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EU Legal Framework — Petr CEJKA

Contract number 2017 96 05 – New Food Investigation Techniques –
Phase II - *Course 2a: E-Commerce of food standard*

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Overview of the EU legal framework applicable to e-commerce of food business operating on Internet

- New OCR
- -General Legal basis – NOW – FB, placing on the market, food information, advertising
- Focus of Official Controls of E-commerce
- Administrative Assistance and Cooperation
- Measures in case of non-compliance



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Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products (Official Controls Regulation)

applies since 14/12/2019

Article 36 - Sampling of animals and goods offered for sale by means of distance communication

http://ec.europa.eu/food/safety/official_controls/legislation_en

https://ec.europa.eu/food/sites/food/files/safety/docs/oc_qa_ocregulation_20170407_en.pdf

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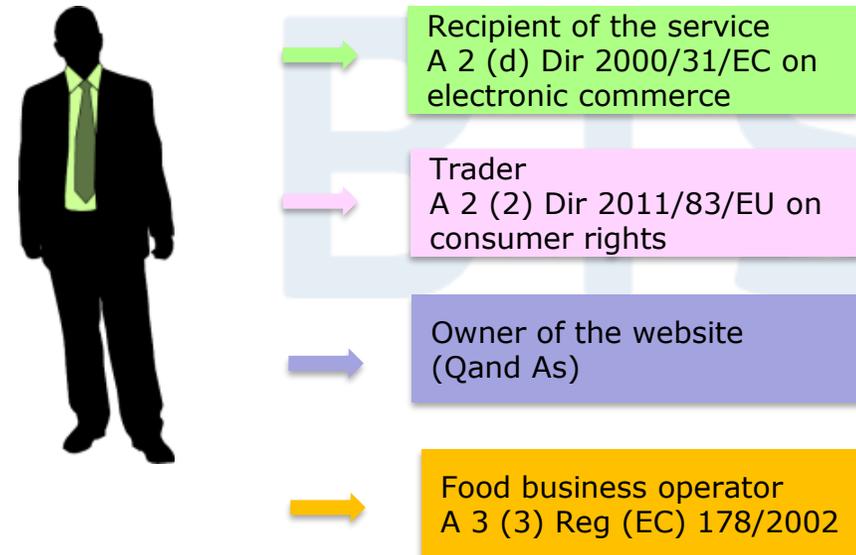
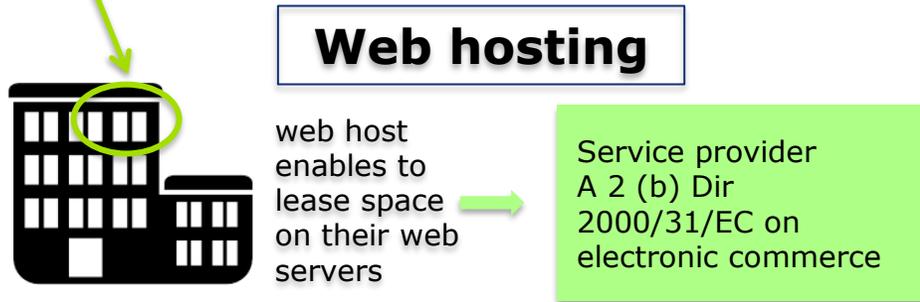
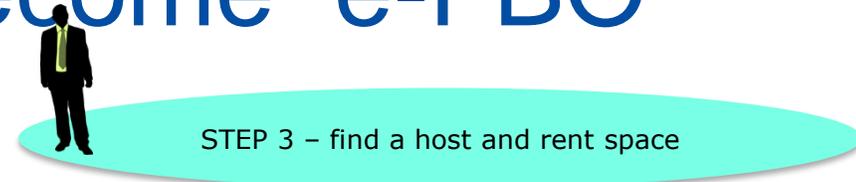
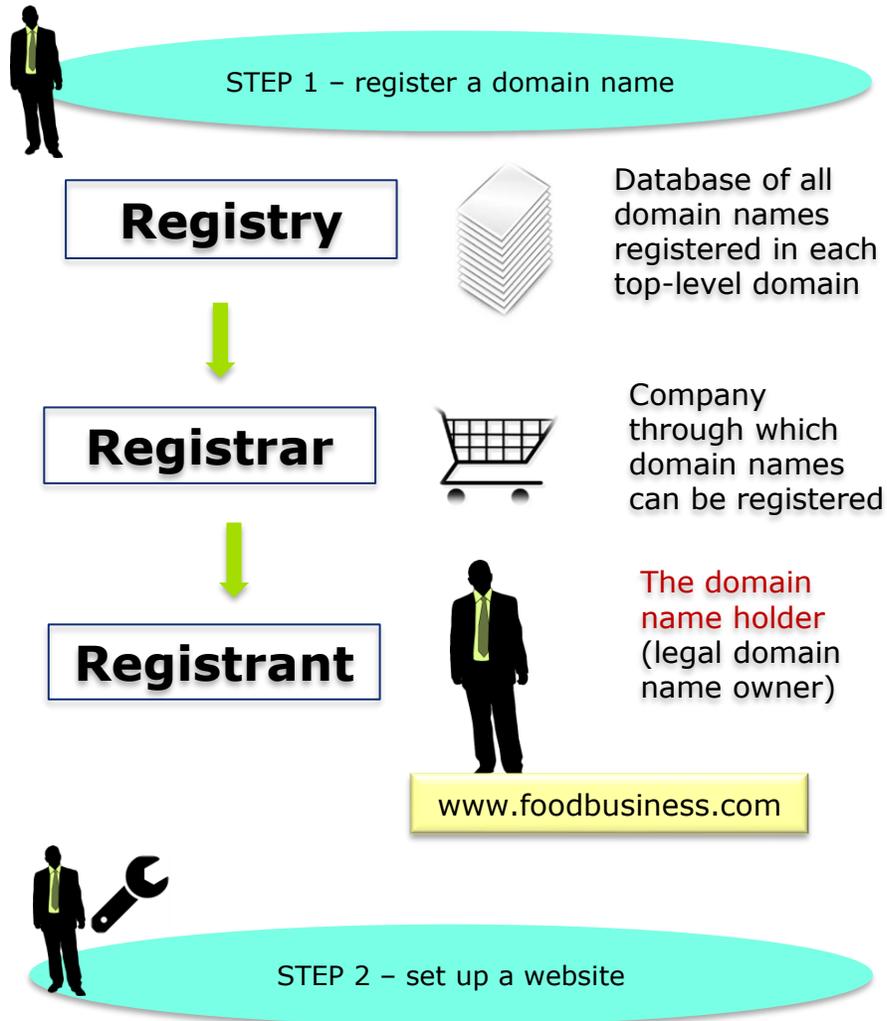
FoodB, placing on the market

Regulation (EC) 178/2002 - *Article 3 - Other definitions*

2. **'food business'** means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of production, processing and distribution of food;

8. **'placing on the market'** means the holding of food or feed for the purpose of sale, including offering for sale or any other form of transfer, whether free of charge or not, and the sale, distribution, and other forms of transfer themselves;

BTSF Steps to become e-FBO



BTSF Different players

| | | | |
|--|--|--|---|
| e-Trader A 2 (2) Dir 2011/83/EU on consumer rightsFood | e-market place/ e-platform | e-advertiser/e- Publisher – no possibility to buy | Service provider – merely technical role |
| Food business operator A 3 (3) Reg. (EC) 178/2002 | Food business operator – <u>when playing active role as FBO</u> A 3 (3) Reg. (EC) 178/2002 | Food business operator – <u>when there is a possibility to order</u> A 3 (3) Reg. (EC) 178/2002 | - |
| Recipient of the service A 2 (d) Dir 2000/31/EC on electronic commerce | - Service provider A 2 (b) Dir 2000/31/EC - Recipient of the service A 2 (d) Dir 2000/31/EC | Recipient of the service A 2 (d) Dir 2000/31/EC on electronic commerce | Service provider A 2 (b) Dir 2000/31/EC on electronic commerce |
| tesco.com | e-Bay | https://www.jointhealthmagazine.com | Internet service provider – T-mobile Webhosting provider - GoDaddy |
| Amazon | | | |

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FB – guidance on the hygiene of foodstuffs

Guidance document on the implementation of certain provisions of
Regulation (EC) No 852/2004

On the hygiene of foodstuffs (Brussels, 18 June 2012)

http://ec.europa.eu/food/food/biosafety/hygienelegislation/guidance_doc_852-2004_en.pdf

3.9. Food businesses and internet sales

Certain businesses offer their goods for sale via the internet. Although such trade is not specifically referred to in the Regulation, such businesses fall within the definition of a food business and the relevant requirements of food law are applicable to them.

BTSF Food information, means of distance communication, advertising

Regulation (EC) 1169/2011 – *Article 2 (2)* – **Definitions**

(a) **‘food information’** means information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication;

(u) **‘means of distance communication’** means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties.

Directive 2006/114/EC concerning misleading and comparative advertising - *Article 2*

‘advertising’ means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations;

advertising - <https://www.jointhehealthmagazine.com/flexoplex.html>

advertising + food information - <https://www.flexoplex.com/?source=JHM/Flex/B/organic>

BTSF Possible Focus of Official Controls

controls of placing on the market of food via internet/distance selling - Dir 2011/83/EU, Reg. 2017/625, reg. 178/2002, Reg. 1169/2011

- **Controls of information requirements for distance and off-premises contracts** – all Member States may control requirements of Article 6 Dir 2011/83/EU on consumer rights – e.g. the identity of the trader (trading name), the address at which is the trader established, tel., fax, e-mail, the address of the place of business, the total price of the goods inclusive of taxes, all additional delivery charges/costs, the arrangements for payments, a right of withdrawal x the fact that the right of withdrawal is not provided, a reminder of the existence of a legal guarantee of conformity of goods, etc.
- **Controls of food information** - Article 14 Reg. 1169/2011 (made available by means of distance selling) - All Member States
- **Controls of nutrition and health claims** - Reg. 1924/2006 (made available by means of distance selling) - All Member States
- **Controls of advertising** – Article 7 (4) a) Reg. 1169/2011 – All Member States
- **Controls of actual product** –control purchase; Article 36 Reg. 2017/625 - all Member States

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Controls of food information

Regulation (EC) 178/2002 - *Article 16* – **Presentation**

Without prejudice to more specific provisions of food law, the labelling, advertising and presentation of food or feed, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed, and **the information which is made available about them through whatever medium**, shall not mislead consumers.

BTSF Controls of food information

Regulation (EC) 1169/2011 - *Article 7 - Fair information practices*

1. **Food information shall not be misleading**, particularly:

- (a) as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;
- (b) by attributing to the food effects or properties which it does not possess;
- (c) by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;
- (d) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.

2. **Food information shall be accurate, clear and easy to understand** for the consumer.

3. (...) **food information shall not attribute to any food the property of preventing, treating or curing a human disease, nor refer to such properties.**

4. Paragraphs 1, 2 and 3 shall also apply to: (a) **advertising**;

(b) the presentation of foods, (...).

BTSF Controls of food information

Regulation (EC) 1169/2011 - *Article 14* - **Distance selling**

1. Without prejudice to the information requirements laid down in Article 9, in the case of **prepacked foods** offered for sale by means of distance communication:

(a) mandatory food information, except the particulars provided in point (f) of Article 9(1), shall be available before the purchase is concluded and shall appear on the material supporting the distance selling or be provided through other appropriate means clearly identified by the food business operator. When other appropriate means are used, the mandatory food information shall be provided without the food business operator charging consumers supplementary costs;

(b) all mandatory particulars shall be available at the moment of delivery.

2. In the case of **non-prepacked foods** offered for sale by means of distance communication, the particulars required under Article 44 shall be made available in accordance with paragraph 1 of this Article.

3. Point (a) of paragraph 1 shall not apply to foods offered for sale by means of automatic vending machines or automated commercial premises.

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QandAs 1169/2011

Questions and Answers on the application of the Regulation
(EU) N° 1169/2011 on the provision of food information to consumers

2.6 Distance selling (Articles 8 and 14)

**2.6.1 Where foods are offered for sale by means of distance selling, who
(a) is accountable for giving the information to consumers and (b)
is responsible for the presence and accuracy of the food
information?**

The food business operator responsible for the food information is the operator under whose name or business name the food is marketed. The operator must ensure the presence and the accuracy of the food information provided.

Where foods are offered for sale by means of distance selling, the responsibility for providing mandatory food information before the purchase is concluded lies with the owner of the website.

BTSF QandAs 1169/2011

2.6.2 Where food is marketed by means of distance selling, what kind of information should the responsible food business operator provide and at what stage?

A distinction should be made between prepacked food and non-prepacked food offered for sale by means of distance selling.

With respect to prepacked food:

Before the purchase is concluded, the responsible food business operator is required to make available all **mandatory food information**, except for **the date of minimum durability or the 'use by' date**. The definition of 'mandatory food

information' includes all information that is required to be provided to the final consumer by EU law in general, and not just limited to the FIC Regulation. The mandatory food information should either appear on the material supporting the distance selling or be provided through other appropriate means clearly identified by the food business operator without any supplementary costs for the final consumer.

In addition, **at the moment of delivery**, the responsible food business operator is required to make available all **mandatory particulars** (including the date of minimum durability or the 'use by' date).

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QandAs 1169/2011

With respect to non-prepacked food:

The food business operator is required to provide only allergen information, unless national measures require the provision of all or some of the particulars referred to in Articles 9 and 10 of the FIC Regulation.

The allergen information or any other particulars required by national law should be provided (a) **before the purchase is concluded** by either appearing on the material supporting the distance selling or through other appropriate means clearly identified by the food business operator without any supplementary costs for the final consumer and (b) **at the moment of delivery**.

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QandAs 1169/2011

2.6.3 Where prepacked food is marketed by means of distance selling, does the food business operator need to provide the 'lot number' before the purchase is concluded, in accordance with Directive 2011/91/EU?

'Mandatory food information' covers all particulars that are required to be provided to the final consumer by Union provisions. The 'lot number' is laid down in Directive 2011/91/EU of the European Parliament and of the Council of 13 December 2011 on indications or marks identifying the lot to which a foodstuff belongs. However, this information is not destined for the final consumer. It is mainly a tool to ensure traceability and does not affect consumers' choice. As such and in the context of a pragmatic approach, there should be no obligation for this information to be provided before the purchase is concluded.

BTSF QandAs 1169/2011 – DRAFT!

6. For distant selling, the mandatory food information shall be available before the purchase is concluded. What should be understood by 'before the purchase is concluded'? Shall the information be already available in the context of a purchase offer? Shall the information be directly available or only upon request? (Article 14)

In the case of a food offered for sale by means of distance selling, where the means may be used for ordering/purchasing purposes, the mandatory information shall be provided by this means **at the stage of the purchase offer**. The mandatory information could also be given by other appropriate means provided that these are clearly identified by the food business operators and consumers are not charged with supplementary costs. For example, such means could include a free of charge consumer care line ensuring a short holding time on the line to obtain the required information.

In the case of a food offered for sale via a web-page, the mandatory food information shall be available directly or be easily and freely accessible through hyperlinks at the stage of the purchase offer.

However, in case of a catalogue that is only used as a promotional/advertising tool and which is not used for ordering/purchasing purposes, the mandatory food information is not required; for example, in an advertising catalogue of products of a supermarket.

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Identification of FBO

Option 1 – FBO is in the Czech Republic:

- internet sale – with a „normal“ store: raises no major problem (a physical control, control of a website and a control purchase may be carried out)
- internet sale – without a „normal“ store (office, private premises): if not possible to carry out a physical control, a control of a website and a control purchase can be carried out

Option 2 – FBO is abroad:

- Other EU member state – a website in Czech would be controlled, in case of non-compliance a competent authority in another MS should be contacted (AACCS, RASFF).
- 3rd country – a website in Czech would be controlled, in case of non-compliance – 3rd country authority assistance needed, information to public

BTSF Registration of FBO (establishment + activities)

*Article 6 Reg. 852/2004 - Official controls, **registration** and approval*

2. In particular, **every food business operator shall notify the appropriate competent authority**, in the manner that the latter requires, **of each establishment under its control** that carries out any of the stages of production, processing and distribution of food, with a view to the registration of each such establishment.

Food business operators shall also ensure that the competent authority always has up-to-date information on establishments, including by notifying any significant change in activities and any closure of an existing establishment.

Article 2 (1) (c) **‘establishment’ means any unit of a food business;**

*Article 15 Reg. 2017/625 - **Obligations of operators***

5. For the purpose of Article 10(2) and subject to Article 10(3), **operators shall provide the competent authorities with** at least the following updated details:

(a) their name and legal form; and

(b) the specific activities they carry out, including activities undertaken by means of distance communication, and the places under their control

BTSF Case law of ECJ – C-585/08, C-144/09

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that **the trader's activity is directed to the Member State of the consumer's domicile:**

- the international nature of the activity,
- use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language,
- mention of telephone numbers with an international code,
- use of a top-level domain name other than that of the Member State in which the trader is established, and
- mention of an international clientele composed of customers domiciled in various Member States.

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.

BTSF Legal basis - Administrative Assistance and Cooperation (AAC)

Regulation (EU) 2017/625 - *Article 102 - 108*

General rule - 102 (1)- The competent authorities in the Member States concerned shall provide each other with administrative assistance (...), in order to ensure the correct application of the rules referred to in Article 1(2) in cases which have relevance in more than one Member State

- **Liaison bodies** - Each Member State shall designate one or more liaison bodies.
- The role of liaison bodies: facilitate the exchange of communications between competent authorities
- the designation of liaison bodies shall not preclude direct contacts between the staff of competent authorities in different Member States.
- 103 (4): the Commission shall publish the list of liaison bodies on its website

+ Commission Implementing **Regulation (EU) 2019/1715** of 30 September 2019 laying down rules for the functioning of the information management system for official controls and its system components (**the IMSOC Regulation**)

BTSF Legal basis - AAC

Assistance on request (A 104)

- Requesting CA - a reasoned request

Requested CA – acknowledge receipt of the request without delay; when requested – indicate within 10 working days the estimated time necessary to provide an informed response; perform controls to provide Requesting CA without delay with all necessary info and doc. to verify compliance

Documents may be transmitted in their original form or copies may be provided

BTSF Legal basis - AAC

Assistance without request in the event of non-compliance (A 105)

CA becomes aware of non-compliance - implications for another MS – shall notify such information to the other MS (without prior request and without undue delay)

- Notified CA - acknowledge receipt of the notification without undue delay, where specified indicate within 10 working days what investigations are intended or the the reasons why no investigation is necessary; if investigated, inform the notifying CA without delay of the results and any measures taken.

Assistance in the event of non-compliance creating a risk or a repeated or potentially serious infringement (A 106)

- MS of destination – establishes non-compliance, shall notify the CA of the MS of dispatch and any other MS concerned without delay
- Notified CA - acknowledge receipt of the notification; where specified indicate what investigations are intended; investigate the matter, take all necessary measures and inform the notifying CA
- If investigation or measures are inadequate according to notifying CA - together - seek ways of remedying the situation + Commission

BTSF Legal basis - AAC

**Assistance
on the basis
of
information
provided by
third
countries (A
107)**

CA receives information from a third country indicating non-compliance - implications for another MS – shall notify such information to the other MS and the Commission if relevant at Union level

- Information obtained by CA through official controls may be communicated to the third country provided that:
 - CA's consent to such communication
 - the third country has undertaken to provide the assistance necessary to gather evidence of practices that are or appear to be non-compliant with Union rules
 - data protection rules are respected

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Measures to be taken in case of noncompliance - FBO

Reg. 625/2017 - Article 138 (2)

Actions in the event of established non-compliance

(2) When acting in accordance with paragraph 1 of this Article, **competent authorities shall take any measure they deem appropriate to ensure compliance** with the rules referred to in Article 1(2), including, but not limited, to the following:

- i) order the cessation for an appropriate period of time of all or part of the activities of the operator concerned and, where relevant, of the internet sites it operates or employs;
- j) order the suspension or withdrawal of the registration or approval of the establishment, plant, holding or means of transport concerned, of the authorisation of a transporter or of the certificate of competence of the driver;

BTSF Measures to be taken – Service provider

Directive 2000/31/EC on electronic commerce - Article 14 - Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

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Summary



- General food law applies also to e-FBOs
- Controls of information made available by means of distance communication are possible in all MSs
- OCR (Reg. 2017/625) introduces control purchase
- Administrative Assistance and Cooperation – crucial for effective official controls of distance selling

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Thank you

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