

# The new Austrian Food Safety and Consumer Protection Act\*

## “Lebensmittelsicherheits- und Verbraucherschutzgesetz – LMSVG”

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**Abstract:** According to Article 4 of the Regulation (EC) No. 178/2002 existing food law principles and procedures must be adapted by January 1<sup>st</sup> 2007 in order to comply with the general framework established by the Regulation. In Austria this target has been achieved mainly by the new Food Safety and Consumer Protection Act (Lebensmittelsicherheits- und Verbraucherschutzgesetz – LMSVG). This present article claims to provide an overview of the key provisions and main principles of the new Austrian Food Safety and Consumer Protection Act which came into force in January 2006.

### I. Introduction

Regulation (EC) No. 178/2002<sup>2</sup> on general principles and requirements of food law provides a legal framework for food and feed within the European Community. It introduces a new safety approach for food and feed from farm to table covering all sectors of the food chain, including feed production, primary production, food processing, storage, transport and retail sale. It does not apply to primary production for private domestic use or for the domestic preparation, handling or storage of food intended for private domestic consumption.

According to Article 4 of the Regulation (EC) No. 178/2002 existing food law principles and procedures must be adapted by January 1<sup>st</sup> 2007 in order to comply with the general framework established by the

Regulation. Following this provision, Member States have started to work on statutory instruments implementing or enforcing Regulation (EC) No. 178/2002 in domestic law or to adapt, if not already included, their national food law to the new European safety approach. In Austria the most important piece of legislation in this context has been the new Food Safety and Consumer Protection Act (Lebensmittelsicherheits- und Verbraucherschutzgesetz – LMSVG)<sup>3</sup>, which came into force January 21<sup>st</sup> 2006.

The Food Safety and Consumer Protection Act (FSCPA) replaces the Food Act 1975 (Lebensmittelgesetz 1975)<sup>4</sup>, which has been in force for almost thirty years. From a political perspective the new legal framework constitutes a total overhaul in food law matters: national food law is becoming more and more part of the legal architecture of the European Union by comprising its political postulates. The most important thereof and the above standing principle is food safety. Following the outlines of Community legislation the FSCPA establishes an entire new concept, which also aims at regaining the consumer's confidence in the safety of food.

### II. The Austrian Food Law – historical review

The first Food Act (“Lebensmittelgesetz”) was published in 1897 during the Austrian-Hungary monarchy. In addition, existing product standards and descriptions, which had been developed during the last

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<sup>2</sup> Regulation (EC) No. 178/2002 of the European Parliament and of the Council of January 28 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002, L 31/1.

<sup>3</sup> Bundesgesetz über Sicherheitsanforderungen und wei-

tere Anforderungen an Lebensmittel, Gebrauchsgegenstände und kosmetische Mittel zum Schutz der Verbraucherinnen und Verbraucher (Lebensmittelsicherheits- und Verbraucherschutzgesetz – LMSVG), BGBl I Nr. 13/2006 of 20/1/2006, amended by BGBl Nr. 136/2006 of 2/8/2006.

<sup>4</sup> Bundesgesetz über den Verkehr mit Lebensmitteln, Verzehrprodukten, Zusatzstoffen, kosmetischen Mitteln und Gebrauchsgegenständen (Lebensmittelgesetz 1975 - LMG 1975), BGBl Nr. 1975/86 of 23/1/1975.

decade of the 19<sup>th</sup> century to facilitate trade within the monarchy, were brought together in the „Codex Alimentarius Austriacus“ (Österreichisches Lebensmittelbuch). In the years 1938 to 1945 the German Food Law was applied. After the Second World War the Food Act 1897 was reinstated and applied until 1951. Then, due to numerous amendments it was consolidated and announced as a new piece of Legislation (Food Act 1951).

The Food Act 1975<sup>5</sup> („Lebensmittelgesetz – LMG 1975“) entered into force on July 1<sup>st</sup> 1975 and installed an overall new concept which lasted until 2006. In this respect some similarity with the former German food legislation existing under the LMBG can be discovered. In Austria the new law was even nicknamed „the legal act of the century“ („Jahrhundertgesetz“) because of its new and visionary approach in food law matters: The targets of the Act were to guarantee „secure food“ („einwandfreie Nahrung“) and to protect the consumer against damages to health and against being misled. The idea to assure „safe“ food was first of all regarded under „quality“ aspects, which stands as a synonym for composition. Safety was not so much of a topic in these days. It was perceived as just existing and therefore did not have to be discussed much. For the first time, a definition of „food“ was introduced and a new product category was installed, called „consumption products“ („Verzehrprodukte“). This group of articles was defined as serving nutritional purposes whilst being neither medicine nor foodstuff. The idea behind was to avoid a „twilight-zone“ between these two groups in order to guarantee the highest possible level of consumer protection. Later on this category turned out to cover mainly „food supplements“. Besides that, with the LMG 1975 the general principle was retained that foodstuffs may basically be placed on the market without being subject to any sort of pre-market authorisation procedures as long as they meet the relevant food law provisions in force. On the other hand additives needed an authorisation issued by the Ministry of Health before being authorised for use in food. Furthermore, cosmetic products were included in the legal framework of food legislation. Health (and disease) related claims were prohibited, unless the claim had been authorised by the Ministry of Health. Such authorisation was granted on the basis that the claim was not misleading. Generally speaking Austrian business operators became familiar with this provision quite early. Authorities and businesses got along with it quite well whereas some importers felt

that Austria was maintaining a non tariff trade barrier. Finally the national Austrian legislation on health claims was subject to an EC court ruling and deleted from the LMG 1975. It is surprising that the upcoming EU regulation on health claims picked up various elements of the former Austria provision, which had to be rescinded because it was regarded as (ia) disproportionate (see section IV.4 above).

Not only the new concept established by the LMG 1975, but also the length of the institutional consultation process, which took almost 15 years before the Act was adopted by the Parliament, might have contributed to its pithy title of being „the act of the century“. Still, the LMG 1975 became adopted by unanimous vote of the political parties represented in the National Council of the Austrian Parliament. Since the beginning of Austria’s negotiations on the EEA (European Economic Area) in the early 90’s food legislation has been subject to continuous alignment with the relevant EC provisions. After Regulation (EC) No. 178/2002<sup>6</sup> laying down general principles and requirements of food law came into force in February 2002, the Austrian Ministry of Health<sup>7</sup> released a first draft of a new food act in 2004. After consulting the draft act with stakeholders and relevant institutional bodies the Austrian Food Safety and Consumer Protection Act (FSCPA) was published in the Official Journal („Bundesgesetzblatt“) in January 2006 and entered into force on January 21<sup>st</sup> 2006. The FSCPA was adopted by majority in the Austrian National Council. It will be interesting to watch the differences in the course of the practical application, which the majority vote indicates in comparison with the unanimous adoption of the recent LMG 1975.

### III. The Food Safety and Consumer Protection Act – Overview

#### 1. EU-Alignment

The Food Safety and Consumer Protection Act (FSCPA) provides the legal framework for food within the context of the relevant European food legislation. In line with Article 4 of the Regulation (EC) No. 178/2002, the Austrian food law was adapted to the general principles established by the regulation: The FSCPA encompasses the principles of risk analysis, transparency, the precautionary principle (§ 2) and traceability (§ 22). Furthermore, it includes the food business operator’s responsibilities according to Article 17 of the Regulation (EC) No. 178/2002 (§ 21). Food safety

<sup>5</sup> See footnote No. 4.

<sup>6</sup> See footnote No. 2.

<sup>7</sup> Bundesministerium für Gesundheit und Frauen (BMGF).

(§ 5) is the focus of the FSCPA, which also incorporates the Community's food safety hygiene rules<sup>8</sup> and the new provisions on official controls<sup>9</sup>, so that overall a general EU-Alignment has been achieved.

## 2. Food Law and Veterinary Law

The FSCPA replaces two previous national legislative acts, namely the Food Act 1975 and the Act on Meat Control ("Fleischuntersuchungsgesetz"<sup>10</sup>). By combining Food Law and Veterinary Law and including the primary sector in one single piece of legislation, the FSCPA covers the whole food chain.

Unlike the German Food and Feed Code (Lebensmittel- und Futtermittelgesetzbuch)<sup>11</sup>, the Austrian FSCPA does not cover feed. The legal provisions for feed are laid down in the Feed Act 1999<sup>12</sup> ("Futtermittelgesetz 1999"), which has already adopted several obligations of the Regulation (EC) No. 178/2002 for feed business operators (e. g. traceability). Further amendments to the Feed Act and the fact that the Regulation (EC) No. 178/2002 directly applies in all Member States ensure that the feed sector complies with the general new legal framework.

## 3. Decriminalisation

In the 1970's the Austrian Criminal Law was completely reformed introducing new approaches in criminal prosecution. Contradictory to this trend, a lot of offences against food law provisions had still to be brought before criminal courts. Not only health damaging food was subject to criminal prosecution but (ia) also foodstuffs, which in their composition did not meet the expectations of consumers. Later on and under the influence of European Court of Justice rulings (Sauce Hollandaise, ...) the interpretation of the relevant penal provisions in the LMG 1975 was adapted: Foodstuffs deviating from national compositional standards or national consumer expectations were allowed to be placed on the markets under the condition that the labelling of such merchandise provided a clear information about the ingredients used. Only

minor offences, e. g. false or misleading labelling, fell under the competence of administrative authorities ("Verwaltungsstrafverfahren").

Breaking with this strict tradition, the FSCPA takes a big step further: According to § 81 FSCPA only food business operators rendering food harmful to health and meat, which has been placed on the market without having undergone the relevant control procedures, are facing criminal proceedings. Any other offence under the FSCPA, especially placing on the market food that is unfit for human consumption, is decided by administrative punishing authorities.

## 4. Less bureaucracy

The new legislation reduces the administrative burdens for food business operators as well as for authorities. Food business operators were obliged to follow a special registration procedure with the Ministry of Health when they intended to place foodstuffs for particular nutritional uses on the market. According to the FSCPA only dietetic foodstuffs not covered by one of the food categories listed in the annex of the Directive 89/389/EEC<sup>13</sup> need to be notified to the Ministry before marketing. Food supplements do not need to be notified by the Ministry of Health anymore either: Already since Directive 2002/46/EC<sup>14</sup> has been implemented by the national Austrian regulation on Food Supplements<sup>15</sup> no specific authorisation procedure for this product category has been applied. Still they need to be notified to the Ministry.

## 5. Active partnership

Following the new safety approach food business operators and the competent authorities are challenged to cooperate closely with regard to food safety matters. This active partnership between business operators and authorities is aiming at providing consumers with safe food along the whole food chain. Especially crisis and emergency cases should be handled more effectively when the parties involved act in sensible co-operation. § 38 lit. 5 FSCPA refers to Article 19 of the Regulation (EC) No. 178/2002 accord-

<sup>8</sup> Regulation (EC) No. 852/2004 on the hygiene of foodstuffs; Regulation (EC) No. 853/2004 laying down specific hygiene rules for food of animal origin; Regulation (EC) No. 854/2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption, OJ 2004, L 165.

<sup>9</sup> Regulation (EC) No. 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ 2004, L 165.

<sup>10</sup> Bundesgesetz über die Schlachttier- und Fleischuntersuchung (Fleischuntersuchungsgesetz), BGBl. Nr. 522/1982 of 1/4/1983.

<sup>11</sup> Lebensmittel-, Bedarfsgegenstände- und Futtermittelge-

setzbuch (LFGB), BGBl I 2005, 2618, (3007) of 1/9/2005.

<sup>12</sup> Bundesgesetz über die Herstellung, das Inverkehrbringen und die Verwendung von Futtermitteln, Vormischungen und Zusatzstoffen (Futtermittelgesetz 1999), BGBl Nr. 139/1999 of 24/7/1999, amended by BGBl Nr. 87/2005.

<sup>13</sup> Council Directive 89/398/EEC of May 3<sup>rd</sup> 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses, OJ 1989, L 86.

<sup>14</sup> Council Directive 2002/46/EG of June 10 2002 on the approximation of the laws of the Member States relating to food supplements, OJ 2002, L 183/51.

<sup>15</sup> Verordnung über Nahrungsergänzungsmittel (NEMV), BGBl I Nr. 88/2004 of 18/2/2004.

ing to which food business operators have to inform actively the competent authority in case they consider or have reason to believe that a food, which they imported, produced, processed, manufactured or distributed does not comply with the food safety requirements. Corresponding with § 38, authorities have to consider measures taken by the operator according to Article 19 of the Regulation (EC) No. 178/2002 in case the authority has to inform the public about injurious food being placed on the market (§ 43).

Although this new approach of an active partnership between food business operators and the competent authorities is the right way forward towards a modern and functioning safety system for food, it will take its time to be fully applied in practice. In Austria the relationship between industry and authority can generally be described as good and constructive. Several cases do exist when active information and cooperation already has helped to solve problems before a crisis or emergency occurs. Still, the new approach requires a "new spirit". This means that the roles of the parties concerned need to be actively shifted towards the type of partnership, which is necessary to implement effective emergency or crisis management procedures. The FSCPA provides an appropriate basis for getting this new concept started.

## IV. The Food Safety and Consumer Protection Act – main provisions

### 1. Structure

Following the structure of the Food Act 1975, the FSCPA provides a flexible framework for the Austrian food law. Instead of going into the details on matters such as the chemical or microbiological safety of food labelling and advertising, it focuses basically on the fundamental principles and leaves the details to further implementation by national regulations. Therefore, the Act empowers the Ministry of Health to lay down a great lot of specific details by adopting administrative regulations under the FSCPA. The first national regulations to be published on the new legal basis referred to EC hygiene law, namely Regulations (EC) No. 852/2004 and 853/2004. They laid down specific requirements for the registration and licensing of food business operators ("Eintragungs- und Zulassungsverordnung"<sup>16</sup>).

The FSCPA comprises five main chapters with 108

paragraphs and one annex. The main chapters include general requirements for food, water for human consumption, food contact materials and cosmetic products (chapter 1), provisions relating to official control, sampling and analysis (chapter 2 and 3), sanctions and penalties (chapter 4) as well as transitional and final provisions (chapter 5). The annex lists EC-Regulations which apply directly in all Member States and which have to be enforced under the FSCPA. Amendments to the annex are easily possible by adoption of a respective national regulation. Since Community law, which applies directly in all Member States, must not be repeatedly stated in national law, the Act refers to numerous EC provisions by (only) mentioning the relevant Article of the Regulation concerned (see examples under point 2).

### 2. Scope, target and definitions

The FSCPA covers food, water for human consumption, food contact materials and cosmetic products (§ 1). It does not cover feed (see under point IV). The Act aims to protect the consumer's health and to protect him against being misled (§ 2). This should be granted by the principles laid down in Regulation (EC) No. 178/2002, specifically risk analysis, precaution and transparency. The FSCPA includes the whole food chain, including primary production. Only primary production for private domestic use or for domestic preparation, handling or storage of food intended for private domestic consumption (§ 1) is not covered by the FSCPA.

§ 3 provides definitions for "food", "food supplement", "dietetic food", "food additives" etc. Furthermore, other basic expressions are outlined such as "food business operator" or "food law". Although the title of the Act "Food Safety and Consumer Protection Act" refers to the final "consumer", the text does not include a respective definition. Concepts for which a specific definition is laid down in EC food law by means of Regulation are referenced to in § 3. For example, § 3 FSCPA refers to "food" as defined in Article 2 of the Regulation EC No. 178/2002 or "food contact material" as defined in Article 1 of the Regulation EC No. 1935/2004<sup>17</sup>. Where specific legal descriptions are laid down by means of EC-Directives, the FSCPA has adapted definitions introduced already under the Food Act 1975 to the ones provided by the Directive concerned (for example "dietetic food"<sup>18</sup>).

<sup>16</sup> *Verordnung der Bundesministerin für Gesundheit und Frauen über die Eintragung und Zulassung von Betrieben von Lebensmittelunternehmern (Eintragungs- und Zulassungsverordnung)*, BGBl Nr. 93/2006 of 1/3/2006.

<sup>17</sup> *Council Regulation (EC) No. 1935/2004 of October 27*

*2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC*, OJ 2004, L 338.

<sup>18</sup> *In line with Council Directive 89/398/EEC.*

The new definition of "food" in line with Article 2 of Regulation (EC) No. 178/2002 considerably changes the previous concept as outlined by the Food Act 1975. More particularly, the former legislation included a tool, which made it relatively easy to distinguish between food and other products. § 2 Food Act 1975 described "food" as any product whether processed, partially processed or unprocessed, intended to be eaten, drunk or chewed by humans mainly for nutritional or enjoyment purpose ("Ernährungs- und Genusszwecke"). Article 2 of the Regulation (EC) No. 178/2002 defines "food" as any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.

Whereas § 2 Food Act 1975 was based on the idea that a food has to be consumed due to a specific intention ("nutrition or enjoyment"), Article 2 of the Regulation (EC) No. 178/2002 does not include this element. According to § 3 FSCPA and Article 2 of the Regulation (EC) No. 178/2002 a product being ingested by humans is a food regardless of whether it is consumed due to nutritional, enjoyment or for any other purposes. This broad definition triggers practical and legal consequences. The former prerequisite that a food is constituted (ia) by its intention to be consumed for "nutritional or enjoyment purpose" enabled enforcement authorities to differentiate foodstuffs from medicines: While foodstuffs had to be eaten, drunk or chewed due to "nutritional or enjoyment purpose" by humans, medicinal products (as well as food supplements or food additives) never were intended for these purposes. As this legal criterion has been left out in the FSCPA, the distinction between a foodstuff and a medicinal product will become more challenging in the future.

"Food additives" are defined according to Directive 89/107/EEC<sup>19</sup>. However, the definition in the FSCPA additionally encompasses the criterion that food additives are not consumed with the purpose of "nutrition or enjoyment". Instead of following the EC Directive's definition (any substance "not normally consumed as a food in itself"), § 3.5 FSCPA defines food additives as any substance, "which is not normally consumed due to nutritional or enjoyment purpose". Compared with the German Food and Feed Act, substances added to foodstuffs as nutrients (for example minerals, trace elements or vitamins) do not fall under the Austrian definition. As a rule, they are not seen as additives but as foodstuffs.

### 3. Food safety requirements

§ 5 sets out general requirements for food. Compared with the Food Act 1975 the main focus is dedicated to the principle of food safety: Food shall not be placed on the market, if it is not safe. § 5 refers to Article 14 of the Regulation (EC) No. 178/2002: Food is deemed to be unsafe, if it is considered to be injurious to health or unfit for human consumption. According to § 5.5 food is injurious to health, if it could harm or endanger human health. Food would be unfit for human consumption, if it can not be used according to its intended purpose. Article 14.3, 4 and 5 of the Regulation (EC) No. 178/2002 lay down specific requirements which have to be taken into account when determining a food to be unsafe (for example the normal conditions of use of the food, the information provided to the consumer, the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations, contamination putrefaction, deterioration or decay). § 5.5 does not refer to subparagraph 3, 4 and 5 of Article 14 of the Regulation (EC) No. 178/2002. Nevertheless, these criteria must be considered when determining a food to be unsafe since they directly apply.

As the previous food law also did, § 5 FSCPA states that food must not be tampered or reduced in value. Whereas most of the offences stemming from the Food Act 1975 have been included in the new legal text some of them have been left out, namely the previous prohibition that food placed on the market must not be imitated or unripe. In addition, the former Food Act 1975 did not allow the placing on the market of food unfit to be used according to its intended purpose ("verdorben"). This latter offence had been the "top shot" of criminal proceedings under the Food Act 1975. Now it is covered by other offences, namely § 5.5 subparagraph 2 ("unfit for human consumption") and § 5.5 subparagraph 4 ("reduced in value"). Food business operators placing food on the market, which is unfit for human consumption or reduced in value, do not face criminal proceedings any longer. This is due to the political decision that the FSCPA shall restrict criminal offences brought before court to food that is injurious to health and meat, which is placed on the market without having undergone the necessary controls.

Furthermore, § 5.2 prohibits to place on the market food that is misleadingly labelled, presented or advertised. In addition the labelling used must not attribute to any foodstuff properties of preventing, treating or curing a human disease, or refer to such properties

<sup>19</sup> Council Directive 89/107/EEC of December 21<sup>st</sup> 1988 on the approximation of the laws of the Member States concern-

ing food additives authorized for use in foodstuffs intended for human consumption, OJ 1989, L 40.

(§ 5.3). This does not apply to foodstuffs intended for particular nutritional use when only the dietetic use of the product concerned is described. § 5.2 and 3 implement Article 2 of the labelling Directive 2000/13/EC<sup>20</sup>.

As pointed out in the historical review (section II above) health claims were generally prohibited under the Food Act 1975 until 2003. This general prohibition applied to all health claims mentioned in the former § 9 of the Food Act 1975, regardless of their potential to mislead consumers. In the case C-221/00 European Commission/Republic of Austria<sup>21</sup> the European Court of Justice (ECJ) referred to the question, whether or not a national legal provision prohibiting health-related information on foodstuffs in a general and absolute manner and subjecting the affixing of such information to a prior authorisation procedure is in line with Article 2 (1) of Directive 2000/13/EC and Article 28 and 30 EC. The ECJ held that a legal system that prohibits all kind of health-related claims - even health claims that are not misleading consumers - and establishes a procedure for a prior-evaluation is a disproportionate and unjustified measure to protect the consumer<sup>22</sup>. According to the judgement of the ECJ, less restrictive measures do exist for the prevention of risks to health, such as, for example, an obligation on the manufacturer or distributor of the product in question, in the event of any uncertainty, to furnish evidence of the accuracy of the facts mentioned on the labelling<sup>23</sup>. As a consequence, the Austrian legislator amended the relevant provision in the LMG 1975 by law<sup>24</sup> corresponding to Article 2 of the Labelling Directive 2000/13/EC and restricted the general prohibition to claims referring to diseases. This provision has also been introduced into the FSCPA by § 5.3.

#### **4. The food business operator's responsibilities**

The FSCPA lays down responsibilities for food business operators in compliance with Article 17, 18 und 19 of the Regulation (EC) No. 178/2002. They comprise the general obligation to comply with existing food law according to Article 17 as well as the demand to trace products along the food chain or to withdraw unsafe food from the market and to inform the competent authority, respectively the consumer. More than that, the FSCPA provides several obligations for

operators who have already been established under the former food law (for example obligations related to official controls, see under point 5).

§ 21 FSCPA states that within the concept of Article 17 of Regulation (EC) No. 178/2002 food business operators shall ensure that food satisfies the requirements of food law which are relevant to their activities and shall verify that such requirements are met. The latter should be done by means on which the operator decides on the basis of a risk analysis. In case the requirements are not met food business operators are obliged to take effective measures to comply with the legal criteria. § 22 FSCPA demands operators to ensure the traceability of products at all stages of production, processing and distribution. This has to be fulfilled in line with Article 18 of the Regulation (EC) No. 178/2002 concerning food, Article 17 of the Regulation (EC) No. 1935/2004 regarding food contact materials and Article 5.2 of the Directive 2001/95/EC<sup>25</sup> as regards cosmetic products. Following § 38 FSCPA food business operators have to withdraw unsafe food from the market and inform the competent authority, respectively the consumer according to Article 19 of the Regulation (EC) No. 178/2002.

The national Austrian regulation on the registration and licensing of food business operators ("Eintragungs- und Zulassungsverordnung"<sup>26</sup>) demands from food business operators starting business from January 1<sup>st</sup> 2006 onwards that they apply for registration at their local authority. Registered business operators are listed in the official index issued by the Ministry of Health. This legal requirement is part of the new EC hygiene legal framework, namely Regulations (EC) No. 852/2004 and 853/2004 and shall provide information to Food Authorities about food businesses in their area so that they can carry out their enforcement duties effectively.

#### **5. Official control**

According to Article 10.1 litera 12 of the Austrian Federal Constitution the enforcement of food law is a federal responsibility (i. e. Ministry of Health) combined with the empowerment of local food authorities for implementation. The legal provisions on official controls have been considerably changed by the FSCPA.

<sup>20</sup> Council Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ 2000, L 109/29.

<sup>21</sup> Judgment of the European Court of Justice of 23/1/2003 in Case 221/00, Commission/Republic of Austria, European Court Reports 2003, p. I-01007; see also joint Cases 421/00, 426/00 and 16/01, Sterbenz, European Court Reports 2003, p. I-01065.

<sup>22</sup> See in particular Case 221/00 paragraph 48ff.

<sup>23</sup> See Case 221/00 paragraph 49 and Case 77/97, Unilever, European Court Reports 1999, p. I-00431.

<sup>24</sup> Bundesgesetzblatt zur Änderung des Lebensmittelgesetzes 1975, BGBl I Nr. 2003/69 of 11/7/2003.

<sup>25</sup> Council Directive 2001/95/EC of December 3<sup>rd</sup> 2001 on general product safety, OJ 2002, L 11.

<sup>26</sup> Eintragungs- und Zulassungsverordnung, BGBl Nr. 93/2006 of 1/3/2006.

Under the new Austrian legislation regulation (EC) No. 882/2004 on official controls as well as several principles established by the Regulation (EC) No. 178/2002 have been incorporated. Furthermore, by bringing together Food Law and Veterinary Law in one single provision, the requirements for the official control also include veterinary controls.

§ 24 FSCPA underlines that official controls have to be carried out by Food Authority officers in line with Regulations (EC) No. 178/2002, No. 882/2004 and No. 854/2004 and on the basis of the latest scientific and technological state of play. Regular trainings of the control staff and a permanent exchange of information on latest scientific improvements are required. Pursuant to § 30 the Ministry of Health has to prepare an integrated multi-annual national control plan. This plan, the implementation of which has to start by January 1<sup>st</sup> 2007 at the latest, outlines the national control system and activities in a global and comprehensive way. In addition to that, an emergency plan within the meaning of Article 13 of the Regulation (EC) No. 882/2004 and an annual audit and sampling plan must be developed fixing the main issues for the forthcoming control activities.

§ 35 FSCPA empowers Food Authority officers to inspect any food intended for human consumption and to detain and seize food suspected of not complying with food safety requirements. Compared to former food legislation officers are given more power to carry out their control activities: Under the Food Act 1975 they could enforce food law predominately by taking samples and checking the food operator's premises. Now they are empowered to take any measures, which are necessary to execute inspection activities. While doing so, they have to proceed according to standardized checklists which apply to all local authorities. These standardized checklists are part of the new internal quality management system, which has to be established by the food control bodies.

If food does not comply with the legal requirements, the Food Authority may forward a legal notice to the food business operator requiring appropriate measures (§ 39). The measures foreseen by the Authority should be proportionate and effective depending on the failure claimed (for example the closure of food premises, adaption of false labelling etc.). Before a legal notice is passed on to the operator, the control officer is entitled to hand out an improvement notice

to the proprietor of a food business. This is a new provision in the Austrian food law. The practice of giving advice, and communicating by letter about enforcement issues, are well-established approaches in practice and understood by food businesses. The FSCPA incorporated this well-established practice in the legal text. The improvement notice should clearly state the time limit by which the measures required by the notice must be completed. Where conditions are serious and severe measures should be taken to prevent unsafe food from being placed on the market (i.e. closure of food premises), the Food Authority officer must not hand out such a notice. In that case the Act calls for legal prosecution in first place. If the operator does not fulfil the requirements of an improvement notice within the specified period, the Authority has to serve a legal notice to the food business operator according to § 39.

As a new element in the FSCPA, the manufacturer has to be informed in writing by the control officer when samples of one of his products have been taken from retail outlets. Samples for the use of the manufacturer must be left with those retail outlets. This new provision established under § 36.7 FSCPA ensures that the manufacturer is able to exercise effectively his right on a second opinion in the case authorities claim that his products fail to meet the standard required on the basis of an analysis of samples of those products taken from retail outlets. § 36.7 implements the Court Decision C-276/01 Steffensen<sup>27</sup>. In this context the FSCPA additionally provides that the retail outlet has to store the sample which is left at its premises in an appropriate way. The Ministry of Health has published a guideline which lay down specific storing requirements<sup>28</sup>.

Finally, the new provisions set out criteria for the seizure of food. Unlike former provisions food must (only) be seized on safety grounds. Following § 41 food is to be seized,

- if a food business operator does not comply with the Authority's legal notice or does not fulfil the requirements laid down therein within a specific period. Additionally the seizure has to be required to protect the consumer's health or to shelter him from being misled;
- if the food is injurious to health and the food business operator does not comply with his obligation to trace the products at the stage which is under his control.

<sup>27</sup> Judgment of the European Court of Justice of 10/4/2003 in Case 276/01, Steffensen, European Court Reports 2003, p. I-3735.

<sup>28</sup> Richtlinie über Fristen und Lagerbedingungen für die

Aufbewahrung von Gegenproben für den Hersteller, [http://www.gastronomieverband.at/RL\\_Aufbewahrung%20von%20Gegenproben.pdf#search=%22Richtlinie%20Lagerung%20Gegenproben%22](http://www.gastronomieverband.at/RL_Aufbewahrung%20von%20Gegenproben.pdf#search=%22Richtlinie%20Lagerung%20Gegenproben%22).

## 6. Institutions and administrative bodies

In 2002 the Austrian Agency for Health and Nutrition Safety ("Agentur für Gesundheit und Ernährungssicherheit") and the Federal Office for Nutrition Safety ("Bundesamt für Ernährungssicherheit") have been established by law<sup>29</sup>. These two legal entities have been set up to protect public health in relation to food and feed. They are involved in the enforcement procedure of food and feed law (ia) by analysing samples and carrying out risk assessments.

In addition the FSCPA continues providing the legal basis for the Commission on the Codex Alimentarius Austriacus and the Permanent Committee on Hygiene. These bodies date back to the beginning of the twentieth century. Since then they have been advising the Ministry responsible for food law matters. The national Austrian "Codex Commission" also prepares the Codex Alimentarius Austriacus ("Österreichisches Lebensmittelbuch"), which was first published in 1911. This Codex Alimentarius Austriacus comprises existing product standards and descriptions, which are used as a general reference for consumer expectations, food producers' duties and for national food control authorities.

Since Austria has joined the EEA and adapted to EC law principles the codex has lost some of its influence due to the ongoing harmonisation of food law. Pursuant to § 80 FSCPA also the national Austrian Commission ("WECO") on the WHO/FAO Codex Alimentarius continues to exist as a body providing advice to the competent Ministry for issues related to the WHO/FAO Codex Alimentarius. Thus, the Austrian legislator responds to the global trend that food related provisions are more and more prepared and decided at international and supranational level. Therefore, the "WECO"-Commission shall prepare and coordinate Austrian positions being put forward in the relevant WHO/FAO and European Committees and Working Groups.

## 7. Offences and punishment

The FSCPA limits criminal proceedings to rendering food harmful to health and to meat, which is placed on the market without having undergone the necessary control procedure (§ 81). Any other offence under

the FSCPA, especially placing on the market food that is unfit for human consumption, is decided by administrative authorities empowered to do punishments. A person placing on the market food, food contact material or cosmetic products harmful to health shall be liable to imprisonment for a term of six months to three years or to a fine up to 360 daily rates laid down by the judge. For other offences administrative authorities may impose a fine up to the statutory maximum amount of € 20.000. Compared to former provision the maximum amount has been increased from € 7.300 to € 20.000 under the FSCPA.

## V. Conclusion

Regulation (EC) No. 178/2002, which lays down the general principles of Food Law and establishes the European Food Safety Authority (EFSA), has opened a new chapter of food law in Europe. Austria has reacted to this new developments by adapting the existing national food law principles to the provisions of the EC Regulation and by installing a new administrative institutional framework. Although previous food acts have always aimed at protecting consumer's health from being harmed by unfit food, the new FSCPA leads the shift of emphasis from guaranteeing "safe" food (mainly within the sense of "quality"; "einwandfreie Nahrung") to the – overall standing – principle of food safety. The new concept established under the FSCPA will help to manage food crises in a harmonized European market. Nevertheless, at the FIAA Symposium on the new Austrian Food Act in February 2006 it was underlined that the aspect of food quality should not be left behind in the overall discussion on food safety<sup>30</sup>. That should call for careful consideration in the upcoming debate on the new European and Austrian food law.

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<sup>29</sup> Bundesgesetz, mit dem die Österreichische Agentur für Gesundheit und Ernährungssicherheit GmbH errichtet und das Bundesamt für Ernährungssicherheit sowie das Bundesamt für Sicherheit im Gesundheitswesen eingerichtet werden (Gesundheits- und Ernährungssicher-

heitsgesetz - GESG), BGBl I Nr. 63/2002 of 19/4/2002, amended by BGBl I Nr. 87/2005.

<sup>30</sup> Speech of Dr. Christian Hauer, partner of the law firm Schönherr RAe GmbH in Vienna.