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NORTON ROSE FULBRIGHT

Cultivate

Food and agribusiness newsletter

Issue 10 / February 2016

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Cultivate

Cultivate delivers market insight into the global food and agribusiness sector. It is published four times a year by Norton Rose Fulbright and is available online and in print.

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Editor – Glenn Hall, UK
Deputy editor – Cynthia Tokura, UK

Editorial

In this tenth issue of Cultivate, we delve into the Netherlands and shine a spotlight on this growing and influential market leader for agribusiness. We speak with Aalt Dijkhuizen, President of Dutch Topsector Agri & Food, a national platform to designed to stimulate food and agribusiness about the role of the Netherlands within the global food and agribusiness sector. We also discuss the Norton Rose Fulbright Annual Food and Agri seminar, which was held in Amsterdam last November, at which three leading industry experts shared their thoughts and experiences on innovation in this ever growing sector.

In addition, Dave Smardon, President and CEO of Bioenterprise (a Canadian business accelerator offering commercialisation services to help promote the expansion of businesses engaged in agri-technologies) speaks to Cultivate about the future of technology in agribusiness, particularly in Canada.

In evaluating the growing interest in Africa as the potential future global supplier of honey, we explore the innovative bee keeping methods which have the potential to create a superior, more marketable, and ultimately more profitable, commodity, and after a decision held by the ECJ weakened the position of plant variety holders in 2003, we examine the latest ruling of June 2014 which has substantially strengthened their rights and balanced them against the interests of the farmers.

Furthermore, in recent years regulators have shifted their focus to trading activity in the global commodity market. We discuss the importance of companies who are involved in agri-trading to ensure they prioritise complying with competition law, authorities and regulators. We also consider an effective investigation proposal for businesses that are examined closely on anti-competitive conduct.

The air pollution index in Indonesia has reached hazardous levels, jeopardizing the safety of its own population and neighbouring countries. We deliberate the reasons behind the high levels of air pollution and how the Indonesian government proposes to combat these issues and in our usual round of Food Safety updates, we review the FDA's authorisation for the accreditation of third party certification bodies to conduct food safety audits, the FDA's approval that genetically engineered salmon is safe for human and animal consumption and the Australian government's changes to the imported food control regulations.

We invite you to read about these recent developments affecting the food and agribusiness industry and welcome your thoughts on areas to cover in future issues.

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Calendar

February

Rome, Italy, February 15–17
International Symposium on the Role of Agricultural Biotechnologies in Sustainable Food Systems and Nutrition

Agadir, Morocco, February 22–26
COFI Sub-Committee on Fish Trade – Fifteenth session

Mexico City, Mexico, February 29–March 3
Regional Conference for Latin America and the Carribbean (LARC)

March

Iowa, US, March 3–5
Global Agriculture Summit

Putrajaya, Malaysia, March 7–11
Regional Conference for Asia and the Pacific (ARPC)

Shanghai, China, March 9–11
7th China International Fertilizer Show

Xi'an, China, March 21–23
Codex Committee on Food Additives

April

Ghent, Belgium, April 4–7
FOODSIM 2016

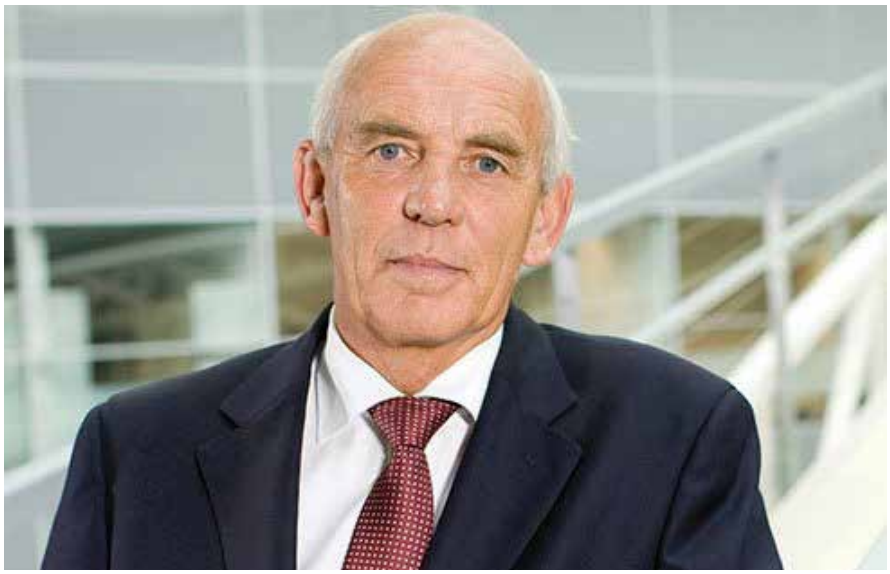
Kuala Lumpur, Malaysia, April 11–12
3rd Plant Genomics Congress: Asia

Darwin, Australia, April 11–13
Northern Australia Food Futures Conference

Role of the Netherlands in the global food and agribusiness

Judith Roelofs & Heimon Smits

An interview with Aalt Dijkhuizen, President, Dutch Topsector Agri & Food.



Aalt Dijkhuizen, 62, started his career in science and became a professor of Animal Health Economics at the University of Wageningen. Following this, he moved into private business and became a managing director at Nutreco, a listed company specialising in high-quality animal and fish feed. Between 2002 and 2014 he was President and Chairman of Wageningen University and Research Centre. Aalt sits on the advisory and supervisory boards of several international food and agribusiness companies. Since 2014 he has been a President of Dutch Topsector Agri & Food.

Based on its strong market position and experience in the sector, what advice can the Netherlands offer to help countries prepare for increasing food demand?

The strength of the food and agribusiness sector in the Netherlands has grown over many decades. This is exemplified through the fact that the Netherlands are now the second largest food exporter in the world, after the United States of America. Our strengths are not limited to one sector; we have a strong presence in numerous key agribusiness industries, particularly horticulture, poultry, pork and dairy. Professional development across the value chain is a significant area of focus which is currently being supported by a diverse range of companies throughout the sector including farmers.

The 'secret' is the large competition for land

The agricultural conditions in the Netherlands help to strengthen the country's agribusiness industry. For instance, our climate and fertile soil are extremely beneficial for agriculture. High prices for land and labour have forced us to improve production and work efficiently. Through a combination of these factors we have been able to become a successful producer. We have a long term commitment to the sector and have extensive knowledge in the areas of management, production, smart marketing and sales.

What is the 'secret' behind the comparatively high productivity of Dutch agriculture?

The 'secret' is the large competition for land in the Netherlands. To stay ahead of competitors we need to be productive and efficient, which requires smart and significant investments. A good example is one of the largest Dutch greenhouses in a small village called Wieringen. The vast greenhouse spreads over 250 hectares. Many millions of Euros have been invested into lighting alone; this is in addition to the building cost of the greenhouse and its climate control systems.

Such a project would not have been possible without receiving financing from the banks. It is important for the growth of the industry that financial institutions have confidence in agribusiness and extensive knowledge of the sector. This in turn allows us to keep up with foreign competition. An excellent research and development base and high-quality management are also very beneficial.

How can the Netherlands maintain a leading knowledge position while at the same time sharing its knowledge with the other countries?

Continuous improvement is necessary. This is shown by being eager, trying to find new solutions before anyone else and being constantly prepared to look for new opportunities. Dutch agribusiness entrepreneurs have that in their genes. I am a farmer's son and have witnessed that farmers are always searching for improvements.

The sector has small margins, as soon as you lose on costs or don't innovate swiftly enough you lag behind competitors. It is not only about buying the newest equipment; history and tradition determine a lot too. Germany has a strong car industry because it has been building up knowledge and experience over several decades. In the Netherlands, we have tried to build this in the past with the DAF car factory. The brand did not generate popular appeal and was unsuccessful. We have learnt that across industries, it is usually the strongest players in the field that are able to grow and successfully develop their businesses.

Having said this, the Netherlands is always open to sharing knowledge and technology. If you are afraid of sharing information you cannot benefit from the knowledge possessed by others. Good products and production systems will become better through the sharing of information. After all, the Netherlands is not able to produce food for the whole world, so cooperation is essential.

In which geographical locations are the greatest business opportunities for the Netherlands?

The Netherlands exports most of its produce to nearby Germany. Growth markets nowadays are further away. The Asian economies continue to grow rapidly and are developing ever stronger purchasing power. China, in particular, is a source of significant opportunity. There is also a growing market in Africa but the continent's position as a purchasing power is in its early days. The focus there is more on governmental intervention rather than private sector business development. The countries in South America, especially Brazil, have an established export-import link with the USA. There are nonetheless opportunities for us, for instance, the horticulture sector is growing rapidly in Chile and Colombia. In all these countries the local economy has a large influence on the development of the food and agribusiness sector. Overall, the demand is becoming greater for high-quality protein such as dairy, meat and vegetables. This shift is brought about by the growing middle classes, who are choosing to spend more on their diet.

What is the role of Food Valley NL in the Netherlands?

It is a sector platform, also described as 'the golden triangle', which brings together the key stakeholders in business, government and science. In the Netherlands we take this type of approach for granted, but most other countries do not have such a platform. Of course innovation and productivity do not come as a result of the existence of the platform itself, they have to be brought about by the various companies and organisations. For example, in the case of China, the focus is still primarily on the government, with private sector involvement in agribusiness being less advanced. Through the golden triangle we are able to innovate more quickly than other countries. I visit China frequently. The Chinese are keen to adopt this structure and often ask how to start such a platform and how to encourage stakeholders to contribute.

What is the role and responsibility of Dutch universities (such as Wageningen) in stimulation of innovation, research and development?

I am not aware of a 'Second Wageningen'. By this I mean another university completely focused on the food and agribusiness sector, and closely connected to a large applied research center. Most universities have specialist food and agribusiness faculties, such as UC Davis and Cornell University in the USA.

Wageningen is important in inspiring the next generation of agribusiness innovators and acts as a frontrunner for research and development in the sector. This system in the Netherlands enables competitors to learn from each other. Just as the IT sector has Silicon Valley, the food and agribusiness sector has Food Valley. Within this, Wageningen University acts as an important facilitator for the continual exchange of information and innovation. The geographical location is also very

appealing for young professionals and academics. It has the facilities required by the students, employees and families alike. We work hard to get the best people from outside the Netherlands. The national and regional governments provide support and fund these facilities.

'A 2-3% increase of productivity is necessary each year'

What are the examples of the current promising research and technology development?

To keep ahead of our competitors the entire portfolio needs to be strong. Across the sector we see many initiatives, the latest trends and developments are:

1. Smart farming – this includes the increasing incorporation of technology and robotics into the production process, and the use of GPS for machinery. The 'big data' that comes out is used to optimise production. This technology is in the early stages of its development. It is expected that over the next 10 to 15 years this will be the biggest revolution in the sector, with phenomenal benefits being seen in numerous areas.

2. Genomics – by this I do not mean GMOs. Darwin was the founder of the production of different species with xenogamy. Only in recent years have we been able to follow up on this with genomics. We are conducting genetic research to establish which seeds and breeds are to be used for the next generation, in an attempt to weed out weaknesses in the genes of plants and animals, which make them more vulnerable to diseases. Genomics is also an important factor for personal nutrition. For both the short and long-term it is essential to understand the effect that dietary factors may have on your genes and how this may vary from person to person.

3. Bio-refinery technology – this technology enables the extraction of value from waste and other animal or vegetable by-products, for example, energy, chemical products or animal feed. Livestock is not only valuable for meat, but also to process manure into energy and animal feed. Sugar beets are a fantastic product too. You can make sugar out of the beet, while the leaves and the roots can be used to produce energy and green chemistry ingredients.

How important is having a large scale operation to be successful in achieving increased productivity?

The definition of 'large scale' varies from country to country. In the Netherlands 200 cows is a large farm, but in New Zealand 450 cows is seen as the average (and still pasture based). That said, to implement most new technologies you need sufficient scale. The new generation of farmers also tend to opt for larger scale where the necessary technology is available; as the returns are higher and it is more fun to work with. I think if we are able to send astronauts to space then we are definitely able to bring robots onto our fields. Technology will then deliver control behind the scenes and will allow us to optimise input and output. For that to be a possibility, the next generation will have to invest in smart technology. This is why innovation takes a long time in agribusiness; large investments and the transfer of businesses from one generation to another are required. It will take a long time before we will really begin to benefit from the introduction of the new technology and knowledge into the business. Will that be in time to feed the required number of people?

'while it is not impossible, we cannot miss a single day'

How can we meet demands to successfully feed a larger world population?

Ensuring security of food production is difficult but we can overcome this problem. A 2-3% increase of productivity is necessary each year. Therefore, we need to constantly work on solutions and search for new opportunities. On the positive side, people are willing to invest in the sector because there is an increasing demand for food in the market. We have to be confident that we will develop new technologies and solutions because while it is not impossible, we cannot miss a single day. If we can increase the amount of productivity in the Netherlands, we can also do it in the less developed countries. In the Netherlands the new technologies will also help to produce more food in a more efficient manner.

Heiman Smits and Judith Roelefs are based in Norton Rose Fulbright's Amsterdam office in the Netherlands. Heiman Smits is a partner and Judith Roelofs is a business development manager.

Innovation in Food & Agribusiness – the key ingredients

Judith Roelofs

Last November, the Norton Rose Fulbright Amsterdam office hosted its annual 'Risks and opportunities in the global food & agri sector' seminar. Leading industry experts from Cosun, Biobest, FMO and Monsanto shared their thoughts to a lively audience.

Ben van Doesburgh, Member of the Board at Royal Cosun, started the evening with a few stories from his successful career at Procter & Gamble ('P&G') and Mattel. He then moved into Food and Agribusiness ('F&A'), discussing Paques, a family owned bio methane business.

At Paques, innovation was thought to be 'innovation and reinvention,' The sub-manufacturer, out of necessity, redesigned silos (a structure for storing grain) to become one of the leading independent suppliers in the bio-methane sector.

Lastly, Ben touched upon Cosun, a leading sugar co-operative in the Netherlands where innovation was deemed 'innovation for change'. Cosun moved from being price leaders in the sugar industry to being leaders in the value add sector, such as the bio plastics, bio methane and 'thick juice' commodities, which are all a basis for third party sustainable products. These are all examples of companies who stayed on top of the market utilising innovation through smart thought and production re-design.

Ben emphasised the importance of companies harnessing the right environment. This requires shareholder support, a long term view (as sometimes, a short-term perspective forced on listed companies can challenge innovation) and a culture of entrepreneurship.

Bart Sosef is General Manager at Biobest in the Netherlands. Biobest produces bumblebees for pollination and pest control which has revolutionised farming in the Netherlands through saving on labour costs and removing the need for hormone injection. This has become the new standard market practice. Biobest has spent the past year focusing on cost leadership and will continue to make improvements in this sector.

The newest issues of high density populations and global warming pose new pressures on agricultural companies to come up with innovative ways to solve these problems. The questions that need solving include: how to transfer Europeans' best practices globally? How to introduce green or sustainable products? Examples of innovative solutions to these issues include low chemical residue food or entirely residue free food and chemical free pest prevention.

As a result, Biobest has moved from cost to product leadership with a growth in global R&D activities producing innovative products such as the 'flying doctor'. Botrytis is grey mould that kills a number of crops. Traditional prevention to get rid of this mould usually requires chemicals that are expensive, time consuming and not within a 'green' tradition. Biobest identified appropriate insects called 'beneficials' and designed a custom 'hive.' This hive applies a droplet of chemical as each beneficial leaves the hive to allow micro-precision application to the crop suffering from the botrytis.

Bart has said that he sees more collaboration in the future between companies. He foresees the key areas for innovation in F&A as the combination of technology and nature (in his case, beneficials) and evolution of production methods.

Marjolein Landheer is Manager of Agribusiness, Food and Water at FMO, a Dutch development bank. FMO's strategy is to become the leading impact investor. By 2020, the bank aims for its investments to double the impact through creating more jobs. The bank also aims to halve its footprint through emitting less greenhouse gas emissions.

FMO's key value is ensuring that profits of the bank reflect society's changing social and economic impact. When FMO was established in the 70's this concept was the cutting edge of innovation. Now FMO leverages its own expertise and finance to help others invest in innovation.

Another key priority for FMO is to identify how to increase food output through maximum impact. Their

focus remains on improving in land cultivation, agricultural practices, resource efficiency, inclusive development and local value add.

Marjolein told the audience interesting case-studies including Usher Agro, an Indian rice miller that is based in Uttah Pradesh in Northern India. India is a major rice producer even though the state has significant energy shortages. Usher Agro hopes to come up with innovative methods to solve the energy shortages India faces. An innovative idea they came up with is a fully 'closed loop' process which saves energy through extracting value from every stage of the rice production process. Usher Agro is amongst the largest producer and processor of non-basmati rice and mills approximately 1.3m tonnes of rice p.a. With the support of FMO, the company has the opportunity to extract up to 90% of silica from ash and use the remaining ash for fertilizer. This innovative practice means that there will be less waste being produced during the agricultural production, benefitting society and the economy as a whole.

Mark Buckingham, Public Affairs, at Monsanto started his session by reminding the audience that innovation in food and agri is centuries old. For example, selective breeding of the original mustard plant resulted in the modern cauliflower and broccoli. Monsanto is well-known for its developments in F&A and plans to invest around €500m in its row crops business in Europe. Even though Monsanto has been connected to Genetically Modified ('GM') products in the past, Mark has said that the future of Monsanto is to focus on non-GM production in Europe.

Mark also agreed with the other speakers, that increase in global demand from a rising population and a growing middle class is a trend that cannot be ignored. However, he pointed out an interesting fact that crop stocks today are relatively low compared to historical averages.

Mark used the case-study of Monsanto's Fieldview software as an example of innovative techniques utilised by Monsanto. This Fieldview software enables farmers to accurately visualise and plan the soil characteristics of their land. Recent trials of over 3,800 fields using traditional techniques showed that about 10% of farmers used too little nitrogen and 40% of farmers used too much nitrogen. The financial and environmental savings could be enormous from this type of data-driven innovation.

The session ended with a lively debate, focused around IP rights in food and agri and whether or not an innovation in F&A should receive patent or other IP protection.

Judith Roelofs is a business development manager based in Norton Rose Fulbright's Amsterdam office in the Netherlands.

Competition law: commodities in the spotlight

Ian Giles & Rebecca Williams

Commodity trading dominates world trade, with hard and soft commodities accounting for 33% of world trade volumes. Soft commodities alone account for 5% of world trade volumes, while the World Bank recently reported that the value of agricultural commodities under management amounted to $320bn.[1] Firms trading in soft and hard commodities have the opportunity to generate huge revenues, with the largest such firms regularly generating annual revenues greater than the GDP of entire countries.

Companies active in agribusiness and commodities are of course subject to the legal frameworks and regulatory obligations that apply in each relevant country - but what is noteworthy is that developments in some recent competition law cases suggest that the application of competition law to commodities trading in particular may be broader than has previously been appreciated.

Gone bananas?

Competition law concerns have traditionally arisen at what may be termed the more 'tangible' stages of the supply chain, for example, in relation to the production, supply and retail of agricultural goods. The European Commission's investigations into cartel activity in the European banana market is indicative of this more traditional approach.

This year has seen European Court judgements rejecting appeals in relation to both the so-called Northern and Southern Europe banana cartels.[2] These cases both involved alleged collusion between banana importers, but what was particularly notable was the judgement and the Commission's reasoning in the Northern Europe case. This case confirmed that a cartel could arise not only when competitors discussed their current or future prices, but also when market participants discuss information 'relating to price'. In this case, this related to discussions on likely future market conditions, and the Commission's theory of competitive harm was that sharing this information between otherwise competing entities reduced uncertainty as to how the market would develop between the banana suppliers, and that this might facilitate coordination of their market behaviour, for example in setting prices.

Importantly, this case also confirmed that under such conditions where there were direct exchanges between competitors, it was not necessary for the Commission to demonstrate that the conduct led to any actual anti-competitive effects – i.e., that prices were any higher than they would have been absent the cartel behaviour. Fines imposed on the banana importers in the two cases totalled around €70m.

These cases therefore highlight both the low legal threshold for the Commission to make out an infringement, and the severity of penalties when illegal behaviour is found.

Focus on trading markets post-Financial Crisis

Away from agri-business, the post-Financial Crisis era has been marked by a series of high-profile regulatory investigations into sectors of the national and global financial markets. The European Commission has been at the forefront of a number of these investigations, including the ongoing Forex investigation, while in 2013, the Commission levied fines totalling over €1.7bn on eight financial institutions for participating in illegal cartels in markets for interest rate derivatives.[3] As discussed below, what is interesting in these cases is the type of behaviours that have been the focus of the authorities' attention.

The rate of investigations into trading markets has shown no signs of slowing and, of greater relevance to the agri-sector, has increasingly ventured into the realm of commodities. One example is the Commission's on-going

1 See, for example, Amity Insight January 2014 and Commodity Markets Outlook: October 2015, World Bank.

2 See Case C-286/13 P - Dole Food Company Inc and Dole Fresh Fruit Europe v Commission, judgment of 19 March 2015 (the 'Northern Europe banana cartel') and Case 469-15 P - FSL Holdings, Firma Léon Van Parys, Pacific Fruit Company Italy SpA, judgement of 16 June 2015 (the 'Southern Europe banana cartel').

3 See http://europa.eu/rapid/press-release_IP-13-1208_en.htm.

probe into potential anti-competitive behaviour in the biofuels sector, in an investigation marked by a series of unannounced dawn raids on multinational energy companies and the pricing agency Platts. The Commission has recently announced it is focussing this investigation on possible collusion affecting the setting of ethanol benchmarks.[4]

Separately the European Commission and the Swiss competition authority (Weko) are conducting a probe into precious metals pricing. The Weko has stated that their focus is on collusion around the setting of 'spreads' – that is, the difference between the bid and offer prices – in the markets for gold, silver, platinum and palladium[5]. The message is clear: commodity trading is now firmly in the regulatory spotlight – with potential implications trading in agricultural products as well as other commodities.

Are traders each other's competitors or counterparties?

The application of competition law to trading markets is complicated as a result of the way in which traders interact. Unlike traditional markets for the sale of goods and services, in trading markets traders will buy from each other one day, and sell to each other the next. There is a legitimate and necessary interaction between market participants in order to (i) gather information on counterparty trading opportunities and negotiate transactions, and (ii) better understand future market movements. However (as discussed in the *Bananas* case above), information exchange between traders could constitute a concerted practice if it reduces uncertainty in the market. This is the case even in the absence of evidence of co-ordination.

In this context, illegal information exchange might include:

- communicating to and/or receiving from individuals information not known/made available to the public on trading positions or preferences;
- disclosing (explicitly or implicitly) the trading position of other market participants and preferences towards a certain direction or a specific level;
- having repeated bilateral contacts to exchange sensitive information and/or competitive intentions and mutual understandings;
- discussing the outcome of trading strategies (even in relation to individuals) once these have taken place; and
- agreeing or reminding participants to conceal contact with one another.

Each of the above may not constitute coordination in and of itself and may not necessarily lead to such behaviour; however, in certain specific circumstances each may be sufficient to establish a competition infringement. As mentioned above, this results in a relatively low threshold for triggering an investigation into a trading market, thereby heightening the contingent risk to market participants.

Big brother is watching

A striking feature of the cases relating to traders was the reliance of the Commission on internet chatrooms (such as those provided by Bloomberg), in which traders would participate in discussions through their working day which covered topics ranging from purely social to allegedly anti-competitive. The increasingly advanced technology used by the competition authorities when investigating potential infringements means these communications can now be recovered and forensically searched.

Indeed, there has been a significant change over the last decade or so in the way in which authorities carry out investigations. A key tool in the authorities' investigatory toolbox is the unannounced dawn raid. Where authorities used to send large teams to trawl through file archives, the focus now is on imaging hard drives, and making forensic copies – or searching – phones, tablets and other portable media. The relevant authority is likely to focus their search on the IT infrastructure of the undertaking in question. The European Commission's revised dawn raids guidance published in September 2015 focuses in detail on its wide powers to search IT systems and hardware, and it is not unusual for thousands, or even millions of emails to be subject to searches for key terms during competition investigations.

Chatrooms are a particularly high-risk area because regulators may be able to take multiple information exchanges between numerous market participants which cross the line into illegality, and string these together to find one 'single continuous infringement' (in other words, a long-running cartel). Critically, the scale of any fine imposed on an undertaking participating in an illegal cartel is usually linked to the duration of the anti-competitive activity – so the effect of such findings can be extremely significant. Evidence gleaned from chatrooms has been integral in building the cases of the various authorities in the various financial trading investigations.

4 See http://europa.eu/rapid/press-release_IP-15-6259_en.htm.

5 See https://www.news.admin.ch/message/index.html?lang=fr&msg-id=58888.

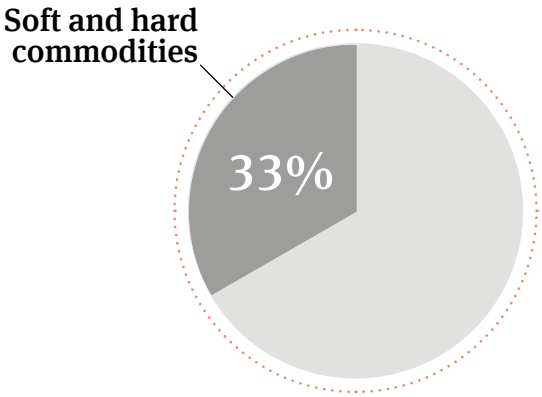
Consequences

It is clear that trading markets remain a priority for national and supranational competition authorities, with regulators having also focused on trading activity in global commodity markets in recent years. In the UK, the Competition and Markets Authority (CMA) and Financial Conduct Authority (FCA) both have significant new resources and a policy agenda of increasing enforcement of competition rules. They have also lowered the legal threshold for criminal prosecutions (broadly speaking, from 'dishonesty' to 'concealment' of the illegal behaviour). This will make it easier to punish individuals involved in competition infringements in the future.

This should sound as a warning bell to those involved in agri-trading – to ensure that compliance with competition law is a priority, but also that the nuances of the law are well understood by those on the frontline. It was notable that certain of the financial traders involved in these investigations voiced an opinion that they were just 'doing their jobs' – companies need to ensure their employees recognise compliance as a key responsibility in this respect.

Ian Giles and Rebecca Williams are based in Norton Rose Fulbright's London office in the UK. Ian Giles is a partner and Rebecca Williams is an associate.

Agricultural commodities under management



World trade volumes

The African bee-keeping story – local opportunities to satisfy a global demand

Lisa Koch & Kimberly Appotive

Bees are crucial to global agriculture and food supply, and bee keeping presents a growing opportunity for African agricultural development.

Honey is five times more expensive than oil[1]

The demand for honey is global, and growing. Not only sought for food consumption, honey is an important raw material in the production of cough medicine, so is bought up by pharmaceutical companies. Honey and wax are also used in cosmetics such as soaps and hair products. Global Industry Analysts Inc. predicts that in 2015 honey production worldwide would have reached 1.9m tonnes. It has been reported that global demand for honey continuously exceeds supply.

In 2015, the honey market globally was projected to hit $12 billion. Pure honey is becoming an expensive commodity – in Kenya a kilogram of honey costs five times more than a litre of petrol, and can be more than double this in Arab markets. In the US, the price of honey is increasing by more than 6% annually.

The value of pollination

Not only do bees produce honey, but their pollination of crops is vital. According to Kevin J. Hackett of the US Department of Agriculture's Agricultural Research Service, one in every three mouthfuls of food we eat directly or indirectly depends on pollination by bees.[2] He cites a Cornell University study which puts the value of bee pollination to US agriculture at more than US$14 billion annually.

For fruit and nut crops, pollination dictates the maximum number of fruits, and is therefore key to increasing yield.

United States bees and African Bees

It's easy to see how the recent phenomenon of bee populations dying off at rapid rates has caused concern with farmers, bee-keepers and environmentalists alike. More prevalent in the United States and Europe than in Africa, the cause is allegedly certain types of insecticides and pesticides used widely in farming. In the US the trend has been named the Colony Collapse Disorder and over the past six years it has wiped out about 10 million beehives worth US $2 billion. In recent years up to a quarter of honeybee colonies have disappeared across Europe.

It's not clear why the bees in Africa have been less affected. There are arguments that they are resistant to the chemicals responsible for killing bees elsewhere in the world; others argue that the African agricultural environment as a whole has lower amounts of pesticides. Some theories point to the genes of the bees, or that the cause could be the different farm practices in Africa which leave the bees undisturbed. Whatever the cause, there is a growing interest in Africa as the potential future global supplier of honey.

The African story

Ethiopia is the largest producer of honey in Africa and produces approximately 45,300 tonnes annually. Tanzania is the second largest (producing approximately 8,000 tonnes annually), and Kenya ranks third in, followed by Uganda and then Rwanda, with just 4,000 tonnes a year. Production for both domestic consumption and export – much of it to the UAE and other Middle Eastern countries – is a lucrative business.

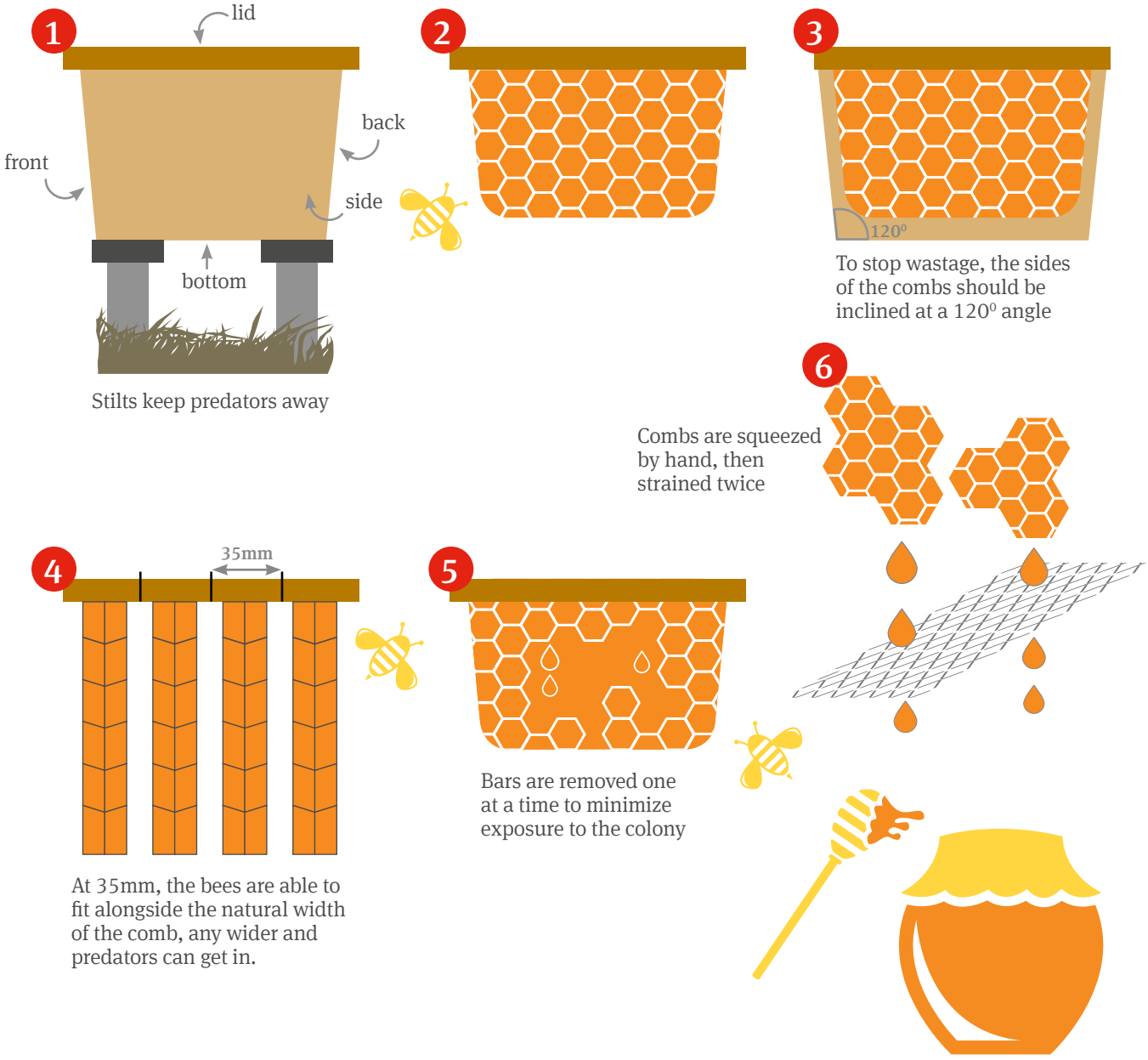
With more investment in African agriculture, local small-scale production has the potential to go beyond satisfying local demands. Investment will also have a direct benefit on other industries such as the pharmaceutical industry – where pharma companies need to ensure that there is a steady supply of honey to avoid production disruption – and food and cosmetic retail and wholesale companies, as one commodity often has many uses and the supply of honey affects a multitude of markets.

Interestingly, while the importance of investment cannot be underestimated, the development of the honey market in African countries mirrors many

1 See http://africanbusinessmagazine.com/sectors/agriculture/the-money-is-in-the-honey/

2 Bee Benefits to Agriculture, Kevin J. Hackett ARS National Program Leader Biological Control Beltsville, Maryland, http://www.ars.usda.gov/is/AR/archive/mar04/form0304.pdf

The top bar bee hive explained



other agricultural markets in Africa, where inefficient skills development, knowledge sharing and technological development are hindering growth in the sector, rather than access to finance. This was the view expressed by a number of panellists at an agriculture focused session at the Global African Investment Summit, a two-day event attended by leading politicians and members of the business community in December.

New bee keeping methods have the potential to create a better product which can be sold at a higher price. Sharing access to innovative techniques can create a superior, more marketable, and ultimately more profitable, commodity. The UK charity Practical Action is an organisation that purchases bee hives for low income families in Zimbabwe and advocates the 'The Kenyan Top Bar Beehive' technique, which does not disturb the bees and results in a purer honey product. The honey can sell for up to a third more than honey produced by more traditional methods.

Although many countries in Africa have begun local honey production not all producers meet international export standards. Food safety, and related packaging and labelling, was another key issue highlighted at the Global African Investment Summit. Falling short of international standards makes it difficult for producers to compete globally. Meeting international standards should be a focus for development if countries are going to take advantage of the high prices, growing demand and possible reductions in Western supply. The European Commission has stated that the EU will assist developing countries in meeting international standards so that African agricultural products can be increasingly traded on global markets. Experts predict that the honey industry will become a major foreign exchange earner for countries like Zimbabwe, if the honey that is produced meets international standards.

The future of honey and the bees

Many African countries are strategising how to pioneer their entry into, or grow their business in, this lucrative domestic and international market. Bee keeping also has other positive benefits for the local community such as helping families become self-sufficient. It is relatively affordable for local farmers to start up their own business ventures and they can start seeing results within three months.

The challenges to the sector are not unique: knowledge transfer, access to capital, quality control, and logistics. Investment in all these aspects is crucial for this sector to grow sustainably and ensure a thriving bee population which have the potential to supply the globe with honey.

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Bag tag (licence) agreements: Things to know under German law

Klaus von Gierke & Katharina von de Heyde

The research and development relating to plant varieties is expensive and time consuming but, once created, a plant of a certain variety is inexpensive to duplicate. The producer of a plant variety right (a breeding company or breeder) will hold intellectual property rights over a plant variety it has created. Protecting those rights, in particular in relation to the "end users" (mostly farmers) of the seeds of the plant variety, is very important to the breeders to ensure that production of a plant variety is economically viable.

Seeds are purchased by the farmers (or other end users) from a supplier, or the last supplier in a chain, through a seed purchase agreement, which will not typically impose restrictions on the purchaser in respect of the use of the plant variety rights.

Breeding companies may try and impose such restrictions on the purchaser by seeking to create a direct relationship with the purchaser. The breeder may attach a tag on the seed packaging (the seed bag) that contains the breeder's terms and conditions and seeks to apply them to the purchaser by stating that they are accepted when the purchaser opens the bag; this is known as a "bag tag". However, while this appears to be a simple and practical solution, use of bag tags can be legally complex, as this article discusses in the context of their use and the protection of intellectual property rights over plant varieties in Germany.

What is the purpose of a bag tag?

Under German law, the protection of plant varieties is provided for in the German Plant Variety Protection Act (Sortenschutzgesetz) of 1985 (the Act) and in the European Regulation No. 2100/94 of 1994 on community plant variety rights.

Under the Act, the breeder is exclusively entitled to reproduce seeds from the plant variety it has created. However, there is a "seed saving exemption" that allows farmers to reproduce seeds from their own harvests by replanting such seeds on their own farms (producing seed from seed). Farmers relying on this exemption (subject to certain exceptions for small farmers) are required to pay an appropriate compensation and disclose all necessary information on the extent of the reproduction to the breeder. These compensation and information requirements are further considered below.

Farmers and other end users are afforded additional flexibility to use rights to plant varieties under the "principle of exhaustion", which provides that protection over plant variety rights will stop applying to a specific plant, part of a plant or plant material once it has been put on the market by the breeder or with the breeder's approval.

The combined impact of the seed savings exemption and the principle of exhaustion is that no licence is required for farmers to make use of (the rights in) a plant variety – the bag tag is therefore not considered to be a licence, but an agreement that seeks to govern and restrict the use of the seeds, in particular by restricting the purchaser's statutory rights.

Can a bag tag agreement be enforced?

However, a breeder's ability to enforce such restrictions depends on whether the bag tag creates a valid contract between the breeder and the end user of the seeds. For such a contract to be formed, the opening of the bag by the purchaser would need to constitute acceptance of terms and conditions of the bag tag agreement, including the restrictions on the use of the seeds. Such acceptance would take place after the purchaser has acquired the seeds, with unrestricted rights of use, from the supplier. Therefore, whether a contract is formed is uncertain, with the most likely conclusion being that a purchaser (or any objective third party) would lack understanding of the implications of opening the bag, meaning that the test for acceptance would not be satisfied and the bag tag agreement would not be considered to be validly formed.

For breeders to ensure that enforceable terms are imposed on the purchasers, these would need to be contained in, or incorporated into, the seed purchase agreement entered into between the purchaser and the supplier of the seeds and, where relevant, replicated in each agreement down the supply chain. The requirement of such incorporation challenges the simplicity of the bag tag concept.

Limitations and restrictions

In addition, even if a bag tag agreement is enforceable, there are requirements and limitations under German statutory law that apply to the content of the terms and conditions of the bag tag agreement.

The language in which the terms are provided is prescribed – the general view is that English will be sufficient but this is not certain where the negotiations and correspondence have been concluded in German.

Any terms that are 'so unusual and surprising that the other party could not have foreseen them' or that (against good faith) inappropriately disadvantage the other party will not be held valid. Whether a party is inappropriately disadvantaged will be determined by the courts on a case by case basis. In general, in case rights having been acquired unrestrictedly are subsequently being restricted, it is more likely than not that a court may deem a party to be inappropriately disadvantaged.

Probably of most interest to breeding companies is that the exclusion of the seed savings exemption (a statutory right) in a bag tag agreement is highly unlikely to be upheld by the courts. However, stipulation of the compensation payable and the information to be provided by the purchaser under the seed savings exemption is more likely to be upheld and could provide some protection for breeders (other than against small farmers to whom an exception from the compensation provisions apply).

In addition, the generally accepted view is that exclusions or restrictions on the export of seeds to countries where plant variety rights are not protected is legitimate and likely to be permissible.

The governing law of a bag tag agreement may also be open to dispute, particularly in cross border transactions (although this is less of a concern within the European Union), which may impact on a breeder's ability to create a standardised bag tag agreement for use globally, particularly as the legal regimes for intellectual property rights on plant varieties vary from jurisdiction to jurisdiction.

Benefits of a bag tag – the seed saving exemption

With such legal uncertainties, it would be easy to conclude that bag tags are of little benefit to breeding companies. However, aside from seeking to establish a contractual relationship, a bag tag will notify the purchaser that the seed contained in the bag is subject to a plant variety right, which may assist the breeder in successfully raising (i) information and compensation claims and / or (ii) damage claims against the purchaser in relation to the breeder's rights under the seed saving exemption.

A well drafted bag tag should allow the breeder to request information and enforce its compensation claims for the previous three years even if no prior claims have been raised during that period.

As the seed saving exemption only applies where appropriate compensation is paid, a breeder may seek damages from a purchaser who infringes its rights by seeking to rely on the seed saving exemption in circumstances where no compensation has been paid. Damage claims will only be successful if the purchaser knew that plant variety rights were being infringed, and a bag tag can provide useful evidence of this knowledge.

Conclusion

Using a bag tag is not as simple and practical as it first appears, and there are more legal uncertainties attached to it than certainties created. However, a properly drafted bag tag will serve the purpose of notifying a purchaser of the breeder's statutory rights. So the purchaser should not hurry to untie their bag tags.

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European Court of Justice strengthens rights of plant variety right holders

Björn Thöne

By its ruling of 25 June 2015 (C- 242/14), the European Court of Justice ('ECJ') substantially reinforced the rights of the plant variety right holders. The court decided that a farmer who has seeded self-produced propagating material obtained from a protected plant variety (*farm-saved seed*) is – in order to benefit from the privilege for farm saved seeds – required to pay the equitable remuneration which is due thereon pro-actively and no later than 30 June following the date of seeding.

The background behind this decision is the fact that, according to Article 13(2) of Regulation (EC) No 2100/94, only the plant variety right holder is entitled to produce and reproduce variety constituents or harvested materials of a protected plant variety. Articles. 14 (3) of said regulation establishes a derogation for farm-saved seeds (so called *farmers' privilege*). Farmers are allowed to use the products obtained on their own grounds for propagating purposes. In order to do so without the consent of the plant variety right holder, they have to fulfil the following prerequisites:

- to the extent that there are indications for the use of farm saved seed of the respective variety, they have to provide information about the extent of the use of farm saved seed of that variety; and
- they have to pay an equitable remuneration[1].

1 Article 14(3) of the Regulation (EC) No 2100/94

The claimant of this case (which dealt only with the payment obligation of the farmer, not with his obligation to inform the plant variety holder) was a company that manages the rights of several plant variety right holders. The defendants – an agricultural partnership and its partners – had sowed farm-saved seed of a protected variety without having paid the equitable remuneration due thereon prior to the end of the relevant financial year. The information about the use of farm-saved seed by the defendants was provided by a processor who had processed the relevant farm-saved seed for sowing by defendants. As a consequence, the claimant filed suit before the Regional Court of Mannheim against defendants, claiming a violation of plant variety rights and financial damages as a consequence thereof. The court raised the question whether a farmer

- can make use of the farmers' privilege by paying the equitable remuneration due on the farm-saved seed used at any time, i.e. even after the end of the relevant financial year and after the use of farm-saved seed (despite the efforts of the farmer to hide that fact from the plant variety right holder) has been detected by the plant variety right holder, and even after suit has been filed accordingly; or
- having failed to pay the equitable remuneration for the use of farm saved seed in due time, could no longer claim the farmers' privilege but rather is, under such circumstances, deemed to have committed a violation of the plant variety right.

Accordingly, the Regional Court of Mannheim submitted to the European Court of Justice the questions whether (i) the farmer has to pay the equitable remuneration prior to sowing the propagating material or – if not – (ii) there is any time limit for payment the farmer has to adhere to in order to be able to benefit from the farmers privilege.

The ECJ used its ruling as an opportunity to point out some fundamental aspects of the systematic of plant variety rights:

> 'It should be noted, first, that Article 13(2) of Regulation No 2100/94 provides that the authorisation of the holder of the plant variety right is required, in respect of variety constituents or harvested material of the protected variety, inter alia,

> for production or reproduction (multiplication). In that context, Article 14(1) of that regulation establishes a derogation from that rule, insofar as use of the product of the harvest obtained by farmers, on their own holding, for propagating purposes in the field is not conditional upon authorisation by the holder of the right where they fulfil certain conditions expressly set out in Article 14(3) of that regulation.[2]

With respect to the questions of the Regional Court of Mannheim, the ECJ pointed out that there is no obligation on the farmer to pay the equitable remuneration prior to sowing the farm saved seed. However, the ECJ recognised that there is a need to find a time limit the farmer has to adhere to in order to be able to benefit from the farmers' privilege. If the farmer would be able to delay the payment of the equitable remuneration indefinitely, there could, by definition, never be a violation of plant variety rights due to non-fulfilment of the prerequisites for the legal use of farm saved seed. The farmer could pay the equitable remuneration at any time (even if he were caught as having used farm-saved seed without having fulfilled the relevant prerequisites) and by doing so legalize the use of farm saved seed subsequently. The ECJ states:

> 'In the second place, it should be recalled that the holders of plant variety rights alone are responsible for the control and supervision of the use of the protected varieties in the context of authorised planting and they depend, therefore, on the good faith and cooperation of the farmers concerned[3]. Accordingly, the absence of a precisely defined period within which farmers are required to comply with the obligation to pay equitable remuneration by way of derogation is liable to encourage farmers to defer that payment indefinitely, in the hope of avoiding payment altogether. To allow farmers to avoid complying with their own obligations towards holders in such a way would be at odds with the objective set out in Article 2 of Regulation No 1768/95 of maintaining a reasonable balance between the legitimate interests of the farmers and the holders concerned.'

Therefore, the ECJ concluded, the farmers who want to make use of the farmers' privilege are obligated to pay the equitable remuneration within the period that expires at the end of the agricultural financial year during which that sowing took place, i.e. no later than 30 June following the date of seeding.

This decision of the ECJ is an important signal in the European seeds market. By setting a time limit for the payment of the equitable remuneration under the farmers privilege the ECJ restores the balance between the interests of the farmers on the one hand and the plant variety right holders on the other hand, which had become necessary after the ECJ had seriously weakened the position of the plant variety right holders in prior decisions (ECJ, decision dated 04/10/2003, C-305/00; ECJ, decision dated 11/15/2012, C-56/11) by limiting the right of the plant variety right holders for information about the usage of farm saved seed of their varieties.

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2 see judgment in Geistbeck, C-509/10, EU:C:2012:416, paragraphs 21 and 22

3 judgment in Geistbeck, C-509/10, EU:C:2012:416, paragraph 42

Bioenterprise Corporation – Helping launch the future of Canadian agri-business

Lorelei Graham

Norton Rose Fulbright is a corporate partner of Bioenterprise, Canada's leading agri-business accelerator and a global leader in agri-technology commercialisation. While our Canadian team provides legal services to Bioenterprise and their innovative clientele, our experts in the UK and Germany have been helping the organisation gain insight into European agri-tech markets.

Their President & CEO, Dave Smardon, kindly agreed to tell Cultivate about Canada's agri-technology sector and how his organisation is helping entrepreneurs, major corporations and investors succeed on the global stage.

'In a nutshell, Bioenterprise's mission is to help agri-technology start-ups get off the ground and help established companies reach the next level of success. We offer help with all elements involved in commercialising an idea — identifying strategic partners, developing a financial strategy, analysing technologies and markets, regulatory requirements and so on. That's one half of what we do.

The other half is helping investors and corporations that want access to Canadian agri-technology. As we have our finger on the pulse of the industry, we're ideally placed to identify investment opportunities. Furthermore, we have the expertise to handle due diligence and help companies find the technology they are looking for. The reason we focus on agri-technology is because it is a sector with huge potential. The world's population is growing: according to the U.N., we are going to hit 9.6 billion by 2050 and a lot of those folks are not going to be happy eating lentils and rice. As the middle class grows dramatically in places like China and India, the demand for meat increases - requirements for producing meat includes a lot more land, water and other resources. At the same time, climate change is putting more pressure on the planet. We simply have to find ways to grow more food with fewer inputs; less water, less fuel, less chemicals, et cetera. This is what agri-technology makes possible. Agri-technology is also creating ways to make the food system safer, boost nutrition and reduce food waste. It is developing renewable, bio-based alternatives to things like plastics, fibres and composites.

What sets Bioenterprise apart from other business accelerators is our domain expertise. We have a fully comprehensive and thorough understanding of the sector because agri-technology is all we do. We know the players and have all kinds of connections, which makes us a great matchmaker. Most importantly, we have the business expertise to assess whether an idea is viable and the effort required to get that idea off the ground.

The other thing is our international outlook. In a global economy, our thinking cannot be limited by national borders. This is why we currently have partnerships in 15 countries around the world and are constantly looking to expand existing partnerships and create new relationships.

We act in a multitude of ways for various clients. For example, WADI: Wellington Agribusiness Developments Inc. They have created a natural sulphite-free coating that continues to keep fruits and vegetables fresh, long after they have been cut or peeled . We handled due diligence on potential distribution partners and helped with international market research and regulatory applications.

Another example is Everspring Farms. We helped them acquire the IP needed to incorporate Omega 3s into sprouted seeds in order to actually boost heart health. It is an entirely natural process — no genetic engineering involved.

Then there is AbCelex Technologies. They are tackling a chicken disease called Campylobacter, which is the number one cause of foodborne illness in the Western world. AbCelex

has developed a cheap, effective solution for Campylobacter that can be added to chicken feed. We helped them get funding for proof-of-concept experiments. Last year, they used the results from those experiments to raise US$2 million in series A financing, and now they are getting ready to hit the market in 2017. Additionally, we have seen demand from companies that want to license technology, acquire start-ups or make big investment decisions. For example, the Egg Farmers of Ontario had funded some researchers at McGill University who found a way to identify infertile eggs and male embryos before incubation. As this was something that could save producers a lot of money, Egg Farmers of Ontario wanted to find a company to commercialise this research. We were hired to conduct the due diligence and work out a licensing deal.

We have also worked with several companies that have been eyeing up the precision agri space — so using very precise technology and data to minimise crop inputs and maximise crop yield. In addition to this, we were commissioned to draft several high-level overviews, as well as reports on particular companies. In one case, we gave a major Japanese multinational company the information they needed to invest in a Canadian company. In another case, a new Canadian family VC office hired us to research a potential investment.

Recently, we did some very extensive due diligence for an American VC outfit that wanted a critical appraisal of a crop input. This was a deal with no Canadian connection — we were hired simply due to our expertise. Based on our research and assessment, they put an additional US$6 million into that product.

In addition to the corporate side, we also have a number of investors getting involved. Big-name investors like Kleiner Perkins, Khosla Ventures and Google Ventures are jumping into the agri-tech space. There are new VC funds focused specifically on agri-tech springing up around the world: Europe, Israel, New Zealand, India and North America.

At the same time, we are seeing agriculture giants like Monsanto, Syngenta, Dow and Dupont setting up their own VC arms. So these are very exciting times for the space, and the momentum just keeps growing.

AgFunder estimates there were US$2.36 billion deals worldwide in 2014 — and it is worth highlighting the fact that seven of the top 20 investments that year went to Canadian firms.

Canada is an agricultural powerhouse. We are the sixth-largest exporter of agri-food products in the world. We have tonnes of expertise in the country and a very robust research and development (R&D) pipeline. Where we have fallen in the past is on commercialising that R&D.

A couple of years ago, the Conference Board of Canada put out a report that listed Canada as a leader in research and innovation but gave us a 'D' in commercialisation. We rank 24th among Western countries and dead last when you look at G13 countries. So, while other countries have been plowing large amounts of money into incubators and accelerators, Canada has been lagging behind.

The good news is that the federal government is pouring US$100 million into incubators and accelerators across the country, and that includes Bioenterprise. Last January, they pledged US$2.5 million to help expand our services over the next five years.

Regardless, 2015 has blown last year's numbers out of the water. In the first two quarters alone, Canada hit more than US$2 billion. The financing rounds are getting bigger, new investors are coming on board, and the average deal today is worth more than US$9 million. At the same time, we are seeing more public dollars flowing into the sector. The UK has committed £160 million to its new national agri-technology strategy. Israel invests roughly US$110 million a year in agri-tech R&D.

This is so exciting because back in 2003, when Bioenterprise was just starting out, agri-technology was barely a speck on investors' radars. There was a lot of promising technology and plenty of talented entrepreneurs who wanted to commercialise it, but the

big stumbling block was the lack of venture capital. I spent a lot of my time just purely raising awareness, talking to different groups of investors about what agri-tech was, how it worked and how much potential it had.

Now things are starting to change. I recently got back from the Global Investors Summit in Switzerland, and what really struck me was how much interest I was seeing in agricultural technologies, food security and water security - even though this was not an agri-tech event, but an event for investors of all stripes.

There is no question that funding is still the biggest barrier, however, we are now starting to see some real movement and we intend to use that movement to improve the market and further our reach.

For many years, we have only had two offices: one in Toronto in the heart of the financial district, the other about an hour away in Guelph, which is a major agri-food hub. Now, thanks to federal funding, we have established two new offices. Last April, we teamed up with the Prince Edward Island ADAPT Council to open an office in Charlottetown. The ADAPT Council is investing capital into the province's economic development and the commercialisation of new agricultural products and business expansion opportunities. Two months later, we opened an office in Halifax in partnership with Innovacorp, which is an early-stage venture capital organisation that focuses on IT, life sciences, clean tech and oceans technology.

Opening offices in Eastern Canada has allowed us to expand and deepen our connections. We have always worked with partners across the country: companies, incubators, universities, research institutes and so on, not to mention Norton Rose Fulbright. But now with an ever growing bricks-and-mortar presence, we are able to serve a much wider range of entrepreneurs.

Looking forward, we are starting to put plans in place for another office, this one out west. Ultimately what we are aiming to do is take Canadian innovation to the global market and really drive forward the kind of change the world needs.

Further information about Bioenterprise is available on their website at www.bioenterprise.ca.

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NORTON ROSE FULBRIGHT

2016 will be the year of agribusiness for Norton Rose Fulbright

Throughout the course of the year we will launch four major campaigns

Legislation, compliance and enforcement

The future of logistics

Food safety

The future of precision agriculture

Plant innovation

Financial institutions | Energy | Infrastructure, mining and commodities
Transport | Technology and innovation | Life sciences and healthcare

Indonesia's haze crisis hits record levels

Rick Beckmann, Jakarta & Aldi Rakhmatillah

It is becoming a regular occurrence.

Indonesia has again been battling forest fires in Sumatra and Kalimantan (Indonesian Borneo), exacerbated by an unusually severe dry season this year. The haze enveloped Singapore and Malaysia, and also wafted into Thailand and the Philippines.

The recent crisis seems to be the worst and longest on record. According to Bloomberg, average daily emissions of carbon dioxide for Indonesia in September 2015 were 22.5 megatons, rising to 23 megatons in October (1-28). Figures from the World Resources Institute indicated that Indonesia normally emitted 2.1 megatons of carbon dioxide per day before this year's forest fires. Other reports mention that Pollutant Standard Index (PSI) levels recorded in Central Kalimantan exceeded 2,000 and even reached 3,300 µg/m3 TPM at times, while anything above 300 is considered hazardous.

The finger of blame has been pointed at the usual culprits – plantation companies in one of the world's two largest palm oil producing nations, and small-scale farmers using slash-and-burn as an economic means of land clearing.

And the Indonesian Government is again under fire for not doing enough.

International criticism

As the air pollution index soared to hazardous levels, Singapore and Malaysia closed schools, distributed masks and advised residents to stay indoors. Some flights in and out of Indonesia were cancelled, putting at risk Indonesia's lucrative tourism industry, with the peak season approaching.

In response to Indonesian Vice-President Jusuf Kalla's statement that neighbouring countries should stop complaining and be grateful for the clean air they enjoy for the rest of the year, the diplomatic spat of previous years has continued. Singapore's Foreign Minister said:

'The Indonesian government has said that it is taking steps to deal with the problem... Yet at the same time, we are hearing some shocking statements made, at senior levels, from Indonesia, with a complete disregard for our people, and their own... How is it possible for senior people in government to issue such statements, without any regard for their people, or ours, and without any embarrassment, or sense of responsibility?'

But the accusation that Indonesia was not taking the issue seriously was perhaps a little harsh.

President Joko Widodo deployed 30 aircraft and 22,000 troops to fight the fires on the ground. Several warships were placed on standby off Kalimantan, ready to evacuate victims, if needed. Malaysia, Singapore, Australia and Japan all sent assistance to help end the fires.

To avoid repeat outbreaks, the key is to prosecute the offenders. Pressure has risen as Indonesia has to face up to its climate commitment to cut carbon dioxide emissions by 29 percent by 2030 made at the United Nations Climate Change Conference in Paris, December 2015.

Local response

The Indonesian government has promised to immediately impose sanctions on the perpetrators (without disclosing names), provided there is a 'clear' legal basis. It has identified the key suspects as palm oil plantation companies, many of which, coincidentally, are backed by Singaporean and Malaysian interests.

While rare in the past, Indonesian courts are increasingly finding palm oil companies guilty of causing the haze. Indonesian courts prosecuted at least four plantation companies for the 2013 forest fires. Hefty fines by Indonesian standards have been imposed in West Kalimantan, Riau, South Sumatra and Aceh over the last couple of years. Reports indicate that the police are currently investigating at least 16 cases in South Sumatra, 11 in West Kalimantan and 121 in Central Kalimantan.

Indonesia's National Agency for Disaster Management has reported that the fires have cost the government

more than US$30 billion. At least 19 people have died from haze-related illnesses and more than half a million cases of acute respiratory tract infection have been reported since July 1 in the most impacted areas of Kalimantan and Sumatra – and the toll is still climbing. The forest fires have also destroyed much of the natural habitat of Indonesia's orang-utans, and there are concerns that businesses could use the government action to declare force majeure on deals in sectors ranging from palm oil to banking.

Six Indonesian provinces declared a state of emergency

The annual conference of the Roundtable on Sustainable Palm Oil in Indonesia this year highlighted the culpability of small-scale farmers in causing haze, since they still use slash-and-burn methods and lack the education or means to engage in social and environmental sustainability. Meanwhile, the governments of Malaysia and Indonesia – the world's top two palm oil producers – have announced plans to form a Palm Oil Council as a joint effort to combat forest fire haze and educate smallholders on sustainable land-clearing practices, among other things.

Investment in plantations

Forest fires aside, the Indonesian government has vowed to tackle monopolies and excessive foreign investment in the plantation industry in recent years.

In 2014 a regulation was issued that reduced the total palm oil area permitted for a 'group of companies' to 100,000 hectares. While there had been various attempts in the past, this was the first serious shot by the government at breaking up plantation monopolies. And it appears to be in the process of implementation.

A controversial new plantations law was rushed through Indonesia's parliament in September 2014. The original draft had proposed that foreign investment in plantations be limited to 30 percent, and required existing foreign investors to sell down their shareholdings within five years. Against a rumbling of potential international arbitration, the 30 percent limitation was not included in the final law.

While the foreign investor limitation remains at 95 percent, the new law provides for a further foreign shareholder limitation to be set within two years, on the basis of 'national interest'. The argument over excessive foreign monopolisation versus insufficient domestic funds to invest in the capital-intensive plantations industry is likely to continue into next year, when the limitation is meant to be settled.

In the meantime, the issues facing the Indonesian plantation industry can be expected to continue for some time to come.

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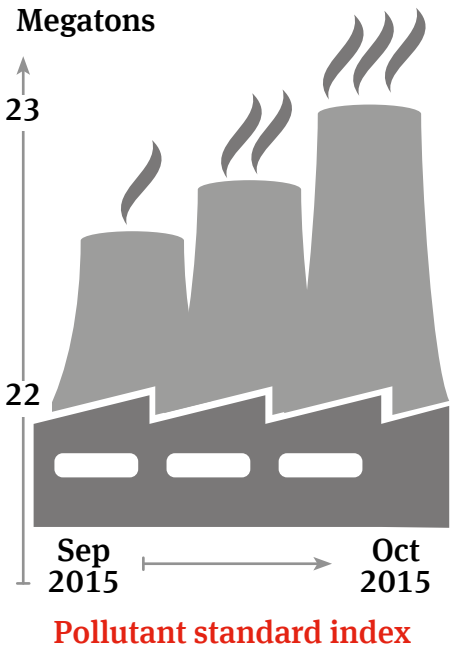

Government investigations: how companies operating in the food & agribusiness sector can be prepared

Chris Warren-Smith, Michael Loesch and Ian Pegram

The impact of government enquiries and investigations remains one of the key concerns of businesses globally. Companies and individuals in the commodities and agri-business sector are no strangers to appearing on the regulators' radar. In recent years, government agencies in the United States, UK and Switzerland, in particular, have examined closely allegations of conduct which breached rules on anti-competitive conduct, manipulation of the markets, corruption and economic sanctions. In some cases, the outcome has been a significant fine and reputational damage.

The global investigations landscape

In the commodities and agri-business sector, market abuse will remain a key issue of focus. The UK Financial Conduct Authority's ('FCA') issued a warning in September 2015 stating that commodity-trading firms had 'learned little' from recent and high-profile market abuse cases. This is a very clear warning to the sector. The FCA found that generally awareness of market abuse risk was poor within the firms it assessed.

In April 2015, the US Commodity Futures Trading Commission charged two significant global commodities and agri-business sector businesses with manipulating wheat futures and cash wheat prices. The regulator sought a permanent injunction from future violations by the two companies, as well as disgorgement and civil monetary penalties.

Global companies in the commodities and agri-business sector face continuing challenges in co-ordination and strategy when investigations involve multiple regulators. Cross-border co-operation between international regulators is now the norm, underpinned by formal agreements in many cases. However, we see examples of tensions between regulators in connection with seeking to achieve global settlements, as each regulator has their own priorities and political pressures. This increased enforcement activity around the globe means that it has become increasingly complex for business to navigate their way to multi-jurisdictional settlements.

Across the globe, governments and regulatory agencies continue to focus on bringing senior executives to account for their conduct in the context of regulatory failures by corporates under their control. The UK FCA is introducing significant changes in 2016 which will place greater accountability on senior management authorised by the regulator. In Singapore two high-profile decisions recently convicted senior managers of multi-national corporations of criminal corruption for procuring secret profits through intricate schemes. It also held that a director's duties include an active duty to exercise reasonable diligence to ensure that the company did not engage in corrupt practices.

Significant enforcement is clearly no longer solely the preserve of the United States regulators. Recent activity against global corporates by government agencies in China, the Netherlands and Brazil, for example, indicates that businesses and senior management must be aware of the changing political and regulatory dynamics in the counties in which they do business. We expect this trend to continue.

The economic sanctions framework is complex and fast-moving in response to political change. Businesses in the commodities and agri-business sector will continue to work through complex issues such as the impact of Russian sanctions, including establishing and enhancing relevant compliance frameworks. We may see investigations and enforcement in connection with breaches of this complex framework. Also, proposed changes in relation to the United States' relationship with Cuba may also bring challenges.

Investigations trigger

It is increasingly common for businesses to consider how they will respond to a raid or 'unexpected visit' by a government agency. Businesses

should implement procedures which engage key decision-makers, key IT staff, and legal advisors at the earliest available opportunity to limit the impact of a raid. The initial response to a raid may impact significantly on the course of a broader investigation which follows. A number of global businesses hold 'mock' dawn raids to ensure that all key responders, from reception staff to executives, are familiar with their roles and responsibilities.

A company may fall under the spotlight when sector peers are subject to investigation, when regulators focus on the sector as a whole in an 'industry-wide sweep', or when press or campaign-group pressure leads to an investigation. Sometimes, businesses find the issues themselves, through risk assessment or audit functions. Whistleblowers are an increasing driver of investigations, particularly given the rewards on offer from US authorities to individuals globally. In a variety of investigations, including insider trading and anti-corruption, the US Department of Justice has increasingly used investigatory methods that were once generally reserved for non-'white collar' crimes, including the use of undercover witnesses and wiretapping - although the prevailing pressure is on companies to bring issues to the regulator through self-reporting.

Whatever the trigger, if your business is subject to an inquiry, (internal or government-led, domestically or on a cross-border basis) spending some time developing protocols to manage investigations before they arise can make a big difference to the ability of the business to respond in a strategic and considered way.

An effective Investigation Protocol

Businesses often develop clear guidance on how investigations should be conducted. These protocols can prove invaluable in demonstrating the integrity of the decision-making process. If the decision is that an investigation should be commenced, a further, specific protocol should be prepared.

The following key considerations should inform the preparation of an effective protocol at the outset of any corporate investigation:

Initial response and immediate remedial steps: set out who within the organisation will make key initial decisions and control the actions needed to neutralise the targets of the investigation. It is imperative that steps are taken to limit the company's potential liability and mitigate risks going forward. In multi-national businesses, a documented protocol should set out thresholds at which matters should be raised to company headquarters.

Identification of the investigation team and key decision-makers: the team must be independent and uninvolved with the matters under investigation. The team must have access to the appropriate resources including legal, accounting, IT, and HR, as well as relevant expertise in the affected business or product area. An effective Investigations Protocol will identify the scope of the team receiving legal advice in order to protect privilege. Third party support services should be identified as necessary.

Issues and scope of the investigation: defining the issues and scope of an investigation sets the initial tone for the investigation. These concepts should be re-evaluated as the investigation progresses and facts are better understood.

Jurisdictions at issue: consider and identify which jurisdictions should be covered by the investigation, and in which jurisdictions there could be exposure, including company headquarters, location of registered office, branches or offices, and jurisdictions in which the company is listed.

Targets of the investigation: identify a preliminary list of target individuals.

Custodians of information: develop a list of custodians for data preservation and collection purposes.

Preserve documents: instruct your IT teams to suspend deletion policies and freeze servers; issue document preservation notices.

Collect data: the Investigation Protocol should set out who will collect data and the types of data needed. It will provide a framework for effective and efficient review. Businesses should take local law advice concerning data privacy and employment rights that may be applicable in advance of any collection.

Consider employment law issues: relevant laws and regulations vary significantly by jurisdiction; businesses should consult with counsel from the jurisdiction of the employee at issue before proceeding with any action related to the employee, by reference to internal policies, employment contracts, disciplinary action, whistleblower protections, employee representation and internal PR.

The interviews: an Investigation Protocol will identify, select and prioritise interviewees. Key considerations include whether initial interviews to obtain background information are required, and whether the company will offer legal assistance to the employee throughout the various stages of the investigation.

Maintain privilege: the protection of legal advice from disclosure to regulators, both domestically and internationally, is critical. Businesses should consult with external counsel in relation to the protection of privilege, including explaining to all those involved in the investigation to ensure that everyone understands the position. It is important that actions in one jurisdiction do not affect privilege claims in another jurisdiction, and that actions in the investigation do not impact privilege claims in other forums such as an investigation by a regulatory authority or during the course of civil litigation.

Data privacy: comply with data protection and privacy laws, and other laws and regulations (e.g. state secrecy laws) that apply to data collected during the investigation. Consider carefully potential transfers of data outside of the European Union. The relevant laws and regulations vary by jurisdiction depending on the location of the employees, location of the servers, and location of any hard-copy materials. Agreements with workers' representatives or unions may also impact an employee's rights concerning data privacy.

Approach to dealing with regulatory authorities: Whether to disclose the conduct under investigation to enforcement and/or regulatory authorities in relevant jurisdictions is an ongoing consideration that must be assessed throughout the course of the investigation. The expectations of regulators across the globe in relation to co-operation continue to evolve. The US Securities and Exchange Commission recently indicated that a company must self-report misconduct in order to be eligible for the Enforcement Division to recommend a Deferred Prosecution or Non-Prosecution Agreement in an anti-corruption case under the Foreign Corrupt Practices Act (FCPA). The UK Serious Fraud Office continues to push an agenda of self-reporting and co-operation, recently commenting that 'you don't have to cooperate, but if you say you want to - back it up, really do it; don't say one thing, but really work to a different agenda.' The approach to regulators, prosecutors and issues of disclosure and co-operation are critical.

Approach to individuals: In September 2015, the US Department of Justice issued a memorandum entitled 'Individual Accountability For Corporate Wrongdoing' (known as the 'Yates Memo') outlining specific policy measures intended to empower US prosecutors further in their pursuit of individuals alleged to be involved in corporate wrongdoing. The Yates Memo appears to set out clear directives to federal prosecutors and, as a practical matter, adds several weapons to the arsenal that the US government can use to flush out and prosecute individual wrongdoers implicated in corporate misconduct. For example, to qualify for any cooperation credit, corporations must provide the US government with all relevant facts relating to the individuals responsible for the misconduct. Conditions which may apply to a Deferred Prosecution Agreements in the UK may include cooperation in any prosecution of individuals.

Media and PR strategy: internal and external communications must be handled effectively from the outset. An Investigation Protocol should set out who within the Company will be in charge of regulating what is said to press, staff and other stakeholders. Businesses should consider how to maintain consistency in any public statements that are made by all parties, taking into account legal or regulatory requirements in all relevant jurisdictions. The adoption of different disclosure practices in different jurisdictions may be appropriate.

A relatively small amount of time spent developing and reviewing a suitable and bespoke protocol for a business can prove invaluable in responding to government enquiries and investigations and mitigating the damage that can result.

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Food safety

Savannah Wiseman

FDA issues accredited third-party certification rule

On November 13, 2015, the US Food and Drug Administration (FDA) issued a final rule establishing a voluntary program for the accreditation of third-party certification bodies to conduct food safety audits and to certify that foreign food facilities and the food they produce comply with FDA food safety requirements. According to the FDA, foreign entities may use certification for two purposes:

- First, importers may use certifications to establish eligibility for participation in the Voluntary Qualified Importer Program (VQIP), which offers expedited review and entry of food to the U.S.
- Second, importers may use certifications to comply with FDA requirements that certain imported foods be accompanied by a certification from an accredited third-party certification body, which the FDA may require in special circumstances to prevent potentially harmful food from reaching U.S. consumers.

The final rule establishes the framework, procedures, and requirements for accreditation bodies seeking recognition by the FDA as well as establishes the requirements for third-party certification bodies seeking accreditation under the program. Both foreign governments and private third parties can qualify as either an accreditation or certification body under the program.

Recognized accreditation bodies will be responsible for accrediting third-party certification bodies to audit foreign food facilities and to certify that the food they produce complies with FDA food safety regulations. The program does not intend for the FDA to directly accredit third-party certification bodies; but does allow the FDA to do so if it has not identified and recognized an accreditation body within two years of the program.

Third-party certification bodies accredited under the program are required 'to perform unannounced facility audits and to notify the FDA upon discovering a condition that could cause or contribute to a serious risk to public health.'

Additionally, the rule provides that facilities and importers may choose to use onsite audits conducted by accredited third-party certification bodies to comply with supplier verification requirements under FDA's recently-released final rules for Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls for Human Food and Animal Food, and the Foreign Supplier Verification Programs (FSVP) for Importers of Food for Humans and Animals. Under those rules, in circumstances where an onsite audit is the appropriate supplier verification activity, such audit must be conducted by a 'qualified auditor,' which is defined to include an audit agent of a certification body that has been accredited in accordance with the final rule.

Notably, the final rule excludes from the mandatory import certification authority (1) alcoholic beverages manufactured by foreign facilities, and (2) meat, poultry and egg products that are subject to U.S. Department of Agriculture oversight at the time of importation.

The FDA has not yet set an implementation date for the accredited third-party certification program. The FDA still needs to finalize the Model Accreditation Standards guidance and a rule proposed earlier this year establishing user fees for accredited third-party certification bodies. FSMA requires that the FDA establish a user-fee program to reimburse the agency for its work in establishing and administering the third-party certification program.

Food companies with international supply chains should start to familiarize themselves with this program. Once in effect, the FDA can require importers of certain 'high risk' foods to obtain certification from a third-party accredited under this new program in order to import these 'high risk' foods to U.S.

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Food safety

Megan Fanale Engel

Genetically modified salmon approved as safe for consumption

On November 19th, 2015 the FDA approved genetically engineered salmon as safe for humans and animals to consume, making it the first genetically modified animal to receive such approval. The decision is a historic one, as the FDA is the first agency to approve a genetically modified animal as safe for consumption.

The genetically modified salmon, produced by AquaBounty Technologies (AquaBounty), can grow to market size faster than unmodified, farm-raised salmon. AquaBounty genetically modifies the salmon by inserting a new gene into fertilized salmon eggs. The inserted gene increases the production of a fish growth hormone, resulting in a type of salmon that can grow twice as quickly as unmodified, farm-raised salmon.

AquaBounty created the genetically engineered salmon, known as AquAdvantage salmon, 25 years ago and has been seeking approval to sell the fish to consumers ever since. Five years ago, the FDA concluded that AquAdvantage salmon would not harm the environment and was safe to eat; however, the FDA did not approve the fish for human or animal consumption until this week.

The FDA also announced that the AquAdvantage salmon does not have to be labeled at the point of sale as genetically altered. The director of the FDA's Center for Food Safety and Applied Nutrition, Susan Mayne, explained that the FDA can only require mandatory labeling of genetically engineered food if the agency discovers a 'material difference' when comparing the genetically modified product with its traditionally produced counterparts. Because the FDA did not find any material differences between AquAdvantage salmon and farm-raised salmon, labeling disclosing that AquAdvantage salmon is genetically engineered will not be required.

Despite the approval, some limitations for AquaBounty's production of the genetically modified salmon remain. FDA is requiring that AquaBounty raise the genetically engineered fish in tanks on land at two approved sites – one in Canada and one in Panama. In addition, AquAdvantage salmon will be sterile, so that should the fish escape into the ocean, they will not be able to reproduce with wild salmon.

Food safety and environmental groups have indicated they intend to contest FDA's approval action. In one case, the Center for Food Safety announced that it plans to sue the FDA to block the approval of AquAdvantage salmon.

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Food safety

Rohan Sridhar

Commonwealth issues new imported food controls

Australian Agriculture Minister, Barnaby Joyce, has introduced new orders designed to complete the *Government's changes to the Imported Food Control Regulations* (Regulations) in respect of recognised foreign government certification.

In March 2015, the Government amended the Regulations to allow the Minister to make orders requiring certain 'risk foods' to be inspected and/or analysed under the Imported Food Inspection Scheme. Risk foods are required to be inspected each time they cross the Australian border. *The Imported Food Control* Order (Order) was amended by the new *Imported Food Control Amendment* (*Recognised Foreign Government Certificates and Other Measures*) *Order* (Amending Order).

The Amending Order requires that raw milk cheese be covered by a recognised foreign government certificate. This was previously required only in respect of New Zealand originating cheese. There are a number of other products which were, and still are, required to be covered by recognised foreign government certificates. Recognised foreign government certificates are agreed upon at a national level by Australia, and are currently in force for 3 jurisdictions – Thailand (issued by the Department of Fisheries for certain fish, molluscs and crustaceans); France (issued by the Department of Agriculture for Roquefort cheese); and Canada (issued by the Canadian Food Inspection Agency for certain fish and molluscs).

The Amending Order also removes from the operation of the Imported Food Scheme certain pig products that originate in New Zealand.

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