FRATINIVERGANO
EUROPEAN LAWYERS

TRADE PERSPECTIVES©

Issue No. 17 of 23 September 2024

- **The European Commission proposes to loosen restrictions on trade in some species of non-EU wild animals**
- **The Government of Indonesia relaxes the local content requirements for electricity infrastructure projects - (in)consistency with WTO rules?**
- **Is your favourite instant *ramen* facing an EU import ban? The other side of the updated EU rules on composite food products**
- **Recently adopted EU legislation**

The European Commission proposes to loosen restrictions on trade in some species of non-EU wild animals

On 9 September 2024, the European Commission launched a public consultation to gather feedback on its *draft Implementing Regulation prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora in accordance with Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein* (hereinafter, draft *Implementing Regulation*). The consultation concerns a regular update process to "*introduce or remove trade restrictions for certain species of wild plants and animals from non-EU countries using the criteria set out in Council Regulation 338/97*". This article looks into the international and the EU legal framework regulating the trade of wildlife species, analyses the legal basis and process for adopting or removing restrictions in the EU, as well as the WTO compatibility of the restrictions. The article also reviews the proposed changes under the draft *Implementing Regulation* and the implications for businesses.

The regulation of international trade in wildlife

The regulation of international trade in wild animals and plants is crucial for the conservation of endangered species and is managed through the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (hereinafter, CITES). The CITES is an international instrument that is legally binding for the 184 Parties that have adopted it, including the EU and all its Member States. In simple terms, the CITES aims at ensuring that "*international trade in specimens of wild animals and plants does not threaten the survival of the species*". CITES guarantees the protection of more than 37,000 species of animals and plants included in its three Appendices. The three CITES Appendices afford differing degrees of protection for listed species, depending primarily on the biological status of the species and on whether the species are or may be affected by trade. The inclusion of a species in one of the Appendices results in the application of certain trade requirements or restrictions under the Convention.

Appendix I of the CITES includes species threatened with extinction, which may only be imported for non-commercial purposes, such as for scientific research, subject to the presentation of export and import permits. Appendix II lists species that are not necessarily threatened with extinction, but that could become so unless trade is closely controlled. Trade in those species requires an export permit or re-export certificate, but generally no import

permit is needed, unless stricter national measures apply. Appendix III is a list of species included at the request of a Party that already regulates trade in those species and that needs the cooperation of other countries to prevent unsustainable or illegal exploitation. Trade in those species is permitted upon presentation of the appropriate permits or certificates.

To comply with CITES, each Party must enact legislation that aligns with the Convention's requirements. Notably, Article XIV of the CITES on the "*Effect on domestic legislation and international conventions*" recognises the right of the Parties to adopt stricter rules for trading, possessing, or transporting listed and unlisted species. The CITES, therefore, only provides minimum standards.

The EU legal framework for the trade of wildlife species

In the EU, the CITES has been implemented through a set of laws referred to as the "*EU wildlife trade regulations*", namely, *Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein* (hereinafter, *Basic Regulation*), which lays down conditions for the introduction into the EU of specimens from non-EU Member States and internal EU trade in specimens of species. The species are listed in its four Annexes: Annex A includes all CITES Appendix I species, some CITES Appendix II and III species with stricter EU measures, and some non-CITES species. For the species listed in Annex A, the same trade prohibition as in the CITES' Appendix I applies. Annex B includes all other CITES Appendix II species, some CITES Appendix III species, and some non-CITES species. Trade in those species requires an import permit. Annex C includes all other CITES Appendix III species. Trade in those species requires an export permit or certificate and an import notification. Finally, Annex D includes some CITES Appendix III species with EU reservations and some non-CITES species, to align with other EU regulations, such as the Habitats and Birds Directives. Trade in those species only requires an import notification.

Detailed rules for certain aspects, such as technical requirements, import and export permits and re-export certificates, sample collection certificates, and marking requirements, are laid down in *Commission Regulation (EC) No 865/2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97* and *Commission Implementing Regulation (EU) No 792/2012 laying down rules for the design of permits, certificates and other documents.* Another EU wildlife trade-related law is the regularly updated '*Suspension Regulation*', through which the European Commission (hereinafter, Commission) suspends the introduction of certain species into the EU. The most recent *Suspension Regulation* is *Commission Implementing Regulation (EU) 2023/2770 of 12 December 2023 prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora*.

Adopting or removing trade restrictions for certain species of wildlife

Two main EU bodies are involved in decision-making under the *Basic Regulation*. Firstly, the *Scientific Review Group*, established under Article 17 of the *Basic Regulation*, which examines any scientific question relating to the application of the *Basic Regulation*. Secondly, the *Committee on Trade in Wild Fauna and Flora* (hereinafter, Committee), which is the main decision-making body established by he *Basic Regulation* and is composed of representatives of the EU Member States and the Commission. The Commission must convey the opinions of the *Scientific Review Group* to the *Committee.* Pursuant to Article 4(6) of the *Basic Regulation*, the Commission has discretion to establish general restrictions, or restrictions relating to certain countries of origin, regarding the introduction of specimens of species into the EU. These restrictions are adopted or removed in consultation with the countries of origin concerned, taking into account the opinion of the *Scientific Review Group* and following the procedure outlined in Article 18 of the *Basic Regulation*. Under that procedure, the Commission must submit a draft of the proposed measures to the Committee, which delivers its opinion within a specified timeframe. If the Committee approves the draft with the required majority, the Commission adopts the measures. If the Committee disapproves or fails to deliver an opinion, the draft is forwarded to the Council of the EU for a decision by qualified majority.

The changes proposed under the draft Implementing Regulation

The draft *Implementing Regulation* does not propose any new restrictions, but proposes to lift the prohibition of the introduction into the EU of certain species. On the basis of the recommendations of the Standing Committee of CITES at its 77th meeting, Recital 3 of the draft *Implementing Regulation* states that the EU's *Scientific Review Group* concluded that the prohibition of the introduction into the EU was no longer required for three specimens of species of chameleons from Cameroon and Equatorial Guinea. Additionally, in its Recital 4, the draft *Implementing Regulation* states that the *Scientific Review Group* also concluded, *"based on the most recent information*", that the prohibition of the introduction into the EU was no longer required for four specimens of species of frogs from Madagascar, as well as for three specimens of species of lizards from Indonesia.

The Annex to the draft *Implementing Regulation* would update the specimens covered in the Annex to the current *Suspension Regulation,* namely *Implementing Regulation (EU) 2023/2770*, by removing the named species of chameleons, frogs and lizards*.* Those species are currently listed as belonging to Annex B of the *Basic Regulation*. Once adopted, interested individuals and businesses would be able to import these species into the EU without conservation related-restrictions (*e.g.*, without having to obtain export permits). The draft *Implementation Regulation* would repeal the current *Suspension Regulation*.

Balancing trade obligations with restrictions adopted via the CITES

The World Trade Organization's (hereinafter, WTO) rules, as confirmed by WTO jurisprudence, provide broad scope for protecting and conserving natural resources, including wild plant and animal species, subject to certain specified conditions. Article XX of the WTO's General Agreement on Tariffs and Trade (hereinafter, GATT) establishes the "*general exceptions*" to trade rules that WTO Members can rely on to adopt and maintain trade-restrictive measures that pursue the promotion and protection of legitimate policy goals set out therein. The two exceptions that are particularly relevant to the conservation of plant or animal species are Article XX(b) of the GATT on "*measures necessary to protect human, animal or plant life or health*" and Article XX(g) of the GATT on "*measures relating to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption*".

WTO Members seeking to adopt trade restrictions with the objective of protecting wildlife should consider two other crucial aspects: 1) The requirement that measures not result in arbitrary discrimination or disguised trade restrictions; and 2) The justification of trade restrictive measures under Article XX of the GATT entailing varying levels of scrutiny of the relationship between the measure and the objective pursued. This is denoted by the use of the term "*necessary*" in Article XX(b) of the GATT, which requires weighing and balancing various factors related to the measure and considering reasonably available alternatives to achieve the desired objective, and of the term "*relating to*", in Article XX(g) of the GATT, which requires a close and genuine relationship between the measure and the conservation objective, not only an incidental or inadvertent connection.

Staying compliant: adapting to the EU Wildlife Trade Regulations

Wildlife trade is considered to be one of the most lucrative trades in the world. For the EU, the Commission's 2022 wildlife trade report showed that, in 2020, the overall value of EU imports of these products was estimated at EUR 656 million for CITES-listed animals and EUR 266 million for plants. Wildlife trade encompasses not only the species themselves, but also their derivatives, such as products derived from protected species of timber and musical instruments adorned with ivory, as well as animal skins and fur used in the fashion industry. The traceability of traded wildlife products is ensured through a system of permits and certificates used to authorise, accompany, and track a particular shipment. By obtaining those permits, individuals and businesses can avoid participating in illegal wildlife trade, for which

Europe, according to the Commission, *"is currently a destination market, a hub for trafficking in transit to other regions, and, for some species, the source region for illegal trade*".

Time to have your say

The Commission foresees the adoption of the draft *Implementing Regulation* in the fourth quarter of 2024. Once adopted, the Implementing Regulation would enter into force 20 days following its publication in the Official Journal of the EU. Interested parties are invited to submit their views on the draft *Implementing Regulation* to the Commission. The feedback period was opened on 9 September 2024 and will run until 7 October 2024.

The Government of Indonesia relaxes the local content requirements for electricity infrastructure projects – (in)consistency with WTO rules?

As part of the Government of Indonesia's plan to attract investments in new and renewable energy projects, Indonesia's Ministry of Energy and Natural Resources issued *Regulation No. 11 of 2024 on the Utilisation of Local Products for Development of Electricity Infrastructure* (hereinafter, MEMR Regulation No. 11/2024) and *Decree No. 191.K/EK.01/MEM/E/2024 on the Minimum Local Component Threshold for Combined Goods and Services in Electricity Infrastructure Development Projects* (hereinafter, MEMR Decree No. 191/2024) on 31 July and 6 August 2024, respectively.

MEMR Regulation No. 11/2024 and *MEMR Decree No. 191/2024* establish new minimum thresholds of local content requirements in the electricity sector, which are significantly lower compared to those previously stipulated by *Minister of Industry Regulation No. 54/M-IND/PER/3/2012 of 2012 on Guidelines for the Use of Domestic Products for Electricity Infrastructure Development* (hereinafter, MOI Regulation No. 54/2012). *MOI Regulation No. 54/2012* was revoked on 25 July 2024. This article discusses the new local content requirements stipulated in *MEMR Regulation No. 11/2024*, the (in)consistency of local content requirements with WTO rules, and the commercial implications for stakeholders.

Indonesia's energy transition and the issue of local content requirements

Indonesia has set a target for a renewable energy mix of 23% by 2025 and 31% by 2050. To ensure a successful energy transition, the Government of Indonesia has launched several initiatives and regulatory instruments, including: 1) The *2021-2030 National Electricity Supply Business Plan*, which requires Indonesia's State-owned electricity company *PT PLN* to prioritise the construction of new and renewable energy power plants; 2) *Presidential Regulation No. 112 of 2022 on the Acceleration of Renewable Energy Development for Electricity Supply*, which introduced a prohibition on the construction of new coal-fired power plants (see *Trade Perspectives*, Issue No. 20 of 31 October 2022); and 3) The *New Energy and Renewable Energy Bill*, which provides fiscal and non-fiscal incentives to support the development of new and renewable energy (see *Trade Perspectives*, Issue No. 13 of 4 July 2022). It is estimated that the country would require USD 37 billion in investments to achieve its renewable energy mix targets.

MOI Regulation No. 54/2012 foresaw that the development of electricity infrastructure for public use, such as hydroelectric, geothermal, and solar power plants, use domestically-sourced goods and/or services. The use of imported goods was only allowed if the relevant goods could not be produced domestically, if the technical specification of domestically produced goods did not meet the relevant requirements, and/or if the volume of domestic production of such goods was unable to meet demand (see *Trade Perspectives*, Issue No. 11 of 3 June 2024). These requirements remain in effect, as provided by *MEMR Regulation No. 11/2024*. The local content requirements outlined in *MOI Regulation No. 54/2012* have posed significant barriers to investments in Indonesia's new and renewable energy projects, putting the country's energy transition at risk. According to *PT PLN*'s Executive Vice President of

Renewable Energy, *Zainal Arifin*, nine new and renewable energy projects with a total value of IDR 51 trillion (*i.e.*, approximately USD 3.4 billion) have lost their financing due to international lenders' reluctance to meet the local content requirements. Given this context, the revocation of *MOI Regulation No. 54/2012* is intended to ease the (self-harming) local content requirements in the electricity sector and, thereby, open up opportunities for foreign investments.

Unpacking *MEMR Regulation No. 11/2024: Lower local content thresholds*

MEMR Regulation No. 11/2024 replaced *MOI Regulation No. 54/2012* and established the new local content requirements for power plants that use both renewable and non-renewable energy sources, as well as for transmission networks, distribution networks, and substations. Interestingly, *MEMR Regulation No.11/2024* even expands the scope of power plants subject to local content requirement to include gas-turbine, wind, biomass, biogas, and waste-to-energy power plants, which had not been covered under *MOI Regulation No. 54/2012*. The local content requirements apply to electricity infrastructure projects intended for public use, when they are developed by: 1) Government institutions; and 2) Business entities involved in the procurement of goods and services, provided that the funding for the project comes from State or Regional budgets, that the work is carried out through partnership with the Central or Regional Governments, and that the entities utilise resources controlled by the State.

MEMR Decree No.191/2024 sets out the thresholds of local content requirements for the relevant power plants. The combined thresholds for domestic goods and services are significantly lower than those previously stipulated by *MOI Regulation No. 54/2012*, which ranged from 30% to 70%. The local content thresholds for all power plants are now below 30%, except for hydroelectric power plants with installed capacities up to 10 Megawatt and between 10 to 50 Megawatt, which have thresholds of 45% and 35%, respectively. There is also a significant reduction for solar power plants, which are now subject to local content thresholds of 20%, down from 40%. Until 30 June 2025, *MEMR Regulation No. 11/2024* relaxes the local content requirements for solar power plants that have a power purchasing agreement signed by no later than 31 December 2024 and that are planned to operate commercially by 30 June 2026 at the latest.

However, despite the notional reductions in the applicable local content thresholds, the overall regulatory context remains highly problematic, with little apparent legal certainty and commercial predictability. In fact, the list of solar power plants eligible for the relaxation will be determined by the Coordinating Minister for Maritime and Investment Affairs. The eligible power plants would be able to use imported solar modules, but only if the foreign manufacturers have committed to invest in the production of solar modules in Indonesia and to comply with the local content requirements for solar modules by 31 December 2025 at the latest. According to Article 10 of *MEMR Regulation No. 11/2024*, compliance with the local content requirements will be assessed by an authorised independent verification agency. Providers of goods and/or services that fail to meet the minimum local content thresholds will be subject to sanctions, including administrative fines and the revocation of the business license. Overall, hardly an enticing regulatory landscape for potential investors.

Exemptions for projects funded by offshore loans or grants

MEMR Regulation No. 11/2024 introduces the long-awaited exemption from the local content requirements for certain electricity infrastructure projects funded by offshore loans or grants. According to Article 17 of *MEMR Regulation No. 11/2024*, the exemption applies if the following two conditions are met: 1) The foreign loan or grant agreement explicitly waives the applicability of the local content threshold specified in *MEMR Decree No. 191/2024,* or specifies alternative local content thresholds for the project; and 2) The foreign loan or grant is intended for an electricity infrastructure project that fulfils domestic electricity needs, entirely or partially, with at least 50% of the funding originating from multilateral creditors and/or bilateral creditors, including development banks. Such exemption, which was not included in *MOI Regulation 54/2012*, aims at facilitating the development of internationally funded

infrastructure projects that are essential for supporting Indonesia's energy transition, while still prioritising the use of domestic goods and services.

(In)consistency of the local content requirements with WTO rules?

Indonesia's local content requirements for the development of electricity infrastructure projects can be considered as *prima facie* discriminatory measures and as restrictions on market access for foreign goods. These requirements, however, are not implemented in isolation: they are part of the country's broader strategy for industrial development aimed at increasing domestic value added and increasing local jobs. To date, Indonesia has enacted local content requirements in, *inter alia*, the pharmaceuticals, telecommunications, and electric vehicles industries (see *Trade Perspectives*, Issue No. 20 of 5 November 2021 and Issue No. 8 of 22 April 2024).

Indonesia's trading partners have repeatedly expressed concerns about Indonesia's local content requirements, highlighting their potential inconsistency with *World Trade Organization* (hereinafter, WTO) rules. With respect to the local content requirements for telecommunication devices, Japan and the US pointed out that the measures, *inter alia*, disrupted supply chains and resulted in more favourable treatment for domestic products *vis-à-vis* imported products.

If challenged by trading partners, Indonesia's local content requirements would likely be found inconsistent with Article 2 of the WTO *Agreement on Trade-Related Investment Measures* (hereinafter, TRIMs Agreement) and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (hereinafter, GATT 1994). Article 2 of the *TRIMS Agreement* prohibits the application of trade-related investment measures that are inconsistent with Article III or Article XI of the *GATT 1994*. Article III requires WTO Members to accord imported products treatment no less favourable than that accorded to '*like*' products of national origin, while Article XI:1 of the GATT prohibits WTO Members to impose quantitative restrictions on the exportation and importation of goods. The local content requirements would likely be found inconsistent with these provisions, as they create incentives for the relevant Government institutions and business entities to use domestic goods and/services for developing electricity infrastructure, to the detriment of foreign counterparts, and as they have a limiting effect on the quantity of imported components.

Key takeaways

Indonesia's new local content requirements for electricity infrastructure projects have prompted responses from the relevant stakeholders. The CEO of *Sky Energy Indonesia*, *Jung Fan*, a leading solar cell and panel manufacturer, argued that the relaxed requirements could negatively impact local solar photovoltaics producers and intensify businesses competition. On the other hand, *Fabby Tumiwa*, the Executive director of the *Institute for Essential Services Reform*, a think-thank focusing on energy and environmental issues, noted that the new rules would remove barriers and support the financing of solar panel projects.

While *MEMR Regulation No. 11/2024* and *MEMR Decree No. 191/2024* significantly lower the local content threshold previously regulated under *MOI Regulation No. 54/2012* and introduce exemptions for projects funded by offshore loans or grants to the benefit of foreign investors, the local content requirements will remain in place and look poised to further hamper Indonesia's efforts to decarbonise and switch to renewable energy sources. It is also unlikely that these constantly changing import substitution policies and local content requirements will stimulate local production and domestic technological advancements. The fact that these requirements now cover nearly all power plant projects in Indonesia could further restrict the market access for imported goods and/or services in the country's lucrative market for renewable energy.

Businesses with activities falling under the scope of *MEMR Regulation No. 11/2024* should now prepare for compliance with the local content requirements, so as to avoid unnecessary

costs and to maintain their involvement in the development of electricity infrastructure projects in Indonesia.

Is your favourite instant *ramen* facing an EU import ban? The other side of the updated EU rules on composite food products

In recent months, an increasing number of exporters of certain food products has been facing issues accessing the EU market. The reason for these border rejections lays in a recent revision of the EU's regulations for so-called "*composite products*", which refers to "*foodstuffs containing both products of plant origin and processed products of animal origin*" intended for human consumption and which can include any combination of meat, dairy, or egg components.

Many of these rejections are linked to the exporting country not having yet established the necessary control plan for relevant ingredients or taken the necessary steps to be authorised to export them to the EU. This article reviews the intricacies of the EU rules on composite food products, especially as they relate to the EU's import requirements, explores the implications for businesses, and provides guidance on how to effectively navigate them.

Understanding composite products: scope and regulatory framework

The range of composite products is expansive, encompassing a wide range of food items, such as biscuits containing eggs and butter, pepperoni sausage pizza, or chicken '*Caesar salad*' with *Parmesan* cheese. It is important to note that products that contain unprocessed products of animal origin, such as raw meat or raw fish, are not considered composite products. In this context, the European Commission (hereinafter, Commission) notes that operators are "*allowed to start the manufacture of a composite product from an unprocessed product of animal origin as long as the processing of the product of animal origin is part of the manufacture of the final product*".

The Commission further states that the addition of products of plant origin during the processing of an animal product "*does not automatically mean that the resulting food falls within the definition of composite products*". For foodstuffs to be considered "*composite products*", the addition of products of plant origin to the processed products of animal origin must modify the main characteristics of the final product. For example, cheeses to which herbs are added and yoghurts to which fruit is added remain dairy products. A change of the tariff heading of the final product, especially the change in chapter between a main ingredient and the final product, can be a good proxy to determine if the final product is a composite product.

Navigating the EU rules for composite products

Under the previous regime for composite products, notably under *Council Directive 97/78/EC of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries* and derivate legislation, the EU import requirements for composite products were based on the percentage of the processed products of animal origin contained in the composite product. In a legislative reform process that spanned from 2019 to 2022, the EU modified its import requirements for composite products to adopt, according to the Commission, a logic based on the specific animal health or public health risk linked to the ingredients of animal origin in the composite product, as well as on the need to transport or store composite products under controlled temperature conditions.

Articles 20 to 22 of *Commission Delegated Regulation (EU) 2022/2292 of 6 September 2022 supplementing Regulation (EU) 2017/625 with regard to requirements for the entry into the Union of consignments of food producing animals and certain goods intended for human consumption*, which entered into force on 15 December 2022, establish the current EU

framework for the entry into the EU of composite products. These articles establish, *inter alia*, that countries exporting composite products must have in place specific control plans to address potential contaminants in animal-derived ingredients.

More specifically, Article 20 of *Commission Delegated Regulation (EU) 2022/2292* on "*Requirements for consignments of composite products"* now differentiates between different categories of composite products in descending order of "*risk*", namely: 1) Non-shelf-stable composite products, which are products that need to be transported or stored at controlled temperatures; and 2) Shelf-stable composite products, which can be kept at ambient temperature. The latter group is further divided into: i) Composite products that contain colostrum-based products (colostrum refers to the first milk produced by mammals after giving birth and is used in infant nutrition and wellness supplement products) or meat products (excluding gelatine, collagen, or highly refined meat derivatives); and ii) Composite products that do not contain colostrum-based products or meat products.

Composite products are subject to specific import requirements. Firstly, according to Articles 1(2) and 6(4) of *Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin,* composite products must be manufactured with processed products of animal origin produced in an EU-approved establishment located either in an EU Member States or in a third country. All EU-approved establishments are listed on the Commission's website. Secondly, with respect to documentary requirements, non-shelf-stable composite products, and shelf-stable composite products that contain colostrum-based products and/or meat products, a government-issued official certificate is required for exporting into the EU the composite product, while the remaining shelf-stable composite products require only a private attestation signed by the importing food business operator.

Crucially, two further specific requirements must be complied with in order to be able to export composite products to the EU. In the first place, when it comes to most non-shelf-stable composite products and shelf-stable composite products that contain colostrum-based products or meat products, the products must come from *"a country or region thereof"* authorised to enter the EU for each of the products of animal origin (the ingredients) contained in the composite product. The authorised countries are listed in the Annexes to *Commission Implementing Regulation (EU) 2021/405 of 24 March 2021 laying down the lists of third countries or regions thereof authorised for the entry into the Union of certain animals and goods intended for human consumption in accordance with Regulation (EU) 2017/625 of the European Parliament and of the Council*. Secondly, the import authorisation depends on the third country or region thereof being listed in Annex -I to *Commission Implementing Regulation 2021/405* as having a control plan for pharmacologically active substances, pesticides, and contaminants "*for the species or commodities from which the processed products of animal origin contained in the composite products, with the exception of collagen, gelatine and highly refined products of animal origin, are derived".* Such listing implies that the manufacturing and exporting country has a residue control plan for the indicated products or that it intends to source them from an EU Member State or a third country that is listed in Annex -I. For non-shelf stable composite products, the exporting country must have a control plan for all products of animal origin contained in the final product. Interestingly, with respect to shelf-stable composite products, if a country has an approved control plan for any of the three categories of *"eggs", "milk"* or *"aquaculture"* and intends to source the processed products from an EU Member State or a third country that is listed in Annex -I, the third country manufacturing the composite product must inform the Commission in writing of its intention, and is then also authorised to export shelf-stable composite products containing ingredients of any other category. For instance, Tunisia is listed as having a control plan for aquaculture and, therefore, may export shelf-stable composite products containing eggs or dairy to the EU even without having a specific control plans for these ingredients.

Really a risk-based approach?

The EU's revised import requirements for composite products have significant commercial implications for businesses operating both within and outside of the EU, noting that certain non-shelf stable composite products are simply no longer allowed to enter the EU. This is not linked to any risk of the specific product, but due to the absence of control plan for all products of animal origin contained in the product. While the EU's import requirements for composite products aim at ensuring food safety, certain aspects may raise questions as to the proportionality of these requirements and consistency with the EU's commitments under the World Trade Organization (hereinafter, WTO), specifically under the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement).

One point of contention could be the requirement for detailed control plans for non-shelf stable composite products, which even applies to ingredients of composite products that have been sourced from the EU and were, therefore, subject to the EU's high food safety standards. For example, a third country wishing to export pastries with EU-sourced milk powder or freeze-dried eggs would need to have in place a control plan for both dairy and eggs. Arguably, this raises questions about the proportionality of such requirements and its compatibility with the standards of the SPS Agreement. Notably, Article 5.6 of the SPS Agreement requires that WTO Members, "*when establishing or maintaining sanitary or phytosanitary measures*", must *"ensure that such measures are not more trade-restrictive than required*"*.* Furthermore, under Article 2.2 of the SPS Agreement, WTO Members must "*ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence*".

These issues have already been raised within the relevant WTO *fora* by several WTO Members. For instance, Chinese Taipei, the Russian Federation, and China expressed concerns about the scientific soundness of the EU measure and its proportionality. More specifically, China argued that "*foods containing a small proportion of animal-derived ingredients were not harmful to human health"* and suggested that the EU *"determined its risk management measures using the content ratio and simplified requirements or provided guidance for countries that were EU-approved and had residue monitoring plans".*

The EU responded *"that the import conditions laid down in the new composite product legislation were all risk-based"* and that the changes to the former rules related mostly *"to the three-tier approach to categorizing composite products depending on their level of risk",* which offered *"more flexibility",* by *"making it easier to source ingredients from other countries"* and including *"a longer list of composite products being exempted from controls at the border due to their lower risk"* and by replacing *"official certificates by a private attestation for certain categories of products".*

In this regard, the EU's revamped regulatory approach, although seemingly geared towards facilitating trade and ensuring a better risk management, appears to hardly do so and could be considered as disproportionate and as violating the principles of the SPS Agreement, particularly regarding proportionality, scientific basis, and the avoidance of unnecessary trade restrictions. The recent surge in third country governments', producers' and traders' pleas for assistance in navigating the new rules and not being shut out of the EU market is testimony to the significant impact that this measure and its requirements are having on trade.

Recently adopted EU legislation

Trade Law

- *Council Decision (EU) 2024/2153 of 4 March 2024 on the signing, on behalf of the Union, and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Kyrgyz Republic, of the other part*

- *Notice concerning the date of entry into force of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other*

- *Commission Implementing Regulation (EU) 2024/2465 of 10 September 2024 amending Regulations concerning restrictive measures and setting out a single list for the Annexes to those Regulations containing the contact details of Member States' competent authorities and the address for notifications to the European Commission*

- *Commission Implementing Regulation (EU) 2024/2384 of 9 September 2024 initiating a review of an exempted party pursuant to Regulation (EC) No 88/97 and making the imports of the exempted party subject to registration*

Trade Remedies

- *Commission Implementing Regulation (EU) 2024/2461 of 17 September 2024 amending Implementing Regulation (EU) 2023/1618 imposing a definitive anti-dumping duty on imports of tungsten carbide, fused tungsten carbide and tungsten carbide simply mixed with metallic powder originating in the People's Republic of China, and subjecting imports of non-agglomerated tungsten carbides mixed together or with metallic binders originating in the People's Republic of China to surveillance*

- *Commission Implementing Regulation (EU) 2024/2415 of 12 September 2024 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of certain alkyl phosphate esters originating in the People's Republic of China*

Food Law

- *Commission Implementing Regulation (EU) 2024/2457 of 9 September 2024 laying down rules for the application of Regulation (EU) 2024/1143 of the European Parliament and of the Council as regards the approval of a Union amendment to the product specification of the protected designation of origin Iaşi*

- *Commission Implementing Regulation (EU) 2024/2491 of 16 September 2024 amending Annex I to Implementing Regulation (EU) 2023/594 laying down special control measures for African swine fever*

Ignacio Carreño, Joanna Christy, Tobias Dolle, Alejandro López Bo, Alya Mahira, Caitlynn Nadya, Stella Nalwoga, and Paolo R. Vergano contributed to this issue.

Follow us on X @FratiniVergano

To subscribe to *Trade Perspectives*©, please click here. To unsubscribe, please click here.

FRATINIVERGANO 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:

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

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/