measures were suffi-

cient. Insofar as the organic operator interpreted the PPP trace to originate from general environmental pollution or from spray drift from conventional neighbours, and if this includes the consideration that the PPP trace could not have been avoided by proportionate and appropriate preventive measures, the burden of proof is not with the organic operator, but with the authorities or the organic certifier to prove otherwise.⁵²

Table 3: ...

	Regulation (EU) 2018/848	Regulations (EC) No 834/2007 and 889/2008
Obligation to provide for preventive measures to minimize the risk of contamination with unauthorized substances in the primary production (pre-harvest)	Art. 28(1)(b) of Regulation (EU) 2018/848	No obligation of organic farmers
Obligation to avoid contamination after the harvest (post-harvest)	Art. 28(1)(b) of Regulation (EU) 2018/848	Art. 26(2) (a) of Regulation (EC) No 889/2008 with the corresponding control provision of Art. 63(1)(b) of this regulation
Marketing stop with the suspicion of the organic operator	Art 27 and as <i>lex specialis</i> for PPP traces Art. 28(2) of Regulation (EU) 2018/848	Art. 91(1) of Regulation (EC) No 889/2008

52 There are similar rules on the burden of proof in the present EU organic food law from the 2007 revision: “Where an operator considers or suspects that a product ... is not in compliance with organic production rules, he shall” provisionally stop to use the product as organic (Art. 91(1) of Regulation (EC) No 889/2008). “He may only” use it again as organic “after elimination of that doubt”. Here the operator’s own suspicion triggers the burden of proof on the site of the organic operator. This is different (Art. 91(2) of Regulation (EC) No. 889/2008) when the authority of the control body has a suspicion: “Where a control authority or control body has a substantiated suspicion that an operator intends to place on the market a product not in compliance with the organic production rules ... [they] can require that the operator may provisionally not market the product ... for a time period to be set by [them]”. “However, if the suspicion is not confirmed within the said time period, the decision referred to in the first subparagraph shall be cancelled not later than the expiry of that time period”. Here, the burden of proof is with the authority in the control body.

Marketing stop with the suspicion of the authority	Art. 29 as <i>lex specialis</i> only for PPP traces and for other cases Art. 41(1) of Regulation (EU) 2018/848	Art. 91(2) of Regulation (EC) No 889/2008
Permanent lot decertification	Art. 29(2) for PPP traces and Art. 41(2) of Regulation (EU) 2018/848	Art 30(1) of Regulation (EC) No 834/2007
Permanent decertification of the organic operator	Art. 42(2) of Regulation (EU) 2018/848	Art 30(2) of Regulation (EC) No 834/2007

5. “Integrity of Product” distinct from “Integrity of Production”

Article 42(1) of Regulation (EU) 2018/848 addresses events “of non-compliance affecting the integrity of organic ... products ... for example as result of the use of non-authorized products”.⁵³ Here, only those applications of non-authorized substances are addressed that show in the finished end product. At this point, the new EU organic food law of Regulation (EU) 2018/848 reduces the spectrum of legal consequences by binding sanctions to the terms “integrity of product” and “integrity of production” side-by-side. There are legal consequences to non-compliances only when the “integrity of product” is affected.⁵⁴

53 While Art. 29 is *lex specialis* to Art. 41, Art. 42 gives, for all non-compliances, including those covered by Art. 28, the rules for lot decertifications.

54 This distinction originated from the 2014 Commission draft. It surprised the observers and requires explanation.

55 The “integrity of the product” was only once mentioned in Regulation (EC) No. 834/2007: “Organic processed products should be produced by the use of processing methods which guarantee that the organic integrity and vital qualities of the product are maintained through all stages of the production chain.”

56 This is a possible explanation for the Commission’s choice to introduce the new terminology “integrity of the product”: It serves to limit the scope of the legal consequences to non-compliances. Laying hens in organic animal husbandry are to have legally exactly defined access to an open air area. If this is not provided, the “integrity of production” is impaired – but not the “integrity of the eggs” since they do not show the lack of open air access. The “integrity of the product” may be unimpaired, where the “integrity of the production” was violated.

“Integrity” means wholeness and refers to the notion that something has not been damaged. “Integrity” referring to the organic production and the organic product is a new wording in the substantive EU organic food law.⁵⁵ The question arises what function the distinction between the two different types of “integrity” has and with which legal consequences. The two terms address fundamentally different concepts: The “integrity of production” refers to meeting the rules of organic production looking back from the product to all stages of the organic production process. This refers to the basic concept of the EU organic food law that does not determine what organic is by looking at the end-product, but rather whether the rules have been observed in the course production process. This has been the fundamental concept of defining “organic” of the EU organic food law since 1991 and it has not been changed.

However, the new term of the “integrity of product” does not look at whether production rules have been met but, rather, where they have not been met and whether this has had consequences that show in the product. This appears as a very particular kind of providing for proportionality of legal consequences, probably based on the idea that what does not show in the organic product does not contradict the consumers’ rightful expectations.⁵⁶

6. The Importance of the Two “Or(s)”

The secret Trilogue sought a solution for this dilemma by introducing a new, narrow definition of the “Integrity of Product”. The legal consequences of the new distinction between the two kinds of “integrity” caused irritation with the Member States. They feared this would mean that violations of rules protecting animal welfare would rarely be sanctioned by decertifying products, since they usually do not show in the product. This was considered highly unfortunate: A correction was introduced in a very late stage of the Trilogue negotiations by a new definition of what “integrity of product” means.

Article 3(74) of Regulation (EU) 2018/848 defines “integrity of product” in a very particular manner that narrows the sense deviating far from the natural meaning of the words. Thus, “integrity of organic products” is defined to mean “the fact that the product does not exhibit non-compliance which: (a) in any stage of production, preparation and distribution

affects the organic or in-conversion characteristics of the product; or (b) is repetitive or intentional". With this particular definition of the sense of "integrity of the product", it no longer matters whether the eggs of an organic laying hen with no access to the open air show this fact, which is of course not the case. Now it is sufficient to decertify the lot of eggs, when the laying hens were intentionally deprived of their access to the open air pen or when this violation of organic production rules has been "repetitive". The two "or(s)" are important: The "integrity of product" is damaged when (a) the organic product shows that the rules of organic production have not been observed or (b) when they were not observed with intent or (c) in a repetitive manner.⁵⁷

7. Negligent First-Time Non-Compliances

Under Regulation (EU) 2018/848 negligent non-repetitive non-compliances do not justify any lot decertification. Negligent and first-time non-compliances which do not show in the organic product have no legal consequences for the organic status of the lot produced in the course of such non-compliance. This is surprising and new, but is a logical consequence of the new dichotomy of integrity of product and integrity of production.

VI. Conclusion

Organic agriculture is fundamentally driven by unimpaired growing consumer demand and by the exceptional resilience of organic farmers in the light of the often arbitrary and impractical regulatory EU organic food framework. Regulation (EU) 2018/848 does not promote organic farming. It guides organic farmers into a permanent conflict with their convention-

al neighbours. This does not help to convince farmers to convert to organic practices. The preliminary marketing stops whenever a pesticide trace shows up in an organic product renders their organic status uncertain. The new rules open the gates to very divergent administrative practices in the 27 Member States and in national federal structures, such as the *Bundesländer* of Germany or Austria. The seemingly full harmonization of the law of organic food in the European Union by the legal format of a regulation hides a highly heterogeneous pattern of widely divergent national administrative implementing practices caused by the very many technically vague provisions of the present EU organic food law. They are vague because more precise rules cannot be developed in a uniform manner reasonably covering the circumstances and needs of all organic farmers in the European Union. Thus, a Directive may be the right legal format for the next revision of the EU organic food law. The organic trade associations that spoke in favour of the Trilogue compromise will have the chance to opt in the 2020's for a change to an organic Directive when their members learned what Regulation (EU) 2018/848 means for their daily work.⁵⁸

57 "Intentional" means that the laying hens were denied open air access with the intent to deny them something which is due to be granted under organic production rules, knowing that a rule is violated and with the will to violate. Negligent non-compliance is not "intentional". "Repetitive" means that the violation of organic production rules is not only done several times, but for the second and consecutive times, after some kind of warning, admonishment, or similar communication to adhere in future to the already once violated rule.

58 The Assoziation ökologischer Lebensmittelhersteller e.V. (AÖL), a group of one hundred organic food processors, wrote that it is urgently interested in harmonizing the law and is therefore in favor of the new regulation: "Die AÖL ... , hat Verständnis für die schwierigen Trilogee, die das neue Gesetz mit sich brachte. Generell ist der Verband an einer Harmonisierung des Rechtes dringend interessiert und befürwortet deswegen die neue Verordnung", <<https://www.aol.org/themen/revision/>>. AÖL had well understood what Regulation (EU) 2018/848 will bring, compare footnote 34.