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The EU's new Regulation on prohibiting products made with forced labour: Another attempt by the EU to address an issue along global supply chains

On 23 May 2023, the European Parliament's Committee on International Trade (hereinafter, INTA) and the Committee on the Internal Market and Consumer Protection (hereinafter, IMCO) will jointly discuss the draft Report on the European Commission's *Proposal for a Regulation on prohibiting products made with forced labour on the Union market*. EU Institutions are currently debating their positions regarding this legislative initiative, which is poised to have a significant impact on businesses, trade, and global supply chains, especially on small and medium-sized enterprises (hereinafter, SMEs).

The Commission's Proposal to prohibit products made with forced labour

On 14 September 2022, the European Commission (hereinafter, Commission) had published its *Proposal for a regulation on prohibiting products made with forced labour on the Union market*. At the time, the European Commission Executive Vice-President and European Commissioner for Trade *Valdis Dombrovskis* explained that the Commission's objective was "*to eliminate all products made with forced labour from the EU market, irrespective of where they have been made*". Commissioner *Dombrovskis* further stressed that the prohibition of products made with forced labour, "*including forced child labour*", would apply "*to domestic products, exports and imports alike*" and that the competent authorities and EU Member States' Customs authorities *"would work hand-in-hand to make the system robust*". The European Commissioner for the Internal Market, *Thierry Breton*, stated that the EU could not "*maintain a model of consumption of goods produced unsustainably*" and that the EU Single Market was "*a formidable asset to prevent products made with forced labour from circulating in the EU, and a lever to promote more sustainability across the globe*".

In terms of scope, the proposed Regulation would lay down "*rules prohibiting economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labour, including forced child labour*". The definitions contained in the Commission's Proposal are largely based on those established by the International Labour Organization (ILO), but the Proposal also introduces new definitions regarding, *inter alia*, "*product made with forced labour*" and "*substantiated concern*". "*Product made with forced labour*" is defined as "*a product for which forced labour has been used in whole or in part at any stage of its extraction, harvest, production or manufacture, including*

working or processing related to a product at any stage of its supply chain" and "*substantiated concern*" is defined as "*a well-founded reason, based on objective and verifiable information, for the competent authorities to suspect that products were likely made with forced labour*".

According to the Commission, EU Member States' competent authorities would be called to implement the prohibition "*through a robust, risk-based enforcement approach*". EU Member States' competent authorities would assess forced labour risks based on different sources of information, which are yet to be defined and established by a Delegated Act to the Regulation. If there is a "*substantiated concern*" regarding a violation, the competent EU Member State authority would initiate an investigation. During the investigation, the competent authority would be able to request information from companies and carry out checks and inspections, including in non-EU countries. If a competent authority were to find that a product has indeed been made with forced labour, it would order the withdrawal of the products already placed on the EU market, prohibit them to be placed on the market, and prohibit their export from the EU. The decision of a competent authority in one EU Member State is to be recognised by all EU Member States.

The European Parliament defines its position

The European Parliament's *draft Report on the Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market* highlights a number of key issues. With respect to governance and enforcement, the draft Report states that, "*in order to avoid Member States establishing different level of penalties, the co-Rapporteurs agreed to task the Commission to establish a harmonised level of penalties. Uniform, EU-wide penalties will avoid a race to the bottom among Member States and ensure a level playing field*". The *co-Rapporteurs* from the INTA and IMCO Committees also considered that *"clear and comprehensible guidelines are key to help economic operators, especially SMEs to comply with this Regulation"*, adding that *"guidelines should be ready 12 months after the entry into force of the Regulation, and should include, in particular, guidance for the submissions of complaints and cooperation with national authorities"*. With respect to a later impact assessment and evaluation of the Regulation, the *co-Rapporteurs* believe that *"the Commission should carry out an evaluation of this Regulation, assessing whether the Regulation achieved its objective, in particular with regard to reducing the number of products made with forced labour on the Union market, improving cooperation between competent authorities and strengthening the controls on products entering the Union market, while taking into account the impact on business and in particular on SMEs"*.

The Commission's Proposal on forced labour foresees additional compliance requirements for companies, including SMEs. However, the draft Report considers that some shortcomings need to be addressed, including the lack of an impact assessment that is to be conducted once the rules are being implemented, particularly regarding the potential effects on SMEs, and ensuring alignment and consistency with other relevant EU rules. Notably, given that a new EU Directive on *Corporate Sustainability Due Diligence* is currently in the legislative process, the future Regulation on forced labour should be harmonised and coherent with similar legal instruments aimed at achieving more sustainable supply chains.

The broader context of legal obligations for more sustainable supply chains

The Commission's Proposal on forced labour does not provide for specific due diligence obligations for companies placing products on the EU market, but the Regulation would oblige the Commission to, within 18 months of its entry into force, issue guidelines on, *inter alia*, "*due diligence in relation to forced labour, which shall take into account applicable Union legislation setting out due diligence requirements with respect to forced labour, guidelines and recommendations from international organisations, as well as the size and economic resources of economic operators*".

In April 2023, the INTA Committee discussed the Proposal on forced labour and stressed that, due to their complementary nature, it should build on the *Proposal for the EU's Corporate*

Sustainability Due Diligence Directive. The European Commission's *Proposal for a Directive on Corporate Sustainability Due Diligence*, which had been published on 23 February 2022, would require economic operators to *"identify and, where necessary, prevent, end or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, for example pollution and biodiversity loss"*.

Significant implications for businesses and trading partners

For businesses, these new rules will ideally deliver increased legal certainty and a level playing field, but will likely also raise compliance costs due to the operationalisation of the new requirements throughout their value chains (see *Trade Perspectives*, Issue No. 6 of 27 March 2023). The future Regulation looks poised to regulate conditions that are often beyond companies' direct control, due to the complex nature of global supply chains and, therefore, has the potential to impose substantial burdens on businesses. On 9 February 2023, *Sophia Zakari*, Policy Advisor at *SMEunited*, the association of crafts and SMEs in Europe, stated that the Commission's Proposal *"privatised the fight against forced labour and sanctions European SMEs, which will struggle to find out what happens on the other side of their supply chains"*, adding that *"the proposal leaves a lot of questions open: what happens if a company did all it could to check the work practices of its partners and it appears later that forced labour was used? SMEs might have to choose to stop trade instead of risking disproportionate sanctions"*.

At the same time, on 15 May 2023, civil society organisations have published a Joint Letter regarding the Proposed Forced Labour Regulation to the Spanish Presidency of the EU Council. Spain takes over the rotating Presidency of the Council of the EU on 1 July 2023. Among the issues raised, the letter states that the Commission's Proposal *"fails to sufficiently clarify buyers' responsibilities to conduct robust due diligence, especially fair purchasing practices, the need for living wages, support for remediation, and responsible disengagement, and lacks provisions to disincentivize "cut and run" by buyers identifying forced labour in their supply chains"*. The Joint Letter adds that this clarification of the buyers' responsibilities would be particularly *"important for companies that are not subject to the upcoming Corporate Sustainable Due Diligence Directive rules*" and that, "*in the absence of such provisions, companies can continue doing the very minimum though many reports have already documented serious problems with the use of standard social audits as a tool to detect forced labour"*.

Once finalised, the new rules will have important implications for the EU's trading partners and exporters around the world. During a meeting of the INTA Committee in April 2023, some Members of the European Parliament (hereinafter, MEPs) emphasised the importance of considering the consequences of the Proposal in producer countries, mainly when it comes to smallholders and their ability to remain active in supply chains. The MEPs noted that provisions on the establishment of partnership mechanisms should be added to the Proposal, so that the relevant authorities in third countries could carry out investigations of forced labour and their root causes. Notably, the INTA Committee's *Rapporteur* for this legislative file, MEP *Samira Rafaela* (Group *Renew Europe*), stressed that unnecessary burdens on companies should be avoided and that, along these lines, support for SMEs should be provided.

The Commission's Proposal does stress the important role of collaboration with third countries, of cooperating with international organisations, and of engaging with countries that have a high risk of forced labour. However, businesses have already underlined the need to ensure that the right incentives are created for businesses to act responsibly, having in mind that different companies and sectors face different constraints and may need different incentives. Companies also highlighted the importance of translating legal rules into practical guidelines to make due diligence obligations more operational and clearer for businesses to implement. It is very likely that such concerns would also be taken up by the EU's trading partners multilaterally, notably within the WTO. However, in the case of forced labour and related due diligence, WTO Members might be faced with a question of competency when selecting the appropriate *forum* within the WTO to undertake these discussions, given that the measures under discussion may not appear to directly fit under any of the existing WTO Committees. It

has been argued that the WTO Agreement on Sanitary and Phytosanitary (SPS) Measures and the WTO Agreement on Technical Barriers to Trade (TBT) might be relied upon to allow process and production method concerns to act as a legitimate basis for trade measures. At the same time, the establishment of a new *Working Group on Trade and Decent Work* in the WTO has already garnered some support in the past, and the EU's proposed Regulation o forced labour could be the final push that leads to the creation of such an institutional architecture, allowing more structured global discussion on such files with a potentially significant impact on trade.

The next steps

Now that the EU Institutions move towards defining their respective positions, interested stakeholders should intensify their engagement to ensure that the future rules are not overly burdensome and that the perspectives of all stakeholders, notably smallholders, and of EU trading partners at all levels of development are taken into account. EU trading partners should have a say in the discussions and, ideally, a more multilateral approach should be pursued, which is the only way to achieve meaningful and sustainable change.

Imports of intangible goods into Indonesia, including software, are now subject to new Customs formalities

On 14 December 2022, Indonesia's Minister of Finance enacted *Minister of Finance Regulation No. 190/PMK.04/2022 on the Release of Imported Goods for Use* (hereinafter, MOF Regulation 190), which entered into force on 14 January 2023. The most important aspects of *MOF Regulation 190* include the introduction of new procedures regarding the submission of the Customs declaration for the import of intangible goods and the reiteration of such goods being subject to a Customs duty, although the current duty rate for the import of intangible goods is 0%. In reaction, business associations around the world have expressed their concern that *MOF Regulation 190* would impede the growth of Indonesia's digital sector, due to the burdensome nature of the additional requirements. This article provides an overview of the new Customs procedures for intangible goods and of Indonesia's tax regime for imports of intangible or digital goods.

The rationale behind the enactment of MOF Regulation 190

Since 2006, imports of intangible goods, such as software, digital books and video content, have been subject to the Customs requirements stipulated in *Law No. 17 of 2006 concerning Amendments to Law No. 10 of 1995 concerning Customs*, including the requirement to submit a Customs declaration and pay the relevant Customs duties. To implement these rules, the Minister of Finance had enacted *Minister of Finance Regulation No. 228/PMK.04/2015* (hereinafter, MOF Regulation 228/2015), which was revoked and replaced by *MOF Regulation 190*. While *MOF Regulation 228/2015* provided the necessary rules to submit Customs declarations, it provided no clarity on how importers of intangible goods should submit the Customs declaration, specifically for imported software or other digital goods provided via electronic transmission. According to the Head of Indonesia's Directorate-General of Customs Excise, *Chotibul Umam,* through *MOF Regulation 190*, the Government of Indonesia introduced procedural rules for the import of intangible goods.

Customs formalities for imports of intangible goods

The submission of a Customs declaration for import and export activities is a common practice, but not for intangible goods that do not physically cross different jurisdictions and that are only electronically transmitted. Under *MOF Regulation 190*, which defines intangible goods as "*software or other digital goods that are transferred through electronic transmission*", importers of intangible goods must comply with two Customs obligations. First, the submission of a Customs declaration to the Customs office where the importer is domiciled or another Customs

office within 30 days of paying for the intangible goods. The Customs declaration form must contain various elements, such as information on the sender, information on the importer or the Customs service provider, information on the invoice, information on the transaction, the tariff code of the goods and the country of origin. Several elements included in the Customs declaration form for tangible goods are not included in the form for intangible goods, such as information on the physical inspection, the delivery, and the submission of manifest. Secondly, the payment of the relevant taxes, such as the value-added tax (VAT) and '*Article 22*' income tax, which refers to taxes imposed on State treasurers or other entities (*i.e.,* organisations and businesses), both government and private, that carry out export, import, and re-import trading activities, and of the applicable Customs duties.

Intangible goods and Customs duties

The imposition of Customs duties for intangible goods was introduced through *Ministry of Finance Regulation No. 17/PMK.010/2018 on the Second Amendment of Regulation No. 6/PMK.010/2017 on Stipulation of Goods Classification System and Import Duty on Imported Goods* (hereinafter, *MOF Regulation 17*), which incorporated '*Chapter 99*' into the Indonesian tariff system. In line with the definition, now provided by *MOF Regulation 190*, Chapter 99 covers "*software and other digital goods that are transmitted electronically and are not related to machines or devices that have been or will be imported that are classified with such machines*". On the basis of the *Ministry of Finance Regulation No. 26/PMK.010/2022 concerning the Determination of Goods Classification System and Imposition of Import Duty Tariff on Imported Goods*, intangible goods are currently subject to 0% Customs duties, while hardware is subject to up to 20% of Customs duties, depending on the specific classification under the Indonesian tariff code.

Nonetheless, businesses predict that the Government of Indonesia would soon increase the applicable tariff-rate. For instance, the Managing Director of the American Chamber of Commerce in Indonesia, *Lin Neumann*, opined that it was hard to imagine why the Government of Indonesia would reiterate the payment of Customs duty for intangible goods in MOF *Regulation 190* if "*it did not intend, later, to impose duties*".

The imposition of VAT and income tax in the digital sector to increase State revenue

Indonesia has been expanding its efforts to increase State revenues from the digital sector due to the massive growth of this market. According to a report by *Bains & Company, Temasek, and Google,* the gross merchandise value of Indonesia's digital economy in 2022 amounted to USD 77 billion, which is a significant increase from USD 41 billion in 2019, making Indonesia the largest digital economy in Southeast Asia.

With the growth of e-commerce transactions and the fiscal pressure increasing during the *Covid-19* pandemic, on 18 May 2020, the Government of Indonesia had enacted *Government Regulation in Lieu of Law No. 1 Year 2020 on States' Financial Policies in Handling the COVID-19 pandemic and/or facing threats to the national economy* (hereinafter, *Perppu 1/202*0) (see *Trade Perspectives,* Issue No. 7 of 10 April 2020). Effective from 1 July 2020, *Perppu 1/2020* and its implementing regulations require domestic and foreign electronic commerce platforms to pay VAT for taxable intangible goods and/or services that were sold from abroad to Indonesia. As reiterated by *MOF Regulation 190,* importers must pay VAT for the imports of intangible goods, which currently stands at 11% of the import value, the same rate applied to all imported products.

MOF Regulation 190 also requires importers of intangible goods to pay *'Income Tax Article 22*' at 2.5% of the import value for registered importers, or 7.5% for unregistered importers, as regulated under *Law No. 36 of 2008 on Income Tax*.

Implications of MOF Regulation 190 and concerns from global associations

The requirements regarding the Customs declaration form provided by *MOF Regulation 190* add an extra layer of administrative requirements that may be particularly burdensome for micro, small and medium-sized enterprises. On 3 April 2023, in a Joint Letter directed to Indonesia's Minister of Finance *Sri Mulyani*, a number of business associations, including the *European Services Forum* (ESF), the *EU-ASEAN Business Council*, *EuroCham*, and the *Singapore Business Federation*, expressed their concerns regarding *MOF Regulation 190*, claiming that the Customs formalities imposed for electronic transactions are measures that impede *"the development of Indonesia's digital trade and economy*".

The associations argue that *MOF Regulation 190* introduced "*uncertainties and potentially onerous costs*", as businesses would need to allocate the time and resources to deal with the filing of the Customs declaration, which would be especially burdensome for smaller companies that are typically less familiar with legal paperwork. For instance, a company that purchases imported software to conduct its business and that has paid and downloaded the software, must submit a Customs declaration.

The Joint Letter highlights the importance of the "*efficient and seamless nature of internet-based commerce that allowed for these activities to flourish*" and argues that *MOF Regulation 190* sets a precedent that would undermine these very advantages of electronic transactions, negatively affecting Indonesian consumers, businesses, and foreign suppliers alike. The associations consider the new Customs formalities as "*out of step with global practices and norms*" and point to a number of problems contained in *MOF Regulation 190*, such as a lack of basic definitions (*e.g.*, the exact scope of "*digital goods*"), inconsistency with the multi-nodal nature of Internet traffic, the lack of clarity in determining the "*country of origin*", or the valuation of intangible goods.

In line with Indonesia's WTO obligations?

In 1998, Members of the World Trade Organization (hereinafter, WTO) established the *Work Programme on Electronic Commerce* and agreed, under the *Moratorium on e-Commerce*, not to impose Customs duties on electronic transmissions. WTO Members have yet to reach consensus on a permanent agreement, and consequently, the *Moratorium* has been extended at every subsequent WTO Ministerial Conference, most recently in 2022.

In general terms, '*electronic transmission*' encompasses anything from software, e-mails, video games, films, all of which can be delivered through electronic means. As Indonesia currently follows the *Ministry of Finance Regulation No. 26/PMK.010/2022*, which maintains 0% Customs duties for imported intangible goods, the requirement for intangible goods, including software, to pay the Customs duty reiterated under *MOF Regulation 190* shows that, *de facto,* there is no inconsistency between Indonesia's tax regime and its obligations under the *WTO Moratorium on e-Commerce.*

A research paper from the *United Nations Conference on Trade and Development* (UNCTAD) on *'Growing Trade in Electronic Transmissions: Implications for the South*' noted that was technically feasible for countries to levy Customs duties on intangible imports through internal taxation, including VAT systems. Nonetheless, under the WTO, the debate is still ongoing whether the *Moratorium on e-Commerce* only covers the '*electronic transmission*' as a method of delivering the intangible goods and/or services or the content of the transmission itself (*e.g.*, digital products such music purchased via electronic transmission). As Indonesia only applies the VAT to intangible goods and the same tax (and tax rate) applies to domestically produced/sold products, it appears to be non-discriminatory and in line with the WTO *Moratorium on e-Commerce*.

Importers should be aware of the changes

MOF Regulation 190 can be seen as the Government of Indonesia's attempt to further regulate its growing digital sector. With the entry into force of *MOF Regulation 190*, imports of intangible goods are now subject to similar requirements as tangible goods. To ensure compliance,

importers of intangible goods into Indonesia must adapt to the new rules, review the applicable Customs formalities, and file the necessary documents.

EU adopts revised Regulation on maximum contaminant levels in food, replacing *Regulation No 1881/2006* – Concerns of WTO Members remain

On 5 May 2023, the EU published *Commission Regulation (EU) 2023/915 of 25 April 2023 on maximum levels for certain contaminants in food and repealing Regulation (EC) No 1881/2006*, which will come into effect on 25 May 2023 and repeal and replace *Commission Regulation 1881/2006 setting maximum levels for certain contaminants in foodstuffs*. In Recital 1 to *Commission Regulation (EU) 2023/915*, the Commission recognises that the current regulation, namely *Regulation No 1881/2006*, had already been substantially amended many times "*and since a number of new amendments are to be made to that Regulation, it should be replaced*". Although there are no substantive changes to EU maximum permitted levels for contaminants in food, there is an important update to the layout of the regulation which improves its readability. The article also addresses the Specific Trade Concerns of WTO Members concerning EU maximum levels on certain contaminants and foodstuffs.

The existing maximum levels for contaminants in food are maintained

The rationale for adopting *Commission Regulation (EU) 2023/915 on maximum levels for certain contaminants in food* is given in its Recital 12, which states that "*Maximum levels as currently set out by Regulation (EC) No 1881/2006, as amended, should be maintained by this Regulation. However, in light of the experience gained with that Regulation and in order to improve the readability of the rules, it is appropriate, on the one hand, to avoid the use of numerous footnotes and, on the other hand, to increase the references to Annex I to Regulation (EC) No 396/2005 of the European Parliament and of the Council for the definitions of the categories*". Annex I to *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* uses the following categories and order 1) Fruits, fresh or frozen; tree nuts; 2) Vegetables, fresh or frozen; 3) Oilseeds and oil fruits; 4) Cereals; 5) Teas, coffee, herbal infusions, cocoa and carobs; 6) Hops; 7) Spices; 8) Sugar plants; 9) Products of animal origin -terrestrial animals; 10) Products of animal origin - fish, fish products and any other marine and freshwater food products; 11) Products or part of products exclusively used for animal feed production; and 12) Processed food products. The food categories and their order used in *Regulation (EC) No 396/2005 on maximum residue levels of pesticides* are now also used in *Commission Regulation (EU) 2023/915 on maximum levels for certain contaminants in food*.

The current maximum levels as such, and the guiding principles for setting maximum levels for food contaminants in the EU, are maintained by *Commission Regulation (EU) 2023/915*. According to its Recital 2, "*maximum levels should be set at a strict level, which is reasonably achievable by following good agricultural, fishery and manufacturing practices and taking into account the risk related to the consumption of the food. In the case of a possible health risk, maximum levels for contaminants should be set at a level, which is as low as reasonably achievable (ALARA)*". According to the Commission, "*such an approach ensures that food business operators apply measures to prevent and reduce the contamination as much as possible in order to protect public health*".

Sorting or other physical treatments can reduce the content of contaminants in food

An important provision is Article 5 of *Commission Regulation (EU) 2023/915 on maximum levels for certain contaminants in food* regarding '*Food to be subjected to sorting or other physical treatment before placing on the market for the final consumer or use as a food ingredient*'. In this context, Recital 6 states that "*it is recognised that sorting or other physical treatments make it possible to reduce the content of contaminants in food*" and that, "*In order*

to minimise the effects on trade, it is appropriate to allow higher levels of contaminants for certain products, which are not placed on the market for the final consumer or as a food ingredient". In those cases, Article 5 provides that the maximum levels for contaminants should be established taking into consideration the effectiveness of such treatments to reduce the content of contaminants in food to levels below the maximum levels set out for those products placed on the market for the final consumer or used as a food ingredient. To avoid that these higher maximum levels be abused, Article 5(2) lays down provisions for the marketing, labelling, and use of the concerned products. The label of each individual package, at stages earlier than the making available to the consumer, and the original accompanying document of such food, must clearly show its use and bear the following information: "*Product shall be subjected to sorting or other physical treatment to reduce [name contaminant(s)] contamination before placing on the market for the final consumer or use as a food ingredient*".

Annex I to *Regulation (EU) 2023/915* covers contaminants in six reorganised sections

Article 2 of *Commission Regulation (EU) 2023/915* establishes the general rule that "*the food listed in Annex I shall not be placed on the market and shall not be used as a raw material in food or as an ingredient in food where it contains a contaminant at a level which exceeds the maximum level set out in Annex I*".

Annex I lays down the maximum permitted levels for the following types of contaminants, newly organised and better readable in six sections, in food: 1) Mycotoxins (*i.e.*, aflatoxins, ochratoxin A, patulin, deoxynivalenol, zearalenone, fumonisins, ergot sclerotia and ergot alkaloids); 2) Plant toxins (*i.e.*, erucic acid, tropane alkaloids, hydrocyanic acid, pyrrolizidine alkaloids, opium alkaloids, delta-9-tetrahydrocannabinol (Δ^9-THC) equivalents); 3) Metals and other toxic elements (*i.e.*, lead, cadmium, mercury, arsenic, inorganic tin); 4) Halogenated persistent organic pollutants (*i.e.*, dioxins and PCBs, perfluoroalkyl substances); 5) Processing contaminants (*i.e.*, polycyclic aromatic hydrocarbons (PAHs), 3-monochloropropane-1,2-diol (3-MCPD), glycidyl fatty acid esters, expressed as glycidol); and 6) Other contaminants (*i.e.*, nitrates, melamine, perchlorate).

The current maximum permitted levels for those contaminants are not amended by *Regulation (EU) 2023/915*, but the Commission already noted that "*a number of new amendments are to be made*" in the near future. This may, according to the discussions within the EU's Standing Committee on Plants, Animals, Food and Feed, Section Novel Food and Toxicological Safety of the Food Chain, entertained on 27 February 2023, concern, for example, the establishment of maximum levels for 3-MCPD fatty esters and glycidyl fatty acid esters in compound foods, such as baby foods and processed cereal based foods for infants and young children.

Notification to the WTO SPS Committee

On 8 May 2023, the EU notified *Commission Regulation (EU) 2023/915* to the World Trade Organization's (hereinafter, WTO) Committee on Sanitary and Phytosanitary Measures (hereinafter, SPS Committee) (document G/SPS/N/EU/635). Under point 6 of the notification on '*description of content*', the Commission notes that "*all the provisions provided for in this Regulation have already been previously notified to the WTO for comments. This draft Regulation does not change in substance these previously notified comments and is therefore mainly notified for information*". Under point 8, regarding whether there is a relevant international standard, the Commission refers to *the Codex Alimentarius General Standard for Contaminants and Toxins in Food and Feed* (CDS 193-1995), but states that "*Certain provisions are aligned with the Codex standard CXS 193-1995, other provisions are not aligned with the Codex standard CXS 193-1995, while most provisions are not yet covered by CXS 193-1995. How and why certain provisions deviate from the CXS 193-1995, have been explained at the occasion of previous notifications and replies have been provided to comments received*".

Specific Trade Concerns of WTO Members concerning the EU rules on contaminants

In fact, the EU's rules on maximum levels of contaminants are often not (yet) covered by the *Codex* standard on contaminants, such as, for example, the maximum levels for the mycotoxin Ochratoxin A set in *Commission Regulation (EU) 2022/1370 of 5 August 2022 amending Regulation (EC) No 1881/2006 as regards maximum levels of ochratoxin A in certain foodstuffs*, which concern foods (*e.g.*, pistachios) in addition to those covered by the *Codex* standard on contaminants (*i.e.*, barley, wheat and rye) (see *Trade Perspectives*, Issue No. 16 of 5 September 2022).

A number of WTO Members, in particular, Brazil, Canada, Ecuador, Peru, and the US, regularly raise concerns in the WTO's SPS Committee regarding the maximum levels for contaminants set by the EU. The main concern from Peru is due to the maximum levels of cadmium in chocolate and cocoa products. On 1 January 2019, new maximum levels of cadmium in specific cocoa and chocolate products, established by *Commission Regulation (EU) No 488/2014 amending Regulation (EC) No 1881/2006 as regards maximum levels of cadmium in foodstuffs*, came into force. This has led to serious concerns in cocoa-producing countries, such as Colombia, Côte d'Ivoire, and Peru, which have repeatedly raised the issue of the new EU rules on cadmium in chocolate as a Specific Trade Concern (STC) at the meetings of the SPS Committee. More specifically, Peru argued that *Regulation (EU) 488/2014* was "*not based on updated scientific principles with respect to the risk to human health*" and that the practical application amounted to a "*disguised restriction on international trade*" (see *Trade Perspectives*, Issue No. 21 of 16 November 2018). At the meeting of the SPS Committee of 9 to 11 November 2022, Peru repeated its concerns regarding *Regulation (EU) No 488/2014* that, in practice, had an impact on trade in cocoa beans and cocoa powder.

But not all concerns relate to cocoa. In the same meeting of 9 to 11 November 2022, Canada noted its concern regarding "*the negative trade implications of the EU approach to the regulation of MLs of cadmium in cereals, pulses and oilseeds; ergot and ergot alkaloids in cereals; ochratoxin A in cereals; and cyanogenic glycosides in linseed*". Canada underlined that "*the lowering of MLs for contaminants in food products was a result of the EU implementation of the precautionary-based regulatory decision-making requirements under Regulation (EC) No 1881/2006*" and reiterated "*that the MLs did not align with international standards and would negatively impact trade for many products exported to the European Union*".

These are two examples of WTO Members expressing their concerns with the EU rules on contaminants. In general terms, under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), while WTO Members have the right to establish their own levels of protection and may adopt measures necessary for the protection of human, animal or plant life or health (*i.e.*, sanitary and phytosanitary measures), these are only permissible where they can be proven to be science-based, proportional to the legitimate objective being pursued, non-discriminatory, and/or based on international standards.

Outlook

At the next meeting of the SPS Committee on 11 July 2023, WTO Members can repeat their specific trade concerns in case the EU has not addressed the matter satisfactorily. The EU's approach to the regulation of maximum levels of contaminants in food and the increased regulatory activity in the EU in recent years, with maximum levels that often exceed the levels established by the relevant international *Codex* standard or establishing maximum levels for products currently not foreseen in *Codex* standards, should be monitored and stakeholders should be prepared to work with their governments to address possible trade impediments related to certain unreasonably strict maximum levels of contaminants having a disproportionate and restrictive impact on trade.

Recently adopted EU legislation

Trade Law

- *Commission Implementing Regulation (EU) 2023/973 of 15 May 2023 amending Annexes V and XIV to Implementing Regulation (EU) 2021/404 as regards the entries for Canada, Chile, 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*

- *Commission Regulation (EU) 2023/966 of 15 May 2023 amending Council Regulation (EC) No 338/97 to reflect the amendments adopted at the 19th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora*

- *Commission Implementing Regulation (EU) 2023/954 of 12 May 2023 correcting Annexes XIII, XIV and XXII to Implementing Regulation (EU) 2021/404 as regards the lists of third countries, territories or zones thereof authorised for the entry into the Union of consignments of fresh meat of ungulates, poultry and game birds, and certain species and categories of animals, germinal products and products of animal origin for which the Union is not the final destination*

- *Commission Implementing Regulation (EU) 2023/953 of 12 May 2023 amending Implementing Regulation (EU) 2020/761 as regards the rules governing the tariff rate quota for export of milk powder to the Dominican Republic*

- *Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism*

Trade Remedies

- *Commission Implementing Regulation (EU) 2023/968 of 16 May 2023 imposing a definitive anti-dumping duty on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council*

- *Commission Implementing Regulation (EU) 2023/935 of 11 May 2023 imposing a definitive anti-dumping duty on imports of high tenacity yarns of polyesters originating in the People's Republic of China and produced by Zhejiang Hailide New Material Co., Ltd.*

- *Commission Implementing Regulation (EU) 2023/934 of 11 May 2023 imposing a definitive anti-dumping duty on imports of high tenacity yarns of polyesters originating in the People's Republic of China following an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Regulation (EU) 2016/1036 of the European Parliament and of the Council*

Food Law

- *Commission Implementing Regulation (EU) 2023/972 of 10 May 2023 authorising the placing on the market of aqueous ethanolic extract of Labisia pumila as a novel food and amending Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2023/961 of 12 May 2023 amending Implementing Regulation (EU) 2017/2470 as regards the conditions of use of the novel food Lacto-N-neotetraose*

- *Commission Implementing Regulation (EU) 2023/962 of 15 May 2023 amending Implementing Regulation (EU) 2021/1448 as regards the conditions of approval of the low-risk active substance calcium carbonate and limestone, and amending Implementing Regulation (EU) No 540/2011*

- *Commission Recommendation (EU) 2023/965 of 12 May 2023 on the methodology for the monitoring of food additive and food flavouring intake*

- *Commission Implementing Regulation (EU) 2023/951 of 12 May 2023 amending Implementing Regulation (EU) 2017/2470 as regards the specifications of the novel food protein extract from pig kidneys*

- *Commission Implementing Regulation (EU) 2023/950 of 12 May 2023 amending Implementing Regulation (EU) 2017/2470 as regards the conditions of use of the novel food 2'-Fucosyllactose*

- *Commission Implementing Regulation (EU) 2023/949 of 12 May 2023 authorising the placing on the market of iron milk caseinate as a novel food and amending Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2023/948 of 12 May 2023 authorising the placing on the market of 6'-Sialyllactose sodium salt produced by derivative strains of Escherichia coli BL21(DE3) as a novel food and amending Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2023/943 of 11 May 2023 authorising the placing on the market of cellobiose as a novel food and amending Implementing Regulation (EU) 2017/2470*

- *Commission Implementing Regulation (EU) 2023/939 of 10 May 2023 withdrawing the approval of the active substance ipconazole in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council, amending Commission Implementing Regulation (EU) No 540/2011 and repealing Commission Implementing Regulation (EU) No 571/2014*

- *Commission Implementing Regulation (EU) 2023/938 of 10 May 2023 amending Implementing Regulation (EU) 2017/2470 as regards the conditions of use of the novel food Yarrowia lipolytica yeast biomass*

- *Commission Implementing Regulation (EU) 2023/937 of 10 May 2023 correcting Implementing Regulation (EU) 2017/2470 as regards the inclusion of 'Phosphated distarch phosphate produced from wheat starch' in the Union list of novel foods*

- *Commission Implementing Regulation (EU) 2023/932 of 8 May 2023 amending Implementing Regulation (EU) No 540/2011 as regards the approval period of the active substance pyridalyl*

- *Commission Implementing Regulation (EU) 2023/931 of 8 May 2023 amending Implementing Regulation (EU) 2017/2470 as regards the conditions of use of the traditional food from a third country infusion from coffee leaves of Coffea arabica L. and/or Coffea canephora Pierre ex A. Froehner*

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