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Ref. : Fresh Mushrooms / Advice  
40549 PL/pl

Dear Mr Grootewaal,

You have asked me to provide you with legal advice regarding truffles cultivated and traded by your company Fresh Mushrooms. At issue is the underground substrate or sclerotium of the *Psilocybe mexicana*, a psychoactive mushroom. Your company cultivates these truffles professionally based on decades of experience. Your product is a food supplement according to the European directives.<sup>1</sup> It fully complies with the applicable European food safety standards. In addition, because of the special method of cultivation, it contains a constant amount of psilocybin of 1 to 2 milligrams per gram of fresh truffle. This makes this truffle cultivated by your company very suitable for the therapeutic application of 'microdosing' of naturally grown psilocybin. As stated on your company's website, such an administration can naturally contribute to an overall better mental and physical functioning and the treatment of psychological problems such as depression, addictions and post-traumatic stress disorder.<sup>2</sup>

Your question concerns the legal status of your product in the Netherlands..

### **The status of the psychoactive truffle internationally**

The truffle cultivated by your company naturally contains a small but constant amount of psilocybin. Psilocin and psilocybin are listed as prohibited substances on List I of the 1971

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<sup>1</sup> Truffles are categorised as "herbs and botanicals" under the European directives. The EFSA, European Food Safety Authority, classifies mushrooms and therefore also truffles under botanicals. It writes on its website <https://www.efsa.europa.eu/en/topics/topic/botanicals>: "*Botanicals and derived preparations made from plants, algae, fungi or lichens have become widely available on the EU market in the form of food supplements.*"

<sup>2</sup> Zie voor de website van Fresh Mushrooms: [www.freshmushrooms.nl](http://www.freshmushrooms.nl)

United Nations Psychotropic Substances Convention. This means that the countries affiliated to the treaty, including the Netherlands and the United States, have the obligation to make these substances punishable.<sup>3</sup> They may not be freely traded, except for scientific and/or medical purposes under specific conditions.

For your question, it is important to note that the Psychotropic Substances Convention, however, intended to prohibit only the listed psychoactive substances and not the various organisms in which these substances naturally occur, such as, for example, the psychoactive mushroom and its underground substrate, the truffle.<sup>4</sup> In the United Nations meeting on the treaty, one of the delegates said: *“that it is not worth attempting to impose controls on biological substances from which psychotropic substances could be obtained.”*<sup>5</sup>

Psychotropic substances occur naturally in a variety of living organisms, including plants, cacti, mushrooms, fish, and nuts. The drafters of the treaty explicitly recognized that an attempt to ban these organisms would involve the eradication and destruction of an unpredictable variety of plants, animals, and other living organisms. The official commentary on the treaty is perfectly clear about the fact that this was never the intention. Organisms that naturally contain psychoactive substances and are not listed as such in any of the Schedules are not subject to the control of the Convention. This includes the psychoactive mushroom. In the words of the commentary: *“Neither the crown, fruit, mescal button of the Peyote cactus nor the roots of the plant Mimosa Hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principals Mescaline, DMT and Psilocybe (Psilocine, Psilotsin).”*<sup>6</sup>

This implies that the member states of the Psychotropic Substances Convention have no obligation to criminalize psychoactive mushrooms or truffles. However, they are obliged to ban the substances psilocybin and psilocin themselves and not to allow them other than for medical and/or scientific purposes.

The treaty furthermore gives the individual member states the freedom to impose stricter restrictions on the possession of and trade in psychoactive substances or organisms in which they naturally occur.<sup>7</sup> This has happened on two occasions in the Netherlands.

### **The status of the psychoactive mushroom in the Netherlands**

The INCB or International Narcotics Control Board of the United Nations, which supervises the compliance of member states with the Psychotropic Substances Convention, wrote to the Dutch authorities in 2001 about psychoactive mushrooms : *“As you are*

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<sup>3</sup> Convention on Psychotropic Substances, Vienna, 21 February 1971, articles 5, 7 and 22.

<sup>4</sup> Commentary on the Convention on Psychotropic Substances, Vienna, 21 February 1971, United Nations New York, 1976/CN/7/589, Reservations under art. 32, sub 5, p. 385.

<sup>5</sup> This was the delegate from the United States, Records 1971, Volume II, p. 38/39.

<sup>6</sup> Commentary on the Convention on Psychotropic Substances, Vienna, 21 February 1971, Reservations, art. 32, p. 386.

<sup>7</sup> Convention on Psychotropic Substances, Vienna, 21 February 1971, article 23.

*aware, mushrooms containing the above substance are collected and abused for their hallucinogenic effects. As a matter of international law, no plants (natural material) containing psilocine and psilocybine are at present controlled under the Convention on Psychotropic Substances of 1971. Consequently, preparations made of these plants are not under international control and, therefore, not subject to any of the articles of the 1971 Convention.*"<sup>8</sup>

The Dutch Supreme Court followed this interpretation of the treaty and thus decided in 1998 and 2002 that organisms that naturally contain psychoactive substances such as hallucinogenic mushrooms and truffles are not punishable as long as they were not themselves listed as such in the Dutch Opium Act. At the same time, however, the Supreme Court took the liberty of placing a restriction on this. Natural products that are not listed in the Opium Act lists but do contain naturally banned psychoactive substances are not prohibited. However, this becomes different, according to the Dutch Supreme Court, at the moment that these natural products have undergone any kind of processing, including, for example, grinding, mixing or active drying.<sup>9</sup> With this court decision the actively dried psychoactive mushroom became a forbidden product in The Netherlands, but the fresh psychoactive mushroom was officially declared legal in The Netherlands.

This jurisprudence is still valid. But the legal status of fresh psychoactive mushrooms also came to an end in 2008. The Dutch legislator then used the freedom that the Psychotropic Substances Convention granted her and once again introduced more far-reaching restrictions than the treaty mandated. On 1 December of that year, a series of psychoactive mushrooms were placed on List II of the Opium Act.<sup>10</sup> This included the *Psilocybe mexicana*, of which your company cultivates the underground substrate. The mushroom *Psilocybe mexicana* has therefore been a banned product in the Netherlands since 2008.

### **The status of the psychoactive truffle in The Netherlands**

However, this does not apply to the truffle of this *Psilocybe mexicana*, or its underground substrate. This is because the Opium Act explicitly prohibits only the psychoactive mushrooms listed in its 2008 List II and not the sclerotium or truffle from which they can grow. This means that the fresh truffles of prohibited psychoactive mushrooms have remained legally marketable in the Netherlands. They do not fall under the prohibited substances added to list II of the Dutch Opium Act in 2008. Criminal law is governed by the so-called legality principle, which states that no offence is punishable unless it has been explicitly made punishable by law in advance. It follows from this principle that a certain penalization cannot be interpreted extensively by the judge. Now that it is generally scientifically accepted that the truffle, the sclerotium, is not a mushroom, the aforementioned legality principle implies that the truffle does not fall under the

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<sup>8</sup> The Secretariat of the INCB, United Nations International Narcotics Control Board, in a letter dated September 13, 2001.

<sup>9</sup> Hoge Raad 18 november 1997, NJ 1998,213 en Hoge Raad 5 november 2002, ECLI:NL:HR:2002:AE2094, NJ 2003,488

<sup>10</sup> Besluit Plaatsing op lijst II van Psychoactieve paddestoelen, 1 december 2008.

prohibitions of the Opium Act, newly introduced in 2008. The latter has been acknowledged twice, in 2009 and 2011, by the Dutch Minister of Health to the House of Representatives.<sup>11</sup> It is an explanation consistent with the 1971 Psychotropic Substances Convention, as discussed earlier.

What it means for you is that the *Psilocybe Mexicana* truffle can be freely cultivated, traded and exported in the Netherlands. It can also be freely provided to third parties in therapeutic sessions. It is a legal product in the Netherlands, as long as it has not undergone "active processing".

This legal status of the psychoactive truffle in the Netherlands has allowed your company Fresh Mushrooms to build up years of experience in the cultivation of high quality psychoactive truffles, also suitable for the therapeutic application of microdosing.

### **The export of the psychoactive truffle to other countries**

The *Psilocybe mexicana* truffle can be freely exported from the Netherlands. But in the country where the product is imported, the status of this product will have to be checked again. After all, the legal status of the product may differ per country. The product is not under the control of the Psychotropic Substances Convention, as described above and this means that the member states have no obligation to criminalize it. However, member states are free to ban this product in their national legislation. This does not alter the fact that the export of the product from the Netherlands is legal.

We are currently witnessing many developments regarding the medical and therapeutic application of psilocybin and psilocin, both in the Netherlands and abroad. Governments are becoming increasingly aware of their positive obligation to safeguard the health of their citizens. The criticism against many modern medicines, such as anti-depressants, is increasing and there is a growing awareness that natural products that have been used for centuries might offer a good alternative. It is also a good development that more and more scientific research is being done in this area. The state of Oregon in the United States fulfills an important and interesting role model in this. In November 2020, the population there voted for a new law that aims to regulate the production and supply of psilocybin for therapeutic and medicinal treatments through the issuing of permits.<sup>12</sup> I do not rule out the possibility that this development in Oregon will be more widely replicated in the near future.

The *Psilocybe mexicana* truffle cultivated by Fresh Mushrooms seems to be perfectly suited for such new medicinal and therapeutic applications.

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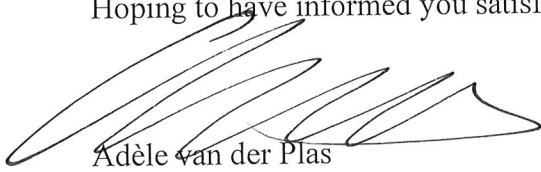
<sup>11</sup> Tweede Kamer der Staten-Generaal, 1509, vergaderjaar 2008-2009, Antwoord van minister Klink van Volksgezondheid, Welzijn en Sport en brief van 27 december 2011 van minister Schippers, ministerie VWS aan de voorzitter van de tweede Kamer.

<sup>12</sup> Ballot Measure 109, Draft Act, Section 3 and following.

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Hoping to have informed you satisfactorily,



Adèle van der Plas