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EU requests arbitration panel under EU-Ukraine Association Agreement – the EU's premiere of choosing FTA dispute settlement over the WTO

On 20 June 2019, the EU Delegation to Ukraine submitted a *Note Verbale* to the Ministry of Foreign Affairs of Ukraine requesting, "*on behalf of the European Union, the establishment of an arbitration panel pursuant to Article 306 of the Association Agreement of 21 March 2014 between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part*" (hereinafter, EU-Ukraine Association Agreement). The dispute concerns Ukraine's export restrictions on timber and unsawn wood of certain species, as well as on unprocessed timber of all species, for a period of ten years. While the restrictions look poised to be difficult to justify for Ukraine, the more interesting and noteworthy element to this dispute is that it is the first trade dispute that the EU is pursuing under a bilateral preferential trade agreement, even though it relates to disciplines that mirror WTO rules.

The EU explains that its request concerns restrictions applied by Ukraine on exports of certain wood products to the EU. More specifically, Ukraine applies, since 2005, a permanent prohibition on exports of *timber* and *sawn wood* of ten wood species (*i.e.*, acacias, acers, black cherries, checker trees, cherry trees, chestnuts, common yews, junipers, pear trees, and walnut trees). In 2015, Ukraine also introduced a temporary ban, for a period of 10 years, on the exports of *unprocessed timber*, which, with respect to *wood species other than pine*, applies since 1 November 2015. With respect to *wood species of pine trees*, it applies since 1 January 2017. These export restrictions are regulated in *Law of Ukraine No 2860-IV* of 8 September 2005 "*On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber*", as amended, in particular, by *Law of Ukraine No 325-VIII* of 9 April 2015 "*On Amendments to the Law of Ukraine On Elements of the State Regulation of Business Operators' Activities Related to the Sale and Export of Timber' concerning the Temporary Export Ban for Unprocessed Timber*".

In terms of the objective and purpose of these laws, the related *Explanatory Notes* provide important elements. The *Explanatory Note to Law of Ukraine No 2860-IV* provides that *it "was developed with the aim of restoring the wood processing and furniture industry, creating workplaces, reorienting exports from wood raw materials to products of a wider degree of processing"*, which appears to be a rather protectionist approach. Reportedly in reaction to international criticism regarding said law, Ukraine adopted, in 2016, the *Law of Ukraine No*

2531-VIII "*Amending Certain Legislative Acts of Ukraine Concerning the Preservation of Ukrainian Forests and Preventing the Illegal Export of Raw Timber*". This law introduced additional restrictions on the domestic use of unprocessed timber, supposedly in view of balancing the earlier measure restricting only exports. The *Explanatory Note to Law of Ukraine No 2531-VIII* provides that the purpose of Law No 2531-VIII "*is to ensure the preservation of the country's forest resources by limiting the domestic consumption of unprocessed timber and strengthening administrative and criminal liability for illegal logging and further export*".

On the basis of Article 305 of the EU-Ukraine Association Agreement, the EU requested, on 15 January 2019, consultations with Ukraine regarding the abovementioned measures with a view to reaching a mutually agreed solution. The consultations were held on 7 February 2019, but did not resolve the dispute. In its request for the establishment of an arbitration panel, the EU notes that the "*export restrictions applied by Ukraine appear to be incompatible with Article 35 of the Association Agreement, which sets out a prohibition of export restrictions and measures having an equivalent effect*". The first sentence of Article 35 of the EU-Ukraine Association Agreement provides that "*No Party shall adopt or maintain any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other Party, except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994 and its interpretative notes*".

Importantly, the second sentence of Article 35 then provides that "*Article XI of GATT 1994 and its interpretative notes are incorporated into, and made an integral part of, this Agreement*". This means that the arbitration panel is called upon to take into account the GATT interpretative notes, and, on the basis of Article 320 of the EU-Ukraine Association Agreement, it is also required to "*adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body*". With respect to the export restrictions for wood and timber, and in view of the above-mentioned objective of restoring its wood processing and furniture industry, Ukraine might try to justify its measure on the basis of Article XI:2 of the GATT, which authorises "*Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party*". First of all, this authorisation only applies to measures that are "*temporarily applied*", which means that it would arguably not apply to the 2005 permanent prohibition of exports of timber and sawn wood of ten wood species. Furthermore, on the basis of the '*jurisprudence*' of the WTO Dispute Settlement Body (hereinafter DSB), it would appear to be challenging for Ukraine to argue that the measure "*applied to prevent or relieve critical shortages of foodstuffs or other products essential*" to Ukraine.

Article 36 of the EU-Ukraine Association Agreement also incorporates Articles XX and XXI of the GATT, as well as the GATT's interpretative notes, and makes them an integral part of the Agreement. In this regard, Ukraine could base its argumentation on Article XX(b) of the GATT, which allows measures "*necessary to protect human, animal or plant life or health*", or on Article XX(g) of the GATT, which allows measures "*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*". Importantly though, the so-called *chapeau* of Article XX of the GATT provides that any such measures may not be applied in a manner, which would constitute "*a means of arbitrary or unjustifiable discrimination*" or "*a disguised restriction on international trade*". While *Law of Ukraine No 2531-VIII* did introduce additional restrictions on the domestic use of unprocessed timber, they are not as significant as the full ban of such products destined for export, and might still be considered discriminatory by the arbitration panel.

Apart from the trade restrictions at issue, the main significance of this dispute rests in the fact that the EU has opted to address this controversy through the dispute settlement mechanism of the EU-Ukraine Association Agreement and not, as would be possible, since the relevant disciplines of the EU-Ukraine Association Agreement incorporate existing WTO disciplines laid out in the GATT, through WTO dispute settlement. This is the first time that the EU, in a case that does not concern so-called *WTO-Plus* provisions (*i.e.*, commitments going beyond WTO

rules), directly resorts to dispute settlement under one of its preferential trade agreements with third countries. Until now, the EU, as well as most other WTO Members, had consistently chosen to pursue such matters at the WTO, even when other options, for instance through dispute settlement mechanisms in trade agreements, existed. While the resolution of *WTO-Plus* provisions can only take place in the context of the particular trade agreement, disputes concerning provisions that rely on WTO rules leave complainants with an important choice – pursuing the matter at the WTO or under the rules of the bilateral or plurilateral agreement(s). For more than two decades, the WTO dispute settlement mechanism has been a respected authority in international trade law, establishing an important body of '*jurisprudence*' and ensuring consistency and legal certainty, thereby overshadowing other available *fora*.

However, recent developments have put into question the rules-based multilateral trading system, including the WTO DSB. For some time now, the US has been blocking the selection process of new members of the Appellate Body to replace those whose term has ended. According to the WTO Dispute Settlement Understanding (hereinafter, DSU), the Appellate Body is composed of seven members, but, due to the stalled reappointment process, the Appellate Body currently only has three members. According to the second sentence of Article 17(1) of the DSU, the Appellate Body "*shall be composed of seven persons, three of whom shall serve on any one case*". The terms of two of the three remaining Appellate Body members will end on 10 December 2019, which will likely lead to the Appellate Body to being paralysed, as there would not be enough judges to hear any new appeal (see *Trade Perspectives,* Issue No. 5 of 8 March 2019). The choice by the EU could be seen as anticipating the paralysis of the WTO dispute settlement, despite reported efforts that the EU has been making in earnest with other WTO Members to find an alternative avenue should the Appellate Body indeed become unavailable.

A key problem with such disputes involving WTO rules incorporated in trade agreements has been the fact that parties to the dispute often successively pursue a dispute in the various available *fora*, considerably prolonging disputes and leading to legal uncertainty. Prominent examples are the US-Canada *Softwood Lumber* dispute, which is still ongoing and has been dealt with in a multitude of dispute settlement proceedings in the context of the North American Free Trade Agreement (NAFTA), as well as by GATT/WTO dispute settlement. Similarly, in the case of *Argentina-Poultry* (WTO DS241), Brazil first pursued the case against Argentina through a Mercosur arbitration panel. After a decision in favour of Argentina, Brazil decided to bring the case to the WTO, where the Panel found that Argentina had acted inconsistently with certain WTO disciplines. To avoid similar situations, modern trade agreements typically provide for a *forum clause*.

In the case of the EU-Ukraine Association Agreement, Article 324 addresses the '*Relation with WTO obligations*'. Article 324(1) of the EU-Ukraine Association Agreement provides that "*Recourse to the dispute settlement provisions of this Chapter shall be without prejudice to any action in the WTO framework, including dispute settlement action*". Notably though, Article 324(2) of the EU-Ukraine Association Agreement then aims at avoiding that a dispute regarding the same measure be successively dealt with under the Agreement and by the WTO DSB, or *vice versa*, with the first sentence stating that, "*where a Party has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 306(1) of this Agreement or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has been concluded*". Most importantly, sentence two provides that "*a Party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums*". On the basis of the third sentence, only in case the selected *forum* fails, for procedural or jurisdictional reasons, to make findings on the claim, a Party would be allowed to bring a claim seeking redress of the identical obligation under the other Agreement within the other *forum*.

While perhaps good in theory, practice has shown that parties to trade agreements do not always respect such *forum* clauses when they disagree with the outcome of a case. It must be considered that adjudication within the WTO and in the context of a trade agreement are

distinct and that a *forum clause* in a trade agreement does not affect a WTO Members' rights under the WTO agreements. Additionally, trade agreements, including the EU-Ukraine Association Agreement, typically do not provide for any immediate consequence if the commitments in Article 324 are not complied with.

According to Article 307 of the EU-Ukraine Association Agreement, within ten days of the date of submission of the request for the establishment of an arbitration panel, the Parties are required to consult in order to reach an agreement on the composition of the arbitration panel. An Interim Panel Report is then to be issued normally after 90 days of the date of establishment of the panel (in any case no later than after 120 days) and the Arbitration Panel Ruling is normally to be issued after 120 days of the date of establishment of the panel (in any case no later than 150 days). This could then be followed by compliance proceedings. Stakeholders and all interested parties should closely follow the proceedings in this case and, if affected, consider submitting *amicus curiae* briefs to the arbitration panel. This important premiere of resolving a dispute within the dispute settlement *forum* established under a preferential trade agreement might foreshadow the new reality of international trade dispute settlement, should the WTO Appellate Body become fully paralysed.

After negotiations spanning over 20 years, the EU and Mercosur reached an '*Agreement in Principle*' regarding the trade part of their Association Agreement

On 28 June 2019, the EU and Mercosur (*i.e.*, Argentina, Brazil, Paraguay and Uruguay) reached an '*Agreement in Principle*' on the trade part of the EU-Mercosur Association Agreement (hereinafter, EU-Mercosur FTA). Negotiations had been launched in 2000 and it remained unclear until the last minute if an agreement could be reached. While the European Commission (hereinafter, Commission) noted that the EU-Mercosur FTA would preserve the interests of sensitive EU economic sectors, as well as of EU consumers, a number of EU industries, particularly EU beef farmers, disagreed and noted concerns with respect to the agreement.

In 2000, the EU and Mercosur began negotiations for the trade part, within the context of the broader bi-regional Association Agreement. Due to substantial differences between the parties, mainly in the areas of trade in agriculture, trade in services and the opening-up of public procurement markets, negotiations were put on hold in 2004 and again in 2012, before being relaunched in 2016. Technical negotiations were already well advanced, so that the EU and Mercosur attempted to reach political agreement on the side-lines of the World Trade Organization's Ministerial Conference in Argentina in December 2017. However, sensitive issues, in particular disagreement over tariff-rate quotas (hereinafter, TRQs) for beef, prevented the conclusion at that time.

On 28 June 2019, the EU and Mercosur announced that they had reached an '*Agreement in Principle*' for a comprehensive trade agreement covering, *inter alia*, trade in industrial and agricultural goods, trade in services, the protection of EU geographical indications for specialty foods, and public procurement.

With respect to liberalisation of trade in goods, Mercosur would remove the majority of tariffs on EU exports to the region. According to the '*Agreement in Principle*', Mercosur would liberalise tariffs on 91% of its imports from the EU over a transition period of ten years. For certain '*sensitive*' products, a transition period of 15 years is foreseen. With respect to the EU's main offensive sectors, such as cars, car parts, machinery, chemicals, and pharmaceuticals, Mercosur would fully remove tariffs over a transition period of up to 10 years for most products. All of Mercosur's tariff reductions are linear (*i.e.*, an equal percentage reduction in tariffs), with the exception of passenger cars, which would be fully liberalised over a period of 15 years and subject to *"a seven-year grace period that will be accompanied by a transitional quota of 50000 units*" with a quota rate of half of the MFN obligation, which varies depending on the kind of engine. 7 years after the entry into force of the agreement, this rate will be reduced further at

an accelerated pace and will end at 0% after 15 years. Conversely, over a period of ten years, the EU would allow 92% of Mercosur goods to enter the EU at zero tariffs. The EU would remove tariffs on 100% of industrial goods originating in Mercosur over a period of 10 years. In the agricultural sector, Mercosur would gradually eliminate 93% of tariff lines concerning EU agri-food exports to Mercosur, which cover 95% of the current export value of EU agricultural products. The EU would liberalise 82% of agricultural imports, while the remaining imports would be subject to partial liberalisation, for instance through TRQs.

As noted above, concessions regarding trade in beef have been a particularly controversial issue. In October 2017, the EU had proposed to grant Mercosur a TRQ of 70,000 metric tonnes of beef per year. However, the EU proposal was not well received by Mercosur, having initially requested a TRQ of 400,000 metric tonnes per year. At the end of 2017, the Commission raised its proposal to 99,000 metric tonnes per year, which caused concerns among a number of EU Member States with important beef production, in particular France and Ireland. Importantly, according to the '*Agreement in Principle*', with respect to beef, the Mercosur Countries would be allowed to export to the EU 99,000 metric tonnes of carcass weight equivalent (*i.e.*, the weight after slaughter, hereinafter, CWE) of beef, which would be subdivided into 55% fresh beef and 45% frozen beef with an in-quota tariff-rate (*i.e.*, the tariff applied on imports within a tariff-rate quota) of 7.5%, phased-in "*in six equal stages*". Additionally, the EU-Mercosur FTA would eliminate the in-quota tariff in the already allocated '*high quality fresh, chilled or frozen meat of bovine animals*' TRQ to Mercosur countries. On the basis of *Regulation (EU) No 593/2013 of 21 June 2013 opening and providing for the administration of tariff quotas for high-quality fresh, chilled and frozen beef and for frozen buffalo meat,* the EU currently provides a TRQ of 66,750 metric tonnes for '*high quality fresh, chilled or frozen meat of bovine animals*'. This quota is allocated on a country-by-country basis and has an in-quota tariff-rate of 20%. The '*Agreement in Principle*' would not increase the TRQ, but would eliminate the 20% in-quota tariff-rate for the Mercosur Countries when the agreement enters into force.

Sugar and ethanol were two further sensitive products. During the negotiations, some EU Member States, such as Poland, were concerned about the impact that the EU-Mercosur agreement could have on ethanol production. In October 2017, the EU had offered a quota of 600,000 metric tonnes of ethanol, including 200,000 metric tonnes for use in transport fuel. In the '*Agreement in Principle*', the EU agreed to grant Mercosur a TRQ of 450,000 metric tonnes at zero tariff for ethanol for chemical uses, and a TRQ of 200,000 metric tonnes of ethanol for all uses, including fuel, with an in-quota rate of one third of the MFN duty. Thereby, the EU's final offer increased the TRQ for ethanol for chemical uses by 50,000 metric tonnes.

With respect to sugar, the EU did not commit to any tariff reduction, but would only introduce a new TRQ for Paraguay and remove the duties on a portion of the existing TRQ granted to Brazil. The EU-Mercosur FTA would grant Paraguay a new TRQ of 10,000 metric tonnes of sugar at zero tariffs at the moment of entry into force. Additionally, the in-quota tariff for a portion of 180,000 metric tonnes of the existing TRQ, currently allocated to Brazil under *Commission Regulation (EC) No 891/2009 of 25 September 2009 opening and providing for the administration of certain Community tariff quotas in the sugar sector*, would be reduced to zero at entry into force. Specialty sugars, such as brown sugar, icing sugar and organic sugar, would be excluded from the agreement.

The EU also agreed to grant Mercosur TRQs at zero duty for: 1) Poultry (180,000 metric tonnes CWE); 2) Rice (60,000 metric tonnes); 3) Honey (45,000 metric tonnes); and 4) Sweetcorn (1,000 metric tonnes). The TRQ volumes of poultry, rice, and honey would be phased-in in six equal annual stages, while the in-quota tariffs on sweetcorn would be eliminated at the entry into force. Additionally, the EU agreed to grant Mercosur a TRQ for 25,000 metric tonnes of pig meat with an in-quota tariff of EUR 83 per metric tonne. Reciprocal TRQs would be opened from both sides for cheese (30,000 metric tonnes), milk powder (10,000 metric tonnes), and infant formula (5,000 metric tonnes). The in-quota tariff would be reduced from the respective base rates to zero in 10 years. The tariffs currently applied by Mercosur to imports from the EU amount to 28% for cheese and milk powder, and to 18% for infant formula. The agreement

would also guarantee the protection of 357 high-quality EU food and drink products recognised as geographical indications (GIs).

The EU-Mercosur FTA is expected to have a significant effect on trade, as it would eliminate or reduce tariffs in sectors in which high tariffs currently apply, such as cars and cheese. The EU succeeded in achieving continued protection of '*sensitive*' products, for which the EU would mostly only eliminate or reduce tariffs on TRQs already allocated, for instance with respect to beef and sugar. At the same time, the EU would benefit from enhanced access for its car industry to the Mercosur markets, notably to the Brazilian market, which had been highly protected.

While the agreement was welcomed by most EU Member States and the Governments of the Mercosur Countries, the announcement of the agreement caused mixed reactions in certain industries, particularly in the meat sector. The *International Meat Trade Association* (IMTA) stated that the EU-Mercosur FTA was an historic achievement. However, the European trade association of farmers and cooperatives, *Copa-Cogeca*, stated that it regretted "*the substantial concessions made in the agricultural chapter*". According to *Copa-Cogeca*, the difference in production standards would "*de facto establish double standards and unfair competition for some key European production sectors*". Irish farmers also expressed their disapproval regarding the agreement, noting that the agreement was not only "*bad for Ireland and Irish farmers*", but also for consumers, for the environment and for EU standards. On the other side of the Atlantic, the Argentinian seafood industry stated that the agreement would improve its access to the EU market, anticipating improved exports of hake, squid and scallops.

The EU-Mercosur trade agreement is currently being '*finalised*' by the EU and Mercosur Countries. The documents are then expected to be published soon, before the so-called '*legal scrubbing*' would begin. Once the legal review is completed, the final version of the EU-Mercosur Association Agreement, including the trade chapter, will be translated into all EU official languages. The Commission stated that it would then "*submit the Association Agreement to EU Member States and the European Parliament for approval*". This is important since it appears that the Commission considers the EU-Mercosur Agreement to be a so-called '*mixed*' agreement, falling under EU and EU Member States' competences and requiring ratification by the EU, as well as all EU Member States. In such cases, the Commission has, in previous instances, recommended to the Council that the parts of the agreement that fall under EU competence be provisionally applied after ratification by the EU, and until ratification by all EU Member States. This would ensure that the trade pillar of the broader Association Agreement could already be applied while the ratification process continues in the EU Members States.

The EU-Mercosur Association Agreement is the first region-to-region trade agreement that the EU has concluded. It represents an important achievement at a time when protectionist tendencies are increasing around the world. As the Commission points out, the EU-Mercosur Association Agreement would "*complete the network of Association Agreements in the Americas and consolidate the relations with the important partners in the region*". Indeed, with trade agreements in place with Canada, Mexico, Central America, the Andean Community, and soon Mercosur, the EU will have liberalised trade with nearly all countries of the American continents. In comparison to other recently concluded trade agreements, the magnitude of the EU-Mercosur FTA becomes apparent. In terms of tariff savings for EU companies, the EU-Canada Comprehensive Economic and Trade Agreement delivered EUR 0.6 billion in savings, the EU-Japan Economic Partnership Agreement EUR 1 billion, while the future EU-Mercosur FTA would deliver more than EUR 4 billion in tariff savings. Finally, the '*Agreement in Principle*' notes that the EU and Mercosur agreed to a dedicated article on climate change, committing "*to effectively implement the Paris Agreement and to cooperate on the trade-climate change interface*".

While it might take up to three years for the EU-Mercosur Association Agreement to fully enter into force, depending on the speed of ratification in EU Member States, now is the time for businesses to prepare. Businesses across the EU and the Mercosur Countries should

diligently review the concessions and plan to take advantage of the future rules. Legal assistance may be required to understand the specific TRQs and other requirements, such as the applicable Rules of Origin.

An EU legislative initiative on "*Migration limits for lead, cadmium and possibly other metals from ceramic and vitreous food contact materials*" could affect the table- and kitchenware industry

On 29 May 2019, the European Commission (hereinafter, Commission) published its *Inception Impact Assessment* on the potential legislative initiative on "*Migration limits for lead, cadmium and possibly other metals from ceramic and vitreous food contact materials*". The objectives of the initiative are to protect human health and contribute to the smooth functioning of the EU Single Market, in particular: 1) To protect human health by ensuring that exposure to metals migrating from ceramic and vitreous food contact materials is consistent with the latest science-based risk assessments; 2) To enhance legal certainty for manufacturers of ceramic and vitreous food contact materials; and 3) To minimise potential adverse impacts on traditional and artisanal production and culturally valuable products. It appears to be a significant burden for certain business operators, in particular small traditional and artisanal producers, to comply with substantially lower or new migration limits for heavy metals.

Food contact materials (hereinafter, FCMs) are materials, such as plastics, paper, ceramics, glass, metals and alloys, that are widely used in everyday life in the form of food packaging, kitchen and tableware, appliances and food processing equipment. The chemical constituents of FCMs may transfer into food, leading to changes in the safety and quality of food. In this context, *Regulation (EC) No 1935/2004 on materials and articles intended to come into contact with food* provides that these materials are neither to adversely affect consumer health nor to influence the quality of the food. FCMs are also to be manufactured under good manufacturing practices according to *Commission Regulation (EC) No 2023/2006 on good manufacturing practice for materials and articles intended to come into contact with food*. Article 5(1)(e) of *Regulation (EC) No 1935/2004* empowers the Commission to establish limits on the migration of constituents (for example, chemicals) from FCMs into food.

According to the *Inception Impact Assessment*, kitchen and tableware manufactured from ceramic and vitreous materials (including glass and glass enamels) widely circulate in the EU and are often imported. Their manufacture may involve specific metal oxides that are added to obtain desired properties. The industry uses lead, barium and aluminium primarily for technical purposes. Lead oxide facilitates processing and appearance and is particularly used at high percentages in glazing and crystal to lower the melting point. The use of lead oxide is also considered a quality requirement for glass, which is protected by *Council Directive 69/493/EEC on the approximation of the laws of the Member States relating to crystal glass*, requiring that glass can only be named '*lead crystal*' when it contains at least 24% of lead oxide. Many other metal oxides are used as colourants for decoration purposes. These oxides are often used in artisanal and traditional techniques to manufacture products that may have a special regional or local cultural value.

Many metals, particularly heavy metals, are known to be dangerous to human health and there is increasing regulatory activity establishing measures to control the use of heavy metals in general. Many metals are considered substances of very high concern under *Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency*. Lead and its compounds have specifically been restricted in petrol, electrical goods, jewellery, and in consumer articles, while maximum levels in drinking water and food have been specified. As a result, the overall exposure to metals decreased significantly over recent decades, but in 2013 it was found to have reached a steady state at a level that is still toxicologically relevant.

With respect to FCMs, *Council Directive 84/500/EEC of 15 October 1984 on the approximation of the laws of the Member States relating to ceramic articles intended to come into contact with foodstuffs* sets out limits for lead and cadmium transfer (or '*migration*') from ceramics, but not for vitreous materials, for which no harmonised legislation exists. In 2009 and 2010 the *European Food Safety Authority* (hereinafter, EFSA) published scientific opinions on the health effects of lead and cadmium in food, concluding that exposure to lead could cause negative health effects at any dose and significantly lowered its recommendations for what constitutes a tolerable intake level for cadmium. Cadmium exerts toxic effects after long-term exposure on the kidney and bones. The EFSA concluded that exposure to lead and cadmium should be significantly reduced and noted that dietary exposure was the main source of exposure to these heavy metals. Moreover, similar scientific evidence has become available for the toxicity of several other metals, including, for instance, aluminium, arsenic, barium, cobalt, chromium, mercury and nickel. Chromium, in its hexavalent form (*i.e.*, CrVI), is considered to be carcinogenic. The EFSA has held that these metals also migrate from ceramic and vitreous materials in amounts that are potentially hazardous to health. Some EU Member States already impose limits on metals other than lead and cadmium. For example, the Dutch *Regulation of 14 March 2014 on packagings and consumer articles coming into contact with foodstuffs,* establishes specific migration levels (SMLs) for additional metals beyond lead and cadmium, such as arsenic, barium, boron, chromium, cobalt, mercury, lithium, rubidium, selenium and strontium. Austria established limits for zinc, antimony and barium, while Finland imposed limit values for lead, cadmium, chromium and nickel.

Earlier consultations with EU Member States in 2012 identified knowledge gaps on the actual migration of metals from ceramics and vitreous materials into food, as well as on available testing methods required for verification of compliance. In order to address these gaps, the EU's Joint Research Centre (*i.e.*, the Commission's science and knowledge service that provides independent scientific advice and support to EU policy, hereinafter, JRC) conducted research on the topic of '*Towards suitable tests for the migration of metals from ceramic and crystal tableware: Work in support of the revision of the Ceramic Directive 84/500/EEC*', "*testing approximately 6000 samples provided by industry*". In 2017, the JRC noted that robust analytical methods exist and that these are representative for food use. According to the JRC, data on the basis of the official controls done by some EU Member States indicate that, for approximately 20% of the tested ceramic and vitreous samples, heavy metals migrate into food at amounts that would cause adverse health effects in view of the new scientific evidence. The JRC notes that this data also shows that artisanal and traditional products are particularly concerned, as such products show a higher than average migration of heavy metals into food.

Regulation (EC) No 1935/2004 provides a harmonised EU legal framework for FCMs in order to promote the functioning of the internal market and the free movement of goods. A harmonised approach avoids an inflation of national approaches leading to a risk of market fragmentation. In particular, Article 5(e) of *Regulation (EC) No 1935/2004* empowers the Commission to set limits on the migration of FCM constituents into food, taking due account of other possible sources of exposure to those constituents. The Commission is currently considering the following options: 1) To do nothing, meaning that the current measure and the current limits for lead and cadmium would continue to apply to ceramics. No EU limit would apply to vitreous FCM and no EU limit would be set for other heavy metals; or 2) To establish appropriate protective migration limits for lead, cadmium and possibly other heavy metals, in ceramic and vitreous food contact materials. Where no protective migration limits could be set, the possibility of bans on certain metals for certain uses would also be considered. However, different provisions to mitigate the possible negative impacts for manufacturers would accompany this second option.

The initial public consultation on the initiative closed on 26 June 2019 and a number of operators and trade associations gave their feedback on the initiative. For example, the *European Federation of Ceramic Table- and Ornamentalware* (hereinafter, FEPF) highlighted that, regarding limits of any additional '*heavy metals*' that could be included in the revised legislation, the EU initiative failed to recognise the difference between naturally occurring elements in clay and other naturally occurring minerals and materials (such as aluminium) and

intentionally added elements (such as lead or cadmium). According to the FEPF, it should also be noted that some elements are present as natural trace elements. The FEPF pointed out a factual error in the *Inception Impact Assessment*, noting that the JRC did not test 6,000 samples, but that the number 6,000 refers to a measurement value ("*Between 2013 and 2017 the JRC's European Reference Laboratory for FCMs generated over 6000 data points on hundreds of samples provided by industry*"). The FEPF remarks that the aim of the JRC was limited to study the kinetics of reactions (*i.e.*, the rates of chemical reactions) with no intention to evaluate any limits values. The FEPF also states that the same level of compliance between EU and imported goods should be a key priority for the Commission, while it is not clear to what extent the existing rules on FCMs had been enforced at a customs level. In fact, large quantities of kitchenware are imported from third countries, particularly China, and apart from trade irritants (see, *inter alia*, *Commission Implementing Regulation (EU) 2019/1099 of 27 June 2019 amending Council Implementing Regulation (EU) No 412/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tableware and kitchenware originating in the People's Republic of China*), there may also be safety issues with imported table- and kitchenware.

The next step in the Commission's initiative on "*Migration limits for lead, cadmium and possibly other metals from ceramic and vitreous food contact materials*" will be an impact assessment, which will include a 12-week open public consultation. On the basis of that impact assessment, the Commission's policy will be further developed, and new legislation may ensue, likely in the first quarter of 2020. The impact assessment should be closely monitored, and stakeholders should be prepared to participate in shaping the forthcoming EU policy by interacting with the Commission in the upcoming consultation to ensure that their legitimate interests are voiced and represented.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Decision (EU) 2019/1146 of 4 July 2019 terminating the anti-dumping proceeding concerning imports of hot-rolled steel sheet piles originating in the People's Republic of China*

- *Commission Implementing Decision (EU) 2019/1145 of 4 July 2019 terminating the partial interim review of the anti-dumping measures applicable to imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India without amending the measures in force*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2019/1190 of 11 July 2019 amending Implementing Regulation (EU) No 185/2013 as regards deductions from fishing quotas allocated to Spain for 2019*

- *Council Decision (EU) 2019/1178 of 8 July 2019 on the position to be taken on behalf of the European Union within the Cooperation Committee set up by the Agreement on Cooperation and Customs Union betwee the European Community and its Member States, of the one part, and the Republic of San Marino, of the other part with regard to applicable provisions on organic production and labelling of organic products, and arrangements for imports of organic products*

- *Commission Implementing Regulation (EU) 2019/1177 of 10 July 2019 amending Regulation (EU) No 142/2011 as regards imports of gelatine, flavouring innards and rendered fats*

- *Commission Implementing Regulation (EU) 2019/1132 of 2 July 2019 providing temporary exceptional adjustment aid to farmers in the beef and veal sector in Ireland*

Other

- *Commission Implementing Regulation (EU) 2019/1189 of 8 July 2019 amending Council Regulation (EC) No 2368/2002 implementing te Kimberley Process certification scheme for the international trade in rough diamonds*

- *Commission Implementing Decision (EU) 2019/1175 of 9 July 2019 on recognition of the 'Roundtable on Sustainable Palm Oil RED' voluntary scheme for demonstrating compliance with the sustainability criteria under Directives 98/70/EC and 2009/28/EC of the European Parliament and of the Council*

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