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Redesigning EU trade agreements – EU Member States discuss their approach to trade and sustainability, as well as investment protection

From 26 to 27 February 2018, EU Trade Ministers will gather for an informal meeting in Sofia, Bulgaria, and will, *inter alia*, discuss, as a central point of the agenda, the Chapters on Trade and Sustainable Development (hereinafter, TSD Chapters) in EU trade agreements. Already on 16 February 2018, trade policy officials from all EU Member States, meeting in the EU's Trade Policy Committee, discussed a draft text for a joint position of the Council of the EU, which would confirm separating investment protection provisions from future EU trade agreements in light of last year's opinion on the respective competences by the Court of Justice of the European Union (hereinafter, CJEU). Both issues, will significantly affect the EU's approach to trade agreements, but important questions remain and continue to prolong the period of relative uncertainty for key EU trading partners: those with whom negotiations have been concluded, those waiting to sign free trade agreements (hereinafter, FTAs), those with whom the EU is currently negotiating, and those that are considering to begin negotiations with the EU.

EU trade policy is currently undergoing the most significant changes since the European Commission's (hereinafter, Commission) '*Trade for all - Towards a more responsible trade and investment policy*' strategy paper, published in October 2015. Even the title of the 2015 strategy suggested increased awareness of the importance of "*responsible*" trade and investment policy. The issue of sustainability and the chapters on Trade and Sustainable Development in EU's FTAs have become increasingly important and are an important aspect of the EU's efforts to regain public support for its trade negotiations. On 11 July 2017, the Commission published a '*non-paper*' on the "*Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)*" (hereinafter, '*non-paper*'), which was intended to stimulate a discussion on the topic with the European Parliament and the Council of the EU (see *Trade Perspectives*, Issue No. 15 of 28 July 2017).

Since the EU-Korea FTA, signed in 2010, all FTAs concluded by the EU include a '*Chapter on Trade and Sustainable Development*' or provisions to that effect. Such chapters generally focus on two key areas: labour and the environment. The '*non-paper*' provides an overview of the current EU's approach on TSD and presents two options for discussion, further developing and refining said approach. The first option is entitled "*a more assertive partnership on TSD*" and essentially builds on the current approach. It would entail closer internal cooperation, among EU Member States and EU Institutions, and external

cooperation vis-à-vis the EU's trading partners. Furthermore, this option provides for a "*more assertive use of the TSD dispute settlement mechanism*". The second option is entitled "*a model with sanctions*", thereby emphasising the main difference between the two options. This option takes up an approach currently used by the US and Canada in their respective FTAs, adding the possibility to apply sanctions at the end of dispute settlement proceedings in case of non-compliance and impacting trade or investment between the parties. In the case of the US, sanctions mean the withdrawal of trade concessions, while the FTAs concluded by Canada provide for monetary fines. Importantly, sanctions require and assume a natural link between sustainable development obligations and trade commitments, namely a "*quantifiable harmful impact on bilateral trade or investment as a result of the FTA violation*" and the resulting withdrawal of concessions or fines would reflect this quantified impact.

On 26 and 27 February 2018, the debate on trade and sustainability will finally reach the level of EU Trade Ministers, who will gather in Bulgaria for an informal meeting. EU Trade Ministers will discuss, for the first time, this issue as a central agenda item. In addition to the Commission's 2017 '*non-paper*', the issue has become increasingly important with respect to the EU-Viet Nam FTA. Negotiations with Viet Nam were concluded in August 2015 and the final text was made public in early 2016. The FTA is now finally scheduled to be signed in the summer of this year, but recently opposition to the agreement appears to be increasing, in particular within the European Parliament, which must give its consent. Bernd Lange, Member of the European Parliament and Chairman of the European Parliament's Committee on International Trade, criticised labour conditions in Viet Nam and stated that preferential market access should only come in parallel with improvements for Vietnamese workers. Mr. Lange went on to underline that, without any progress on human rights and especially on labour rights, the FTA could not be ratified by the European Parliament. The European Commissioner for Trade, Cecilia Malmström, reportedly also committed to an early review of the TSD Chapter contained in the Comprehensive Economic and Trade Agreement (hereinafter, CETA) between the EU and Canada, which only entered into force in September 2017. Therefore, the fate of the EU-Viet Nam FTA, as well as the EU's general approach to trade and sustainable development provisions, including the enforcement options proposed in the Commission's '*non-paper*' will likely be at the core of next week's debate.

The Commission's '*non-paper*' already indicated its concerns with introducing sanctions in the TSD Chapters. The Commission noted that such a more confrontational approach might jeopardise the relations with the relevant trading partner and thereby put the effectiveness of the TSD Chapter as a whole at risk. It also appears that not all EU Member States consider that imposing sanctions on the EU's trading partners would be the appropriate approach. The issue is delicate, as it connects trade with non-trade, but trade-related, issues and concerns. However, it should perhaps be noted that the EU's own Generalised System of Preferences (GSP), which provides unilateral preferences to developing countries, already provides for the temporary suspension of preferences or even their withdrawal if the beneficiary country does not comply with certain provisions. The connection between trade (*i.e.*, economic and commercial commitments or concessions) and sustainability (*i.e.*, environmental, social and/or labour commitments) is clear. The trade-offs within preferential trade agreements are and must be, first and foremost, economic in nature. Any equation that does not recognise this simple premise, will not work.

On the one hand, it appears absolutely natural that, if a country, or group of countries like the EU, wanted to link some of its preferential market access concessions to its trading partners' commitments on sustainability (*i.e.*, environmental, social, labour obligations or human rights), it should be allowed to use sanctions (*e.g.*, withdraw the preferential market access concessions) in case its trading partners do not comply with their sustainability commitments. As indicated, this is already the case under both the EU's GSP and GSP+ schemes. On the other hand, the opposite must also be considered: trading partners within a preferential trading arrangement (*i.e.*, FTA, EPA, CEPA, etc.) that have committed to comply with often

costly and legally, economically and commercially challenging obligations on sustainability (*i.e.*, environmental, social and/or labour obligations), should be rewarded with stable, effective and non-discriminatory preferential market access conditions to the other party's market if they complied with their sustainability obligations. Should such preferential market access be distorted or prevented, such trading partners should be allowed to address this trade imbalance either by withdrawing some of their own commercial concessions or be given compensation. This is a simple and fair concept, which is already one of the bedrocks of the WTO system and applied in many preferential trade agreements around the world.

The examples abound, at both ends, make it difficult and politically charged to get the necessary support of the key constituencies. EU industries, NGOs and public opinion at large find it increasingly difficult to accept the granting of market access concessions if the countries benefitting from them do not then comply with their own commitments, often in the area of environmental, social and labour standards and protection. Developing countries often find it hard to comply with strict sustainability schemes that they sometimes consider not developmental priorities, that are costly and burdensome to implement, or that are unilaterally imposed by importing countries. Some countries also find it difficult to accept that, while they are asked to make such efforts to comply, they then find their products competing on markets, such as the EU market, with products of third countries that allegedly are not subject to or violate the same sustainability obligations.

The issue is political as much as it is legal and economic in nature. The trade and legal instruments, to make trade and sustainable development work, do exist (*e.g.*, preferences, sanctions, compensation, standards, conformity assessment procedures, etc.) and can be cleverly and innovatively used. Seemingly, it is the political will that is still lacking and perhaps the escalation of this issue to the EU's Trade Ministers is a good opportunity to find that political will.

The second recent development concerns the separation of investment protection provisions from EU's FTAs. On 16 February 2018, trade policy officials from EU Member States gathered in the EU's Trade Policy Committee, discussed a draft text for a joint position of the Council of the EU, which would confirm separating investment protection provisions from future EU's FTAs, in light of last year's opinion on the respective competences by the CJEU (see *Trade Perspectives*, Issue No. 10 of 19 May 2017). Indeed, the issue has remained an open question ever since the Commission published, back in September 2017, the draft negotiating mandates for the upcoming FTA negotiations with Australia and New Zealand. In the draft negotiating mandates, in the section on the nature and scope of the agreement, the Commission notes that the "*Agreement should exclusively contain provisions on trade and foreign direct investment related areas applicable between the parties*". The negotiating directives and the accompanying documents remain silent, however, as to the fate of the other types of investments and investment protection, including investor-State dispute settlement (ISDS). However, EU Member States have yet to approve the two negotiating mandates. At the meeting on 16 February 2018, EU Member States' trade policy officials discussed their respective positions. While the overall reaction to the idea of FTAs without investment protection provisions was reportedly positive, important concerns remain.

The main concern for EU Member States with EU's FTAs under the EU's new approach and without investment protection provisions is that those FTAs would be EU-only agreements, meaning that they would only concern competences held by the EU and, therefore, only need to be ratified by the EU. FTAs relying on both EU and EU Member States' competences must be ratified by the EU, as well as by the 28 EU Member States. Due to the involvement of regional Parliaments in certain EU Member States, this process typically requires the approval by some 40 EU Member State Parliaments, which considerably prolongs the ratification progress. This became particularly evident in the final weeks of negotiations for the CETA between the EU and Canada (see *Trade Perspectives*, Issue No. 19 of 21 October 2016). This lack of involvement is at the core of EU Member States'

concerns: 1) The involvement of EU Member States' Parliaments; and 2) The approval of FTAs by a qualified majority of EU Member States.

The first issue, the involvement of national Parliaments, is important to ensure public support for EU's FTAs in EU Member States. Reportedly, EU Member States aim at improving the process of informing and engaging with national legislatures, in particular during the negotiations, in order to mitigate potential concerns and avoid opposition at the end of the negotiations. Interestingly, EU Member States appear to consider a ratification process '*through the backdoor*', relying on national Parliaments to hold a vote authorising the respective Governments' approval of the respective FTAs in the Council of the EU. This must, arguably, be decided by individual EU Member States themselves and take the respective constitutional requirements into account. Secondly, EU Member States appear to be concerned that future EU-only FTAs would only require the approval by a qualified majority of EU Member States, meaning only 16 out of 28 EU Member States, as long as they represent 65% of the EU population. To avoid EU Member States to be overruled by the majority, the draft position debated by EU Member States' representatives would commit EU Member States to continue seeking unanimous approval of trade deals, whenever possible.

EU Member States were requested to submit comments with respect to the joint Council position by 28 February 2018. Agreement on this issue is an important precondition for the Council to approve the draft negotiating mandates to finally begin negotiations with Australia and New Zealand. Already in the autumn of 2017, it appeared that both trading partners were becoming increasingly impatient, while the EU and EU Member States continue to sort out their internal positioning (see *Trade Perspectives*, Issue No. 20 of 3 November 2017). At the same time, the Commission is expected to shortly propose the ratification of the revised EU-Singapore FTA and the EU-Japan FTA, also as '*EU-only*' FTAs. Reportedly, indicative planning by the Commission provides that both FTAs are currently scheduled to be approved by the EU's Foreign Affairs Council on Trade on 22 May 2018.

EU policy is at a turning point. Important negotiations are ongoing, but agreements need the support of all involved. Even if future FTAs will be '*EU-only*', they cannot be concluded without the consent of a qualified majority within the Council of the EU, composed of the EU Member States, as well as the consent of the European Parliament. Finding appropriate solutions to separate investment protection provisions from trade agreements and an agreed approach to the TSD Chapters, possibly including enhanced enforcement or mutual sanctions, that satisfy the diversity of stakeholders, will be two key aspects for future EU trade negotiations. Time is of the essence and internal EU debates on these issues should not, once again, continue to considerably delay or prolong negotiations, as well as ratification processes. Interested stakeholders and EU trading partners should closely follow the debates and contribute to the shaping of the EU's future approach to trade policy.

Towards an EU-UK transition period and a trade relationship after '*Brexit*': The UK food industry asks for certainty

On 7 February 2018, the European Commission (hereinafter, Commission) published a position paper titled "*Transitional Arrangements in the Withdrawal Agreement*" (hereinafter, Position Paper), which provides a text proposal for the provisions of the chapter on a transition period. On 21 February 2018, the UK Government published its own proposals. On 18 February 2018, the UK House of Commons' Environment, Food and Rural Affairs Committee had published its report "*Brexit: Trade in Food*". The latter report focuses on the impact of '*Brexit*' on different agro-food sectors (*e.g.*, dairy, beef, poultry, cereals and pig meat), should the EU and UK fail to reach an agreement on their post-'*Brexit*' relationship and trade were to be governed by default World Trade Organisation (hereinafter, WTO) rules. In a letter of 11 February 2018, the UK's food and farming sector asked the UK

Government for certainty on food regulation and market access to the EU. More specifically, the 36 signatory organisations requested the UK Government to maintain free and frictionless trade with the EU, which is endangered should no transition period be agreed and until an EU-UK trade agreement will be concluded.

On 23 June 2016, a majority of the UK population participating in the *referendum* on whether the UK should '*remain*' or '*leave*' the EU voted in favour of leaving the EU. On 29 March 2017, the UK Government officially notified the EU of its intention to withdraw from the EU. Article 50 of the Treaty on the Functioning of the EU (TFEU) provides for a two-year period to negotiate the exit. In its '*Brexit*' bill, the UK has formally committed to '*Brexit*' at 23:00 GMT on 29 March 2019. On 15 December 2017, the EU and the UK agreed that sufficient progress was made in the first phase of '*Brexit*' negotiations and agreed that negotiations would move to second phase, meaning that negotiations regarding the future relationship of the EU and the UK could start. During the final meeting of the first phase, both Parties adopted guidelines for a transition period and a timetable for the next steps of the negotiations.

From 6 to 9 February 2018, '*Brexit*' negotiations resumed. The seventh round of negotiations, and the first round of the second phase, covered the following areas: 1) Solutions to avoid a hard border in Ireland; 2) The governance of the withdrawal agreement, in particular concerning effective implementation mechanisms and the role of the Court of Justice of the EU when an agreement refers to EU law; and 3) The transition period. In 2017, both sides agreed in principle that '*Brexit*' would be followed by a transition period of approximately two years, during which the UK would continue to abide by EU law, but would not have a role in any decision-making process. Both Parties aim at concluding a transition agreement at a summit on 22 to 23 March 2018 in Brussels. To inform these negotiations on the specifics of the transition period, the Commission published, on 7 February 2018, its Position Paper. The Position Paper envisages a transition period starting from the date of entry into force of the Withdrawal Agreement (likely on 30 March 2019) until 31 December 2020. It further states that, during the transition period, EU law would continue to bind the UK, but notes that the scope for participation of UK experts or representatives at certain meetings of the EU institutions would be subject to invitations and be without voting rights. Regarding EU '*external actions*', the Position Paper states that, during the transition period, the UK "*shall be bound by the obligations stemming from the international agreements concluded by the Union*", but could not "*become bound by international agreements entered into in its own capacity in the areas of exclusive competence of the Union, unless authorised to do so by the Union*". Finally, the Position Paper states that "*the Governance and Dispute Settlement Part of the Withdrawal Agreement should provide for a mechanism allowing the Union to suspend certain benefits deriving for the [UK] from participation in the internal market where it considers that referring the matter to the Court of Justice of the European Union would not bring in appropriate time the necessary remedies*". The Commission's Position Paper has been sent to the EU Member States and, once agreed by the remaining 27 EU Member States, will be the basis for negotiations with the UK.

On 21 February 2018, the UK Government published its draft text on the transitional arrangements. While the UK agrees in principle with the Commission's approach laid out in the Position Paper and the proposed timeframe by the EU, it proposes that the transition period "*should be determined simply by how long it will take to prepare and implement the new processes and new systems that will underpin the future partnership*". If in March or at a later stage the EU and the UK cannot agree on a transitional agreement, it would indeed come to the so-called '*hard Brexit*', meaning that trade between the EU and the UK would be governed by WTO rules. The aim of the transition agreement is to achieve a smooth exit of

the UK from the EU, providing more certainty to businesses and industries, and allowing both sides to reach an agreement on areas such as finances, tariffs and market access.

In November 2017, the UK Government established the Food and Drink Sector Council (hereinafter, Sector Council), a formal industry partnership with the UK Government to create a more productive and sustainable food and drink sector. While the Sector Council is working on establishing a joint strategy on a variety of challenges for the post-'*Brexit*' future of the industry, the impact that '*Brexit*' will have on food business operators remains a key concern for the food industry. The concerns of the agro-food industry have been increasingly addressed by UK regulators. On 18 February 2018, the UK House of Commons' Environment, Food and Rural Affairs Committee published its report titled "*Brexit: Trade in Food*". Despite the ongoing negotiations on the transitional arrangements, the report encourages the sector to be prepared for a scenario in which trade would be governed by WTO rules. It analyses certain sectors (*e.g.*, dairy, beef, poultry, cereals and pig meat) and issues a number of recommendations.

The report points out that the UK is currently benefiting from tariff-free trade within the EU and that the UK and other EU Members States levy common tariffs on products imported into the EU from other countries. However, it notes that, once the UK has ceased to be a Member State of the EU, tariffs might considerably increase under WTO rules. For example, UK exports to the EU of frozen beef would be subject to a tariff of 87%. Currently, around 90% of beef exports are destined for markets in other EU Member States. Regarding imports, the report stresses that the UK would need to set out its own schedule of tariffs and tariff rate quotas (hereinafter, TRQs). The report notes that, when establishing its own tariffs, the UK Government must consider all possible effects, because "*High tariffs on imports would raise the cost for consumers while removing tariffs could lower the cost for consumers but have a devastating effect on the long-term future of the UK's agricultural industry*". The report also notes that non-tariff barriers (hereinafter, NTBs) were a main concern to the agricultural industry causing additional cross-border paperwork, additional expenses and delays. The report also calls on the UK Government to support the UK's agro-food industry in preparing for business post-'*Brexit*', noting that the UK Government "*must offer […] clarity and stability so that the industry has the confidence to invest and take advantage of the opportunities offered to the industry post-Brexit*". Finally, it calls on the Department of Food, the Environment and Rural Affairs to conduct a sector-by-sector analysis of the impact of '*Brexit*' and on the UK Government to publish as soon as possible its Agricultural Bill, which is supposed to set out the UK's agricultural policy replacing the EU's Common Agricultural Policy.

An interesting issue raised in the report by the UK House of Commons' Environment, Food and Rural Affairs Committee is the '*country of origin label*' (hereinafter, COOL) and the '*method of production labelling*'. Currently, the EU has largely harmonised food labelling and EU Member States have a very small margin for regulating on their own. The report describes '*Brexit*' as an opportunity for the UK to frame its own food labelling legislation. According to the report, "*[i]mproved legislation would allow consumers to distinguish between food produced domestically and to high welfare standards, and imports where standards were not as high*". Regarding COOL, the report points out that current EU regulation on COOL for meat allows for meat products to be labelled with the country where the last significant change in production took place. The report states that "*this could lead to a situation where, were chlorine-washed US chicken used as an ingredient in a UK-made chicken pie, it would not require labelling*". The report also notes the need to introduce mandatory '*method of production labelling*' and points out that meat and milk should be

among the products with mandatory labels that provide clarity to the consumers on how they were produced.

Furthermore, the UK Local Government Association (hereinafter, LGA) expressed that '*Brexit*' was an opportunity to make so-called '*traffic light labelling'* on food and drink packaging mandatory to help consumers make informed choices. '*Traffic light* labelling' is a system of food labelling in which red, amber, and green symbols are used to indicate whether the food contains high, medium, or low amounts of, for example, sugar, fat, or salt. Such additional front-of-pack (hereinafter, FoP) nutrition labelling is an area that is currently not harmonised at the EU level. In the UK, voluntary '*traffic light labelling*' is in place since 2013, but, according to the LGA, it is only provided on two thirds of products sold in the UK. Due to their simplistic character, FoP '*traffic light*' labels have been criticised in the EU since their introduction. In fact, in October 2014, the Commission initiated infringement proceedings against the UK over its '*traffic light*' nutrition labelling scheme (see *Trade Perspectives*, Issue No. 19 of 17 October 2014). The LGA states that '*traffic light labelling*' should become a legal requirement for all products, once EU laws are transferred into UK law after '*Brexit*'. This would allow consumers to see at a glance how much fat, saturates, sugar and salt a product contains and to make healthy food choices. On the other hand, it must be said that the introduction of mandatory '*traffic light labelling*' in the UK after Brexit would constitute a non-tariff barrier for EU businesses and possibly violate WTO rules on technical regulations under the WTO Agreement on Technical Barriers to Trade.

Considering the ongoing negotiations and current uncertainties, on 11 February 2018, 36 organisations of the UK's agro-food sector sent a joint letter to the UK Government demanding more certainty for their industries. They urged the UK Government to reach a deal with the EU in order to maintain free trade with the EU, ensure ongoing access to EU labour, and ensure that businesses operate under an efficient and proportionate regulatory system that is centred on scientific evaluation, innovation and competitiveness.

The EU and the UK aim at agreeing to a transition agreement at the EU summit on 22 to 23 March 2018. Both sides have now published their text proposals for the relevant provisions of a transition period. Any lack of agreement and further delay would complicate the negotiating schedule and provide additional uncertainty to all industries. An agreement on the transition period in March would also mean that negotiations on the future trade relationship between the EU and the UK could start with the clear aim of avoiding the UK having to trade under WTO rules with the EU. If agreement on the transition period cannot be reached by the March summit, the start of trade negotiations could be delayed until the next formal EU summit in late June. Both Parties are hoping to outline their future trade relationship by October 2018. The coming months will be decisive for EU-UK trade in the years to come. All interested stakeholders should prepare for the various '*Brexit*' scenarios and engage with their respective interlocutors in the EU and in the UK.

The EU Regulation on acrylamide comes into effect in April 2018: are potato crisps facing trouble?

All food business operators (hereinafter, FBOs) supplying the EU market will, from April 2018, be expected to put in place practical steps to manage acrylamide within their food safety management systems. From 11 April 2018, new EU legislation will come into effect, which describes measures to mitigate acrylamide formation in a range of foods and sets '*benchmark levels*', but not maximum permitted levels of acrylamide in food. These '*benchmark levels*' have been exceeded in tests carried out in Italy. The tests by a consumer

magazine revealed that seven out of 16 potato crisps samples exceeded the future '*benchmark levels*'.

Acrylamide is a low molecular weight, highly water-soluble, organic compound, which forms from the naturally occurring constituents asparagine and sugars in certain foods, when prepared at temperatures typically higher than 120°C and low moisture. The presence of acrylamide in food was initially detected in 2002. It forms mainly in baked or fried carbohydrate-rich foods, where raw materials contain its precursors, such as cereals, potatoes and coffee beans. As the acrylamide levels in some foodstuffs appear to be significantly higher than the levels in comparable products of the same product category, *Commission Recommendation 2013/647/EU* provided for voluntary mitigation measures to reduce the presence of acrylamide and invited EU Member States' competent authorities to carry out investigations in the production and processing methods used by FBOs to determine whether the acrylamide level found in a specific foodstuff exceeded the indicative values set out in the Annex to that Recommendation. In 2015, the Scientific Panel on Contaminants in the Food Chain (CONTAM) of the European Food Safety Authority (hereinafter, EFSA) adopted an opinion on acrylamide in food. Based on animal studies, EFSA confirmed previous evaluations that acrylamide in food potentially increases the risk of developing cancer. EFSA also stated that the levels of acrylamide in foodstuffs were not consistently decreased in recent years. In addition, the investigations performed by the EU Member States on the basis of the Commission Recommendation showed that the implementation by FBOs of the voluntary mitigation measures to reduce the presence varied widely.

Commission Regulation (EU) 2017/2158 of 20 November 2017 establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food was adopted having regard to Article 4(4) of *Regulation (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs* (for the complex history of its adoption, see *Trade Perspectives*, Issue No. 4 of 24 February 2017). *Regulation (EC) No 852/2004* aims at ensuring a high level of consumer protection with regard to food safety. It defines '*food hygiene*' as a set of measures and conditions necessary to control hazards and to ensure fitness for human consumption of a foodstuff taking into account its intended use. Food safety hazards occur when food is exposed to hazardous agents, which result in contamination of that food. Food hazards may be biological, chemical or physical. Acrylamide is a contaminant as defined in *Council Regulation (EEC) No 315/93 laying down Community procedures for contaminants in food* as "*any substance not intentionally added to food which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food, or as a result of environmental contamination*". As such, acrylamide is a chemical hazard in the food chain.

Given the EFSA's conclusions with respect to carcinogenic effects of acrylamide, and in the absence of any consistent and mandatory measures to be applied by FBOs in order to lower levels of acrylamide, the Commission deemed it necessary to ensure food safety and to reduce the presence of acrylamide in foodstuffs where raw materials contain its precursors by laying down appropriate mitigation measures. The levels of acrylamide can be lowered by a mitigation approach, such as the implementation of good hygiene practices and the application of procedures based on hazard analysis and critical control point (HACCP) principles. In accordance with Article 4 of *Regulation (EC) No 852/2004*, FBOs are to follow the procedures necessary to meet targets set to achieve the objectives of that Regulation and to employ sampling and analysis as appropriate to maintain their own performance. In that respect, the setting of targets, such as benchmark levels, may guide the implementation

of hygiene rules, while ensuring the reduction of the level of exposure to certain hazards. The Commission assumes that mitigation measures would lower the presence of acrylamide in food. In order to check the compliance with the benchmark levels, the effectiveness of mitigation measures should be verified through sampling and analysis.

Regulation (EU) 2017/2158, therefore, establishes mitigation measures, which identify food processing steps susceptible to the formation of acrylamide in foods, and sets out activities to reduce the levels of acrylamide in those foodstuffs. Benchmark levels are defined as "*performance indicators to be used to verify the effectiveness of the mitigation measures and are based on experience and occurrence for broad food categories"*. The Commission established them at a level as low as reasonably achievable with the application of all relevant mitigation measures. The benchmark levels have been determined taking into account the most recent occurrence data from the EFSA's database. It is also assumed that, within a broad food category, the level of acrylamide in 10% to 15% of the production with the highest levels can usually be lowered by applying good practices. The Commission plans to regularly review the benchmark levels with the aim to set lower levels, reflecting the continuous reduction of the presence of acrylamide in food.

In addition to sampling and analysis by the FBOs, *Regulation (EC) No 882/2004 of the European Parliament and of the Council on official controls* requires the EU Member States to regularly perform official controls to ensure compliance with feed and food law. The sampling and analysis performed by the EU Member States in the context of official controls must comply with the sampling procedures and analytical criteria established in application of *Regulation (EC) No 882/2004*. Most importantly, Recital 15 of *Regulation (EU) 2017/2158* reads that "*complementary to the measures provided for in this Regulation, the setting of maximum levels for acrylamide in certain foods should be considered in accordance with Regulation (EEC) No 315/93 following the entry into force of this Regulation*". The eight sections of the Annex to *Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs* establish MLs for nitrate; mycotoxins (including aflatoxins); metals; 3-monochloropropane-1,2-diol (3-MCPD); dioxins and PCBs; polycyclic aromatic hydrocarbons (PAHs); melamine and its structural analogues; and inherent plant toxins. A section on acrylamide looks poised to being established after *Regulation (EU) 2017/2158* comes into effect.

Annex I to *Regulation (EU) 2017/2158* establishes a detailed catalogue of mitigation measures related to products and production processes. For example, for products based on raw potatoes, "*FBOs shall identify and use the potato varieties that are suitable for the product type and where the content of acrylamide precursors, such as reducing sugars (fructose and glucose) and asparagine is the lowest for the regional conditions*". For sliced potato chips, "*FBOs shall use in-line colour sorting (manual and/or optical-electronic) for potato crisps post frying*". Specific rules have been established in Annex II for small restaurants and chip shops, for example: "*For the cooking of French fries, it is appropriate that the FBOs make use of available colour guides providing guidance on the optimal combination of colour and low levels of acrylamide. It is appropriate that a colour guide providing guidance on the optimal combination of colour and low levels of acrylamide is visibly displayed at the premises to the staff preparing the food*". Annex IV sets the actual benchmark levels (in µg/kg) for the presence of acrylamide in foodstuffs (*i.e.*, French fries, other cut (deep fried) products and sliced potato crisps from fresh potatoes; potato crisps, snacks, crackers and other potato products from potato dough; bread; breakfast cereals (excluding porridge); fine bakery wares; coffee (including roast coffee and instant (soluble) coffee; coffee substitutes; and baby food and, processed cereal-based food intended for infants and young children). Benchmark levels of 500 µg/kg have been set, for example, for

ready-to-eat French fries and of 750 µg/kg for potato crisps from fresh potatoes and from potato dough, potato-based crackers, and other potato products from potato dough.

On 11 January 2018, the Italian consumer magazine *Il Salvagente* published the results of a new series of laboratory tests on the presence of acrylamide in potato crisps sold in Italy. Under the benchmark levels set in *Regulation (EU) 2017/2158*, acrylamide should account for no more than 750 µg/kg. The tests revealed that, in seven out of the 18 samples of crisps (reportedly, including famous brands) that were subjected to laboratory tests, the presence of acrylamide was well above the limit. *Il Salvagente* notes that, in six out of the 18 samples, the level of acrylamide even reached and exceeded the reference limit of 1,000 µg/kg provided by the EFSA for acrylamide. Therefore, FBOs risk falling well short of meeting the new EU rules aimed at limiting levels of acrylamide. The results of the '*hot potato*' (*i.e.*, '*patata bollente*') test have been published in the January 2018 issue of *Il Salvagente*.

FBOs have until April 2018 to comply with the benchmark levels for acrylamide established by *Regulation (EU) 2017/2158*. However, while the regulation requires FBOs to take '*mitigating measures*' to reduce acrylamide's presence in their products, it does not include a sanctions regime for those that will breach the benchmarks. Enforceable levels are likely to be established in the near future under *Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs.* Interested food industry stakeholders must continue to monitor the legislative procedures in relation to acrylamide, analyse any new proposal for maximum permitted levels being made, develop a position, and engage with the key stakeholders and competent authorities at the EU and EU Member States level.

Recently Adopted EU Legislation

Customs Law

- *Commission Delegated Regulation (EU) 2018/216 of 14 December 2017 amending Annexes V and IX to Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences*

Trade Remedies

- *Commission Implementing Regulation (EU) 2018/260 of 21 February 2018 terminating the investigation concerning the possible circumvention of anti-dumping measures imposed by Council Implementing Regulation (EU) No 1008/2011, as amended by Implementing Regulation (EU) No 372/2013, on imports of hand pallet trucks and their essential parts originating in the People's Republic of China by imports consigned from Vietnam, whether declared as originating in Vietnam or not*

- *Commission Implementing Decision (EU) 2018/218 of 13 February 2018 amending Annex II to Decision 92/260/EEC as regards temporary admission of registered horses from certain parts of China, amending Decision 93/195/EEC as regards animal health and veterinary certification conditions for the re-entry of registered horses for racing, competition and cultural events after temporary export to China, Mexico and the United States of America, and amending*

Annex I to Decision 2004/211/EC as regards the entries for China, Mexico and Turkey in the list of third countries and parts thereof from which imports into the Union of live equidae and semen, ova and embryos of the equine species are authorised

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2018/252 of 19 February 2018 on exceptional market support measures for the poultry sector in France*

- *Commission Regulation (EU) 2018/213 of 12 February 2018 on the use of bisphenol A in varnishes and coatings intended to come into contact with food and amending Regulation (EU) No 10/2011 as regards the use of that substance in plastic food contact materials*

Other

- *Decision No 1/2017 of the EU-Ukraine Trade and Sustainable Development Sub-Committee of 30 May 2017 adopting its Rules of Procedure*

- *Notice concerning the provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part*

Ignacio Carreño, Tobias Dolle, Lourdes Medina Perez and Paolo R. Vergano contributed to this issue.