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The EU takes measures to prepare for the WTO Appellate Body's likely paralysis by the end of the year

On 21 October 2019, the EU and Norway notified to the World Trade Organization (hereinafter, WTO) their *interim* appeal arbitration arrangement, which is supposed to provide for an "*effective and binding dispute settlement for any potential trade disputes that might oppose them under the WTO law, in case the existing WTO Appellate Body stops being operational*". Indeed, the WTO Appellate Body looks poised to be incapable of taking up any new appeal cases from 10 December 2019, when the terms of two of the three remaining Appellate Body members will end. The blockage, notably by the US, regarding the appointment of new members to the Appellate Body will likely put the entire system of global trade dispute settlement among WTO Members at risk with important implications for world trade.

The WTO dispute settlement system is one of the central pillars of the multilateral trading system. Its objective is to contribute to the stability of the global economy and to enforce the rules-based system. Its procedural stages are regulated by the WTO Understanding on rules and procedures governing the settlement of disputes (hereinafter, DSU). Settling disputes is the responsibility of the Dispute Settlement Body (hereinafter, DSB), in which all WTO Members are represented. WTO disputes begin with a request for consultations by a WTO Member. During the first stage of dispute settling procedures, the parties to the dispute are encouraged to solve the issue through consultations before taking any further actions. Parties to a dispute can also request the WTO Director-General to mediate or to try to assist in any other way at any time. After the consultations, the complainant may request the establishment of a panel. The DSB has the authority to establish the panel of experts to consider the case, which should be composed of three or five panellists and, to assist in the selection of panellists, the WTO Secretariat maintains an indicative list of governmental and non-governmental individuals with specified qualifications. Initially, the parties to the dispute provide written submissions to the panel. This is followed by a first hearing, written rebuttals and the presentation of oral arguments at a second hearing. The panel then prepares the descriptive part of its report and submits it of the parties for comments. The full findings are contained in the interim report, which is also submitted to the parties for comments (additional hearings may be held), before the panel then submits its final report to the parties. Within 60 days after the panel's publication of the final report, the final report is adopted by the DSB, unless the DSB rejects it by consensus. The DSU provides the parties to the dispute with the possibility to appeal a panel report. According to the second sentence of Article 17(1) of the DSU, the Appellate Body is to "*be composed of seven persons, three of whom shall serve on any one case*" and "*persons serving on the Appellate Body shall serve in rotation*". For the Appellate

Body, Article 17(2) of the DSU states that "*the DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once*".

Over the past years, WTO Members have been intensifying the debate on how to reform the WTO on a broad range of issues, from changes to working procedures within the WTO permanent committees to changes to the overall rulemaking. One urgent area of reform, or at least of agreed common understanding, concerns the WTO DSB, more specifically the WTO Appellate Body. The urgency increased in 2018, after the US published the *President's Trade Policy Agenda*, in which the US Administration had detailed five US concerns with respect to the WTO dispute settlement mechanism, relating to: 1) Delays in the issuance of appeal decisions; 2) The continued service by members of the Appellate Body whose terms have ended; 3) Decisions going beyond the issues necessary to decide the appeal; 4) The Appellate Body's approach to reviewing facts; and 5) The claim that Appellate Body reports be treated as precedents.

As a consequence of those alleged '*shortcomings*' and the lack of reform, the US has been blocking the appointment process of new members of the Appellate Body to replace those whose terms have ended (see *Trade Perspectives*, Issue No. 15 of 27 July 2018). On 5 July 2018, the European Commission (hereinafter, Commission) submitted proposals on WTO modernisation to the Council of the EU. The EU proposals provide detailed considerations on the issues put forward by the US Administration. In terms of the process, the EU suggested to focus on addressing the main issues raised by the US in order to allow new members to join the Appellate Body. Once those issues are addressed and the functioning of the Appellate Body is guaranteed, WTO Members should review some of the more substantive concerns. A *Discussion paper* prepared by Canada also provided a number of general, as well as specific, proposals to improve the WTO dispute settlement system. The proposals concern, *inter alia*: 1) Making the dispute settlement procedures more flexible and adaptable; 2) A commitment to self-restraint and openness to mediation by WTO Members; 3) The discussion by WTO Members on the "*authoritative interpretation*" of the WTO rules; and 4) The introduction of minority opinions by dissenting panellists.

The terms of two of the three remaining Appellate Body members will end on 10 December 2019, which will lead to the Appellate Body being effectively paralysed, as there would not be enough judges to hear any new appeals. Despite this date fast approaching, it does not appear that WTO Members are negotiating in earnest to prevent the Appellate Body from becoming paralysed. In the US, free-market and business groups urged the US President to make a proposal to save the WTO Appellate Body. However, the US Administration stated that, before any solution could be found, other WTO Members had to acknowledge that the WTO Appellate Body was not operating as it should be. European Commissioner for Trade Cecilia Malmström stated that the EU would continue its efforts to reform the WTO, but pointed out that "*the situation is worrying*" and does not look "*very optimistic*" at this stage, but that the EU was "*totally united*" in trying to find a solution.

In view of the increasing likelihood that the Appellate Body will be unable to hear new cases from 10 December 2019, WTO Members are preparing alternative avenues to deal with future trade disputes. More specifically, the EU has already agreed *interim* appeal arbitration with Canada, as well as with Norway.

Following the EU-Canada Summit in July 2019, the two parties reaffirmed their commitment to preserve and safeguard a functioning WTO Appellate Body system and stated that the resolution of the blockage of the Appellate Body remained their clear priority. However, the EU stated that "*in the event these efforts are unsuccessful, due diligence commands that we work together to preserve our rights in WTO disputes*". On 25 July 2019, the EU and Canada then agreed to an *Interim Appeal Arbitration Pursuant to Article 25 of the DSU* (hereinafter, interim *appeal arbitration*), which is based on existing WTO rules. The *interim appeal arbitration* is intended to apply to disputes between the EU and Canada in the event that the Appellate Body would cease to function on 10 December 2019. On 21 October 2019, the EU and Norway also agreed to a bilateral *Interim Appeal Arbitration Pursuant to Article 25 of the DSU*. The *interim*

appeal arbitration intends to replicate as closely as possible "*all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU including the provision of appropriate administrative and legal support to the arbitrators by the Appellate Body Secretariat*".

Article 25 of the DSU provides WTO Members with the option of arbitration. Article 25(1) of the DSU states that "*[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties*". Under the *interim appeal arbitration*, the EU mutually agreed with Canada and Norway to pursue arbitration under Article 25 of the DSU regarding the appeal of any final panel report that might result from a current or future WTO dispute. According to the agreed procedure, the *interim appeal arbitration may* only be initiated in the event that the Appellate Body is not able to hear an appeal. The *interim appeal arbitration* does not affect the panel stage of the dispute settlement, it only intends to substitute the WTO appeal stage until the Appellate Body is again composed of sufficient members to hear appeals. Under the agreed *interim appeal arbitration* procedures, after the issuance of the panel report to the parties, "*but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the membership, any party may request that the panel suspend the panel proceedings with a view to initiating the arbitration*".

Following the suspension of the panel proceedings, the arbitration must be initiated by filling a *Notice of Appeal* with the WTO Secretariat that must include the final panel report. The arbitrators must be three people, which will be selected by the WTO's Director-General within 10 days from the filing of the *Notice of Appeal* from the pool of available former members of the Appellate Body. The selection process will be based on "*the same principles and methods that apply to constitute a division of the Appellate Body under Article 17.1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review*". However, two nationals of the same WTO Member may not serve on the same case. The agreed procedures for the *interim appeal arbitration* state that an appeal must be limited "*to issues of law covered by the panel report and legal interpretations developed by the panel*". Arbitrators can uphold, modify, or reverse the legal findings and conclusions of the panel. Additionally, the findings of the panel that have not been appealed are to "*be deemed to form an integral part of the arbitration award*". The arbitration award is final, and parties agree to abide by it. The award must be notified to the DSB and to the Council or Committee administering any relevant WTO agreement. Third parties to the disputes cannot initiate the arbitration procedure. However, third parties, which have notified the DSB of a substantial interest in the matter before the panel, may make written submissions and must be given an opportunity to be heard by the arbitrators.

The *interim appeal arbitration* could be a temporary solution to continue a kind of parallel appeal mechanism within the WTO framework. However, such arrangements do not provide a sustainable solution to the '*demise*' of the WTO Appellate Body. Importantly, while Article 25 of the DSU is available to all WTO Members, such agreed *interim appeal arbitration arrangements* only concern those WTO Members that agreed to them. In view of the multitude of disputes that are currently in their panel stage (30 cases) or awaiting the composition of a panel (30 cases) and for which no appeal proceedings would likely be available, this situation risks seriously undermining the authority of global trade rules. This situation could also cause WTO Members to have increased recourse to the dispute settlement systems provided in their bilateral or regional trade agreements. However, not all WTO Members are linked via such agreements and such agreements do not always provide for elaborate or functional dispute settlement mechanisms.

WTO Members can continue to bring cases before the WTO after 10 December 2019, as consultations and panel proceedings will remain available and functional. However, if no solution is found to the blockage of the appointment of judges to the Appellate Body, the currently existing option of appealing panel reports would cease to be available to the parties of disputes. Even as things stand and should a deal be found before the 10th of December, it would take a considerable amount of time to appoint new Appellate Body members, so the institution would inevitably stop functioning for at least a few months. This would considerably

weaken the multilateral trading system as a whole. Time is running out and restoring the functioning of the Appellate Body, as well as the broader debate on WTO reform, are becoming more pressing every day. Interested stakeholders should closely monitor and asses any developments, while contributing to the debate.

The EU agrees to take steps to resume trade negotiations with Thailand

On 14 October 2019, the EU's Foreign Affairs Council (hereinafter, Council) discussed EU relations with Thailand, following the March 2019 Thai elections. According to the outcome document, "*the Council now considers it appropriate for the EU to take steps towards broadening its engagement with Thailand (…) by preparing for the timely signature of the Partnership and Co-operation Agreement (PCA)*". The Council also stressed "*the importance of taking steps towards the resumption of negotiations on an ambitious and comprehensive Free Trade Agreement (FTA)*". Following positive signals in recent months, this is now the official confirmation that the EU is ready to resume negotiations. Thailand appeared to welcome this development, as it pursues greater diversification of its economy and export destinations.

Originally, the EU and Association of Southeast Asian Nations (hereinafter, ASEAN) initiated negotiations to conclude a '*region-to-region*' agreement, but the parties agreed to put those discussions on hold, due to the complexity and sensitivity of '*block-to-block*' trade negotiations. Instead, the Council of the EU decided to pursue negotiations with individual ASEAN Member States. Negotiations for trade agreements with Singapore were concluded in 2014, those with Viet Nam in 2015, while negotiations with Malaysia, the Philippines, and Thailand were opened, but are currently *de facto* suspended, and negotiations are ongoing with Indonesia. Although the strategic objective of the '*region-to-region*' agreement has notionally been maintained, insomuch as the individual agreements are to be concluded with a view to eventually use these agreements as '*stepping stones*' for an EU-ASEAN FTA (see *Trade Perspectives*, Issue No. 9 of 4 May 2012), the focus is currently clearly on bilateral negotiations with individual ASEAN Member States.

On 28 February 2013, the European Commission (hereinafter, Commission) received the endorsement from the Council to open negotiations for a Free Trade Agreement (hereinafter. FTA) with Thailand. On 6 March 2013, the then European Commission President, *José Manuel Barroso*, and the then Thai Prime Minister, *Yingluck Shinawatra*, had launched negotiations for an FTA between the EU and Thailand. Between 2013 and April 2014, four rounds of trade talks were held, before negotiations were suspended, in 2014, due to the political situation in Thailand.

A general election took place in Thailand in March 2019 and a new Government took office in the Spring, finally paving the way for the possible relaunch of negotiations with the EU. Following the elections, Thailand's Director General of the Department of Trade Negotiations, *Khun Auramon Supthaweethum*, stated that the Department would inform relevant stakeholders including EU representatives, the private sector, as well as civil society groups about Thailand's intention to re-start negotiations. In September 2019, the EU's Ambassador to Thailand, H.E. *Pirkka Tapiola*, noted the intentions of the Government of Thailand and underlined that he was confident that negotiations could restart soon. Finally, on 25 July 2019, Thailand's new Deputy Prime Minister, *Somkid Jatusripitak*, and the country's Minister of Commerce, *Jurin Laksanavisit*, announced that Thailand intended to relaunch FTA negotiations with the EU shortly. On 16 October, shortly after the Council's decision on the EU's relations with Thailand, the 14th Senior Officials' Meeting (SOM) between the EU and Thailand was held in Brussels. According to the EU's press release, the meeting "*noted substantial progress made by Thailand on important matters such as fight against illegal fishing (IUU)*", but it appears that details on the resumption of trade negotiations were not yet discussed.

Thailand is poised to strongly benefit from an FTA with the EU and the bilateral deal could contribute to stabilising certain economic sectors, such as the fishery and electronics sectors. Until 1 January 2015, Thailand had benefitted from the EU's Generalised Scheme of Preferences (hereinafter, GSP), but since then it is subject to the EU's most-favoured nation (MFN) duties. Prior to the removal of GSP preferences, Thailand's exports to the EU progressively and significantly increased year-on-year, but following the political developments and the switch to MFN duties, exports strongly decreased and largely stagnate at a lower level than before. For instance, the applicable duty on frozen shrimp exports to the EU almost tripled from 4.2% under the GSP to 12% under the MFN duty rates. According to EU statistics, in 2018, total bilateral trade between the EU and Thailand amounted to EUR 38 billion. For Thailand, the EU is its 4th largest trading partner, following China, Japan, and the US, and accounting for 9.1% of Thailand's total trade. Thailand is the EU's 25th largest trading partner worldwide. In 2018, Thailand exported goods worth EUR 22.9 billion to the EU, notably exporting machinery and electronics and transport equipment, miscellaneous manufactured articles, as well as food products, including chicken and fishery products. Thailand reportedly aims at diversifying its trade, in particular at reducing its dependence on China, which, in 2018, accounted for 12% of Thailand's total exports. With respect to EU exports to Thailand, the Commission names machinery and transport equipment, chemicals and related products, and manufactured goods as the most important sectors.

A key priority for Thailand should arguably be the fisheries sector, both in terms of market access, but also in terms of achieving recognition for its important progress in the combat against illegal, unreported and unregulated (hereinafter, IUU) fishing. IUU fishing refers to fishing that is: 1) Illegal (*i.e.,* lacks authorisation, violates national laws or international obligations or does not comply with conservation and management measures); and/or 2) Unreported (*i.e.,* it is not properly reported under international, regional or national laws and regulations); and/or 3) Unregulated (*i.e.*, it is performed by vessels without national flag or that jeopardise fish stocks). The EU's framework to address IUU fishing requires the flag State of the fishing vessel to certify the origin and legality of fishery products in order to guarantee traceability. If a country is unable to comply, the Commission will first attempt to assist and improve the legal framework of said country via its '*card system*'. The first issuance by the Commission (*i.e*., the issuance of a '*yellow card'*) pre-identifies the country as non-cooperative and opens a six-month formal dialogue to assist the country to improve its system. After this dialogue, the Commission evaluates the country's situation and either: 1) Lifts the pre-identified status (*i.e*., issues a '*green card*'); 2) Maintains the '*yellow card*' and continues the dialogue; or 3) Formally identifies the country as being non-cooperative (*i.e*., issues a '*red card*'). A '*red card*' results in the imposition of a ban of all fishery products imported directly or indirectly from the country listed as non-cooperative. In practice, the Commission often extends the six-month '*dialogue*' period, if efforts are progressing in the right direction.

A so-called '*yellow card*' had been in issued to Thailand in 2015 and maintained over four years, citing Thailand's inadequate legal framework on fisheries, as well as inadequate monitoring, traceability and control systems. On 8 January 2019, the Commission finally delisted Thailand from the list of '*warned countries*', as recognition of its progress in addressing IUU illegal fishing, highlighting the achievement of a "*major upgrade of the Thai fisheries governance in accordance with the international commitments of the country*".

The issue of IUU fishing is typically addressed in the chapters on trade and sustainable development of trade agreements negotiated by the EU, but those provisions basically refer to political commitments to address IUU fishing. More importantly, Thailand should further build on its successful policy that led to the removal of the EU's '*yellow card*' earlier this year and should strive to secure significant market access concessions from the EU in relation to fishery products. This could allow the Thai fishery sector to fully benefit from the future EU-Thailand FTA. Additionally, the agreement could institutionalise cooperation between EU and Thai authorities to avoid any impediments to Thailand's fishery exports to the EU. In 2014, 10.3% of Thailand's fishery exports were destined for the EU, a figure that decreased to 10% in 2018 with the decline attributed to the EU's '*yellow flag*'. In absolute terms, the EU's '*yellow card*' led to a significant decrease of Thailand's fishery exports from a value of EUR 1.9 billion in

2014 to EUR 1.6 billion in 2015, which slowly recovered in the following years and reached again EUR 1.85 billion in 2017. In terms of tariffs, as noted above, frozen shrimp exports from Thailand to the EU are currently subject to duties of 12%, while canned tuna is even subject to a duty of 24%. If brought down to 0%, exports from Thailand could significantly increase.

Further sectors that could benefit from a future FTA with the EU are Thailand's machinery, transport, and electronics sectors. In addition to the reduction of tariffs, these sectors would strongly benefit from a reduction of non-tariff measures affecting trade, as well as the alignment and mutual recognition of standards. The EU-Japan Economic Partnership Agreement, which entered into force on 1 February 2019, is an important example of a trade agreement that specifically targeted non-tariff measures affecting trade relating to motor vehicles, hydrogen fuelled cars, food additives, and pharmaceuticals. Thai businesses should identify key products and rules that could be addressed as part of the forthcoming negotiations.

The resumption of negotiations with the EU must also be considered in view of a recent decision by the US Administration to suspend certain trade preferences under the US GSP programme. On 25 October 2019, the Office of the United States Trade Representative announced that US President *Donald Trump* had decided to suspend USD 1.3 billion in trade preferences for Thailand "*under the Generalized System of Preferences (GSP) based on its failure to adequately provide internationally-recognized worker rights*". The USTR published the full list of affected products, noting that it focuses "*on products for which the United States is a relatively important market for Thailand, but where Thailand accounts for a relatively small share of U.S. imports*" and that "*due to longstanding worker rights issues in the seafood and shipping industries*", GSP eligibility would be revoked for all seafood products. While it remains unclear for how long this suspension would be applied, Thailand already announced that it would appeal the decision. The objective to diversify export destinations and improve trade relations with the EU looks poised to deliver important opportunities and contribute to Thailand's economic stability.

Reports from earlier this Autumn indicated that Thailand's Ministry of Commerce would organise a seminar to gather input from stakeholders, such as Government agencies, private companies, educational institutes, entrepreneurs and the general public. In fact, considering that negotiations can be expected to resume in early 2020, stakeholders in the EU, as well as in Thailand, should now determine their offensive and defensive interests and identify any elements that negotiators should take into account. Both sides will now prepare for the relaunch of trade negotiations and work on their respective negotiating strategies, approaches, and, ultimately, text proposals.

The use of bacteriophages to prevent listeria on ready-to-eat food – The General Court of the EU issues an Order in proceedings *Micreos v European Commission*

On 26 September 2019, the President of the General Court of the EU issued an Order in Case T-568/19 R in the proceedings of *Micreos Food Safety BV* (hereinafter, *Micreos*) v *European Commission* (hereinafter, Commission). Although the application for *interim* measures has been rejected as inadmissible, the Order has been described in the press as "*paving the way for natural phages against listeria*" or "*enabling food producers to continue using phages to prevent Listeria on all ready-to-eat foods in the absence of an EU legal framework*".

A bacteriophage, also known simply as phage, is a type of virus that infects bacteria. In fact, the word '*bacteriophage*' literally means '*bacteria eater*', because bacteriophages destroy the host cells that contain them. Bacteriophages are composed of a nucleic acid molecule that is surrounded by a protein structure. Bacteriophages only destroy specific bacterial strains and are supposed to be harmless to humans. This could make them a promising alternative to antibiotics for the prevention of pathogens growing in food.

Micreos, based in Wageningen, in the Netherlands, develops phage technology for food safety applications, including the *Listex™ P100*, a product against listeria, which was the first phage product approved as a food processing aid by the US Food and Drugs Administration (FDA), and is available in countries around the world such as Australia, Canada, Israel, and New Zealand. However, *Micreos* has encountered regulatory challenges to market the product in some EU Member States, notably Belgium and Estonia. In 2007, *Micreos* approached the Commission seeking confirmation of the use of *Listex™ P100* as a non-decontaminating processing aid on animal derived ready-to-eat (hereinafter RTE) food on the basis of *Regulation (EC) No 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives*. *Regulation (EC) No 1333/2008* provides for an authorisation procedure for food additives. However, the Regulation does not apply to processing aids, unless they are used as food additives. Article 3(2)(b) of *Regulation (EC) No 1333/2008* defines '*processing aid*' as any substance which: 1) Is not consumed as a food by itself; 2) Is intentionally used in the processing of raw materials, foods or their ingredients to fulfil a certain technological purpose during treatment or processing; and 3) May result in the unintentional, but technically unavoidable, presence in the final product of residues of the substance or its derivatives, provided that they do not present any health risk and do not have any technological effect (*i.e.*, a function) in the final product.

However, the Commission took the view that the use of *Listex™ P100* on animal-derived RTE food should be addressed as a '*decontaminant*', requiring approval in accordance with Article 3(2) of *Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin*. Article 3(2) of *Regulation (EC) No 853/2004* provides that "*Food business operators shall not use any substance other than potable water – or, when Regulation (EC) No 852/2004 or this Regulation permits its use, clean water – to remove surface contamination from products of animal origin, unless use of the substance has been approved by the Commission*". Following applications for approval, the Commission reviews the application, consults the European Food Safety Authority (hereinafter, EFSA), and submits a proposal to the Council, which then approves or rejects the proposal. For example, an US request of approval for use of four pathogen reduction treatments (*i.e.*, chlorine dioxide, acidified sodium chlorite, trisodium phosphate and peroxyacids) on poultry destined for export to the EU was not approved by *Council Decision 2009/121/EC of 18 December 2008 rejecting the proposal from the Commission for a Council Regulation implementing Regulation (EC) No 853/2004 of the European Parliament and of the Council as regards the use of antimicrobial substances to remove surface contamination from poultry carcasses*. The approach of an authorisation under Article 3(2) of *Regulation (EC) No 853/2004* was used, *inter alia*, in *Commission Regulation (EU) No 101/2013 of 4 February 2013 concerning the use of lactic acid to reduce microbiological surface contamination on bovine carcases*. *Micreos* disagrees with the approach of applying *Regulation (EC) No 853/2004*, arguing that the phage product is intended for use in food products that are not contaminated and that the objective, in fact, is to prevent their contamination.

In 2009, the Netherlands approved *Listex™ P100*'s use as a processing aid on animal derived RTE food, such as cheese. On 19 June 2015, *Micreos*, despite its objections that *Listex™ P100* is considered as a '*decontaminant*', submitted a request for approval of the use of the product under *Regulation (EC) No 853/2004*. On 7 July 2016, on the basis of a request from the Commission, the EFSA adopted an opinion on the "*Evaluation of the safety and efficacy of Listex™ P100 for reduction of pathogens on different ready-to-eat (RTE) food products*", essentially concluding that it was effective and safe.

On 19 February 2018, the Commission informed *Micreos* that, due to the absence of sufficient '*political support*' for the approval of *Listex™ P100* under *Regulation (EC) No 853/2004*, it intended not to pursue the approval process further. The product was, according to *Micreos*, left in a "*regulatory limbo*" that, in practice, blocked sales to customers. On 25 April 2019, *PA International*, acting on behalf of *Micreos*, approached the Commission and requested, *inter alia*, the recognition of *Listex™ P100* as a non-decontaminating processing aid. Similarly, by letter of 9 May 2019, *Micreos* requested the Commission to approve the use of *Listex™ P100* on animal-derived RTE food as a non-decontaminating processing aid.

In discussions at the request of Belgium, held in the Working Group of hygiene experts of the EU Member States on 29 April 2019, Belgium drew the attention of the Commission to the fact that *Listex™ P100* was advertised to companies on its territory despite not being allowed on the market and that its recognition as a processing aid in another EU Member State created difficulties for competent authorities. As it was later stated in the Court Order, the Commission merely recalled at this occasion that no authorisation had been given at EU level for the placing on the market of the product in accordance with Article 3(2) of *Regulation (EC) No 853/2004*.

The Commission responded by letters of 17 June 2019, sent to *Micreos* and to its representative. By application lodged on 16 August 2019, *Micreos* brought an action against the Commission for annulment of the contested acts (*i.e.*, the letters sent by the Commission). By separate document lodged on the same day, *Micreos* brought an application for *interim* measures, in which it claimed that the President of the General Court should "*order the suspension of the application of all the provisions of the [contested acts] until the Court has ruled on the application for annulment submitted by the applicant*". In the action for *interim* measures, in essence, the President of the General Court concluded that the applicant had not provided sufficient evidence or arguments for it to be concluded, *prima facie*, that there was a decision as alleged. *Micreos*' application for *interim* measures was therefore dismissed as inadmissible, without it being necessary to rule on urgency or the condition relating to a *prima facie* case. The President of the General Court, however, added that this does not leave *Micreos* without judicial protection, referring to the legal remedies available at EU and EU Member States' level.

The Order of the President of the General Court states that the alleged prohibition on the marketing of *ListexTM P100* as a decontaminant originates, *prima facie*, directly from *Regulation (EC) No 853/2004*, as interpreted by the Commission, and was not the result of the alleged decision. That prohibition would continue, if the Commission's interpretation is correct, until the marketing of the product was authorised under said regulation. Accordingly, the mere suspension of a decision, by which the Commission allegedly decided not to pursue the approval process further, "*would not alter the situation as regards the marketing of Listex™ P100 as a processing aid for use on animal-derived RTE-Food*". Pursuant to the Order, *Micreos* is free to seek legal remedies against acts adopted by EU Member States' authorities that prohibit the marketing of *Listex™ P100* on the basis of the above interpretation of the Commission, such as the Belgian and Estonian authorities to which *Micreos* refers, allowing the national courts to make an order for reference to the Court of Justice pursuant to Article 267 TFEU.

Recent listeria outbreaks in Spain, Germany, and most recently in the Netherlands, demonstrate the urgency to prevent contamination of food with listeria bacteria. Members of the European Parliament (hereinafter, MEP) are now turning to the Commission with the urgent advice to develop a specific EU phage regulation. Already on 24 May 2018, MEP *José Inácio Faria* asked a question for written answer to the Commission regarding the establishment of a bacteriophage regulatory framework: "*Noting that the EU has already funded research projects into bacteriophage therapy, specifically the Phagoburn project, and taking into account that the Commission is currently considering introducing phage-based products in the area of existing food-feed legislation, would the Commission be prepared to consider creating a bacteriophage-specific regulatory framework covering both food and feed safety and efficacy requirements?*". The answer given by the European Commissioner for Health and Food Safety, Mr. *Vytenis Andriukaitis* on behalf of the Commission stated that the Commission was aware of the potential merits of bacteriophage therapy, but that studies in livestock had not always been positive. The Commissioner further noted that the EU-funded project CAMCON did not show consistent reduction of Campylobacter in broiler chicken resulting from such therapy. Most importantly, Commissioner Andriukaitis noted that "*the EU food and feed safety legislation and veterinary medicines legislation is structured around the authorisation of substances e.g. as pesticides, biocides, veterinary medicines or feed additives, rather than on the creation of specific substance-related regulatory frameworks. Along this line, the possible concrete applications of bacteriophages should be tailored to the intended use as requested*

by the respective pieces of legislation. For instance, the Commission is currently proceeding with an application of a bacteriophage under the scope of Regulation (EC) No 1831/2003 on additives for use in animal nutrition".

On 3 July 2019, MEP *Pascal Arimont* asked the Commission if it was "*considering classifying bacteriophages as processing aids – within the meaning, for instance, of Regulation (EC) No 1333/2008 – as has already been done in a number of countries?*". On 16 August 2019, Commissioner Andriukaitis replied on behalf of the Commission that, from the point of view of EU law, the category of bacteriophages was too general to provide for specific legal consequences for all products that may fall under it. Therefore, a case-by-case approach was required. A possible qualification as a processing aid, for the purpose of decontamination, would not remove the prevailing authorisation obligation under Article 3(2) of *Regulation (EC) No 853/2004.* Andriukaitis concluded that it is worth noting that the use of decontaminants in food is often associated with lower attention being given to the hygienic production of food and is, therefore, seen as a disincentive for food business operators from investing in hygiene at all steps of food production, from the farm to the fork.

The Commission appears reluctant to classify bacteriophages as processing aids in food. It remains to be seen whether the national authorities in the EU Member States indeed understand the Order of the General Court in the proceedings *Micreos* v Commission as "*paving the way for natural phages against listeria"*, along the lines of what has been reported by some observers. It appears to be a wide interpretation of the statement in the Court's Order that the suspension of a decision, by which the Commission allegedly decided not to pursue the approval process further, "*would not alter the situation as regards the marketing of Listex*™ *P100 as a processing aid for use on animal-derived RTE-Food*". There are certainly potential merits of bacteriophage therapy, but although the fight against bacterial contamination is very important, this should not lead to food business operators investing less in hygiene at all steps of food production. Interested stakeholders should monitor developments related to the regulation and approval of bacteriophages and engage with public authorities as necessary.

Recently Adopted EU Legislation

Food and Agricultural Law

- *Commission Implementing Directive (EU) 2019/1813 of 29 October 2019 amending Implementing Directive 2014/96/EU on the requirements for the labelling, sealing and packaging of fruit plant propagating material and fruit plants intended for fruit production, falling within the scope of Council Directive 2008/90/EC as regards the colour of the label for certified categories of propagating material and fruit plants and the content of the supplier's document*

- *Commission Implementing Regulation (EU) 2019/1787 of 24 October 2019 amending Implementing Regulation (EU) 2016/6 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station*

- *Commission Implementing Regulation (EU) 2019/1786 of 23 October 2019 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin*

- *Commission Implementing Decision (EU) 2019/1772 of 23 October 2019 amending Annex II to Decision 2007/777/EC as regards the inclusion of the United Kingdom of Great Britain and Northern Ireland and its Crown Dependencies in the list of third countries or parts thereof authorised for the introduction into the Union of consignments of certain meat products and treated*

stomachs, bladders and intestines for human consumption (notified under document C(2019) 7642) (Text with EEA relevance)

- *Commission Implementing Regulation 2019/1762 of 23 October 2019 amending Regulation (EU) No 206/2010 as regards the inclusion of the United Kingdom of Great Britain and Northern Ireland and its Crown Dependencies in the lists of third countries, territories or parts thereof authorised for the introduction into the Union of certain animals and fresh meat (Text with EEA relevance)*

- *Commission Implementing Regulation (EU) 2019/1761 of 23 October 2019 amending Part 1 of Annex I to Regulation (EC) No 798/2008 as regards the inclusion of the United Kingdom of Great Britain and Northern Ireland and certain of its Crown Dependencies in the list of third countries, territories, zones or compartments authorised for the introduction into the Union of consignments of poultry and poultry products (Text with EEA relevance)*

- *Commission Implementing Regulation (EU) 2019/1759 of 23 October 2019 amending Annex I to Regulation (EU) No 605/2010 as regards the inclusion of the United Kingdom of Great Britain and Northern Ireland and its Crown Dependencies in the list of third countries or parts thereof authorised for the introduction into the Union of consignments of raw milk, dairy products, colostrum and colostrum-based products intended for human consumption (Text with EEA relevance)*

Other

- *Council Decision (EU) 2019/1736 of 10 October 2019 on the position to be adopted on behalf of the European Union within the Partnership Committee established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, as regards the establishment of the list of individuals to serve as arbitrators in dispute-settlement proceedings*

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