

- **Mandatory due diligence obligations for businesses operating in the EU: Trade barriers or necessary tools to avoid negative impacts?**
- **Peanuts, pistachios and protecting public health: A look at the US reasserting its presence in the EU through enhanced testing for aflatoxins**
- **The complex setting of maximum levels of residues for non-authorized pesticides: the case of the fungicide *mancozeb***
- **Recently adopted EU legislation**

Mandatory due diligence obligations for businesses operating in the EU: Trade barriers or necessary tools to avoid negative impacts?

On 23 February 2022, the European Commission (hereinafter, Commission) published its *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*. The proposed Corporate Sustainability Due Diligence Directive aims at promoting sustainable and responsible behaviour of companies operating in the EU in order to address issues related to the environment and human and labour rights throughout their global value chains. In addition to this broader Due Diligence Directive, on 17 November 2021, the Commission published its *Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation*, which will prohibit the placing on the EU market of certain commodities associated with deforestation and forest degradation. While the proposed obligations contained therein should lead to a more level playing field between companies that already comply with strict requirements, the rules must not be so burdensome that they impede trade and/or run afoul of international trade rules.

Establishing a legal framework for due diligence obligations

The concept of “*due diligence*”, broadly conceived, relates to a comprehensive assessment conducted by a company in furtherance of exercising its duty of care to company stakeholders. As consumers and citizens are placing increasing importance on the environmental and human rights impact of economic activities, there has been a trend in the EU towards requiring operators to establish and implement greater due diligence procedures in those areas of focus. For instance, voluntary and mandatory due diligence obligations are already being implemented for certain industries, such as timber under the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) scheme and for so-called ‘*conflict minerals*’.

On 22 October 2020, the European Parliament adopted a [Resolution](#) calling on the Commission to propose a legislative initiative on mandatory due diligence requirements to ensure that commodities derived from deforested or forest degraded areas not be placed on the EU market. Consequently, in an effort to harmonise EU rules and in line with broader policy objectives, the Commission has recently proposed two legal instruments, which would introduce mandatory due diligence obligations for EU and non-EU companies. The proposed

Corporate Sustainability Due Diligence Directive would target issues related to the environment and human rights, while the proposed Regulation on deforestation-free products would only address deforestation and forest degradation.

The EU's Proposal for a Corporate Sustainability Due Diligence Directive

In recent times, individual EU Member States have been developing policies that aim at making supply chains “*more sustainable*”. In an attempt to augment the efficacy of those policies, these pioneering EU Member States have also put in place due diligence frameworks. In fact, the proposed Corporate Sustainability Due Diligence Directive builds on many of the features that already exist in due diligence requirements in Germany and France. For example, in 2017, France introduced a *Duty of Vigilance Law*, which imposes a legal obligation for companies to introduce a ‘*vigilance plan*’ in order to identify, prevent, and address issues related to human rights and the environment throughout their supply chains. Other EU Member States have introduced similar due diligence legislation.

The proposed Directive would establish an EU-wide framework for corporate sustainability due diligence obligations, which could be a welcome development in view of the current piecemeal approach by individual EU Member States. However, as the proposed EU legal instrument is a Directive, its provisions must be ‘*transposed*’ by all EU Member States into their respective legal systems, EU Member States may also decide to go beyond the exact rules of the Directive and be more demanding, in a phenomenon known as ‘*gold-plating*’. EU Member States with established due diligence laws would be required to adjust them according to the future EU Directive and would be required to monitor compliance and implementation.

The proposed Directive would only apply to large EU companies (*i.e.*, those with more than 500 employees and a net turnover of more than EUR 150 million), large third-country companies operating in the EU market (*i.e.*, those with a turnover in the EU of more than EUR 150 million), and to smaller companies (*i.e.*, those with more than 250 employees and a turnover of more than EUR 40 million for EU companies, and a net turnover in the EU of more than EUR 40 million, but less than EUR 150 million, for non-EU companies) if at least 50% of this net turnover is generated in one or more “*high-risk*” industries defined by the Directive. More specifically, the proposed Directive identifies a broad range of industries as “*high-risk*” sectors, namely textiles, leather and related products, agriculture, forestry, fisheries, the manufacture of food products and mineral resources. Given the thresholds on size and turnover for a company to be subject to the due diligence obligations, small and medium-sized enterprises (hereinafter, SMEs) would be exempt from the obligations. However, SMEs would be indirectly impacted if they are part of the value chain of a covered company.

Under the proposed Directive, covered businesses would be required to introduce due diligence obligations into their corporate policies, including a Code of Conduct, in order to identify actual or potential adverse human rights and environmental impacts, such as inadequate workplace health and safety, exploitation of workers, greenhouse gas emissions, biodiversity loss, ecosystem degradation, and waste disposal. Obligations relating to value chains would apply upstream (*e.g.*, to producers of raw materials) and downstream (*e.g.*, to retailers, recyclers, and those dismantling the product), which means that companies would be required to identify actual and potential adverse impacts on human rights and the environment arising from both their own operations and those with whom the company would have an established business relationship, such as subsidiaries, contractors and subcontractors. Covered companies would be required to establish and effectuate due diligence action plans and provide contractual assurances to prevent or mitigate adverse impacts on human rights and the environment. Companies would also need to adopt measures to monitor their compliance with the due diligence obligations and to include a complaint procedure to allow for persons and organisations to submit complaints. The new obligations would likely lead to the addition of significant administrative burdens and related costs for impacted companies. In case of non-compliance, covered companies would also be subject to fines for harms committed by the company itself, or by their subsidiaries, contractors, and/or suppliers.

Addressing deforestation and forest degradation

The EU is also preparing a separate set of rules and due diligence obligations that would prohibit the placing on the EU market of certain commodities associated with deforestation and forest degradation. The proposed Regulation on deforestation and forest degradation would cover six commodities purportedly linked to deforestation and forest degradation, namely cattle, cocoa, coffee, palm oil, soya, and wood. The proposed Regulation would prohibit the placing on the EU market of such commodities and their export from the EU market “*unless they are deforestation-free and have been produced in accordance with the relevant legislation of the country of production*”. In this regard, the commodities and products subject to the new rules would need to be accompanied by a due diligence statement. The EU already follows a similar approach under [Regulation \(EU\) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market](#) (the EU’s Timber Regulation), an instrument that would be repealed by the new Regulation. More specifically, the due diligence procedure laid out in the proposed Regulation includes three elements that would have to be complied with by operators (*i.e.*, any natural or legal person placing commodities and products on the EU market or exports them from the EU) “*with regard to all relevant commodities and products supplied by each particular supplier*”: 1) Information requirements, including, *inter alia*, documents and data demonstrating that the relevant commodities and products are compliant; 2) A risk assessment, which is to include, *inter alia*, an assessment of the prevalence of deforestation or forest degradation in the country, region, and area of production of the relevant commodity or product; and 3) Certain risk mitigation measures.

Importantly, the proposed Regulation would derive the due diligence requirements from a benchmarking system that is to categorise countries on the basis of their perceived risk of deforestation and forest degradation. The proposed Regulation foresees three categories of countries: 1) Low risk; 2) Standard risk; and 3) High risk. On the basis of the risk level, the obligations for operators and EU Member States’ authorities would vary. Notably, operators from low risk countries would have less onerous due diligence obligations relative to those in high-risk countries, who must, *inter alia*, provide a risk assessment “*to establish whether there is a risk that the relevant commodities and products intended to be placed on or exported from the Union market are non-compliant with the requirements of this Regulation*”. Such categorisation could become an important, and potentially divisive factor (if not discriminatory, depending on its application and on the criteria used to ‘label’ countries under the three categories of risk), with significant implications for businesses and traders.

Square pegs and round holes: Does WTO law provide a solid source for challenging the EU’s due diligence legislation?

Given the expansive scope and application of the due diligence obligations contained in the proposed Directive and/or the proposed Regulation, there is little doubt that their adoption would have a significant impact on trade. There are interesting questions, however, with respect to which areas of WTO law might, or could, be invoked in an attempt to scrutinise or challenge either piece of legislation. As the primary focus of the proposed Directive or the proposed Regulation is ostensibly on establishing company procedures relating to internal operations, rather than on a product itself, the connection between the ‘*measure*’ and a given impacted product is relatively attenuated. As such, complex concepts, such as those related to whether a measure aims at addressing non-product-related process and production methods (hereinafter, NPR-PPMs), could, where applicable, lead to a measure’s exclusion from the scope of certain agreements (*e.g.*, the TBT Agreement). Nevertheless, one can still imagine a country availing itself of some of the typical pathways used in challenging product-based measures. Indeed, the EU could, where relevant, potentially be challenged for having breached GATT-based obligations relating to, *inter alia*, most-favoured nation treatment (under Article I:1), national treatment (under Article III:4) and/or as part of a claim that a given measure represents a ‘*restriction*’ on imports (under Article XI:1). Ultimately, regardless of whether the rules are perfectly suited to challenge certain obligations contained in the proposed due

diligence legislation, the significant impact that is apt to accrue to companies, their products, and trade more generally, due to this legislation, makes it quite likely that WTO challenges would be raised.

Conducting due diligence on the proposed legislation

The Commission's Proposals will now be discussed by EU Member States gathered in the Council of the EU and by the European Parliament. Together with the Commission, these institutions will need to find agreement on common texts. Discussions on the due diligence obligations are ongoing, and the final texts may very well be a compromise between the positions of the various EU Institutions involved in the discussions. Given the impact on entire value chains, not to mention the potential for market prohibitions on certain commodities covered by the proposed Regulation on deforestation and forest degradation, interested stakeholders should actively participate in the legislative debate and engage in all relevant *fora* to ensure that an adequate balance is struck between the due diligence obligations and the necessary efforts and costs for the covered companies, whose trade with the EU will be inevitably impacted.

Peanuts, pistachios and protecting public health: A look at the US reasserting its presence in the EU through enhanced testing for aflatoxins

On 8 February 2022, the Agricultural Marketing Service (hereafter, AMS) of the US Department of Agriculture (hereafter, USDA) announced the addition of peanuts that are destined for the European Union (EU) to the *Laboratory Approval Program for Analysis of Aflatoxins* (hereafter, LAP-Aflatoxin) at the request of the *American Peanut Council* (hereafter, APC). The aim of adding these testing measures is to stem the precipitous drop in peanut exports to the EU experienced by US growers over the last few years due to, *inter alia*, rigid enforcement of EU health and food safety standards relating to aflatoxins. In so doing, the US peanut industry ostensibly hopes to emulate the largely successful steps taken by pistachio growers in the creation and development of the *Pistachio Export Aflatoxin Reporting* (PEAR) Program.

Maximum levels for contaminants

When it comes to pistachios, peanuts and a host of other similar commodities, aflatoxins are a persistent cause of concern. Aflatoxins are naturally occurring contaminants of the family of mycotoxins (*i.e.*, toxic chemical compounds generating in moulds that especially develop in warm and humid conditions and occur mainly in tree nuts (*e.g.*, almonds, Brazil nuts, cashews, hazelnuts, pecans, pistachios, and walnuts), ground nuts (*e.g.*, peanuts), figs, other dried fruits, crude vegetable oils, cocoa beans, and maize. According to studies, aflatoxin B1 is the most common aflatoxin found in food and among the most potent genotoxic and carcinogenic mycotoxins (though aflatoxins B2, G1, and G2 are also considered as "*probable human carcinogenic*" according to a study conducted by the *International Agency for Research on Cancer* (IARC)). High levels of aflatoxins exposure may result in chronic liver damage or liver cancer, as well as to stunted growth and delayed development in children (see *Trade Perspectives*, Issue No. 7 of 10 April 2020).

Given the concerns related to aflatoxins in food generally, and aflatoxins in peanuts, in particular, there has been an ongoing debate about what the maximum allowable levels ought to be. In the US, one of the world's largest growers of peanuts, pursuant to *21 U.S. Code § 342(a)(1), on adulterated food*, as elaborated by *Compliance Policy Guide Sec. 570.375, Aflatoxins in Peanuts and Peanut Products*, the Food and Drug Administration (hereafter, FDA) has established a maximum (or '*action*') level of 20 µg/kg or parts per billion (ppb) for total aflatoxins (*i.e.*, B1, B2, G1, and G2) in peanuts. As a practical matter, the US peanut industry voluntarily applies a more stringent level of 15 µg/kg for total aflatoxins and industry leaders have touted their belief in the appropriateness of this standard. The Chairman of the *U.S. Peanut Federation* and CEO of the Georgia-based *Premium Peanut Company*, Mr. Karl

Zimmer, noted that “The frustrating thing is that we truly believe (U.S. peanuts) are safe and our customers in Europe want to buy them”.

Notably, the US industry’s standards for maximum aflatoxins are comparable to those recommended by the *Codex General Standard for Contaminants and Toxins in Food and Feed* (hereinafter, *Codex*). The *Codex* sets the maximum levels for total aflatoxins B1, B2, G1 and G2 at 15 µg/kg, regardless of whether peanuts are meant for further processing or are “ready-to-eat” (though, restrictions relating to the latter category, are under discussion). By comparison, for almonds, Brazil nuts, hazelnuts and pistachios, the *Codex* establishes a range of maximum levels from 10 to 15 µg/kg, depending on whether they are ready-to-eat products or intended for further processing.

For its part, the EU has adopted the *Codex* standard in *Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs* for peanuts that will undergo further processing (i.e., 15 µg/kg), but provides much stricter standards for “ready-to-eat” peanuts, setting the maximum level for total aflatoxins (i.e., B1, B2, G1 and G2) at 4 µg/kg and, importantly, introducing a dedicated maximum level for aflatoxin B1 at 2 µg/kg. The maximum level for B1 in peanuts that will be further processed is set at 8 µg/kg.

	Peanuts for further processing Tolerance in µg/kg (ppb)	Peanuts ready-to-eat Tolerance in µg/kg (ppb)
US	Legal (i.e., USDA) – 20 Total* Industry Standard – 15 Total	Legal (i.e., USDA) – 20 Total Industry Standard – 15 Total
Codex	15 Total	<i>Under discussion</i>
EU	15 Total 8 (B1)	4 Total 2 (B1)

Regulatory levels for aflatoxins in peanuts (*Total: includes B1, B2, G1 and G2)

The impact on the US peanuts industry

Even while the rigorous EU standards were nominally in place, the US managed to establish a robust presence in the EU market for its peanuts. This presence reached a crescendo in the year 2017, when the US exported peanuts with a total value of USD 175 million to EU buyers, and in 2018, when that amount increased to USD 197 million. More recently, however, a renewed attention by the EU to the aflatoxin maximum levels has had a serious impact on the amount of US peanut exports to the EU. This, arguably, began in 2019 with an *audit* conducted by the European Commission’s Directorate-General for Health and Food Safety (DG SANTE) on the ability of exporting country systems to adequately test aflatoxin contamination in peanuts sent to the EU. In the US case, the assessment found that testing was primarily geared towards ensuring conformity with the acceptable US maximum levels, which are less stringent than the EU maximum levels. Following the audit, increased incidents of non-compliance of peanut consignments originating in the US with the applicable EU aflatoxin maximum levels prompted the EU to increase the frequency of checks on peanuts arriving from the US from 10% to 20%, beginning in late November 2021 under *Commission Implementing Regulation (EU) 2019/1793 of 22 October 2019 on the temporary increase of official controls and emergency measures governing the entry into the Union of certain goods from certain third countries*. The negative impact of the overall increased attention on aflatoxins in US peanuts can be seen in the trade statistics, where the export value to the EU decreased from the high of USD 197 million in 2018 to USD 153 million in 2019 and a mere USD 71 million in 2020. The decrease in value corresponds with recent declines in overall volume shipped. That downward trajectory appears to have continued in 2021 and, given the increased checks, is unlikely to change course in the near term.

In recognition of the difficulties facing their industry, US peanut growers directed their disappointment not only at the EU, but also at the relevant US authorities. In addition to calling for the US to facilitate meetings between industry leaders and EU authorities, additional technical support was also desired. This latter concern led the FDA and the US peanut industry

to seek the USDA's assistance in launching specific aflatoxin testing for US grown peanuts destined for the EU. The USDA mechanism for effectuating such a request is the *Laboratory Approval Program* (hereinafter, LAP), which establishes requirements relating to good laboratory, quality assurance, and control practices in line with international standards. The LAP is administered by the *Laboratory Approval Service* (hereinafter, LAS) Branch, which, according to the USDA "*approves, or accredits, laboratories to perform testing services in support of domestic and international trade*". In response to the APC's request, eleven laboratories have been approved to test aflatoxin levels in peanuts destined for export to the EU. In these facilities, peanuts intended for the EU market are tested in accordance with *Commission Regulation (EC) No 401/2006 of 23 February 2006 laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs*. Obviously, the objective of adopting these methods is to detect aflatoxin levels at or above the limits established by *Commission Regulation (EC) No 1881/2006*. That is why, based upon the testing methodology, LAP-Aflatoxin procedures contemplate the provision of "*interpretation statements*" that aver to a given lot's conformity with EU-mandated maximums for aflatoxin (in total or for just B1) in both peanuts requiring further processing, as well as "*ready-to-eat*" peanuts.

The short-term goals associated with establishing this type of testing in the US are to decrease the number of peanut exports to the EU that are rejected and, further, to establish sufficient trust necessary to decrease the percentage of EU-imposed checks on imports of US peanuts and, ultimately, to remove any increased controls. A more ambitious, long-term aim would be to again allow pre-export checks to suffice in the export process in line with Article 73 of *Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls*. Such pre-export controls replace or reduce the documentary, identity and physical controls upon importation into the EU. From 2008 to 2015, US peanuts benefitted from such pre-export controls, on the basis of *Commission Decision 2008/47/EC of 20 December 2007 approving the pre-export checks carried out by the United States of America on peanuts and derived products thereof as regards the presence of aflatoxins*, which was repealed by *Commission Implementing Regulation (EU) 2015/949 of 19 June 2015 approving the pre-export checks carried out on certain food by certain third countries as regards the presence of certain mycotoxins*, a regulation that only allows US almonds to benefit from pre-export checks.

Lessons from the US pistachio industry

The US peanut industry might be able to emulate the successful steps taken by US pistachio exporters in the creation and development of the PEAR program. The PEAR program was developed by the *Administrative Committee for Pistachios* (ACP) to meet EU expectations for a formal aflatoxin control program for US pistachio exports to EU Member States, specifically under *Regulation (EC) No. 1881/2006* and provides standardised reporting of sampling to the Commission, analytical aflatoxin testing in USDA-approved laboratories, program verification audits by the *USDA-Specialty Crops Inspection*, procedures for responding to RASFF notifications, and traceability with equivalency to that used by the EU for official testing of pistachios at the port of entry. Participation in the PEAR program is voluntary, but signatories are required to adhere to the requirements of the program and may not ship pistachios to the EU outside of the PEAR program. In parallel to the implementation of the PEAR program, the US pistachio industry stepped up its reporting and communication with relevant EU officials and units within the European Commission. The higher level of compliance with the EU maximum levels and increased trust in US testing has led to the EU removing, in November 2021, US pistachios from the list of products subject to increased control.

Predicting the presence of US peanuts on the EU market

By creating a testing regime for aflatoxins in peanuts that is calibrated to EU standards, the US peanut industry would certainly seem to have taken a solid first step toward ingratiating itself with EU regulators. As the move is redolent of that made by the US pistachio industry, it is worth wondering whether US peanuts will follow the same auspicious trajectory. While

market dynamics will help to answer that question, so too will be the degree to which the parties involved can establish and nurture a relationship built upon trust. This, of course, is dependent upon whether US actions are viewed as being made in earnest and in good faith and in whether the EU is willing to reward such efforts in this industry. The recommendation is made that the US peanuts industry drive this process engaging with both US and EU authorities, defining a comprehensive strategy in light of EU requirements, available mechanisms and best practices.

The complex setting of maximum levels of residues for non-authorized pesticides: the case of the fungicide *mancozeb*

In December 2020, the European Union (hereinafter, EU) decided to not renew the registration of *mancozeb* as an approved plant protection product. *Mancozeb* may still be used throughout the world on fruits and vegetables for import into the EU, provided that the EU maintains maximum residue levels (hereinafter, MRLs) for *mancozeb* in imported produce and goods comply with those MRLs. This article describes the global relevance of *mancozeb*, the rationale for its non-renewal in the EU, and, in more general terms, the procedure to establish relevant MRLs. The review of the MRLs for *mancozeb* happens at a time when France, which currently holds the rotating Presidency of the Council of the EU, urges the EU to take “*better account of global environmental challenges when defining MRLs*”, in view of the EU’s *Farm to Fork Strategy* towards “*greener*” and more sustainable farming models.

The non-renewal of mancozeb in the EU

On 14 December 2020, the European Commission adopted [Commission Implementing Regulation \(EU\) 2020/2087 concerning the non-renewal of the approval of the active substance *mancozeb*, in accordance with Regulation \(EC\) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market](#) and, since 4 July 2021, the widely used fungicide *mancozeb* is no longer approved as an active substance in plant protection products in the EU. A fungicide is a specific type of pesticide used to control fungal diseases by inhibiting or killing the causal agent. EU Member States had until 4 July 2021 to withdraw all authorisations for plant protection products containing *mancozeb* and the grace period for EU farmers to use up existing stocks of products containing *mancozeb* ended on 4 January 2022.

The non-renewal of the approval of the active substance *mancozeb* came after the European Food Safety Authority (hereinafter, EFSA) published, on 16 December 2020, the [Peer review of the pesticide risk assessment of the active substance *mancozeb*](#). In the review, the EFSA identified certain specific concerns, in particular, that “*mancozeb has been classified as toxic for reproduction category 1B and that the new criteria to identify endocrine disrupting properties are met for humans and most likely for non-target organisms*”. In addition, the EFSA’s peer review “*concluded that the non-dietary exposure estimates exceed the reference values for the representative uses in tomatoes, potatoes, cereals and grapevines*”. In simple terms, the EFSA stated that *mancozeb*, which has been used for decades on many fruits, including bananas, and on several vegetables, including carrots, onions and potatoes, was toxic for human health and the environment.

Current MRLs for mancozeb in fruit and vegetables

For active substances in plant protection products, which are not authorised at the EU level, but are still used internationally, like *mancozeb*, the EU can establish MRLs, also known as “*import tolerances*”. Article 3(2)(g) of [Regulation \(EC\) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin](#) defines “*import tolerance*” as “*an MRL set for imported products to meet the needs of international trade where: - The use of the active substance in a plant protection product on a given product is not authorised in the Community for reasons other than public health reasons for the specific product and specific use; or - A different level is appropriate because the existing Community MRL was set for reasons other than public*

health reasons for the specific product and specific use". This can be easily seen in the EU pesticides database. According to [Commission Regulation \(EU\) 2017/171 of 30 January 2017 amending Annexes II, III and IV to Regulation \(EC\) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for aminopyralid, azoxystrobin, cyantraniliprole, cyflufenamid, cyproconazole, diethofencarb, dithiocarbamates, fluazifop-P, fluopyram, haloxyfop, isofetamid, metalaxyl, prohexadione, propaquizafop, pyrimethanil, Trichoderma atroviride strain SC1 and zoxamide in or on certain products](#) (mancozeb falls under the group of dithiocarbamates), MRLs for *mancozeb* have been set for numerous fruits and vegetables, including avocados (7 mg/kg), bananas (2 mg/kg), mangoes (2 mg/kg), papayas (7 mg/kg), cranberries (5 mg/kg), potatoes (0.3 mg/kg), onions (1 mg/kg), and carrots (0.2 mg/kg). Where no specific MRL was set, the default value of 0,01 mg/kg (the "*lower limit of analytical determination*" or LOD) laid down in Article 18(1)(b) of [Regulation \(EC\) No 396/2005](#) applies.

The current review of MRLs for active substances

The review of the existing MRLs for active substances according to Article 12 of [Regulation \(EC\) No 396/2005](#) is performed in line with a process agreed to by the European Commission (hereinafter, Commission) and EU Member States in June 2014 and modified in November 2019. [Detailed instructions](#) have been established by the EFSA, which aim at providing clearer advice, defining roles and responsibilities between EU Member States, Rapporteur Member States, EU Reference Laboratories and EFSA, and, most importantly, improving transparency for stakeholders. Within this procedure, the EFSA is currently reviewing the MRLs for the active substance *mancozeb*. On the basis of this review, the Commission will then decide whether to lower the MRLs of *mancozeb* allowed in imported produce. According to the [Overview of the MRL review progress under Article 12 of Regulation \(EC\) No 396/2005](#), the EFSA's reasoned opinion on *mancozeb* is to be published by the end of April 2022. The opinion is expected to assess risks to consumers from *mancozeb* residues in imported food. According to a Report by the US Department of Agriculture's (USDA) Foreign Agricultural Service (FAS) on [Mancozeb Non-Renewal and MRL Review](#), "*unlike the EU's pesticide review process, the EU MRL review process subjects substances to a risk analysis process that not only considers potential hazard criteria, but also the associated exposures and risks*".

The EU's Farm to Fork strategy and "Mirror clauses"

The Commission announced in the EU's [Farm to Fork Strategy](#) the need to make food production systems more sustainable and stated that it would "*take additional action to reduce the overall use and risk of chemical pesticides by 50% and the use of more hazardous pesticides 13 by 50% by 2030*". The non-renewal of the widely used fungicide *mancozeb*, which appears to be crucial for main banana supplying countries, and the setting of the respective MRLs, has been called "*a first test of how far the EU is willing to go to make food production systems more sustainable*", reducing the overall use and risk of pesticides considered harmful to health and the environment.

This occurs at a time when France's Presidency of the Council of the EU announced, in the document [Strengthening coherence between the Green Deal, the CAP and trade policy to support the transition towards sustainable food systems](#) of 21 February 2022, its proposal on "*mirror clauses*". In simple terms, "*mirror clauses*" aim at ensuring "*that imported products are subject to the manufacturing standards in force within the EU*" (see [Trade Perspectives, Issue No. 3 of 14 February 2022](#)). In the context of MRLs, France indicated its intention to put an end to double standards for food produced in the EU and in third countries, which permit that food or feed containing residues of substances like *mancozeb* that are prohibited in the EU, can be legally placed on the EU market, as long as the MRLs are complied with. This prompted France to insist that the EU should take "*better account of global environmental challenges when defining MRLs*".

The relevance of mancozeb in banana trade

Mancozeb is one of the most commonly used fungicides in the world. According to the USDA, *mancozeb* is also key to many strategic crops imported into the EU. For example, fungicides like *mancozeb* are routinely used in commercial banana plantations to control the fungal diseases *Black Sigatoka* and *Sigatoka leaf spot* (yellow Sigatoka), which can devastate banana harvests. According to media reports, industry representatives claim that “*if the Mancozeb MRLs for bananas become unacceptably low, the imports from African, Caribbean, Pacific, South and Central American countries and thus the availability of bananas in the EU, will be critically impacted. There is no alternative pesticide to Mancozeb for the exporting countries and substantial production without proper fungal disease control is not possible there, due to the Black Sigatoka fungus that can destroy more than 50% of the plant yield*”.

It also appears that the bananas and crop protection industries have so far not sufficiently invested in the approval of fungicides as effective as *mancozeb*. Consider, in this respect, the *Cavendish* bananas variety, which is virtually the only kind of banana traded internationally. *Cavendish* bananas are suitable for large monoculture banana plantations. However, they are also susceptible to fungal diseases like *Black Sigatoka*, which has to be controlled through the use of products like *mancozeb*. Ultimately, while there may be a degree of justified frustration at the insufficient investment made by the banana industry in finding alternative fungicides that are as effective as, but less dangerous than, *mancozeb*, there must likewise be a proper appreciation for the market impact of banning (or severely curtailing) its presence in the EU market in terms of the MRLs on imported produce.

Outlook

The setting of MRLs for *mancozeb* in imported produce may indeed show how far the EU is willing to go to make food production systems more sustainable by reducing the overall use and risk of pesticides considered harmful to health and the environment, and avoiding double standards for products produced in the EU and in third countries. For example, If the EU were to adopt more stringent MRLs for bananas, this may inevitably lead to a lack of banana supply and a significant increase in prices for the limited supply of one of Europe’s most favoured fruits. Overall, it appears that the current banana production model in large monoculture plantations, which depend on fungicides like *mancozeb*, may indeed no longer be sustainable, but any transition to alternative fungicides would have to be gradual and properly regulated and assisted, so as not to result overnight in trade barriers and devastating effects, especially on developing countries.

Recently adopted EU legislation

Trade Law

- [*Commission Implementing Regulation \(EU\) 2022/479 of 24 March 2022 amending Annexes V and XIV to Implementing Regulation \(EU\) 2021/404 as regards the entries for the United Kingdom and the United States in the lists of third countries authorised for the entry into the Union of consignments of poultry, germinal products of poultry and fresh meat of poultry and game birds \(1 \)*](#)
- [*Council Decision \(EU\) 2022/481 of 22 March 2022 on the position to be taken on behalf of the European Union within the General Council of the World Trade Organization as regards the adoption of a decision on the review of the Understanding on Tariff Rate Quota Administration Provisions of Agricultural Products*](#)

Customs Law

- *Commission Implementing Regulation (EU) 2022/478 of 24 March 2022 on maintaining protective measures on imports of bivalve molluscs from Turkey intended for human consumption (1)*

Food Law

- *Commission Regulation (EU) 2022/488 of 25 March 2022 correcting the French language version of Regulation (EU) No 142/2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive (1)*
- *Commission Implementing Regulation (EU) 2022/489 of 25 March 2022 amending Implementing Regulation (EU) No 540/2011 as regards the approval periods of the active substances flubendiamide, L-ascorbic acid, spinetoram and spirotetramat (1)*
- *Commission Implementing Regulation (EU) 2022/490 of 25 March 2022 amending Implementing Regulation (EU) 2018/2019 as regards certain plants for planting of *Juglans regia* L., *Nerium oleander* L. and *Robinia pseudoacacia* L. originating in Turkey, and amending Implementing Regulation (EU) 2020/1213 as regards the phytosanitary measures for the introduction of those plants for planting into the Union territory*
- *Commission Recommendation (EU) 2022/495 of 25 March 2022 on monitoring the presence of furan and alkylfurans in food*
- *Commission Delegated Regulation (EU) 2022/474 of 17 January 2022 amending Annex II to Regulation (EU) 2018/848 of the European Parliament and of the Council as regards specific requirements for the production and use of non-organic, in-conversion and organic seedlings and other plant reproductive material (1)*

Ignacio Carreño, Joanna Christy, Tobias Dolle, Michelle Limenta, Alya Mahira, Lourdes Medina Perez, Stella Nalwoga, Sean Stacy, and Paolo R. Vergano contributed to this issue.

Follow us on twitter [@FratiniVergano](https://twitter.com/FratiniVergano)

To subscribe to *Trade Perspectives*®, please click [here](#). To unsubscribe, please click [here](#).

FRATINI VERGANO specialises in European and international law, notably WTO and EU trade law, EU agricultural and food law, EU competition and internal market law, EU regulation and public affairs. For more information, please contact us at:

FRATINI VERGANO – EUROPEAN LAWYERS

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

Trade Perspectives® is issued with the purpose of informing on new developments in international trade and stimulating reflections on the legal and commercial issues involved.

Trade Perspectives® does not constitute legal advice and is not, therefore, intended to be relied on or create any client/lawyer relationship.

To stop receiving *Trade Perspectives*® or for new recipients to be added to our mailing list, please contact us at TradePerspectives@fratinivergano.eu

Our privacy policy and data protection notice is available at <http://www.fratinivergano.eu/en/data-protection/>