



Legal mechanisms to contribute to safe and secured food supply chains in time of COVID-19

INTRODUCTION

The COVID-19 pandemic has triggered the use of emergency regulatory mechanisms (FAO, 2020a) and has impacted contractual transactions in food supply chains, altering the equilibrium of supply and demand and leaving small producers and business operators in a fragile situation (FAO, 2020b).

Legislation covering the supply chain can contribute to restoring secure and safe transactions in times of emergencies such as the COVID-19 pandemic. Legal frameworks should recognize the rights of producers and vulnerable groups affected by changes in supply and demand, and their need to appropriately adapt to these changes; to ensure the proportionality and necessity of restrictive measures; and to strengthen their capacity to face the challenges posed by the new situation, including enabling flexibility in the application of certain administrative requirements.

The regulatory measures suggested in this brief would not only be useful during the COVID-19 pandemic but would provide the basis for creating more resilient and sustainable food supply chains beyond the current emergency and anticipate the “new normal” brought on by the pandemic as well as future emergencies. The legislative measures proposed in this brief should not come with an “expiry date” but apply to future emergencies and remain in place beyond the pandemic, in order to avoid reactionary measures which may not be well informed due to the typical sudden occurrences of emergencies.

REGULATORY ACTIONS IN TIMES OF COVID-19 AND ITS IMPACT ON FOOD SUPPLY CHAINS

COVID-19 has triggered central governments in many jurisdictions to declare emergencies and invoke exceptional powers to establish measures to respond to the emergency (FAO, 2020a). Even in federal systems of government, central governments have claimed devolved and decentralized powers and, by virtue of their emergency powers, have established measures which restrict peoples’ rights and freedoms (such as the freedom of movement) in order to contain the pandemic. **To comply with the rule of law, these exceptional measures should be temporary, proportional and no stricter than necessary to effectively deal with the existing challenge**, and this fact should be explicitly recognized in the related legal instruments.

Emergency measures frequently introduce movement restrictions, including the closure of all productive activities not deemed “essential”. In this situation, **the definition of what is “essential” becomes critical**. In order to facilitate food supply chains, it is important that

activities related to the production, processing and distribution of food, including the production and distribution of inputs (seeds, feed and pesticides) and the provision of support services (agricultural mechanization) should be considered and defined as essential. Otherwise societies may face the risk of food unavailability and/or inaccessibility, increases in food loss and waste (FLW), or a collapse of small- and medium-sized agribusinesses and food supply chains.

Likewise, **movement restrictions adopted in the time of crisis may disrupt the process flow of supply chains** including the normal availability and functioning of logistics and various services (e.g. packaging, certification, storage, transportation, financial services). They may result in the closure of marketing channels and outlets for smallholder producers (e.g. open markets, restaurants and small food businesses), and may also change consumers' shopping preferences, as people could increasingly prefer purchasing online or one-stop shopping options such as in big supermarkets, where they can have access to a broader range of products at the same time. Small producers and small agribusinesses may have difficulties in accessing alternative markets, in part due to special licensing requirements. **Flexibility in the licensing requirements for direct sales, e-commerce and food transportation can help these small producers and agribusinesses to find alternative market opportunities**, as does enabling legal frameworks for the e-commerce of food.

Reducing regulatory restrictions to facilitate local purchases, while ensuring food safety, would also contribute to the identification of alternative market opportunities. In particular, institutional procurement can focus more on local purchases of food, for example for school feeding, food banks or other humanitarian food programmes, thereby helping smallholders to continue selling their products, while providing food to those who need it most.

Governments should also pay attention to potential shortages in seasonal workforce as a result of the movement restrictions, particularly in times of harvesting and sowing. Failure to do so may lead to food shortages, food price increases, food losses (e.g. harvests rotting in the fields and related adverse environmental impact), and loss of income and livelihood. Seasonal workers are often recruited internationally or across borders. **Improving access to work contracts overseas and formalizing informal agriculture labour force would facilitate the timely availability of seasonal workers** and the timely completion of harvest and associated agricultural activities. Labour shortages can also foster mechanisation, and lead to fewer jobs in the industry in longer term.

These factors contribute to limiting smallholders' access and participation in food supply chains. This problem is aggravated by the lack of storage for smallholders, particularly in developing countries, which denies them the opportunity to safely store their goods until market demand matches their supply. **Warehouse receipt systems can help farmers to use the receipts to get their payments** (FAO, 2020c). The use of warehouse receipt systems requires an enabling legal framework to back it up as it can provide legal clarity and predictability of the warehouse system's rules and the rights and obligations of the participants.

Finally, uncertainty and the potential impact of COVID-19 on international food prices for certain commodities may result in trade restrictions (export quotas or bans), causing food shortages in importing countries. Trade legislation, including regulation on restrictions to food imports and exports, can contribute to reduce tariffs, quotas, and trade restrictions. Multilateral collaboration towards consistent implementation of trade legislation might contribute to minimizing trade restrictions.

THE ROLE OF CONTRACT LAW IN SUPPLY CHAINS

Food supply chains are normally composed of vertical and horizontal chains of contracts connecting various core value-chain actors from producers to consumers, as well as contractual relations among operators of support services (e.g. purchase of inputs, financial agreements). **All contracts in the chain should be fair and equitable for all parties and administered in good faith.** The contracts should clarify the parties' rights and responsibilities, paying attention to the essential elements of a contract as stipulated in the national contract law. Commonly, these essential elements would include, at least, the identification of the parties, offer and acceptance, obligations, price determination, remedies in case of partial or non-compliance, termination and provisions on dispute resolution, including alternative dispute resolution (ADR). In the context of a pandemic, the risk that some of these elements may be compromised is increased.

Contracts should always ensure fair and equitable risk allocation and management. Certain risk allocation and management would – to some extent – be covered by the concepts of *force majeure* and/or change of circumstances, which are designed to respond to both natural disasters (disease outbreaks, disasters, etc.) and societal events (export bans, movement restrictions, etc.). Domestic legislation often requires four simultaneous conditions to be fulfilled before the application of *force majeure*: the event should be 1) unforeseeable, 2) unavoidable 3) outside the parties' control and 4) it should objectively prevent one or both of them from performing. Change of circumstances (hardship-like situations) generally requires the first three pre-conditions. Such change in circumstances would not necessarily prevent parties from performing, but it would fundamentally change the basis on which the contract was formed and alter the balance of the relationship, making it unfair to hold either or both parties to their original obligations (UNIDROIT, FAO and IFAD, 2015).

Parties who concluded a contract prior to the outbreak of COVID-19 and the subsequent imposition of related restrictions, may claim that either *force majeure* or change of circumstances, depending on the legal and factual context, apply to their ongoing contractual relationship. **The final application of *force majeure* or change of circumstances would depend on a national court's or an ADR mechanism's interpretation of the applicable criteria** and may excuse compliance with, or suspend, the affected obligations or lead to renegotiation of the contract. For contracts concluded after the declaration of the emergency, the application or not of these clauses would depend on whether further changes in circumstances, connected to the emergency, can be considered "unforeseeable", months into the pandemic.

This uncertainty needs to be taken into account by those who enter into new contracts under current conditions. The negotiation and drafting of new contracts should aim at providing clarity on what should happen to the contractual relationship due to the continuing and emerging impacts of COVID-19. Considerable contractual innovation, as supported and protected by the principle of freedom of **contract, is required to ensure equitable risk allocation.** One option could be to explicitly agree in the contract to consider COVID-19 and its related upheavals as *force majeure*, or change of circumstances, where the domestic legislation allows parties to depart from the standard and most probably narrow legal definitions of these terms. Another option would be for the contract to mandate the parties to renegotiate the contract, either after some time has passed or if a certain event triggers the need to do so (such as new movement restrictions imposed by the government). Finally, the contracts could also explicitly consider COVID-19 and its effects when drafting remedies for contractual breaches, such as waiving the use of

remedies or opting for less disruptive and more lenient options when the underlying breach was demonstrably caused by the pandemic.

Unfortunately, contractual innovation may also open the door for the stronger party in a contract to take advantage and impose imbalances in risk allocation between the parties through the introduction of unfair contractual terms and practices. A classic example of an unfair practice would be for the contract to allow only one party to unilaterally terminate the contract without notifying or discussing it in advance with the other party. On a general level, this requires **governments to either adopt, or increase enforcement of, unfair contractual practices legislation** to prohibit the use of contractual terms and practices that are considered unfair. Enhanced enforcement should begin immediately, as abuses may already be happening. At the same time, if there are gaps, the reform of the legislative framework should commence in earnest as it requires an investment of effort and time and will likely go beyond the duration of the current COVID-19 crisis. In the context of food supply chains, at least for nodes such as contracts between smallholder producers and their buyers, governments may consider creating either mandatory or voluntary registries for contracts. These can increase transparency and legal certainty for parties, when they know that their contract (with sensitive commercial information removed) may be accessible to a defined audience (Viinikainen and Bullón, 2018).

Greater prominence and application of the common, but not universally accepted, principle of good faith should be promoted in this time of uncertainty and can be effective if it is backed by the threat of enforcement. The principle of good faith requires the parties to interact honestly and fairly, and refrain from taking actions that would deny their counterparty from receiving the expected benefits of the contract. Essentially, **good faith infuses the contract relationship with the kind of flexibility required to address the complications that come with a pandemic** or any other global emergency. Good faith may involve applying, or refraining from adopting, certain conduct (UNIDROIT, FAO and IFAD, 2015). In the context of COVID-19 this could include greater flexibility for delivery times, honest and timely exchange of information between the parties on the impacts that the emergency has had to better anticipate difficulties, as well as willingness to renegotiate to better adjust the contractual relationship to the rapidly changing circumstances.

Finally, as good contractual practice, it is important to include **reference to grievance mechanisms in the contract**. This is even more important in the uncertainty created by COVID-19, which may increase the likelihood of both breaches and disputes. Deciding on the method of dispute resolution in advance is important as, once a dispute has arisen, it may be difficult for the parties to agree on how to resolve it. In general, for smallholders in particular, the use of ADR mechanisms, such as arbitration and mediation, may be preferable as they tend to be less costly, less formal and faster in dealing with disputes than the courts.

FOOD SAFETY AND QUALITY LEGISLATION AND FOOD SUPPLY CHAINS

Food safety and quality legislation provides the formal basis for governments to control the safety and quality of food products. Based on Codex Alimentarius standards, **food safety legislation introduces rules that define minimum criteria that any food item has to meet** to be placed on the market as food, and that are applicable to food production and distribution across all areas of the production chain “from farm to fork”. These include rules on food traceability, labelling and packaging, the authorization of food ingredients and substances, the

approval of identity standards, market surveillance and control. They also set up mechanisms for the identification and control of physical, chemical and microbiological hazards in food, including the recall from the market of products that do not meet the prescribed safety or quality specifications. Food safety and quality legislation recognizes food operators as directly responsible for the safety and the integrity of their products. It establishes regulatory mechanisms such as the issuance of licenses and permits to food business operators and food establishments, as well as rules on food preparation and delivery, including the hygiene and sanitary security measures to implement in food markets and food transport.

In addition to improved health and quality conditions, there is much more that food safety and quality legislation can do for food supply chains in times of a pandemic. Food safety and quality legislation can contribute to the prevention and control of food fraud, by setting up the basis for strong market surveillance, traceability and recall systems, as well as identity standards (Box 1). Appropriate labelling provisions and enabling systems for food donations also contribute to minimizing food losses and waste (FLW is discussed further below). Application of food safety and quality legislation to the rapidly growing field of e-commerce can also help smallholders to access markets at time where the more traditional food supply chains are suffering under the strain of the pandemic.

Box 1 | Food fraud in the times of the pandemic

In times of a pandemic, when the food supply chains are distorted by changes in supply and demand, it is particularly important not to lower consumers' trust in the food products they purchase, both in distance selling and in brick and mortar markets. Food safety and quality legislation provides the basis for the government to monitor and sanction any intentional adulteration of a food product, with the purpose of economic gain or undue advantage. This would include any element of the product that deviates from the criteria included in the reference identity standard, such as ingredients and substances, nutritional composition, weight, or the information and claims included in the label. Food products with objectively inefficient health claims aimed at deceiving the customers with the objective of monetary gain for the criminal, are an example of food fraud.

To address food fraud, governments may need to define what food fraud is and to counter it through their national regulatory frameworks. This requires a coherent, fluid and multi-faceted approach, that prioritizes and focuses on balancing preventing and controls by using a suite of tools – including coordination with food business operators (FBOs) – while leveraging food safety, consumer protection and criminal legislation.

Prevention of food loss and waste

In the face of increased food insecurity due to COVID-19 as well as the associated effects on climate change due to FLW (FAO, 2019), it is important that the governments are sensitive to the topic of FLW when considering their regulatory responses to the pandemic and follow the “food-use-not-loss-or-waste” – hierarchy (Figure 1). As a short-term response, to minimize the creation of food losses at the farm level due to missed harvests, it is important to include farm workers, both local and foreign, in the list of essential personnel allowed to continue to move and work during the pandemic.

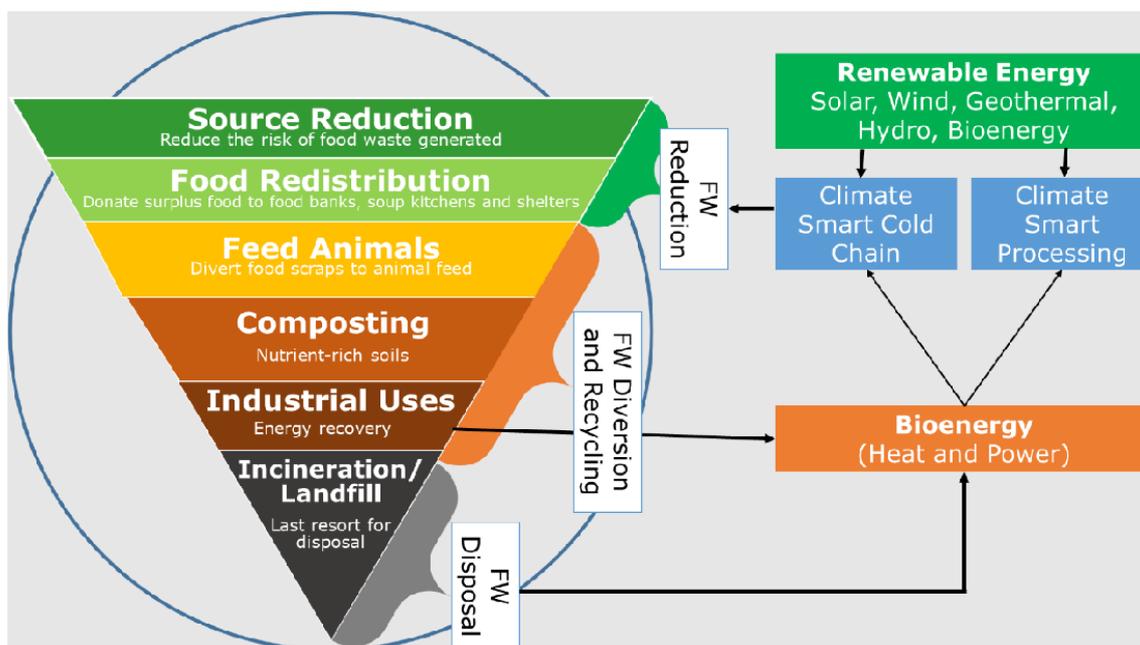


FIGURE 1 | “Food-use-not-loss-or-waste” hierarchy

Source: FAO, 2017

In addition to food losses, COVID-19 has also the potential to increase food waste. This may be related to the rapid changes in consumer preferences, such as the shift observed in Italy towards staples and products with long shelf-life (Coldiretti, 2020). Without sufficient nimbleness, at least in the short term, this shift can increase food waste created at the retail level when demand for certain products, such as fruits, horticultural and perishable products (ANSA, 2020) changes faster than the retailers can change their supply chains. Consumers may also end up creating more food waste, as they adapt to their new consumption patterns and due to longer periods between shopping trips, may pay more attention to food labels, which may have unfamiliar or unclear expiry dates.

Legislation may provide avenues to alleviate both concerns. For the food waste created at the retail level, where consumer demands no longer match the available food, leading to potentially discarding edible and safe food, supporting food donations through legal measures is an alternative way to distribute the products before they spoil. In the context of COVID-19, where economic turmoil is increasing the people relying on food banks and other charities, a well-functioning food donation system would have the double benefit of increased access to food and reduction of food waste. **Legislation should ensure the smooth operation of food**

donations and ensure that donated food meets applicable food safety standards. Recently, some jurisdictions have passed so called “Good Samaritan Laws”,¹ which limit the liability of retailers and other donors when donating to established food banks and charities. Further topics that the legislation may need to consider include the roles and responsibilities of the parties participating in food donations, which food products can be donated, and applicable hygiene requirements.

To reduce food waste at consumer level, particularly when a shift is happening towards consumption of goods with longer shelf-life, the importance of labelling and date-markings becomes pronounced. Therefore, it is important that the applicable **legislation provides clear rules on how food is to be labelled** to provide accurate and easy to understand information on their durability, storage and sale. In the times of COVID-19, governments may need to pay heightened attention on rapidly increasing awareness of the meaning of labels, to avoid waste of food. Particularly important is to clarify whether the date-marking indicates a “best-before” date, i.e. when the quality of the food might start to degrade while remaining safe to consume, or “use-by” date, i.e. when the food may become unsafe to consume. To tie into the discussion on food waste and food donation, it would be useful to explicitly allow the donation of items past their “best-before” date, while this would be unacceptable when the “use-by” date has passed.

E-commerce regulation and COVID-19

As the world has learned from previous health emergencies, most recently related to the Ebola virus disease, one of the primary measures to help smallholders access markets and value chains during times of health crisis is through establishing safe trade corridors based on public health mitigation measures along market chains (FAO, 2016).² Thanks to modern information and communications technologies, such as mobile broadband infrastructure and smartphones, similar results in ensuring the **smallholders’ continuous access to markets and value chains could be created by embracing e-commerce of food** to a greater extent, promoting sales of food from smallholders to consumers either directly or facilitated by digital platforms.

For the e-commerce of food to function in a reliable and safe way, from the viewpoints of both food safety and consumer privacy, a clear enabling legal environment is required. According to the United Nations Conference on Trade and Development (UNCTAD), an enabling legal framework for e-commerce consists of four pillars: the legal framework for electronic transactions or e-signature ensuring equivalence between paper-based and electronic forms of exchange; the legal framework for data protection or online privacy; the legal framework for consumer protection for online purchases; and the legal framework for cybercrime prevention (UNCTAD, undated). Regarding consumer protection for online purchases or purchases through e-couriers delivering from brick-and-mortar stores, it is important to differentiate consumer protection against food safety and quality-associated risks from consumer protection against misleading practices.

¹ For example, see the Good Samaritan Law (L. 155/2003) in Italy or the United States’ Bill Emerson Good Samaritan Food Donation Act.

² For more discussion on safe trade corridors, please see FAO. 2020. *COVID-19 and smallholder producers’ access to markets*. Rome.

With increasing volumes of food being traded through e-commerce, there may be a need to consider if and how the evolving marketing system may pose food safety risks to consumers and the regulatory mechanisms governments should put in place to face these risks. Food safety risks may arise at any point of the food supply chain, including the final delivery from the food business operator (FBO) to the consumer.

While the existing food safety legislation, including rules on the hygienic handling of food, apply to those FBOs that market through e-commerce, there are various aspects that may require specific attention. First, with the emergence of new actors, there is a need for the legal framework to ensure that all actors in the food e-commerce chain, including internet platforms, have well-defined responsibilities and are subject to adequate surveillance and enforcement. This can also require the reviewing of specificities related to record-keeping and transparency requirements, such as to ensure the traceability of food. Second, it is important to guarantee that consumers will have an effective right to claim for food products that do not meet the prescribed safety or quality requirements, as well as direct access to the seller to formulate their claims. Third, in cases of cross-border e-commerce, the controls and import formalities (the differences in terms of food certification, documentary and other food safety controls, between normal importations and internet-based purchases for self-consumption) must be equally effective for regular importation and individual e-trade imports.

CONCLUSION

The COVID-19 pandemic presents considerable challenges to the maintenance of food supply chains, and is having severe related detrimental impacts on employment, and food security. It also, however, presents opportunities for governments to modernize, adopting regulatory measures that could strengthen food supply chains in general, and support resilience in future emergencies. This brief identifies some of the areas that governments may want to strengthen to build more resilient food supply chains and illustrates how appropriate regulatory frameworks can contribute to ensuring food security and economic development.

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