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Belgium's legislative proposal on mandatory due diligence for compliance with social and environmental standards along the supply chain: Foreshadowing long-awaited EU rules?

On 27 September 2021, Belgium's Council of State (*i.e.*, Belgium's supreme administrative court), issued its much awaited [opinion](#) regarding the legislative *Proposal for a law introducing a duty of vigilance and a duty of responsibility on companies throughout their value chains* (hereinafter, *Mandatory Due Diligence Law*), which was introduced on 2 April 2021 before Belgium's Federal Chamber of Representatives (hereinafter, Federal Chamber). The legislative proposal foresees the introduction of mandatory due diligence requirements related to the corporate responsibility to respect human rights, labour rights, and environmental issues along the entire value chains. In its opinion, Belgium's Council of State criticised that, overall, the various concepts contained in the legislative proposal are too unclear.

At EU level, discussions are currently ongoing on a similar initiative and the European Commission (hereinafter, Commission) is expected to publish the proposal for an EU Directive on due diligence requirements before the end of the year. These initiatives on due diligence requirements for companies may significantly affect businesses in the coming years and harmonisation through the forthcoming EU Directive is urgently needed to maintain a level playing field for businesses across EU Member States.

The trend towards increased due diligence obligations

Consumers, society at large, and now public authorities are becoming increasingly aware of occurrences of human or labour rights violations or negative environmental impacts of economic activities throughout businesses' supply chains. Companies are generally expected to carry out due diligence procedures to ensure the compliance with social, environmental, health and human rights standards. Companies have committed to voluntary due diligence systems, which are typically limited to the '*upstream*' value chain, a concept that refers to the raw material inputs needed for production.

Given the limited scope and accountability of such voluntary schemes, the EU has introduced, over the years, a number of sector- or product-specific due diligence requirements, such as

mandatory due diligence regarding conflict minerals under the EU's *Conflict Minerals Regulation* and due diligence requirements for timber products under the EU's *Timber Regulation*, which aim at ensuring that supply chains comply with human rights and environmental standards, respectively.

In recent times, the Commission has started placing greater emphasis on labour rights and environmental matters with respect to companies' supply chains. EU Member States have also been increasingly developing policies to improve supply chains and make them "more sustainable". A study for the Commission on due diligence, published in 2020, noted that only 37% of EU companies perform due diligence on social and environmental standards, and that only 16% of EU companies carry out such due diligence across their entire value chains. On 30 July 2020, the Commission published its *Inception Impact Assessment on sustainable corporate governance*, with the stated objective of encouraging businesses "to frame decisions in terms of environmental (including climate, biodiversity), social, and human impact for the long-term, rather than on short-term gains". With respect to labour rights, according to statistics from the International Labour Organization (ILO), in 2019 there were 25 million cases of forced labour, 152 million cases of child labour, and 2.78 million labour-related deaths. With respect to environmental issues, according to a study conducted for the Commission in 2020, only 4.96% of large companies and 16.67% of medium-sized enterprises indicated that they had undertaken environmental or climate change due diligence.

Given the Commission's initiative on the issue, earlier this year, the European Parliament adopted its *Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability*, which includes an actual proposal for an EU Directive. With respect to voluntary due diligence standards, the European Parliament noted that they had limitations and "had not achieved significant progress in preventing human rights and environmental harm and in enabling access to justice". Therefore, the European Parliament proposed that the scope of the EU's mandatory due diligence legislation apply to all companies. While the European Parliament does not have the power to make a legislative proposal, a right that lays solely with the Commission, it can issue recommendations to influence proposals being prepared by the Commission. With respect to the scope, the European Parliament noted that, "In order to be fully effective, due diligence should not be limited to the first tier downstream and upstream in the supply chain but should encompass those that, during the due diligence process, might have been identified by the undertaking as posing major risks". This means that companies would also have to carry out due diligence on their subsidiaries, subcontractors, and possibly even their customers.

Belgium's proposal on supply chain due diligence

In parallel to the developments at EU level, Belgium is moving forward with its own legislative initiative on due diligence regarding social and environmental standards. However, while there is almost a majority in Belgium's Federal Chamber favouring this proposal, some parties are advocating to wait for the legislative proposal by the Commission for an EU *Directive on corporate due diligence and corporate accountability*. This legal instrument was originally supposed to be published in July 2021, but has now been delayed until the end of the year.

On 2 April 2021, a legislative proposal for a *Mandatory Due Diligence Law* was introduced by the socialist parties (i.e., *Vooruit* and *Parti Socialiste, PS*) in Belgium's Federal Chamber. On 22 April 2021, the proposal received the support from the green parties (i.e., *Ecolo* and *Groen*) and the Flemish Christian-Democrats (i.e., *Christen-Democratisch en Vlaams, CD&V*). The remaining two parties from the coalition forming Belgium's Federal Government, namely the two liberal parties (i.e., *Open Vlaamse Liberalen en Democraten, Open VLD*, and *Mouvement Réformateur, MR*) currently prefer to wait for the proposal for an EU Directive from the Commission. The legislative proposal would introduce mandatory supply chain due diligence on corporate responsibility to ensure the respect of human rights, labour, health and environmental standards. The due diligence obligations would apply to all companies, including small and medium enterprises (SMEs), that are active in Belgium, and throughout their entire value chains.

The legislative proposal establishes that companies would be required to develop a “*vigilance plan*”, which would have to be linked to a company’s business plan. The “*vigilance plan*” is a plan providing, *inter alia*, a risk map of the entire value chain of the company, a description of the value chain, procedures for regular evaluation, and appropriate actions to mitigate the risks or prevent serious harm. Such plan should be based on EU and international standards for due diligence. According to the legislative proposal, Belgium’s Federal Public Service of Economy, SMEs, Middle Classes, and Energy would supervise the implementation of the “*vigilance plan*”.

At EU level, a discussion is currently ongoing regarding the type of obligation that companies must comply with, either an ‘*obligation of effort*’ or an ‘*obligation of result*’. In the case of an ‘*obligation of effort*’, it suffices for a company to demonstrate that it had taken all possible measures to avoid and remedy violations of social or environmental standards in its value chains. However, if legislation were to provide for an ‘*obligation of result*’, even if all efforts have been made in order to comply with a due diligence obligation, but there is a violation of certain standards, the company can still be held liable. The Belgian legislative proposal pursues both approaches and would introduce a result-based commitment linked to the “*vigilance plan*” for large companies and for SMEs active in so-called “*high-risk zones and/or sectors*”, and an effort-based commitment for SMEs in zones and sectors that are not considered “*high-risk*”. The proposal does not provide a clear definition of “*high-risk zones or sectors*”, but a list would be adopted through a Royal Decree.

Important consequence of non-compliance

With respect to the consequences of non-compliance, the legislative proposal introduces civil and criminal liabilities for violations of the due diligence requirements. More specifically, a company can be held liable for damages caused throughout its value chains in accordance with Belgium’s Civil Code. Notably, the *Mandatory Due Diligence Law Proposal* foresees a presumption of liability, unless proven otherwise, which reverses the common burden of proof. Under such approach, businesses would have to prove that they are not liable for a violation of the covered commitments throughout their value chains. This would be particularly burdensome for SMEs’ activities, as well as for their suppliers, their subsidiaries and, possibly, their customers. The legislative proposal also provides that companies, as well as their board of directors, can be held criminally liable in cases of violations of their duties of vigilance and their obligations set out in the due diligence plan. Sanctions include the cessation of activities, exclusion from public contracts, fines from EUR 250,000 to EUR 1,000,000, and prison sentences ranging from one month to one year.

Finally, the legislative proposal provides for “*collective redress*”, which would allow a collective of individuals, including civil society organisations or trade unions, to seek compensation from a company in case of damages resulting from that company’s violation of its duty of vigilance.

Belgium’s Council of State requests clarifications and amendments

As part of Belgium’s legislative procedure, each legislative proposal has to be submitted to the Council of State for an opinion. On 27 September 2021, Belgium’s Council of State issued its opinion regarding the proposed *Mandatory Due Diligence Law*, stating that various concepts contained in the legislative proposal were unclear and criticising the vague wording and the unclear scope of the obligations. For instance, the Council of State noted that the principle of legality in criminal matters requires that criminal law formulate, in a sufficiently precise manner, which offences are punishable. Therefore, according to Belgium’s Council of State, the principle of foreseeability is violated due to the vagueness of the proposal on the types of violation that would constitute criminal offences. The Council of State further noted that the current proposal would conflict with private international law, as it foresees that Belgian courts would be competent to hear claims against companies established or operating in Belgium when the violation occurred in their value chains abroad, while Belgian courts are not

competent to hear such cases. Belgium's Council of State has requested the Federal Chamber to clarify the various concepts and to make the necessary amendments.

Towards the EU's Due Diligence Directive

The proposal for a *Mandatory Due Diligence Law*, currently being discussed in Belgium, appears to seek a balance between the French and German approaches to due diligence requirements for businesses regarding social and environmental issues, while going beyond the European Parliament's proposal (see *Trade Perspectives, Issue No. 20 of 30 October 2020*). The France's *Duty of Vigilance Law*, which applies to large companies since 2017, imposes a legal obligation to identify, prevent, and address certain human rights and environmental issues. The German *Law on Corporate Due Diligence in Supply Chains*, which was adopted on 11 June 2021 and will enter into force in 2023, establishes effort-based obligations for companies that have more than 3,000 employees, and foreign companies that have a branch office in Germany with at least 3,000 employees in Germany, concerning human rights and violations of certain environmental standards within their supply chains. From 1 January 2024, the threshold of 3,000 employees will be reduced to 1,000 employees for both German and foreign companies.

The longer it takes for the Commission to publish its proposal for a Directive, which would eventually harmonise the approach across the EU, the more EU Member States would likely start establishing their own due diligence legislation, potentially creating a complex framework of diverging rules across the EU, severely complicating the operations and compliance of companies doing business in various EU Member States. However, given that the EU is expected to issue a Directive, which, according to Article 288 of the *Treaty of the Functioning of the European Union* (TFEU), is binding as to the result to be achieved, national EU Member States' authorities would retain the choice of form and methods to achieve such results. Thus, while some degree of harmonisation will likely be achieved, differences in the due diligence approaches will likely persist across EU Member States.

In Belgium, the Federal Chamber will now have to reconsider and amend the proposal in view of the opinion from the Council of State, before it can be debated during plenary sessions. Once Belgium's Federal Chamber has adopted a final text, it would be submitted for formal approval to the King. Businesses in Belgium and around the world should closely monitor the developments related to due diligence requirements and already determine their level of compliance with the proposed rules. At EU level, the Commission's proposal for a Directive is expected for the end of 2021 and the usual consultative processes, including a public consultation, will likely ensue, providing companies with an important opportunity to contribute to the legislative process.

The European Commission proposes to address practical difficulties with the implementation of the Northern Ireland Protocol: Towards additional benefits for the agri-food industry?

On 13 September 2021, the European Commission (hereinafter, Commission) published its proposals to facilitate the movement of goods from England, Scotland, and Wales to Northern Ireland, as a solution to the practical difficulties regarding the implementation of the Northern Ireland Protocol, which is an integral part of the EU-UK Withdrawal Agreement. In essence, the Northern Ireland Protocol allows Northern Ireland to remain part of the EU Single Market for purposes of trade in goods, following the UK's Withdrawal from the EU. As a basis for further discussions with the UK, the Commission published four informal proposals that set out the proposed solutions to the concerns in relation to the Northern Ireland Protocol and the conditions for their application, namely non-papers on: 1) *Food, plant and animal health*; 2) *Customs*; 3) *Engagement with Northern Ireland Stakeholders*; and 4) *Medicines*. The Commission's proposals on food, plant and animal health are of significant relevance for agri-

food businesses, as they might simplify processes and procedures for complying with EU rules regulating agri-food products.

The Northern Ireland Protocol

On 29 March 2017, the Government of the UK had officially notified the EU of its intention to withdraw from the EU and, on 24 December 2020, the EU and the UK agreed on the *EU-UK Trade and Cooperation Agreement* (hereinafter, the EU-UK TCA), which established the terms for the new relationship between the EU and the UK. Since 1 January 2021, the EU-UK TCA applied provisionally, and it formally entered into force on 1 May 2021. The EU-UK TCA establishes a preferential trade area regarding goods and limited mutual market access in services (see *Trade Perspectives, Issue No. 2 of 31 January 2020*).

The *Protocol on Ireland and Northern Ireland* (hereinafter, the Protocol) is an integral part of the Withdrawal Agreement and was agreed and ratified by both the EU and the UK. It has been in force since 1 February 2020. The aim of the Protocol is to protect the *Good Friday* or *Belfast Agreement* in all its dimensions, maintaining peace and stability in Northern Ireland and, in particular, avoiding a ‘hard’ border between Northern Ireland and the Republic of Ireland (*i.e.*, border checks between the Republic of Ireland, as an EU Member State, and Northern Ireland, which is part of the UK), while preserving the integrity of the EU Single Market. Since its entry into force, the Protocol has prompted disagreements between the UK and EU because it disrupts trade between the other parts of the UK (*i.e.*, England, Scotland, and Wales) and Northern Ireland. For some time now, the Government of the UK has been calling for the Protocol to be amended, notably by removing the Customs checks between England, Scotland, and Wales, on the one hand, and Northern Ireland, on the other hand, and allowing goods to circulate freely in Northern Ireland if they conform to either UK or EU regulations. In this context, the Commission, in its *Non-Paper on SPS issues*, states that “*The implementation of the Protocol on Ireland / Northern Ireland (“the Protocol”) in the area of SPS (feed, food, plants, animals) is unsatisfactory. European Union (EU)’s SPS law is not correctly applied or not applied at all as regards goods moving from Great Britain to Northern Ireland as a result of the United Kingdom (UK)’s unilateral decisions (grace periods) and the lack of proper infrastructure and staff to perform border controls in Northern Ireland*”.

Since 1 January 2021, the provisions of EU law, including EU SPS rules, listed in Annex 2 to the Protocol continue to apply with respect to Northern Ireland. Conversely, since the end of the transition period on 31 December 2021, England, Scotland, and Wales are no longer subject to EU’s SPS rules. This means that agri-food products shipped from England, Scotland, or Wales to Northern Ireland are subject to the rules related to health conditions and requirements, certification and controls, that apply to imports from any third country, including any mandatory checks, and must fully comply with the relevant EU SPS requirements.

The Commission’s proposed changes related to compliance with SPS rules

The Commission’s *Protocol on Ireland and Northern Ireland - Non-Paper - Sanitary and Phytosanitary (SPS) Issues* (hereinafter, Non-Paper on SPS issues) concerns the simplification of processes and procedures for a significant range of goods destined solely for sale to end consumers in Northern Ireland (hereinafter, “*retail goods*”) within the existing framework.

The Commission proposes two major changes, namely: 1) Simplified certification for retail goods; and 2) Reduced identity checks on trucks transporting agri-food products arriving at Northern Ireland points of entry and reduced physical checks of the contents in the trucks. As an example, for simplified certification, the *Non-Paper on SPS issues* states that there could be a “*simplified official certificate globally stating that all goods of different type, class or description transported by the same lorry meet the requirements of EU legislation, with detailed documentation for each product available electronically for inspection.*” In practice, this would mean that a truck that transports different food products from England, Scotland, or Wales to Northern Ireland would, in principle, only need one certificate stating that all goods of different

types, class or description meet the relevant EU SPS requirements. However, the proposal also notes that, *“when the consignment includes products which are subject to prohibitions/restrictions for import into the EU (to be specifically defined in a list by the EU), such as certain meat and meat products or certain plants or plant products, those products should be accompanied by an individual official certificate, for which a specific model would be provided”*.

With respect to reduced identity and physical checks, the *Non-Paper on SPS issues* states that, *“while documentary checks should remain compulsory and can be performed remotely through electronic means, the frequency of identity and physical checks to be performed at the points of entry in Border Control Posts in Northern Ireland, as provided for in EU legislation, could be reduced. The level of checks would not be managed at the level of individual traders / consignments / products but as part of an overall system defining the risk management principles and related decisions, as provided for in EU SPS legislation”*. In practice, this would imply that a business importing food products into Northern Ireland from England, Scotland, or Wales would no longer be subject to the same level of identity checks and physical controls. On this basis, more than 80% of the identity and physical checks currently required would be removed. Currently, in order to bring a consignment subject to EU SPS rules from England, Scotland, or Wales into Northern Ireland, three checks must be performed, depending on the nature of the consignment: documentary, identity, and physical checks. Physical checks are conducted for selected goods to ensure that goods coming into Northern Ireland are safe and comply with the EU SPS requirements.

According to the Protocol, SPS inspections take place at Northern Ireland ports, and Customs documents have to be filled in. Despite the commitments on avoiding a ‘hard’ border, these inspections have prompted criticism that a new border has effectively been created in the Irish Sea, even though the full effect of the Protocol has, so far, been limited, due to the suspension of checks in certain areas, in view of insufficient facilities to carry out the checks.

The European Commission’s conditions linked to the proposed changes

For agri-food businesses to take advantage of the simplified certification for retail goods and reduced identity and physical checks, the Commission lists the following five conditions in the *Non-Paper on SPS issues* that would apply: 1) *“If, despite the further adjustment of supply chains, the bespoke solution would also include some meat and meat products subject to prohibitions and restrictions, basic production requirements in Great Britain would need to remain aligned with those in the EU. Given the risk that diseases spread, the need for alignment with those production requirements might need to be considered for other areas as well.”*; 2) With respect to products packed for end consumers and labelled as such, *“labelling requirements at the level of the individual end-consumer packaging, with a mention such as “products for sale only in the United Kingdom”, should effectively prevent any further movement of the goods concerned into the EU Internal Market”*; 3) Products must be destined solely for sale to end consumers in retail shops located in Northern Ireland”; 4) The facilitations *“should only be applicable to end products produced from primary products originating in UK in accordance with the EU-UK Trade and Cooperation Agreement or coming from the EU. As the UK is no longer aligned on EU import conditions, products introduced from third countries must not end up in the EU’s SPS area”*; and 5) *“Reinforced monitoring of supply chains”*.

The Commission’s proposed safeguards against non-fulfilment of conditions

According to the *Non-Paper on SPS issues*, the Commission proposes the following structural safeguards to ensure that the above-mentioned conditions are respected in practice, namely: 1) The solution is subject to a review clause; 2) There shall be a rapid reaction mechanism to any identified problems in relation to individual products or traders; 3) The possibility for the EU to take unilateral measures in case of failure by UK competent authorities or the trader concerned to react to or remedy an identified problem, such as the suspension or revocation of the facilitation for the products or traders concerned; 4) Active monitoring by EU representatives in Northern Ireland and relevant market surveillance authorities; and 5) A

compliance verification mechanism by the Commission is put in place (e.g., through audits, on-site inspections of traders and establishments), relying as much as possible on the existing presence of EU representatives in Northern Ireland. The implementation of these safeguards, would likely be subject to a number of pre-conditions, such as the UK providing access to information technology systems in the area of Customs.

The agri-food industry's reaction to the Commission's proposals

The Commission's proposals have received a cautious welcome by the UK's *Food and Drink Federation* (hereinafter, FDF). On 13 October 2021, the FDF described the Commission's proposals as a "*welcome starting point*" and noted that "*solutions to the Northern Ireland Protocol need to be specific to Northern Ireland and based on actual and not perceived risk to the single market*". The FDF's most recent business survey shows that the volume of food and drinks moving from Great Britain into Northern Ireland had decreased by 15% since 1 January 2021. According to the European Commission, in addressing issues related to the implementation of the Protocol, the scope of any specific solution must be based on a thorough risk assessment and an analysis of changes that have already happened or are being implemented in supply chains (based on evidence from the UK, from stakeholders and on EU's own statistical data - for instance, there is clear evidence that several supermarkets have already managed to restructure their supply chains).

Next steps for the EU and the UK?

On 13 October 2021, the UK's Minister of State at the Cabinet Office, *Lord David Frost* confirmed that he intends to pursue negotiations on the Commission's proposals. The EU and the UK hope to reach a lasting solution, to the concerns related to the Northern Ireland Protocol, by the end of this year. Agri-food businesses should carefully review the proposals and make their voice heard in order to contribute to sustainable solutions for EU-UK and intra-UK trade.

European Commission warns again the Czech Republic that systematically requiring pre-notification on arrival of foodstuffs is a breach of EU rules

On 23 September 2021, the European Commission (hereinafter, Commission) has sent an additional reasoned opinion to the Czech Republic as part of the ongoing infringement procedure for failing to comply with EU rules on official controls performed to ensure the verification of compliance with EU feed and food law, as well as animal health and animal welfare rules. The Czech Republic has established in national legislation the obligation for operators to systematically notify, at least 24 hours in advance, the arrival of certain foodstuffs, including certain fruits and vegetables, to the place of destination. This article discusses the Commission's infringement procedure against the Czech Republic for creating unnecessary administrative burdens, delays, and high costs, without clear benefits for businesses, consumers, and the authorities themselves.

The infringement procedure according to Article 258 of the TFEU

Already in 2019, the European Commission launched an infringement procedure against the Czech Republic for failing to comply with EU rules on official controls performed to ensure the verification of compliance with EU feed and food law, as well as animal health and animal welfare rules.

The infringement procedure is regulated in Article 258 of the Treaty on the Functioning of the EU (hereinafter, TFEU), which provides that, "*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the*

Commission, the latter may bring the matter before the Court of Justice of the European Union". There are several ways for the Commission to open an infringement procedure: 1) The Commission itself through its own investigations can open a procedure against an EU Member State, if it identifies possible infringements of EU law; and 2) Citizens, businesses, or other stakeholders can file complaints against any EU Member State, whether directly with the Commission or through the European Parliament's Committee on Petitions.

If, after being requested to do so, the EU Member State does not rectify the suspected violation of EU law, the Commission may launch a formal infringement procedure with a number of procedural steps. The Commission sends a letter of formal notice requesting further information to the EU Member State concerned, which must send a detailed reply within a specified period, usually two months. If the Commission concludes that the EU Member State is failing to fulfil its obligations under EU law, it may send a reasoned opinion (*i.e.*, a formal request to comply with EU law). The reasoned opinion explains why the Commission considers that there is a breach of EU law. It also requests that the EU Member State inform the Commission of the measures taken, within a specified period (usually two months) to remedy the situation. If the EU Member State still does not comply, the Commission may decide to refer the matter to the Court of Justice of the European Union for breaching EU law.

The Commission has absolute procedural discretion in proceedings under Article 258 of the TFEU. It is free to decide against what kind of violation and against which EU Member State it initiates proceedings, as well as on the timing of these proceedings. According to [scholars](#), the reasons of this wide discretion are, *inter alia*, limited resources, political considerations, and efficient compliance management.

Commission urges the Czech Republic to correctly apply EU rules on the performance of official controls

The infringement procedure against the Czech Republic illustrates the wide procedural discretion enjoyed by the Commission. On 23 September 2021, in the proceeding [INFR\(2016\)4222](#), the Commission sent an additional reasoned opinion according to Article 258 of the TFEU to the Czech Republic. A first letter of formal notice and a first reasoned opinion were sent by the Commission to the Czech Republic in January and July 2019, respectively, for breaching Article 3(6) of [Regulation \(EC\) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls. Regulation \(EC\) No 882/2004](#) was repealed and replaced by [Regulation \(EU\) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products](#), which largely applies since 14 December 2019, but the provisions of Article 3(6) of [Regulation \(EC\) No 882/2004](#) were maintained in Article 9(7) of [Regulation \(EU\) 2017/625](#) and the Commission considers the Czech Republic to continuously be in breach of those provisions. Therefore, a supplementary letter of formal notice was sent by the Commission on 2 July 2020, for failing to comply with EU rules on official controls.

According to the Commission, Czech authorities carry out a systematic risk assessment and subsequent potential official controls targeting certain foodstuffs coming from other EU Member States each time that such foodstuffs enter the Czech Republic. The Czech Republic has established in [Decree No. 172/2015 Coll. on the notification obligation of the food recipient in the place of destination \(*i.e.*, \[Vyhláška 172/2015 Sb. ze dne 1. července 2015 o informační povinnosti příjemce potravin v místě určení\]\(#\)\)](#) the obligation for operators to systematically notify, at least 24 hours in advance, the arrival of such foodstuffs to the place of destination. According to the Decree, the foodstuffs of plant origin concerned are fresh fruits (*i.e.*, peaches and nectarines, pears, apples, plums and damson plums, oranges, bananas and table wine grapes), fresh vegetables (*i.e.*, onion and garlic, carrot, and knob celery, tomatoes, peppers and salad cucumbers, cabbage, cauliflower and broccoli), early consumable potatoes and late consumable potatoes, poppy seeds, and food supplements. The Commission argues that this is incompatible with the harmonised framework established by EU rules in [Regulation \(EU\)](#)

2017/625 and that the obligation to report the arrival of goods from another EU Member State must not be systematic. On the contrary, the reporting of the arrival of such goods may be requested by the competent authority only on a risk basis and to the extent strictly necessary for the organisation of the official controls. The Czech Republic was given three months to take the necessary measures to comply with the supplementary letter of formal notice, otherwise the Commission could, if appropriate, issue a reasoned opinion. This reasoned opinion was issued on 23 September 2021.

EU rules on official controls

Article 9(1) of *Regulation (EU) 2017/625 on 'General rules on official controls'* provides that “Competent authorities shall perform official controls on all operators regularly, on a risk basis and with appropriate frequency”. Article 9(4) of *Regulation (EU) 2017/625* provides that “Official controls shall be performed without prior notice, except where such notice is necessary and duly justified for the official control to be carried out”. Article 9(5) of *Regulation (EU) 2017/625* contains the important principle that “Official controls shall be performed as much as possible in such a manner that the administrative burden and operational disruption for operators are kept to the minimum necessary, but without this negatively affecting the effectiveness of those controls”. Finally, Article 9(7) of *Regulation (EU) 2017/625* provides that, “To the extent strictly necessary for the organisation of the official controls, Member States of destination may require operators that have animals or goods delivered to them from another Member State to report the arrival of such animals or goods”.

Notification of selected foodstuffs pursuant to Decree No. 172/2015 Coll.

The Czech Agriculture and Food Inspection Authority (hereinafter, CAFIA) informs that *Decree No. 172/2015 Coll.* applies since 1 August 2015. The Decree is an implementing regulation to the Czech Republic's *Act on Foodstuffs No. 110/1997 Coll. (Zákon 110 ze dne 24. dubna 1997 o potravinách)*, which, in its Article 3d(3), provides for the obligation of food business operators (hereinafter, FBOs) to inform the relevant control authorities on the reception of selected sorts of foodstuffs originating in another EU Member State or a third country. According to the CAFIA, the Decree applies only to those foodstuffs that are destined for the territory of the Czech Republic where the goods are received, handled, or manipulated for the first time. The FBOs must notify the foodstuffs at the places of destination.

The mandatory information that has to be provided by the FBOs at the place of destination is the following: 1) Sort of the foodstuffs arriving at the place of destination; 2) Amount of foodstuffs arriving at the place of destination; 3) EU Member State or third country of origin, as well as name and address of the FBO dispatching the foodstuff to the place of destination; 4) Name, address and identification number of the place of destination and recipient of the foodstuff; and 5) Date of arrival of the foodstuffs at the places of destination. Information on the arrival of the foodstuff must be sent by the FBOs using the CAFIA notification web form. The information must be sent at the latest 24 hours before the arrival of the foodstuffs.

Problems in practice

In its *Single Market Barrier Review of August 2020*, the Commission included the infringement procedure related to the Czech Republic's *Decree No. 172/2015 Coll. on the notification obligation of the food recipient in the place of destination*. The review lists the following problems that may occur: 1) “Especially for FMCG [i.e., fast moving consumer goods], orders could be placed within hours due to supply and demand. A 24h pre notification is an unnecessary delay”; 2) “Especially in border regions this causes problems”; 3) “If fresh products are not pre-notified in time, the supplier needs to wait at the border until the 24h deadline has passed (and the truck would need to keep the engine running for functioning of the cooling system)”. Essentially, the procedure under *Decree No. 172/2015 Coll.* is creating unnecessary administrative burdens, delays, and high costs, without clear benefits for businesses, consumers, and the authorities themselves.

Indeed, it appears that the Commission's argument, that the obligation to report the arrival of goods from another Member State "*must not be systematic*", is backed by Article 9 of Regulation (EU) 2017/625 on 'General rules on official controls', which provides that "*Competent authorities shall perform official controls on all operators regularly, on a risk basis and with appropriate frequency*". Controls must be carried out regularly and on a risk basis, but not systematically. These official controls are to be "*performed without prior notice, except where such notice is necessary and duly justified for the official control to be carried out*". Only "*To the extent strictly necessary for the organisation of the official controls, Member States of destination may require operators that have animals or goods delivered to them from another Member State to report the arrival of such animals or goods*". The possible exception applies to animals and feed, not to non-animal products like fruit and vegetables. The general principle is that "*Official controls shall be performed as much as possible in such a manner that the administrative burden and operational disruption for operators are kept to the minimum necessary, but without this negatively affecting the effectiveness of those controls*". It is not clear how the Czech authorities will attempt to justify the apparent deviation from EU law in its legislation and practice.

Conclusion and outlook

The Czech Republic has two months to take measures to comply with the supplementary reasoned opinion, otherwise the Commission may refer the case to the Court of Justice of the European Union for breaching EU law. Interested stakeholders should follow this case of an evident barrier to the EU's '*Internal Market*' in the field of food and feed safety. Food business operators should carefully assess the practices of national authorities and determine, if necessary with legal support, whether such practices comply with relevant EU rules. If that is not the case, the Commission should be called upon to take action, as in the case against the Czech Republic.

Recently adopted EU legislation

Trade Law

- [*Council Decision \(EU\) 2021/1852 of 18 October 2021 on the position to be taken on behalf of the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, as regards the extension of the validity of the EU-Algeria partnership priorities until new updated partnership priorities are adopted by the Association Council*](#)
- [*Council Decision \(EU\) 2021/1844 of 18 October 2021 on the position to be taken on behalf of the European Union within the Association Council established by the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, as regards an amendment to Protocol 3 to that Agreement concerning the definition of the concept of 'originating products' and methods of administrative cooperation*](#)
- [*Council Decision \(EU\) 2021/1854 of 18 October 2021 on the position to be taken on behalf of the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, as regards the extension of the validity of the EU-Jordan*](#)

Partnership Priorities until new Partnership Priorities are adopted by the Association Council

Food Law

- *Council Decision (EU) 2021/1851 of 15 October 2021 on the position to be taken on behalf of the European Union within the International Sugar Council as regards amendments to the International Sugar Agreement 1992 and the timetable for their implementation*
- *Commission Regulation (EU) 2021/1841 of 20 October 2021 amending Annexes II and III to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for 6-benzyladenine and aminopyralid in or on certain products (1)*
- *Commission Regulation (EU) 2021/1842 of 20 October 2021 amending Annexes II and III to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for flupyradifurone and difluoroacetic acid in or on certain products (1)*
- *Council Decision (EU) 2021/1843 of 15 October 2021 on the position to be taken on behalf of the European Union within the International Sugar Council as regards the extension of the International Sugar Agreement 1992*

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

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FRATINIVERGANO – EUROPEAN LAWYERS

Boulevard Brand Whitlock 144, 1200 Brussels, Belgium. Telephone: +32 2 648 21 61, Fax: +32 2 646 02 70. www.fratinivergano.eu

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