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## Legal interpretations that concern fair competition



Photo by Tina Nord from Pexels

### THE INITIAL SITUATION - A LEGAL DISPUTE LASTING MORE THAN TEN YEARS

A company from the food industry is trying to take action against an EU regulation which, in its opinion, puts EU companies at a disadvantage compared to US companies with regard to product labelling. The subject of the dispute is a mixture of organic fruit juices and organic herbal extracts, supplemented with vitamins and trace elements, marketed as a dietary supplement.

The company was prohibited by the competent authority from labelling this product according to the previous EU Regulations 834/2007 and 889/2008 for the first time on 18 January 2012. The company filed a lawsuit against this decision. The Administrative Court then referred the question of whether or not the restrictive interpretation of the

organic legislation with regard to the supplementation of organic food is legally compliant to the European Court of Justice (ECJ).

*The company had claimed unjustified and unequal treatment in the first ECJ proceedings:*

*“In addition, Herbaria claims that it is placed at a disadvantage in that it is not allowed to market Blutquick as an organic product, whereas, on the basis of the amendments made to Regulations 889/2008 and 1235/2008 by implementing Regulation 126/2012, a comparable beverage originating in the United States, and labelled as an organic product under the rules of that third country, can be freely marketed in the Union with such a label as organic, despite the addition of synthetic minerals and vitamins.”<sup>1</sup>*

*Continued on page 3*

## What's in TOS 188

*Dear readers*

In this issue of TOS, we are happy to have contributions from new authors. In the Country Focus section, Kateryna Shor explains about the development of the organic sector in Ukraine, both regarding legislation and market. It is remarkable that Ukraine, despite its current very difficult situation, continues to be an important producer and exporter of organic food (exports have even increased in 2022), and the country remains very active and shows great impetus and resilience.

As Kateryna says: “Despite the war, Ukraine continues to develop the organic market and increase organic exports”. In her article, Kateryna gives us detailed information on the evolution of the market, the development of the national legislation and the development of the organic sector in Ukraine. It is good to know that the organic sector remains as one of the priorities for the Ukrainian government.

We also warmly welcome Alexander Beck who addresses a burning issue: legal interpretations (NOP/EU) that concern fair competition. It is good that the international trade of organic goods flows smoothly, without unnecessary burden and bureaucracy, but sometimes there are cases where companies in the importing country can be disadvantaged by the facilities given to exporters from other countries and by interpretations of the legislation. Alexander's article describes an actual case in which these circumstances may occur.

In the article, ‘Talking about

the future’, Ilaria Barbonetti from IFOAM Organics Europe reports on the Organic Food Conference that took place in Tuscany, Italy on 22-23 May 2023. The conference addressed topics such as the future of organic food, the sustainability challenges of the ‘Farm to Fork’ strategy, multi-generational communication, and the new organic regulation. The article also includes links with direct access to all the information about the conference.

In this issue, we also publish the second parts of the articles, ‘Organic Enforcement (SOE) Final Rule’ by Marni Karlin of Karlin Strategic Consulting LLC, and ‘New Regulation on Organic Producer Groups; Challenges and Opportunities’ by Gabriela Soto of Eco- LOGICA S.A. Therefore, the readers who asked us further by email about these articles will now have more information. Thank you very much to both authors.

This issue ends with an article by Nuria on the use of ethylene and the question of whether it is allowed or not in the ripening of organic lemons and mandarins?

The idea for writing this article came from a question from some Spanish enterprises exporting oranges and mandarins to the German organic market. They asked us whether ethylene is allowed in organic standards (EU/Naturland/BioSuisse) for degreening these citrus products. In the case of Naturland, the standard refers to the EU Regulation for using ethylene, but the Regulation is quite ambiguous in its frequently



changing position about this matter, as remarked on by the Spanish certification body, CAE-CV.

On the other hand, the latest list of authorised inputs by the EU Regulation excludes the use of ethylene in pineapple cultivation, which may be an issue for exporting countries producing this fruit.

This TOS issue is completed with a wide range of short news pieces, covering very diverse subjects, such as some market data from the US and the EU (very good in the US, not so good in the EU), some updates on organic standards and regulations among others.

We hope that the content of TOS 188 will be of interest to all of you.

Kind regards,

*Jesús Concepcion-Cabrera and  
Nuria Alonso*  
Editors

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## THE FIRST REFERRAL TO THE ECJ - DISCRIMINATION ISSUE IS LEFT OUT

With regard to the issue of competence with a similar, NOP-certified product, which can be marketed in the EU as organic, while the one produced in the EU cannot, Advocate General Sharpston had previously made explicit reference to the far-reaching consequences of such a consideration: “*The question referred to may be of immense importance. (...) It is the problem of ‘mutual recognition’, which raises questions of equal*

*treatment and, where appropriate, reverse discrimination. If the European Union must permit the importation and subsequent sale of food labelled as organic that does not comply with European Union legislation, but only with equivalent guarantees, the question arises whether it must not also be permissible to market as organic food produced in the European Union that meets the requirements of the legislation providing those equivalent guarantees.”<sup>2</sup>*

However, the Administrative Court dismissed the company’s action for annulment on February 17, 2016. The appeal was also dismissed by the BayVGH<sup>3</sup> on July 29, 2021.

There was subsequently a pending appeal to the Federal Administrative Court, where the plaintiffs insisted on the considerable competitive disadvantage of their product compared to the US product in the EU market.

The defendant Bavarian authority insists that this disadvantage does not arise because the US products may bear the label “organic” but not necessarily the EU organic logo, and equal treatment with US products would lead to a significant change in the EU system and jeopardize the EU regulatory framework.

## THE SECOND REFERRAL TO THE ECJ - DISCRIMINATION ISSUE MOVES TO CENTER STAGE

The BVerwG<sup>4</sup> suspended the proceedings pursuant to Art. 267 TFEU, in order to obtain a preliminary ruling from the Court of



Justice of the European Union.

The BVerwG submitted three questions to the ECJ, which - in abbreviated form - are as follows:

1. May the EU organic logo be used for products imported into the EU that do not comply with the requirements of Art 16(1) of Regulation (EU) 2018/848, e.g. with regard to supplements used?
2. if yes: does it follow from Art. 20 GRC that the EU organic logo may also be used for products which are produced and distributed in the EU, even if they comply with the requirements of Art. 48 (1) of Regulation (EU) 2018/848 but not with the requirements of Art. 16 (1)?
3. Or does it follow from Article 20 of the CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION that such a processed foodstuff originating in the EU may be labelled in accordance with Article 30(1) of Regulation (EU) 2018/848 with reference to organic production without the EU organic logo being used?

## news shorts...

### CB LISTS FROM AND TO THE EU

The list of Certification Bodies (CBs) from EU Member States can be found at:

[https://ec.europa.eu/agriculture/ofis\\_public/actor\\_cbeu/ctrl.cfm?targetUrl=home](https://ec.europa.eu/agriculture/ofis_public/actor_cbeu/ctrl.cfm?targetUrl=home)

The list is sorted alphabetically by country, starting with Austria, and is constantly updated.

This list is sorted alphabetically by the CB’s name, starting with A Cert from Greece, and listing the countries where each of these CBs can operate. ■

More information at: [https://ec.europa.eu/agriculture/ofis\\_public/pdf/CBListAnnexIV.pdf](https://ec.europa.eu/agriculture/ofis_public/pdf/CBListAnnexIV.pdf).

The company had claimed unjustified unequal treatment in the first ECJ proceedings... ■

## news shorts...

### **BAN MICROPLASTICS IN COSMETICS, PLEASE!**

A group of beauty brands, led by Weleda, Beauty Kitchen and NAÏF and associations such as COSMOS, have signed an open letter to the EU Commission urging for a swift ban on added microplastics in all cosmetic products. Premium Beauty News explains that in 2015, Cosmetics Europe had recommended that manufacturers discontinue the use of synthetic, solid and non-biodegradable plastic particles used for exfoliating and cleansing in wash-off cosmetic products which were placed on the market as of 2020. However, the use of plastic polymers in the cosmetics industry is far from being limited to these products. Microplastics are found in human blood, lungs and even the placenta, and can carry toxic chemicals. The brands signing this open letter have demonstrated that microplastics are not necessary to formulate cosmetic products. Avoiding them is just a question of willingness. ■

More information at: <https://rethinkplasticalliance.eu>



### **THE DECISIVE CONSIDERATIONS OF THE BVERWG**

According to the BVerwG, the interpretation of the wording “in accordance with the provisions of this Regulation” in Article 33 (1) of Regulation (EU) 2018/848 was of decisive importance in this case. The appellate court, the BayVGh, had still assumed:

*“According to Art. 33 (1) of Regulation (EU) 2018/848, the logo of the European Union for organic products may only be used if the products comply with the provisions of this Regulation. According to Art. 44(1) of Regulation (EU) 2018/848, a product may be exported from the Union as an organic product and bear the European Union organic production logo, provided that it complies with the organic production rules of this Regulation. If, on the other hand, products are imported from a third country in accordance with Article 45 of Regulation (EU) 2018/848 under the conditions specified therein for the purpose of being placed on the market in the Union as an organic product or as a product in conversion, it cannot be inferred from the import regulations*

*of Article 45 et seq. of Regulation (EU) 2018/848 that this is associated with the right to bear the EU logo. Rather, it remains with Art. 33 of Regulation (EU) 2018/848.”<sup>5</sup>*

The BVerwG considered this view to be possible, but not compelling, and the right of an organic product imported in the EU may bear the EU organic seal even if it contains minerals and vitamins which can be subject to different interpretations.

With regard to the question of equal treatment, the BVerwG considered: *“It is in need of clarification whether it follows from Article 20 of the CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION that a processed food originating from the European Union may be labelled with reference to organic production pursuant to Article 30 (1) of Regulation (EU) 2018/848 without using the logo of the European Union for organic production.”<sup>6</sup>*

### **CONCLUSION AND OUTLOOK**

Recital (95) of Regulation (EU) 2018/848 makes clear the difference between products produced or manufactured according to European organic legislation and ‘organic

...the Administrative Court dismissed the company’s action for annulment .... ■

products' declared marketable via trade agreements: the possibility of access to the Union market for organic products that do not comply with Union organic production rules, but originate from third countries whose organic production and control systems have been recognised as equivalent to the Union system should be maintained.

Should the bridge of a trade agreement in connection with the principle of equality be able to restrict Europe's political freedom of design in the organic sector (and possibly beyond) in a more or less drastic way? Despite all differences, the legal dispute poses the question, also submitted to the ECJ by a German court, whether legal indications of



origin can be brought down via the general prohibition of deception.

The case is similar here; the principle of equality is not a permissible vehicle for more or less reversing unwelcome substantive decisions via trade agreements. The unequal treatment perceived by EU producers because of this is - to put it this way - a necessary systemic cost; this is the 'normative price' of a trade agreement. Any other view would make the outcome of a decided regulation subject to a subsequent trade agreement.

We look forward to seeing how the ECJ rules on this. The decision could have a significant impact on the Commission's efforts on mutual recognition agreements under Art-45 (1) (b) (iii) Regulation (EU) 2018/848. However, it could have effects far beyond that on other free trade agreements and call their functionality into question. ■

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The references are translations from original German texts.

Note: This is a shorter version of the article „Was lange währt, ... wird endlich entschieden - Abkommen zur gegenseitigen Anerkennung von Bio-Ware auf dem Prüfstand“ first published in edition 4/2023 of Zeitschrift Lebensmittel & Recht, publisher C.H. Beck, Munich.

#### REFERENCES:

<sup>1</sup>ECJ, Judg. 5.11.2014 – C-137/13, EuZW 2015, 72 Rn. 49.

<sup>2</sup>Advocate General Sharpston, Opinion 8.5.2014 – C-137/13, BeckRS 2014, 80881.

<sup>3</sup>Bavarian administrative court of justice.

<sup>4</sup>German federal administrative court.

<sup>5</sup>BayVGH, Judg. 29.7.2021 – 20 BV 16.1456

<sup>6</sup>BVerwG, Judg. 9.12.2022 – 3 C 13.21

## news shorts...

### QUESTIONS ON THE EU ORGANIC RULES?

The document 'Frequently Asked Questions on the Regulation (EU) 2018/848' has been updated. The current version is from 12 June 2023 and can be found at:

[https://agriculture.ec.europa.eu/system/files/2023-06/organic-rules-faqs\\_en.pdf](https://agriculture.ec.europa.eu/system/files/2023-06/organic-rules-faqs_en.pdf)

This link can be found on the website of the European Commission at the following address: [https://ec.europa.eu/info/food-farming-fisheries/farming/organicfarming/organics-glance\\_en](https://ec.europa.eu/info/food-farming-fisheries/farming/organicfarming/organics-glance_en) and also contains information on the aims of the EU organic policy, the organic logo and legislation on organic production. ■

The legal dispute reminds - despite all differences...



889/2008. Last year, the work began on approximation of the Ukrainian organic legislation to the new Regulation (EU) 2018/848. It became especially relevant after Ukraine was granted EU candidate status on 23 June 2022.

However, the majority of organic operators in Ukraine are now certified according to the EU organic standard, i.e. equivalent to EU Regulations 834/2007 and 889/2008, with gradual transition to the new Regulation (EU) 2018/848 of the European Parliament and of the Council. In addition, Ukrainian organic operators are often certified according to the US National Organic Program (NOP) and/or Canada Organic Regime (COR). Other organic standards used in

Ukraine are Bio Suisse (Switzerland), Naturland and Bioland (Germany), JAS (Japan), and KRAV (Sweden).

In early 2021, the regulatory framework necessary for the fully fledged implementation of the Ukrainian organic legislation (UA) was finalised, and in early 2022, the qualification exams for organic inspectors opened the way for the accreditation of control bodies. Exams are organised by the Ministry of Agrarian Policy and Food of Ukraine, and once the inspector has passed the exam, certification bodies can apply for accreditation. The availability of approved inspectors is one of the important requirements for accreditation.

The need to have and implement its own organic legislation is mainly due to the rule-making differences between the Ukrainian national standards and the EU regulation, since the legal system in the country is slightly different from the EU. The same applies to the implementation of control measures, which are based on Ukrainian legislation.

Nothing will change for the operators who plan to work only for export. They will continue to be certified under the standards of the importing country, while the control bodies which are not accredited in Ukraine will have to be listed on the register of foreign control bodies kept by the State Service of Ukraine on Food Safety and Consumer Protection.

Regarding imports, Ukraine imports mainly organic products but also some ingredients. Since implementation of the UA legislation



Taras Vysotskyi at Biofach, Photo by Thomas Alfoeldi / SECO / FiBL

started, all the importers will need to be certified according to the UA standards, and then all the organic imports will need to be subject to additional controls.

According to Taras Vysotskyi, First Deputy Minister of Agrarian Policy and Food, Ukraine has fulfilled the obligation to harmonise its organic legislation with the relevant EU regulation. The effective law, adopted in 2018, contains provision of Regulations (EU) 834/2007 and 889/2008. In addition, all the necessary by-laws that ensure its implementation have been adopted (a total of 15 by-laws, four of which ensure state control).

With the purpose of implementing the organic legislation, the exams for organic inspectors were organised. Based on their results, 36 inspectors confirmed their competence in organic production.

This allowed the National

## news shorts...

### UPDATED SOIL ASSOCIATION STANDARDS

The Soil Association (SA) has updated its standards for Great Britain and Northern Ireland. Due to Brexit, the SA Standards for Great Britain are now different from those for Northern Ireland, because the Northern Ireland ones have to comply with the current EU Regulation 2018/848. The SA's Sourcing Organic Ingredients Annex has also been updated to version 1.7 ■

Source: <https://www.soilassociation.org/certification/certification-updates/2023/may/25/update-to-soil-association-standards-for-great-britain-and-northern-ireland/>

...the majority of organic operators in Ukraine are now certified according to the EU organic standard... ■

## news shorts...

### UGLY FOOD CAN BE BENE & BONO

The waste of organic fruit and vegetables just because of minor damage or unattractive appearance is a big problem; and wasting these products goes radically against the principles of responsible consumption.

Bene Bono operates in France and Spain through its website and offers organic products directly to consumers that have not been accepted by traditional distribution channels for mainly aesthetic reasons. Bene Bono works directly with suppliers who are organic-certified growers, organising a box scheme service to distribute these non-perfectly looking products directly to consumers.

Bene Bono was founded in 2020 in France by Grégoire Carlier, Sven Ripoché and Claire Laurent. It has recently started to operate in Spain, so far in the Madrid area. According to Bene Bono, after just a few weeks of starting their service in Spain, they have already saved 7.8 tons of 'ugly' organic fruit and vegetables. ■

More information: <https://benebono.fr/>

Accreditation Agency of Ukraine to start the accreditation of organic certification bodies. In late May 2023, the first organic certification body — Organic Standard LLC — was accredited according to the national organic standards of Ukraine, and in early June, it was listed in the relevant national register kept by the Ministry of Agrarian Policy and Food of Ukraine.

Accreditation of the first national certification body is a long-awaited event for the Ukrainian organic market. It allows implementation of the national organic legislation in Ukraine to begin, which is an integral part of organic sector development.

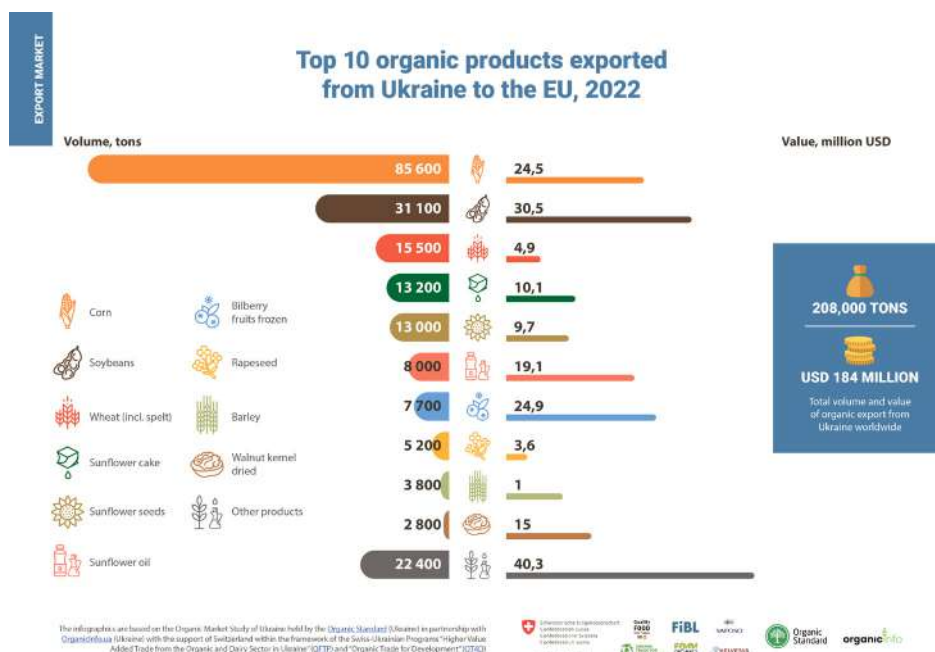
Certainly, the aforementioned event is a result of fruitful and long-term cooperation among state authorities, organic sector stakeholders and international partners, both in terms of establishing the regulatory framework and other

measures aimed to ensure effective functioning of the Ukrainian organic market.

Implementation of the national organic legislation will provide robust competition on the market, and consumers will be guaranteed that the products they buy meet their expectations, as bringing the organic market into a legal field will allow the relevant control systems to be applied.

Today, the organic sector has to re-focus in accordance with the Ukrainian legislation. Adaptation will not be complicated, and consumers may expect the appearance of organic products labelled with the state organic logo on the Ukrainian supermarket shelves soon

Starting from 1 July 2024, certification under the Ukrainian national standards will become mandatory for the operators to be able to sell organic food products



Accreditation of the first national certification body is a long-awaited event for the Ukrainian organic market. ■

on the domestic market. However, the operators certified under foreign standards by certification bodies listed on the National Register of the Certification Bodies in Organic Production and Circulation of Organic Products have the possibility to be certified under the national standards in a simplified procedure, and if these operators are in conversion, their organic ‘experience’ will be taken into account.

It should also be noted that given Ukraine’s course of integrating with Europe and by obtaining EU candidate status, the Ministry of Agrarian Policy and Food of Ukraine continues to work on harmonising the Ukrainian organic legislation with the EU regulation applied since 2022, specifically, Regulation (EU) 2018/848 of the European Parliament and of the Council.

## TWO UKRAINIAN ORGANIC PROCESSORS AND TRADERS EXPLAIN THEIR EXPERIENCE TO TOS READERS

### 1. CHEMEX LTD, LLC

Iryna Sholokhova, board member at CHEMEX LTD, LLC (grain and pulses processor and trader)

Today, organic processors face a reduction in the volume of organic raw materials for processing due to the contraction of sown area in Ukraine, a decrease in domestic demand for organic products, and logistical problems during export.

The recent ban on imports of Ukrainian agricultural products to five EU countries made the situation even more complicated. On one hand, this is because of the closure of sales markets for agricultural products from Ukraine in these countries, on the other hand, it is due to difficult



transition of the goods. All these have led to accumulation of trucks on the borders, longer delivery times and, as a result, high freight prices. Importers do not want to make FCA agreements and take the risks of finding vehicles and delivering the goods, therefore, the goods are mainly delivered on a DAP basis (Delivery at Place).

The ban remains, although the list of products concerned has changed since the beginning of June.

It is the second time that CHEMEX LTD has been affected by war. The company was registered in Donetsk region 20 years ago, and with the beginning of war in the east of Ukraine in 2014, it had to relocate to Kyiv. And from February to mid-April, the community where the company’s production facilities are located was temporarily occupied. After liberation, the company resumed its operation, and the

production director has served in the Armed Forces of Ukraine since the first month of war.

CHEMEX LTD (TM Proorganica) has been certified organic since 2019 and cooperates with small-scale producers from all over the country. The company also supplies ingredients for food and feed production in the EU and UK.

Despite the challenges of today, the company is optimistic about the future and is contracting and financing farmers to grow crops for further processing at their facilities.

### 2. Brancho Ukraine LLC

Andrii Shkliar, Commercial Director, Brancho Ukraine LLC

Brancho Ukraine LLC produces dried fruit and vegetables. The company’s decision to develop exports was made before the COVID-19 pandemic, and while the pandemic was spreading, we invested in our own production to meet the certification standard requirements.

In January 2022, we received our first EU organic certificate and started working on the creation of a product line of organic snacks,



...Ukraine continues to work on harmonising the Ukrainian organic legislation with the EU regulation...

but Russia's full-scale invasion of Ukraine changed the time horizons of our plans. Nevertheless, we were able to resume production in March 2022, keep the team, and even increase our share of the local market.

Missile attacks on the energy infrastructure of Ukraine made us develop an individual power supply plan to maintain production in case of power cuts. Power supply and resilience of our production were the key things that worried our potential partners.

We attracted the interest of one German brand which, in fact, was choosing between us and a Polish company to order production of organic snacks under their private label. During Biofach 2023, all the details and production plans were finalised and approved. This is a complicated but quite successful contract which greatly expanded the possibilities of our company, having allowed the details of export operations to be polished, even under the current conditions of martial law.

## OVERVIEW OF THE DOMESTIC MARKET

As noted above, as of 2021, there were 422,299 hectares under organic management with 528 certified operators, and domestic sales of Ukrainian organic products (excluding imports) reaching USD 33 million.

Dairy products accounted for more than half of organic food products consumed in Ukraine before the full-scale invasion, followed by fruit and vegetables and cereals, i.e. groats, flours and milling products.

Organic Standard LLC, which certifies almost all the organic operators that work domestically, analyses the situation on the domestic



market. However, one can definitely say that organic domestic sales have decreased due to significant population movement. According to the UN, about 8 million people have fled Ukraine since the full-scale invasion, mainly women with children who were key consumers of organic products.

## ORGANIC EXPORT UNDER CURRENT CONDITIONS

In the past few years, Ukraine has been the biggest organic exporter to the EU, with over 80% of all organic products from Ukraine being exported.

In 2021, Ukraine slightly reduced its organic export to the EU (189,239 tonnes in 2021 vs. 217,210 tonnes in 2020), but it still remains among five leading suppliers of organic products to the EU. The total share of Ukrainian organic export amounted to 6.6% in 2021 (<https://agriculture.ec.europa.eu/system/files/2022-09/>

[agri-market-brief-19-organic-imports-en.pdf](#)).

While the domestic market stagnates, exports are growing, strange as it may sound under the current conditions. Despite the disrupted supply chains and blocked seaports, organic exports to the EU amounted to about 208,000 tonnes in 2022 and the total volume of organic export from Ukraine worldwide amounted to about 245,000 tonnes.

In 2022, 36 countries worldwide imported organic products from Ukraine, 67 different products were exported and the value of total exports from Ukraine was approximately USD 219 million. Of this, 95% of exports were to Europe (both EU and non-EU countries), 4% to North America, 1% to Asia and small amounts of organic products were exported to Australia.

In 2022, the supply conditions and routes changed due to the war. While before sea freight was mainly used, in 2022 road transport prevailed.

The decision to abolish import tariffs and duties on Ukrainian goods

...as of 2021, there were 422,299 hectares under organic management with 528 certified operators...

exported to the EU, exclusion of Ukraine from the list of countries to which additional official controls on organic products imported to the EU apply, and general support of Ukraine by the EU and other international partners greatly contributed to the increase in organic export to the EU. According to the organic standard data on their clients presented at Munich Organic in May, the organic export in Q1 2023 exceeded the volumes in similar periods from the previous three years. Overall, 37,000 tonnes were exported in Q1 2023.



International support of Ukraine and the abolition of import quotas facilitate the export of final products and not only with regard to raw materials and feed.

Ukraine used to have quite a broad export geography, but due to the seaport blockade and air traffic ban in 2022, the volumes of supply to more distant countries, such as the UAE, China, Japan, etc., slightly decreased due to the complicated logistics. Correspondingly, exports to the European countries have significantly increased — up to 95%. The Netherlands, Germany, Austria, Switzerland, Poland, Lithuania, USA,

Italy, United Kingdom, and Czech Republic were TOP10 importing countries in 2022. However, exporters now have to find new supply routes for their products due to the import ban to Bulgaria, Hungary, Poland, Romania, and Slovakia.

Fortunately, organic production remains one of the priorities for the development of the agri-food sector in Ukraine. Ukraine is one of the top exporters of organic products in

Europe, and its goal is not only to maintain or gain a foothold there, but also to lead the organic food market worldwide. *“We do our best to ensure that our products reach the final consumer and meet all their needs. As representatives of the state, we make maximum efforts to minimise obstacles to export and present products abroad at the largest international events”*, said Andrii Lytvyn, Deputy Director, State Institution, ‘Entrepreneurship and Export Promotion Office’. ■

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...organic production remains one of the priorities for the development of the agri-food sector in Ukraine. ■

# Organic Enforcement (SOE) Final Rule

*Dear readers, in this section we continue with the second part of this article by Marni Karlin.*

## ● STRENGTHENING RECORD-KEEPING AND SUPPLY CHAIN TRACEABILITY

The SOE final rule adds requirements to improve certified operations' and certifiers' record-keeping and fraud prevention procedures. For certified operations, this includes:

- Labelling all non-retail containers (used for raw material shipping or storage, but not in retail display

## news shorts...

### NEW ZEALAND ORGANIC LAW IN PROGRESS

New Zealand is currently immersed in the process of issuing a national legislation for organic production.

The national organic standard will set the production and processing rules for products labelled as organic, and any requirements that are specific to the products covered by the standard. ■

For more information on the changes and updates to the organic products law see: <https://www.mpi.govt.nz/agriculture/organic-product-requirements-in-nz/changes-to-organic-products-law/TOP>

or sale) with information<sup>8</sup> that identifies contents as organic and includes traceability information. This does not apply to non-retail containers used to ship or store products packaged for retail sale with organic identification visible on the retail label. These new mandatory labelling requirements are designed to improve traceability, help maintain the audit trail and reduce accidental mishandling.

- Incorporating supply chain traceability - within a certified operation, back to its suppliers, and forward to its customers<sup>9</sup>. Certified operations must maintain records of activities from purchase or acquisition, through production, to sale or transport; maintain records that trace back to the last certified operation in the supply chain; and maintain audit trail documentation, including the identification of agricultural products as organic, name of last certified handler, and information that determines the source, transfer of ownership and transportation of the product.
- Maintaining and implementing a 'fraud prevention plan'<sup>10</sup>. 'Organic fraud' is defined in the final rule as "deceptive representation, sale, or



labeling of nonorganic agricultural products or ingredients as "100 percent organic," "organic," or "made with organic (specific ingredients or food group(s))".<sup>11</sup> Fraud prevention plans must be included in an operation's organic system plan: verify the organic status of suppliers and products; describe monitoring practices and procedures used to verify suppliers and products received, and prevent organic fraud; and be appropriate to the activities, scope and complexity of the operation.

The rule also requires certifiers to maintain procedures to identify operations and products that are at high risk of organic fraud<sup>12</sup>, conduct risk-based supply chain traceability audits<sup>13</sup>, and incorporate mass-balance audits into inspections<sup>14</sup>. 'Supply chain traceability audit' is defined in the new rule as "the process of identifying and tracking the

The SOE final rule adds requirements to improve certified operations' and certifiers' record-keeping... ■

## news shorts...

### RESILIENT ORGANIC SALES IN THE US

The organic market shows its resilience and is growing in spite of all the challenges faced lately such as inflation, which reduces consumers' purchasing capacity, supply chain disruptions caused by the pandemic and global political issues, a proliferation of competing food labels and a labour shortage felt acutely by organic producers.

Products which are certified organic now account for 6% of total food sales in the United States.

To give some numbers: fruit and vegetables, followed by beverages (including coffee and soft drinks) are at the top of organic sales. Eggs and dairy sales grew over 7% from the previous year, baby food rose by 13%, grains and potatoes grew by 10 %, and there was the same growth for organic pork.

OTA is optimistic and sees a bright future for the organic sector. ■

Source: <https://www.ota.com/market-analysis/organic-industry-survey/organic-industry-survey>



movement, sale, custody, handling, and organic status of an agricultural product along a supply chain to verify the agricultural product's compliance.<sup>15</sup> Certifiers are also required to conduct unannounced inspections in at least 5% of the operations they certify<sup>16</sup>, verify product traceability<sup>17</sup>, and conduct inspections at least once per calendar year<sup>18</sup>.

#### ● *REQUIRING USE OF ELECTRONIC IMPORT CERTIFICATES*

Organic import certificates contain detailed information about the quantity, origin and organic status of imported products, and provide trackable and auditable documentation to demonstrate organic compliance and support investigations of misrepresented products. Historically, the NOP has only required organic import certificates for products imported from certain

countries of origin as required by equivalency arrangements.

Under the SOE final rule, the use of electronic NOP import certificates issued from the USDA Organic Integrity Database (OID) will be mandatory for all imported organic products<sup>19</sup>. These certificates are meant to provide traceability to the port of entry and ensure an auditable record trail for monitoring and fraud detection. Import certificates generated in the OID will then be entered into the US Customs and Border Protection (CBP) import system.

Certificates must include origin, destination, name of certifier issuing the certificate, harmonised tariff code (when applicable), total weight, organic standard to which the product is certified, 10-digit identifier for the exporter in the OID, and a unique numerical identifier<sup>20</sup>. Certificates

Certifiers are also required to conduct unannounced inspections in at least 5% of the operations they certify. ■

may be issued to cover individual or multiple shipments, or shipments over a defined period of time or volume, depending on the certifiers' oversight systems<sup>21</sup>.

So how does an import certificate get issued? First, the exporter requests an import certificate from its certifier<sup>22</sup>; next, the certifier evaluates the request and, if approved, generates the import certificate and provides it to the exporter<sup>23</sup>. The exporter sends the import certificate to the importer, at which point the importer or designated customs broker enters import certificate data into the CBP system<sup>24</sup>. The importer is responsible for verifying that products received are associated with a valid import certificate and have not been

fumigated or irradiated<sup>25</sup>.

Some exporters based outside the US will need to become USDA-certified, even if this is not required by their home country's organic scheme. Additionally, the USDA will work with other governments to facilitate the inclusion of internationally accredited certifiers in the OID, whether through trade arrangements, equivalency or recognition agreements, or other methods.

The USDA is currently building the technology within the OID to support these requirements, and we expect that they will conduct training when launched.

#### ● *CLARIFYING CONDITIONS AND REQUIREMENTS FOR FOREIGN CONFORMITY ASSESSMENTS*

The SOE final rule clarifies the conditions under which foreign-produced products can be labelled and sold as organic in the United States. This is meant to strengthen the oversight and enforcement capacity of organic imports, but is not a change to existing practices.

The Organic Foods Production Act of 1990 allowed agricultural products certified to another country's organic certification programme to be imported and represented as organic in the United States, if the foreign organic certification programme provides safeguards and guidelines that are at least equivalent to the requirements under the USDA organic certification programme<sup>26</sup>.

The US currently has organic equivalency arrangements with Canada, the European Union, Japan,

Korea, Switzerland, Taiwan and the United Kingdom. These partnerships facilitate the trade of organic products without requiring certified operations to hold multiple organic certifications. The USDA works closely with other US government agencies to assess the equivalence of foreign organic certification programmes and negotiate appropriate trade arrangements and agreements.

The new rule clarifies that foreign product that is produced and handled under another country's organic certification programme may be sold, labelled, or represented in the US as organically produced if the US determines that country's organic certification programme provides technical requirements<sup>27</sup> and a conformity assessment system<sup>28</sup> that are at least equivalent to the NOP<sup>29</sup>. The SOE final rule codifies the USDA's existing authority to establish equivalence determinations, and codifies the existing practices and procedures that the USDA uses to establish, oversee and terminate such equivalence determinations.

#### WHERE DO WE GO FROM HERE?

Following the January publication of the SOE final rule, organic stakeholders engaged with supply chains that touch the United States have been poring over the rule - reading it, analysing its impact on their operations, asking clarifying questions of their consultants and trade associations and the NOP, and working hard to be prepared for the March 2024 implementation deadline. They are doing the critical thinking

## news shorts...

### CONCERNING MARKET DATA IN THE EU

- In Denmark, sales of organic food in 2022 dropped by 3%, a decline for the first time since reporting began in 2003.
- From January to October 2022, organic sales in Germany fell by 4.1%, with volumes declining by 5.7%, the first time ever that this has occurred.
- In France, for the second year in a row, sales declined in 2022, a contraction of 6.3%. ■

Source: Organic Insider, 26.04.2023

The SOE final rule codifies the USDA's existing authority to establish equivalence determinations... ■

## news shorts...

### KEEP GMO LABELLING

In the EU, it is obligatory to identify GM ingredients in food products. It is true that GM ingredients are widely imported and used in conventional feed, but the obligatory transparency in food labelling has led to a high percentage of the European population identifying and rejecting GM foods.

According to the organisations, Friends of the Earth Europe and Foodwatch, the EU Commission is preparing new legislation that excludes most GM plants from any GMO labelling requirements. However, the agri-industry is pushing to exclude all new GMOs from GMO labelling. If this decision is taken, consumers, farmers and the rights of the whole food chain will be sacrificed to meet the demands of the big pesticide corporations. ■

More information: <https://friendsoftheearth.eu/wp-content/uploads/2023/05/FoEE-FW-Unmasking-new-GMOs-briefing-ENG.pdf>

to assess what is required of them, design and implement changes, and communicate the new paradigm to the organic community. Operations are assessing their supply chains to ensure that all required entities are certified, and fraud prevention and other supply chain traceability programmes are in place.

Certifiers are ensuring that they understand their responsibilities, from issuing electronic certificates, to implementing increased training for staff. The USDA staff are building the technology needed to ensure that implementation is seamless, while trade associations, consultants and others are communicating to the supply chain and consumers alike about the new regulations and their intended outcomes.

The work continues - both to implement this rule and to advocate for continuous improvement in the organic regulations worldwide - which will increase the integrity of the global organic market, bolster confidence in organic, and transform the oversight and enforcement of organic production worldwide. ■

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Operations are assessing their supply chains to ensure that all required entities are certified.... ■

### RESOURCES

<sup>8</sup> See 7 CFR 205.307

<sup>9</sup> See 7 CFR 205.103

<sup>10</sup> See 7 CFR 205.201

<sup>11</sup> See 7 CFR 205.2

<sup>12</sup> See 7 CFR 205.504(b)(7)

<sup>13</sup> See 7 CFR 205.501(a)(21)

<sup>14</sup> See 7 CFR 205.403(d)(4)

<sup>15</sup> See 7 CFR 205.2

<sup>16</sup> See 7 CFR 205.403(b)

<sup>17</sup> See 7 CFR 205.403(d)(5)

<sup>18</sup> See 7 CFR 205.406(b)

<sup>20</sup> See preamble, at page 59.

Accessed at <https://public-inspection.federalregister.gov/2023-00702.pdf>.

<sup>21</sup> See id at page 63.

<sup>22</sup> See 7 CFR 205.273(a)

<sup>23</sup> See 7 CFR 205.273(b)

<sup>24</sup> See 7 CFR 205.273(c)

<sup>25</sup> See 7 CFR 205.273(d)

<sup>26</sup> See 7 USC 6506(b)

<sup>27</sup> ‘Technical requirements’ are defined as “a system of relevant laws, regulations, regulatory practices, standards, policies, and procedures that address the certification, production, and handling of organic agricultural products.” 7 CFR 205.2

<sup>28</sup> ‘Conformity assessment system’ is defined as “all activities, including oversight, accreditation, compliance review, and enforcement, undertaken by a government to ensure that the applicable technical requirements for the production and handling of organic agricultural products are fully and consistently applied.” 7 CFR 205.2

<sup>29</sup> See 7 CFR 205.511

## New regulation on organic producer groups: challenges and opportunities.

*Dear readers, in this section we continue with the second part of this article by Gabriela Soto*

### 3. ELEMENTS THAT AN INTERNAL CONTROL SYSTEM (ICS) MUST HAVE

Each organised PG must have an ICS. The SOE NOP defines ICS as an internal quality management system that establishes and governs the review, monitoring, training and inspection of the operation of the group of producers, and the

acquisition and distribution of inputs and production resources and shared management, to maintain compliance with the USDA organic regulations (7 CFR 205.201(c)). The requirements of the ICS are not too variable between the two regulations.

Certification literacy is not always a strength in PGs; for this reason, writing policy and procedure requirements, such as the definition of a geographic area, as well as measures to protect the inspectors and the ICS members from conflicts of interest, can be a major task for some of them.



Examples of documents should be made available for the organisations to use as examples. With increases in policies and procedures, it will be important to keep a good balance between the time invested in reviewing documentation versus the time invested in the field.

### news shorts...

#### SUPPORT FOR UNCERTIFIED OPERATORS

The USDA National Organic Program's Strengthening Organic Enforcement (SOE) Rule poses significant changes for the organic community. The US certification body CCOF has created an easy-to-use self-assessment for uncertified operations to use when navigating the new regulations. Uncertified storage facilities, private label brand owners, brokers, traders, wholesalers, distributors, importers, exporters, transporters, and transloaders should take time to review this tool. ■

More at: <https://ccof.org>



The SOE NOP defines ICS as an internal quality management system. ■

**Table 2.** Elements required for the Internal Control System (ICS) for Producer Group Certification

Requirements of the Internal Control System	NOP-USDA	EU Regulation
Documentation describing the organizational structure	7 CFR 205.201 (c)(1)	-
Record of all its members (location record, maps, letters of commitment, etc.)	7 CFR 205.201 (c)(2)	848 Art 36 (1)(g)(i)
Procedure for registration of new members, new plots, or new activities	7 CFR 205.201 (c)(5)	848 Art 36 (1)(g)(iii)
Measures in case of non-compliance among members (internal sanctions)	7 CFR 205.201 (c)(10) Describe internal audits in addition to internal inspections.	848 Art 36 (1)(g)(vii) 2021/279 Art 5(f)
Criteria to define high-risk producers	7 CFR 205.201 (c)(6)	
Describes how common resources are managed	7 CFR 205.201 (c)(7)	
Describe training and technical assistance to producers	7 CFR 205.201 (c)(8)	2021/279 Art 5(e)
Internal inspections to 100% of its members annually	The producer must be present during the internal inspection. Must include mass balance. 7 CFR 205.400 (g)(8)	848 Art 36 (1)(g)(ii)
Additional % of inspections based on risk	7 CFR 205.201 (c)(6)	848 Art 36 (1, g, ii)
Number of internal inspectors	-	The number of internal inspectors must be adequate and proportional to the activity of the PG. Must be a competent person. 848 Art 36 (1)(h)
Internal inspectors training	Describe how training is done in the organic management plan (7CFR 205.201 (c)(8)	It must be carried out annually and must include an evaluation of acquired knowledge. 848 Art 36 (1)(g)(iv) 848 Art 36 (1)(h)(ix) Details of training dates 2021/279 Art 5(d)
Conflict of interest of internal inspectors	A strategy must be in place to protect the ICS and internal inspectors from retaliation for conflicts of interest. 7CFR 205.201 (c)(3)	The inspector must report potential conflicts of interest annually. 848 Art 36 (1)(h)(vii)
Outsource internal inspections		The ICS may subcontract internal inspections. 848 Art 36 (1)(h)(xii)
Rol of internal inspectors	-	Carry out inspections of the members of the PG according to the calendar, prepare reports within a reasonable period, present a declaration of conflict of interest updated annually 848 Art. 36 (h)
The record system is described to guarantee traceability and mass balance, in a common marketing system	7CFR 205.201 (c)(9)	848 Art 36 (1)(g)(viii) 2021/279 Art 5(g)
Information that the ICS must send to the CA immediately throughout the year	-	Suspected non-compliance, suspensions, and marketing prohibitions 2021/279 Art 6

## 4. REQUIREMENTS FOR THE INSPECTION OF PRODUCER GROUPS BY CERTIFICATION AGENCIES

Certification agency inspection of PGs is described in these new regulations. The two regulations seem to have a different understanding

of the role of certification agencies evaluating the ICS. While the SOE NOP gives certification agencies good flexibility, making it possible to better adapt to local conditions, the EU regulation considers it necessary to describe step by step how to perform mass balances, traceability, etc. This

degree of description is interesting when one considers that certification agencies have been doing these measures for years to comply with national regulations (in Costa Rica, Mexico, Central America, etc.).

A new and challenging issue is the percentage of residue testing in

**Table 3.** Requirements for certification agencies to inspect a producer group

Requirements to inspect a PRODUCER GROUP by a Certification Agencies	NOP-USDA	EU Regulation
Sample size	At least 1.4 times the square root or 2% of the total number of grower group members, whichever is greater, must be visited individually 7CFR 205.403(a)(2)(iii)	5% per year but not less than 10 members (if the group has only 10 members or less, all producers will be inspected) 2021/1698 Art 9 (7) 2021/279 Art 7(e)
All inspections must be planned considering risk analysis	All high-risk GOP members according to the Certification Agency must be inspected. 205.403(a)(2)(iii)	2021/1698 Art 9 (2)
All facilities must be inspected	205.403(a)(2)(iv)	2021/1698 Art 9(9)
Date of the inspection		The most appropriate time to verify compliance with critical control points 2021/1698 Art 9(8)
Unannounced inspections	5% of all operators per year (not specific to PRODUCER GROUP) 7 CFR 205.403 (b)(1)	10% of all operators per year (not specific to PRODUCER GROUP) 2021/1698 Art 9(5) 2021/279
Residue testing	-	2% of the producers of each PO must be sampled. And 5% of the total number of operators 2021/1698 Art 12(2) based on risk analysis 2021/1698 Art 12(3). Lots with high risk will be sampled every year at the appropriate time 2021/1698 Art 12(5).
Shadow inspections of internal PO inspectors	7 CFR 205.204 (a)(2)(ii)	-
Traceability and mass balance must be carried out	7 CFR 205.400 (g)(9)	Documented accounting controls. 2021/771 Art 1 And based on risk assessment. 2021/1698 Art 11(2 and 3)
Evaluation of the effectiveness of the ICS	7 CFR 205.403 (2)(i)	The CA should have a tool to assess the effectiveness of ICS 2021/1698 Art 13(1)(h)
Publish the name and number of the producers the PG	Integrity shares information about each operator	2021/1698 Art 17(a)(ii)

PGs for the EU Regulation. The cost of residue testing in most regions is around \$300 per sample. A 2% sampling rate may increase the costs of certification considerably and considering that in many scenarios the products are low risk by nature, this measure may not increase integrity. One proposal could be to test initially, but if in recurrent samples the results are negative, the percentage sampled can decrease. Another possibility is to mix samples to overcome this cost.

Group certification for organic production has been in place for many years in many countries of the world. The system has been tested and improved thought the years, long experience has been built up and that should be taken into consideration. At the same time, until now, it was not possible to opt for group certification within the EU or the US. However, it can also be an interesting option for European and North American smallholders when selling their product all together, such as certain agrarian co-operatives do.

It is good that both the EU Regulation and the SOE NOP regulate the option of group certification for the EU and the US too, but it should be done without imposing their rules on the rest of the world, which knows from experience how to organise a group certification project.

The organic grower group model provides, in many cases for the first time, concrete benefits for the world's most vulnerable organic smallholders by providing access to more valuable foreign markets for high-demand organic crops like coffee, tea, cocoa and bananas. Individual certification is far too expensive, and these farmers need to aggregate their products to meet market demands.

Producers from Africa, Latin America, and Asia exporting to these



two main markets will now need to comply with two different organic import requirements, as many need both of these markets to provide adequate income.

In the longer term, the harmonisation of best practice and standards is key to their survival, in the meantime, much attention, additional resources and collaboration are needed to ensure that these farmers can fairly compete and continue to benefit from this creative solution to organic certification.

We intend to continue this series of articles in further issues of TOS to stimulate discussions, ideas and solutions as we all work to comply with these new regulations, listening to what PGs have to say. ■

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## RESOURCES

- Florentine Meinshausen, Toralf Richter, Johan Blockeel and Beate Huber Project: Consolidation of the Local Organic Certification Bodies—ConsCert (2014–2018)// March 2019 <https://orgprints.org/id/eprint/35159/7/fibl-2019-ics.pdf>.

The authors would like to thank Vitoon Panyakul (Green Net, ASEAN Organic Federation) for his valuable contribution.

In the longer term, harmonisation of best practice and standards is key to their survival... ■

# Talking bout the future

The Organic Food Conference (<https://organicfoodconference.bio/>) took place at Aboca's premises in Sansepolcro, Tuscany, Italy on 22-23 May 2023. A broad variety of participants, from organisations and companies to university students, media and others came together to discuss and network.

The conference kicked off with a keynote speech by Christian Felber, initiator of 'Economy for the Common Good'. His words left a profound impression on the entire audience, especially when he emphasised that the current global ecological crisis needs the establishment of a sustainable, socially responsible and human-centric economic model.

Over the two days, four different expert panels discussed hot topics for the sector, such as the future of organic food in a changing world,

organic in a polluted world. Besides attending sessions, participants had the opportunity to visit the fascinating Aboca's Museum, which focuses on the story of herbs and health through the ages, and to enjoy a delicious organic dinner, offered by the 'BEING

Organic in EU' project, the sponsor of day two.

Detailed recaps of the two days of the conference can be found on the IFOAM Organics Europe website:

- Organic Food Conference – day 1 [https://www.organicseurope.bio/news/exploring-the-future-of-organic-agriculture-highlights-from-day-1-of-the-organic-food-](https://www.organicseurope.bio/news/exploring-the-future-of-organic-agriculture-highlights-from-day-1-of-the-organic-food-conference/)



sustainability challenges of the 'Farm to Fork' strategy, multi-generational communication, and the new organic regulation - namely, how to produce

[conference/](#)

- Organic Food Conference – day 2, sponsored by the 'BEING Organic in EU' project <https://www.organicseurope.bio/news/a-recap-of-the-organic-food-conference-by-being-organic-in-eu/> ■

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Detailed recaps of the two days of the conference can be found on the IFOAM Organics Europe website. ■

# When can I use ethylene?

The use of ethylene gas may be permitted in organic fruit production for ripening and degreening; on pineapple, it is used to induce flowering and on citrus, it is useful for controlling fruit fly, because if citrus fruits are harvested when they are still green, fruit fly infestation can be avoided. Afterwards, citrus are degreened by exposing to ethylene gas in close chambers.

However, early-ripening oranges and mandarins reach their maturity before the typical orange colouring of the peel. For this reason, the process of degreening with ethylene can also be used just to modify the external colour of the fruit peel.

The restrictions on the use of ethylene have varied in the EU Regulation several times since 2014:

- From 2014 to 2015: it was permitted for the degreening of bananas, kiwis and kakis, to induce flowering on pineapples, to inhibit the sprouting of potatoes and onions and for the degreening of citrus, but only as a strategy to control fruit fly.
- From 2016 to 2018: there was no restriction on the use of ethylene in organic production in the EU.
- In 2018: ethylene was restricted for indoor use with all fruits, not only citrus.
- In December 2019: all restrictions on the use of ethylene were raised again.
- Regulation (UE) 2021/1165 of 15

July 2021: allowed ethylene only for bananas and potatoes, and on citrus to prevent damage by fruit fly; therefore, the use of ethylene in pineapple cultivation is not currently allowed.

Regarding the use of ethylene with citrus, CAE-CV, the public certification body (CB) from Valencia (Spain), a CB that certifies many citric crops, argues that the current wording of the Regulation in this matter is not clear enough and it may be interpreted that ethylene can only be used in citrus if there is a problem with fruit fly. CAE-CV asks that the wording is modified to clearly permit ethylene for the degreening of citrus, removing this permission from applying only to the presence of the fly pest. ■

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## FOR FURTHER INFORMATION SEE:

Comments from the CAE-CV to the EU Commission: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives>

Webinar sessions on the new EU Organic standard for African companies: [https://www.gfrs.de/fileadmin/files/info/FAQ\\_European-requirements-for-organic-farming\\_EN.pdf](https://www.gfrs.de/fileadmin/files/info/FAQ_European-requirements-for-organic-farming_EN.pdf)

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