



**Association for Modern Trade**

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**Opinion on Notification 2020/36/BG by TRIS of Bill for Agri-food Chain Management Act (Bill)**

Dear ladies and gentlemen,

We refer to Notification 2020/36/BG, which was made on January 29<sup>th</sup>, 2020, with preliminary standstill period till April 30<sup>th</sup>, 2020.

Art. 48(2) of the Bill contains prohibition on the return of food from wholesale and retail outlets to production sites, except in the cases referred to Art. 19 of Regulation (EC) No. 178/2002 (EU Basic Regulation) (**Prohibition**).

The above provision is in breach of EU-law main principles (e.g. free movement of goods in the European Union) and violates the EU Charter of Fundamental Rights.

**I. Business background**

In the course of their daily activities, retail establishments often face situations where the return of food is required - mainly from their warehouses (e.g. due to incorrect labeling, wrong delivery - addressee, quantities or products, non-compliance with contractual terms, etc. (but of good quality and safe for consummation)). Such necessity appears after the goods have been delivered by the supplier/manufacturer and accepted by the retailers/merchants, usually in their warehouses, before the goods enter the trading hall and this can't be resolved earlier, before receiving the goods. The latter are of good quality, within shelf-life, safe for consummation and should not be destroyed.

The Prohibition will disable any options for adjustments and corrections, which are required on daily basis. Possible consequences will be the destruction of goods, which, on the one hand, causes significant expenses and losses for the business, and, on the other hand, will lead to unjustified waste of food resources which is not tolerated by the World Health Organization and the European Commission (on the contrary a very relevant goal at the moment) and is also unfair from a moral, public and social aspect.

Further, the Prohibition could also undermine the warranty rights of wholesalers and retailers.

In addition, the donation of such goods is impossible given the fact that the product is claimed to the supplier/manufacturer and the trader is not entitled to dispose it.

## **II. Legal aspects**

### **1. Violation of the free movement of goods**

The Prohibition would create an unjustified internal market barrier and thus violate the fundamental freedom of movement of goods.

Art. 28 of the Treaty on the functioning of the European Union (TFEU) protects the free movement of goods through the customs union and guarantees the freedom of the internal market in the European Union. At the same time, the provision prohibits quantitative restrictions on imports and exports as well as measures having the same effect. Measures with the same effect are all government measures that are likely to directly or indirectly, actually or potentially hinder trade between the member states.<sup>1</sup>

The Prohibition applies (according to its wording) not explicitly for cross-border issues, but affects them particularly. Art. 48(2) of the Bill prohibits the return of food from wholesale and retail establishments in the production sites and limits with it at the expense of food companies the right to return food to manufacturers.

Further, the exception to the Prohibition is incomprehensibly when food is to be assessed as unsafe within the meaning of Art. 19 of the EC basic regulation is unreasonable and illogical, i.e. the unsafe food can be return, the safe one cannot.

Freedom of the internal market does not apply without restrictions, interventions can be justified. Reasons for restricting the free movement of goods can be in the public interest. The reasons for justification are in particular tax controls, the protection of public health, the protection of the fair trading and reasons for consumer protection<sup>2</sup>. All these arguments are not part of the discussed problem - public health, the fair trading and the reasons for consumer protection are not jeopardized.

### **2. Breach of the EU Charter of Fundamental Rights**

Art. 48(2) of the Bill is also in breach of Art. 17(1) of the EU Charter of Fundamental Rights, which provides that everyone has the right to own, use, dispose of and bequeath their lawfully acquired possessions. The obligation to comply with property rights in accordance with Art. 17 EU Charter of Fundamental Rights applies in accordance with Art. 51, para. 1, sentence 1 EU Charter of Fundamental Rights, on the one hand, to the European Union and its bodies and, on the other hand, to the member states. This also includes the right to sell or return food to the manufacturer. Therefore, there is an interference with the right of property.

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<sup>1</sup> .(ECJ, Case 8/74 ("Dassonville")).

<sup>2</sup> (Cassis-de-Dijon, Case 120/78; Art. 36 TFEU)

### 3. Breach with entrepreneurial freedom

The discussed Prohibition is not only a violation of the right of property of the food business operator, but is also an interference with the entrepreneurial freedom to trade goods freely and to sell them back to the manufacturers, as per Art. 16 of the EU Charter of Fundamental Rights (entrepreneurial freedom (which according to the legal practice of ECJ includes, among other things, the commercial and industrial manufacture of products)<sup>3</sup> is recognized in accordance with Union law and national law and practice).

In addition, the Bill violates the general principles of proportionality which require any restrictions and administrative regulation to be undertaken only insofar as they are justified with regard to the protection of public interest.

Yours sincerely,



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Executive Director  
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<sup>3</sup> case 183/95 margin 41 ff