

- **The case for greater EU-Indonesia cooperation for green energy and carbon reduction**
- **Singapore-based European businesses express expectations for the future EU-Singapore Digital Partnership: Towards concrete rules for digital trade?**
- **The EU sets new maximum levels for ochratoxin A that could restrict imports of various foodstuffs into the EU**
- **Recently adopted EU legislation**

The case for greater EU-Indonesia cooperation for green energy and carbon reduction

Sustainable development is acknowledged as an issue of global importance, especially for tackling climate change. The commitment of countries to address climate issues is reflected in the *Paris Agreement*, an international treaty aimed at addressing global climate change. The *Paris Agreement* was concluded in the context of the United Nations Framework Convention on Climate Change (UNFCCC), which provides commitments for countries to decrease greenhouse gas (hereinafter, GHG) emissions. When ratifying the *Paris Agreement*, parties are required to submit their Nationally Determined Contributions (hereinafter, NDCs), which refers to the parties' plans for climate action. As stated in Indonesia's NDCs, Indonesia committed to decrease GHG emissions by 29%, or by 41% with international support, by 2030. Indonesia is further committed to reach net-zero carbon emissions by 2060. However, to achieve this target, Indonesia needs to strengthen cooperation with like-minded partners, such as the EU. This is particularly relevant as Indonesia still lacks labour skills, infrastructure, financial resources, and technology to shift towards renewable energy and cease its reliance on coal. Hence, further dialogue and cooperation between the EU and Indonesia could be an important driver for Indonesia's efforts towards net-zero carbon emissions.

Indonesia's green initiatives

As stated in its NDCs, Indonesia is committed to addressing climate change and preventing temperature increase, by keeping the temperature increase below 2°C at the global average or at 1.5°C above pre-industrial levels. Indonesia is also committed to shifting toward a low-carbon economy by reducing emissions from polluting sectors, such as Waste, Agriculture, Forestry, and Land Use (AFOLU), Energy, and Industrial Production and Process Use (IPPU). In 2021, Indonesia released the Long-Term Strategy for Low Carbon and Climate Resilience (LTS-LCCR), which serves as a roadmap to reach the *Paris Agreement* targets in 2060 or sooner.

However, it is extremely costly for Indonesia to achieve its targets under the *Paris Agreement*, an effort estimated to require at least USD 261 billion to fund climate adaptation and mitigation measures. Indonesia's objectives mainly depend on significant sustainable urban infrastructural development (*i.e.*, the development of sustainable buildings, transportation, and

industrial systems), along with the development of the infrastructure and technology for renewable energy. Notably, the energy sector dominates, with 92% of the total financial needs. This reflects Indonesia's difficulty in shifting towards renewable energy and its heavy reliance on coal-fired powered power plants, which currently supply 61% of Indonesia's electricity.

Indonesia's carbon tax

As an effort to achieve its NDC targets and to control GHG emissions, Indonesia has issued *Presidential Regulation No. 98 of 2021 on the Implementation of Carbon Economic Value for Achieving Nationally Determined Contribution Targets and Control of Greenhouse Gas Emissions in National Development*. *Presidential Regulation No. 98 of 2021* introduced carbon pricing instruments, such as carbon trading, which will be implemented through an emission trading system starting with the coal-fired power plant sector for plants operated by both State-owned enterprises and private companies. The carbon tax was approved by Indonesia's Parliament on 30 September 2021 and is to be applied subsequently to other carbon-intensive sectors as well, such as pulp and paper, cement, electricity generation and petrochemical industries (see *Trade Perspectives, Issue No. 21 of 19 November 2021*).

Indonesia's carbon tax for the coal-fired power plant sector was initially planned to be implemented by April 2022. However, the implementation has been postponed in view of the current economic condition overshadowed by various global crises and risks, including Russia's aggression on Ukraine and the inflationary pressures.

Carbon reduction measures in the EU

In recent years, the EU has intensified measures related to sustainability and the environment. One of the green initiatives by the EU to reduce carbon emissions is its Emissions Trading System (hereinafter, ETS), which was launched in 2005. The EU's ETS mechanism is based on a cap-and-trade mechanism, which imposes a restriction on the amount of GHG emissions that specific sectors may emit. Under the EU's ETS, emission allowances are distributed through auctions and can be sold or purchased by businesses. Certain sectors may benefit from the free allocation of allowances. This approach, however, does not apply to products produced in other countries and imported into the EU. The sectors that are included in the EU's ETS are electricity and heat generation, energy-intensive industry sectors (e.g., oil refineries, steelworks, and production of iron, aluminium, metals, cement, etc.). Since the EU's ETS was introduced in 2005, emissions were reduced by 42.8% in the main sectors, such as power and heat generation, as well as energy-intensive industrial installations.

To further reduce carbon emissions and to promote sustainable trade, the EU intends to implement a Carbon Border Adjustment Mechanism (hereinafter, CBAM), which is supposed to contribute to the EU's carbon emission reduction target of 55% by 2030. Through the CBAM, the EU intends to impose a carbon tax on imported goods from 2026. The establishment of the CBAM was prompted mainly by concerns that EU-based companies could face competition from items produced outside of the EU that are less "green", but more competitive, due to the application of the EU's ETS only on 'like products' manufactured in the EU. The CBAM also aims at reducing the risk of "carbon leakage" by encouraging non-EU businesses to "green" their production processes. Carbon leakage refers to the practice of transferring production to countries with less stringent emissions regulations, mainly in the attempt to avoid the expenses related to environmental policies.

The proposed CBAM would require EU importers to purchase carbon certificates corresponding to the carbon price that the imported items would have paid under the EU's ETS carbon price rules. However, based on the principle of equivalence, Article 9 of the proposed CBAM Regulation foresees that, if a trader can prove that the foreign manufacturer has paid a price for the carbon used in the manufacture of the imported goods in a third country, the costs spent can be deducted. The CBAM is expected to apply to certain carbon-intensive sectors, namely iron and steel, aluminium, fertilisers, electricity, and cement. The European Parliament

has proposed to broaden the scope of CBAM to also include organic chemicals, plastics, hydrogen and ammonia (see *Trade Perspectives, Issue No. 15 of 1 August 2022*).

In light of this, Indonesia has voiced its opposition to the implementation of the CBAM to the European Commission on 14 January 2022. Indonesia's Ministry of Trade noted that the implementation of the CBAM could disrupt global trade. For Indonesia, the CBAM could have a negative impact on the iron and steel industries, which account for 11% of Indonesia's trade share with the EU. Indonesia's carbon policies, once applicable, may be a first step towards allowing businesses to deduct costs incurred in Indonesia from the future CBAM. It is certainly on this 'equivalence' that the two trading partners should start engaging in a serious dialogue and in legal, technical, and regulatory cooperation, so that the outcome may lead to mutual efforts towards reaching their respective NDCs rather than to new trade frictions.

Areas of cooperation between Indonesia and the EU

Compared to the EU, Indonesia is still rather new to pursuing emission reduction measures, as the EU has already adopted an advanced framework to reduce emissions through the ETS and is planning to further decrease emissions and address carbon leakage through the forthcoming CBAM. The success of the implementation of the EU's ETS indicates that this could be a good example for Indonesia.

Other areas of cooperation to accelerate Indonesia's carbon reduction could be the cooperation in skilled labour, green technology, financial infrastructure for renewable energy, and towards increasing public awareness and participation in green economic efforts. The transfer of knowledge and sharing of best practices from the EU to foster green skills is pertinent to ensure greater availability of green skilled labour in Indonesia. In light of this, Indonesia could cooperate with the EU in research programmes to enhance the utilisation of green technology, particularly for renewable energy, in order to support its progressive shift towards renewables.

Accordingly, as Indonesia has started taking measures in the context of carbon reduction through a carbon tax, and initiated discussions to enact a *New Energy and Renewable Energy Bill* (see *Trade Perspectives, Issue No. 13 of 4 July 2022*), the EU and Indonesia could further enhance their dialogue and promote sustainability in forms that may be included in the EU-Indonesia Comprehensive Economic Partnership Agreement (CEPA), so as to cement with bilateral trade preferences the outcomes of their sustainability policies and regulatory convergence.

Areas of cooperation between ASEAN, and the EU

Joint efforts are also needed to further reduce GHG emissions within the greater ASEAN region, especially to reduce its reliance on coal. Carbon pricing is notably one of the issues that has been recently discussed within the G20 (*i.e.*, the Group of Twenty, an intergovernmental *forum* comprising 19 countries and the EU representing the world's major economies). Most G20 members have implemented either a carbon tax or an emission trading system in which their total national carbon pricing instruments cover around 38% of the aggregate emissions. Moreover, a total of USD 16 billion has been raised through the national carbon taxes in 2021, along with USD 52 billion from auction revenues of the national ETS of the G20 countries. Carbon pricing has been observed to play a crucial role in accelerating low carbon economic transformation and sustainable economic growth. However, only a few ASEAN Member States have initiated rules on carbon pricing and on carbon taxation, notably Indonesia, Malaysia, and Singapore. Therefore, cooperation and, in particular, the transfer of knowledge regarding the potential establishment of a regional mechanism for carbon pricing, taxes, and trade appears pertinent to expedite the low carbon economic transformation and a sustainable economic recovery in the region.

In light of this, ASEAN Member States should work hand-in-hand and start developing a roadmap to reduce GHG emissions. This could be done by looking at the EU's green initiatives,

for instance to guide in the definition and implementation of a carbon tax system within ASEAN. To achieve this, further dialogue is needed within ASEAN to address the serious issue of climate change and for ASEAN Member States to jointly reach their NDC commitments.

Indonesia will step up as the Chair of ASEAN in 2023, following its presidency in the G20 in 2022. This could be an important opportunity for Indonesia to start a dialogue between ASEAN and the EU in order to share the latter's best practices in handling current issues that impede ASEAN Member States to achieve their climate goals, such as ASEAN Member States' reliance on coal.

Singapore-based European businesses express expectations for the future *EU-Singapore Digital Partnership*: Towards concrete rules for digital trade?

In recent times, electronic commerce (e-commerce) and digital trade have grown substantially, but the relevant legal frameworks are still lagging behind. Efforts, domestically and internationally, are underway for the rules to catch up. On 7 December 2021, the EU and Singapore announced, in a [Joint Statement](#), their intention to negotiate a comprehensive *EU-Singapore Digital Partnership*, upon which EU and Singapore officials were tasked to start technical discussions and identify the relevant digital trade elements to be addressed.

In July 2022, the European Chamber of Commerce (hereinafter, *EuroCham*) Singapore, the business association representing European businesses invested in Singapore, circulated the results of a [survey](#) that it had conducted among its members regarding their expectations for the future *EU-Singapore Digital Partnership*. The survey underlines three top priority areas put forward by the European businesses in Singapore, namely: 1) Business and trade facilitation; 2) Data concerns; and 3) Business and consumer trust. The growing importance of digital trade creates significant commercial opportunities. However, to take advantage of such opportunities, the results of the survey underscore the need to advance from regulatory cooperation to concrete and legally binding rules governing such trade.

The growing importance of regulating elements of digital trade

Essentially, common approaches to digital trade governance could allow for compatible rules that, in turn, could facilitate and expand global trade. In this context, *EuroCham* Singapore notes that the “*international trade system should be up to date*”, so that businesses “*can exploit new opportunities and address challenges of the present world*”. *EuroCham* Singapore underlines that the survey showed that “*regulatory fragmentation is a significant barrier to international trade*” and that there was “*a need to reform the rules that govern trade*”, which “*should be done in an inclusive manner*”.

At the international level, efforts to develop common rules on digital trade are ongoing in the context of the plurilateral negotiations for a World Trade Organization (WTO) Agreement on Trade-Related Aspects of Electronic Commerce (see [Trade Perspectives, Issue No. 17 of 24 September 2021](#)). In parallel, countries around the world are also resorting to develop rules to facilitate digital trade through dedicated provisions and chapters in their Preferential Trade Agreements (hereinafter, PTAs), such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), that Singapore is party to (see [Trade Perspectives, Issue No. 2 of 31 January 2022](#)).

More recently, Singapore has placed particular emphasis on negotiating so-called ‘*Digital Economy Agreements*’ (hereinafter, DEAs) and ‘*Digital Economy Partnership Agreements*’ (hereinafter, DEPAAs), through which Singapore seeks “*to develop international frameworks to foster interoperability of standards and systems and support businesses, especially SMEs, engaging in digital trade and electronic commerce*” These agreements are either stand-alone digital agreements or upgrades of existing PTAs. So far, Singapore has concluded two DEAs with Australia and with the UK, respectively, and two DEPAAs, trilaterally with Chile and New

Zealand, and with the Republic of Korea, respectively. Singapore's DEAs and DEPAs are very detailed and broad in scope, covering commitments relating to various aspects of digital trade and related trade facilitation, such as on '*Paperless trading*' (i.e., accepting electronic versions of administrative documents, for instance phytosanitary certificates), as well as on emerging technologies, such as cooperation on '*Artificial intelligence*'. The agreements also contain clear commitments relating to personal data protection, cross-border data transfers, and the protection of software codes (see *Trade Perspectives*, Issue No. 2 of 31 January 2022).

As an ASEAN Member State, Singapore has also committed to certain rules on digital trade in the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), which contains a dedicated chapter on '*Electronic Commerce*' with provisions on, *inter alia*, transparency, domestic regulatory frameworks, electronic authentication, and paperless trading. The most comprehensive rules within ASEAN were agreed under the Regional Comprehensive Economic Partnership (RCEP), an agreement between the ASEAN Member States and most of the '*ASEAN+1 trading partners*', referring to the countries with which ASEAN was already linked via PTAs, namely Australia, China, Japan, New Zealand, and South Korea.

The EU's Digital Partnerships

Due to the growing importance of digital trade, the EU's trade policy communication *An Open, Sustainable and Assertive Trade Policy*, published in 2021, underlines that "*supporting Europe's digital agenda is a priority for EU trade policy*". According to *The EU Strategy for Cooperation in the Indo-Pacific*, the EU set out to negotiate Digital Partnerships with Japan, the Republic of Korea, and Singapore. On 7 December 2021, the EU and Singapore announced, in a Joint Statement, their shared intention to negotiate a comprehensive *EU-Singapore Digital Partnership* (see *Trade Perspectives*, Issue No. 2 of 31 January 2022). On 12 May 2022, the EU and Japan announced the conclusion of the *EU-Japan Digital Partnership*, which is the first such partnership concluded by the EU (see *Trade Perspectives*, Issue No. 11 of 6 June 2022). The *EU-Japan Digital Partnership* contains cooperation commitments related to the regulation of online platforms, privacy rules, digital trade, '*Data free flow with trust*', and international standardisation. Other commitments within the partnership cover emerging technologies, such as '*5G and Beyond 5G technologies*'. The EU and Japan underline that the partnership itself would "*not create legal obligations on either side but will be based on voluntary cooperation*". The *EU-Japan Digital Partnership* is heavy on aspirations for enhanced cooperation, while Singapore's DEAs and DEPAs contain concrete and legally binding digital provisions in addition to provisions on cooperation.

The EuroCham survey: Businesses' priorities for the EU-Singapore Digital Partnership

To understand how to govern and harness the surge in digital data, *EuroCham* Singapore launched the "*Digital Economy Programme 2022*" to highlight the multidimensional aspects of data, including the implication of digital transformations on trade, economic development, human rights, peace, and security. A survey was conducted with the aim to "*raise awareness in the digitalisation of businesses to advocate for a DEA between the EU and the Singapore government, while keeping in mind consumer trends*" and to serve as the basis for engagement of *EuroCham* members with the European Commission and Singaporean authorities in supporting the negotiations of the *EU-Singapore Digital Partnership*. The respondents of the survey were asked to rank nine elements of digital trade in order of importance, selecting the following three priority areas: 1) Business and trade facilitation; 2) Data concerns; and 3) Business and consumer trust. Dispute settlement was ranked as the least important element, followed by data inclusion, transparency, standards for emerging trends and technologies, consumer data protection, and treatment of digital products, respectively.

Singapore's DEPA as a benchmark?

Singapore's DEPA with Chile and New Zealand could be considered an important benchmark. It is the first stand-alone agreement exclusively dedicated to address various digital economy issues. It largely builds upon the Parties' existing commitments under the CPTPP. The DEPA

follows a modular structure, consisting of 11 modules dedicated to substantive matters and five modules addressing the operationalisation of the agreement and the resolution of disputes. Modules 2, 4, and 6 of the DEPA are of relevance with respect to the three priority areas put forth under the survey for the *EU-Singapore Digital Partnership*.

Module 2 on *'Business and Trade Facilitation'* promotes the adoption of technology to facilitate trade, providing commitments on, *inter alia*, trade documentation to be paperless and prohibiting the imposition of customs duties on electronic transmissions. Module 4 concerns *'Data Issues'* and includes commitments on the free movement of data across borders and a prohibition on rules requiring local hosting of computing facilities (subject to exceptions), along with a strong framework for the protection of personal information. Module 6 on *'Business and Consumer Trust'* aims at protecting businesses and consumers by providing commitments to stop unsolicited messages (*'spam'*) and on online consumer protection.

The EU's approach to the EU-Singapore Digital Partnership

According to *EuroCham* Singapore, a digital agreement between the EU and Singapore would *"facilitate better access to the digital economy by aligning digital trade rules and make it easier for businesses to reach new customers"*. On the basis of this stakeholder expectation, the question is whether the EU would follow the approach taken in the *EU-Japan Digital Partnership*, which mainly focuses on enhanced cooperation, or if it would commit to more concrete and legally binding rules. According to the Joint Statement on the *EU-Singapore Digital Partnership*, the European Commissioner for Internal Market, Mr. *Thierry Breton*, and Singapore's Minister-in-charge of Trade Relations, Mr. *S Iswaran*, had *"stressed that the Digital Partnership should be a flexible structure that goes beyond dialogue and exchange of information to deliver concrete results"*.

In this context, on 16 June 2022, a presentation made during a *Virtual Stakeholder Outreach Event*, organised by the EU and Singapore, notes that the EU and Singapore *"aim to establish a flexible architecture that can accommodate a comprehensive range of issues"*, entailing *"an overarching framework which is a non-binding instrument"*. Under that overarching framework, the EU and Singapore would *"cooperate on different issues using different modalities, e.g., dialogues, MOUs, or even updates to the EU-Singapore Free Trade Agreement"*. With respect to the scope of the *EU-Singapore Digital Partnership*, the presentation at the Virtual Stakeholder Outreach Event listed a broad array of digital issues that could be addressed, such as *'trusted data flows and data innovation'*, *'digital regulations'*, and emerging areas, such as 5G/6G technologies.

Shaping the future EU-Singapore Digital Partnership

The participation of European businesses in the survey and the results of the survey underscore the positive and growing *momentum* towards the *EU-Singapore Digital Partnership*. The EU and Singapore should consider negotiating concrete rules on digital trade beyond the cooperation-centric commitments undertaken in the *EU-Japan Digital Partnership* in order for European businesses invested in Singapore to achieve greater legal certainty in their digital cross-border trading activities. Interested stakeholders should closely follow the developments and actively participate in the negotiation of the Digital Partnership, thereby contributing to shape the future regulatory environment.

The EU sets new maximum levels for ochratoxin A that could restrict imports of various foodstuffs into the EU

On 8 August 2022, the EU published *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 introduced new maximum levels for of ochratoxin A in additional foodstuffs and revised existing levels. The article provides an overview of the current EU rules on maximum levels of ochratoxin A (hereinafter, OTA) in foodstuffs, the rationale for extending

rules on maximum levels to further foodstuffs, the affected foodstuffs, the international trade dimension, and the stakeholders' views on the new maximum levels of OTA in certain foodstuffs.

Occurrence of Ochratoxin A (OTA)

Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs sets maximum levels for certain contaminants, including mycotoxins, which are toxic compounds that are naturally produced by different types of fungi, like aflatoxins and OTA, in foodstuffs.

OTA is a mycotoxin naturally produced by fungi of the genus *Aspergillus* and *Penicillium* and is found as a contaminant in a wide variety of foods, such as cereals and cereal products, coffee beans, dried fruits, wine and grape juice, spices, and liquorice. In 2020, the *European Food Safety Authority* (hereinafter, the EFSA) adopted an [update of the scientific opinion](#) on OTA in food. The EFSA states that “*New data that have become available since the last assessment in 2006 suggest that OTA can be genotoxic by directly damaging the DNA. Experts also confirmed that it can be carcinogenic to the kidney*”. The EFSA considered that, “*since recent studies have raised uncertainty regarding the mode of action for kidney carcinogenicity, it is inappropriate to establish a health-based guidance value (HBGV) and a margin of exposure (MOE) approach was applied*”.

The EFSA noted that the Tolerable Weekly Intake (TDI) of 120 ng/kg body weight (bw), as established by the EFSA in 2006, is consequently no longer valid and further concluded that the calculated margins of exposure for carcinogenic effects of OTA indicate a possible health concern for certain consumer groups. The EFSA, however, admitted that “*uncertainty in this assessment is high and risk may be overestimated*”. The EFSA analysed that the “*most important contributors to the chronic dietary exposure to OTA were ‘Preserved meat’, ‘Cheese’ and ‘Grains and grain-based products’. Dried and fresh fruits such as grapes, figs and dates as well as fruit juices and nectars were also contributing to the exposure of in some of the ‘Toddlers’ and ‘Other children’ groups, albeit, to a lesser extent than the three major categories*”.

Existing maximum levels for OTA and products affected by the new rules

According to Recital 4 of *Commission Regulation (EC) No 1881/2006*, which is based on *Council Regulation (EEC) No 315/93 laying down Community procedures for contaminants in food*, “*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 contaminants which are considered to be genotoxic carcinogens or in cases where current exposure of the population or of vulnerable groups in the population is close to or exceeds the tolerable intake, maximum levels should be set at a level which is as low as reasonably achievable (ALARA)*”. The degree of severity of the application of this principle depends on the relation between exposure and the tolerable intake.

Maximum levels for OTA were already in place for certain foods and categories of foods listed in section 2.2.1 of the Annex to *Regulation (EC) No 1881/2006*: 1) Unprocessed cereals; 2) All products derived from unprocessed cereals; 3) Dried vine fruit (currants, raisins and sultanas); 4) Roasted coffee beans and ground roasted coffee; 5) Soluble coffee; 6) Wine and fruit wine; 7) Aromatised wine; 8) Grape juice; 9) Processed cereal-based foods and baby foods for infants and young children; 10) Dietary foods for special medical purposes intended specifically for infants; 11) Spices, including dried spices; 12) Liquorice; 13) Wheat gluten not sold directly to the consumer.

Regulation (EU) 2022/1370 states that, since OTA has been found in foods for which no maximum level has been established yet and which contribute to the human exposure to OTA, it is appropriate to set a maximum level also for these foods such as dried fruit other than dried

vine fruit, certain liquorice products, dried herbs, certain ingredients for herbal infusions, certain oilseeds (*i.e.*, sunflower seeds, pumpkin seeds, water melon seeds hempseeds, soybeans), pistachio nuts, and cocoa powder. *Regulation (EU) 2022/1370* further notes that “*even if the relationship between the level of ochratoxin A in malt and in non-alcoholic malt beverages, and in dried dates and date syrup needs to be further clarified, it is also appropriate to set already a maximum level in non-alcoholic malt beverages and date syrup. Also taking into account the available occurrence data, it is appropriate to lower the existing maximum levels of ochratoxin A in certain foods, such as bakery products, dried vine fruit, roasted coffee and soluble coffee. In addition, the existing provisions for ochratoxin A in certain spices has been broadened to all spices*”. For cheese and ham, *Regulation (EU) 2022/1370* states that “*additional monitoring on the presence of ochratoxin A is appropriate before establishing maximum levels*”. Notably, the maximum level of OTA in roasted coffee has been lowered from 5 to 3 µg/kg and in soluble coffee from 10 to 5 µg/kg.

According to Article 3 of *Regulation (EU) 2022/1370*, the new rules entered into force on 28 August 2022 and will take effect on 1 January 2023, so as to enable economic operators to prepare for the new rules. Article 2 of *Regulation (EU) 2022/1370* provides for a transitional period for foodstuffs lawfully placed on the market before 1 January 2023. These foodstuffs may remain on the market until their date of minimum durability or use-by-date.

Scientific uncertainties

It must be noted that the EFSA itself admitted that “*uncertainty in this assessment is high and risk may be overestimated*”. In setting the maximum limits, the EU appears to take a strong precautionary approach, despite the clear scientific uncertainties and possible overestimation of the risk. According to Article 7(1) of *Regulation (EC) No 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety* on the ‘Precautionary Principle’, “*in specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment*”. According to Article 7(2) of *Regulation (EC) No 178/2002*, measures adopted on the basis of the Precautionary Principle “*must be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen*” in the EU and “*the measures must be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment*”.

Still, it appears that exposure to some products, like pistachios, where the consumption is relatively low, has been overestimated in the setting of the new maximum levels for OTA and the new or revised maximum levels appear overly strict. For instance, *Regulation (EU) 2022/1370* sets a maximum level of 10,0 µg/kg OTA in pistachios to be subjected to sorting, or other physical treatment, before their placing on the market for final consumption or for use as ingredient in food, and a maximum level of 5,0 µg/kg in pistachios placed on the market for final consumption or for use as ingredient in foodstuffs. These maximum levels for OTA are stricter than the maximum levels for aflatoxin B1 in pistachios (12 and 8 µg/kg, respectively). While such approach may be appropriate under the Precautionary Principle, it also suggests that further research is necessary and that the new levels should be subject to regular review.

FRUCOM, the European federation of the trade in dried fruits and edible nuts, already commented in a 2018 [position paper](#) on the possible setting of levels for OTA for nuts, dried fruit, and seeds that the exposure to OTA due to consumption of dried fruit, nuts, and oilseeds is minimal for the vast majority of consumers. FRUCOM stated that “*further extension of limits*

on the level of OTA in dried fruit, nuts and oilseeds is going to lead to a decreasing effectiveness in protecting consumer health, whilst significantly increasing costs to the sector”.

Surge of rejections due to OTA notified by EU Member State authorities

Already before the new maximum levels for OTA are to apply on 1 January 2023, there appears to be a surge of rejections notified by EU Member State authorities under the EU's *Rapid Alert System for Food and Feed* (RASFF) because of products exceeding the existing maximum levels. In the period from 1 July 2022 to 30 August 2022, 16 consignments of products, including sultana raisins from Turkey, dark raisins from Uzbekistan, raisins from India, cereal-based foods for infants from Austria, dried figs from Turkey, date syrup produced with organic dates from Tunisia, rye flour from Belgium, wheat flour from Belgium with raw material from France, broken nutmeg from Indonesia, flaked torrefied oats from UK and nutmeg from the UK, were rejected by the respective authorities of the Netherlands (five rejections), Belgium (three), Poland (three), Italy (two), Czech Republic (one), Ireland (one) and Finland (one). These developments indicate that EU Member State authorities increasingly test foodstuffs for OTA contamination. Given the very low maximum levels of OTA established for some foodstuffs, there is a risk of many more rejections from 1 Jan 2023 onwards.

The international trade dimension of the maximum levels for OTA

On 9 March 2022, the European Commission notified the draft Regulation and its Annex on the OTA maximum levels to the World Trade Organization's (WTO) Committee on Sanitary and Phytosanitary Measures (SPS Committee). It appears that no specific trade concern to the SPS Committee has been published in this context by other WTO Members yet.

The *Codex Alimentarius General Standard for Contaminants and Toxins in Food and Feed* (CXS 193-1995), adopted in 1995 and last amended in 2019, establishes maximum levels of OTA only in wheat, barley and rye. According to the report of the May 2022 session of the relevant *Codex Committee on Contaminants in Food*, work on extending the maximum levels of OTA to further foodstuffs is ongoing, particularly on spices (*i.e.*, nutmeg, dried chili and paprika, ginger, pepper, and turmeric). However, the scope of the EU's *Regulation (EU) 2022/1370* is much broader, including commodities not addressed in *Codex*, such as cocoa powder, dried fruits, pistachios, and certain oilseeds.

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) provides that, 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, non-discriminatory and/or based on international standards.

Importantly, Article 66(1) and (3) of *Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls on 'Measures to be taken in cases of non-compliant consignments entering the Union'* provides that the competent authority may order operators to destroy the consignment; re-dispatch the consignment outside the EU; or subject the consignment to special treatment in accordance with Article 71(1) and (2) (*i.e.*, treatment or processing, including decontamination, where appropriate, but excluding dilution).

In the case of pistachios, the special treatment by manual sorting effectively removes contamination. Similar to aflatoxins contamination, OTA may be indicated by visible moulds caused by certain fungi. Importantly, Article 67 of the Official Controls Regulation on '*Measures to be taken on animals or goods entering the Union from third countries presenting a risk*' does not foresee the option of re-dispatch for a consignment of animals or goods that presents a risk to human, animal or plant health, animal welfare. Thus, in such cases, it is even more relevant for reasons of trade facilitation that an establishment for special treatment be available

also for OTA reprocessing, in order to avoid the destruction of the produce or the costly and environmentally unfriendly re-dispatch of the rejected goods.

The next steps

As from 1 January 2023, the new or revised maximum levels for OTA will apply. Foodstuffs placed on the market before 1 February 2023 may remain on the market until their date of minimum durability or use-by-date. Given the scientific uncertainties, the new levels should be subject to particular scrutiny and regular review. At the same time, trade facilitative flanking measures should be provided and approved in order to safeguard both consumers' health and the viability of important industries in the EU and abroad.

Recently adopted EU legislation

Trade Law

- *Voluntary Partnership Agreement between the European Union and the Republic of Honduras on forest law enforcement, governance and trade in timber products to the European Union*
- *Council Implementing Regulation (EU) 2022/1446 of 1 September 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine*

Customs Law

- *Commission Implementing Regulation (EU) 2022/1454 of 1 September 2022 amending Annexes V and XIV to Implementing Regulation (EU) 2021/404 as regards the entries for Canada, the United Kingdom and the United States in the lists of third countries authorised for the entry into the Union of consignments of poultry, germinal products of poultry and fresh meat of poultry and game birds (1)*

Food Law

- *Commission Delegated Regulation (EU) 2022/1450 of 27 June 2022 supplementing Regulation (EU) 2018/848 of the European Parliament and of the Council as regards the use of non organic protein feed for the production of organic livestock due to Russia's invasion of Ukraine (1)*
- *Commission Implementing Regulation (EU) 2022/1451 of 1 September 2022 concerning the authorisation of camphor white essential oil from *Cinnamomum camphora* (L.) J. Presl. and cinnamon tincture from *Cinnamomum verum* J. Presl. as feed additives for all animal species (1)*
- *Commission Implementing Regulation (EU) 2022/1452 of 1 September 2022 concerning the authorisation of 3-ethylcyclopentan-1,2-dione, 4-hydroxy-2,5-dimethylfuran-3(2H)-one, 4,5-dihydro-2-methylfuran-3(2H)-one, eugenol, 1-methoxy-4-(prop-1(trans)-enyl)benzene, α -pentylcinnamaldehyde, α -hexylcinnamaldehyde and 2-acetylpyridine as feed additives for certain animal species (1)*

Ignacio Carreño, Joanna Christy, Tobias Dolle, Alya Mahira, Lourdes Medina Perez, Stella Nalwoga, Paolo R. Vergano and Lisa Wijayani contributed to this issue.

Follow us on twitter @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/>