IFOAM EU Interpretation Note on Article 91 of Regulation (EC) No 889/2008


As voluntary harmonisation tool, this paper provides an interpretation of Article 91(1) and (2) of Regulation (EC) No 889/2008 on measures in case of suspicions of infringements and irregularities.

Article 91(1)

Where an operator considers

“Considers” means “has reliable information”.

or suspects

“Suspects” (and “suspicion”) means “to his discretion, there are relevant and significant indications which might lead to a possible non-compliance.

If any suspicion arises from the activities of internal controls or from evidences from third parties, it must be rapidly followed up by an intensive internal investigation.

Examples of relevant reference points which can lead to a suspicion are:

- inspection of incoming goods by considering the appearance, the labelling, the packaging,
- possible contaminations,
- price which is below the average market prices,
- doubts regarding the authenticity of the suppliers’ certificates
- detection of residue values that could be a relevant indication for the use of products or substances not permitted under the EU organic regulation.

that a product which he has produced, prepared, imported or that he has received from another operator, is not in compliance with organic production rules,

This provision has the purpose of ensuring that all the phases of production and processing comply with the organic regulation. The Regulation (EC) No 834/2007 is based on a process-based approach.

he shall initiate procedures either to withdraw from this product any reference to the organic production method or to separate and identify the product

The operator - to his discretion - decides which procedural steps need to be taken. The procedure should provide for an ‘on-hold’ status of the relevant lots, which cannot be further put on the market until the doubts have been cleared up.

As long as the operator has the substantiated suspicious that those lots of products are not compliant with the organic regulations, the product cannot be marketed as organic. This is a temporary safeguard measure.

He may only put it into processing or packaging or on the market after elimination of that doubt, unless it is placed on the market without indication referring to the organic production method.
The objective is to protect consumers and market actors from false organic claims. Divergent views held by consumers and market actors on the quality of the organic products are not of legal relevance.

This provision has not to be interpreted as a measure aimed at public health protection or food safety. This must be taken into consideration when the control bodies/authorities evaluate what steps have been taken by the operator.

In accordance to the principle of proportionality the operator is obliged to implement measures that are:

- suitable (the measures taken make the objective achievable)
- necessary (from all the ‘suitable’ measures, the operator should take the least burdensome)
- appropriate (the burden created by the measures taken should be proportionate to the resulting advantages for the consumers and the market actors)
- reasonable (measures have to be proportionate to the severity and the urgency of the case)

The operator has to carry out investigations and evaluations based on internal information and - if necessary - in cooperation with third parties. Concrete measures can generally be derived from this evaluation process. The exact set of measures is decided on a case-by-case basis. What is required to the operator should be weighed up against the Principle of Proportionality and the Ban on Excessive Punishment.

In the case of residue findings, even if an intensive investigation was carried out, a full clearing up of the cases is often not possible. This situation needs to be accepted in accordance to the principle of proportionality.

*In case of such doubt, the operator shall immediately inform the control body or authority.*

The general aim of this rule is to provide the control body/authority with an explanation of the facts based on comprehensive information and practical experience as soon as possible.

Notification is absolutely required when there is sufficient information and clear indications which lead to a substantiation of the initial suspicion. Along with the notification, the operator should transfer any information which could be used to support the suspicions or likewise counter them.

The operator is obligated to “immediately” notify the control bodies/authorities. The term used *(immediate)* means as *without culpable delay*. And *without culpable delay* in the area of private law means that the notified operator is legally entitled to a period of consideration that is limited to two (2) weeks maximum.

*The control authority or control body may require that the product cannot be placed on the market with indications referring to the organic production method until it is satisfied, by the information received from the operator or from other sources, that the doubt has been eliminated.*

This provision gives the control bodies/authorities discretion to decide.

Based on the information and notification received, the control body/authority is required to assess whether further investigations are necessary. The control body/authority is required to make use at its best of its expertise and extensive practical experience in order to clear up the suspicions.
Article 91 (2)

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 but bearing a reference to the organic production method, this control authority or control body can require that the operator may provisionally not market the product with this reference for a time period to be set by that control authority or control body. Before taking such a decision, the control authority or control body shall allow the operator to comment.

As the previous one, this provision gives the control bodies/authorities discretion to decide.

This case applies when the control body/authority has indications that the operator would like to market the product and that, based on information gathered, there are clear and irrefutable evidences which lead to a possible non-compliance.

The control body/authority is obligated to disclose the considerations which brought to its decision. This is to be done in writing to the involved operator.

This decision shall be supplemented by the obligation to withdraw from this product any reference to the organic production method if the control body or authority is sure that the product does not fulfil the requirements of this Regulation.

Based on the information and evidences gathered, the control body/authority must come to the doubtless conclusion that the non-compliance exists. The control body/authority is obligated to disclose such information and evidences. This is to be done in writing to the involved operator.

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.

The control body/authority is obligated to withdraw the measure of blocking the product from marketing if the suspicious cannot be substantiated within the given time limit.

According to the intention of the legislation, such uncertain and unexplainable facts should not result in decertification.

The time limit as laid out by the control body/authority is to be determined to its discretion and upon consideration of the principle of proportionality. The time limit is determined upon issuance of the measure.

A time period of two/three weeks should act as a general frame of reference.

The operator shall cooperate fully with the control body or authority in resolving the suspicion

A very comprehensive investigation and the fastest possible resolution of any suspicion should be the objective of the operator, and the control bodies/authorities. This requires wide-ranging co-operation of each party according to each actor’s capacities and based on the principle of proportionality.