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### **A WTO Panel explores the issue of the ‘essential security interests’ exception of Article XXI of the GATT**

On 5 April 2019, the World Trade Organization (hereinafter, WTO) published the Panel report in the case *Russia – Measures Concerning traffic in transit* (WT/DS512). In September 2016, Ukraine had requested consultations with Russia regarding restrictions on traffic in transit via Russia to Kazakhstan and the Kyrgyz Republic. Ukraine had alleged that the restrictions caused a *de facto* extension of the bans to Ukrainian traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan. Most notably, the WTO Panel addresses the interpretation of Article XXI of the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994 on ‘Security Exceptions’ and the question of whether a WTO Panel and/or the WTO Appellate Body (hereinafter, AB) had the jurisdiction to review measures by WTO Members under Article XXI of the GATT. The Panel report could have important implications for the ongoing WTO cases related to tariffs on steel and aluminium imposed by the US under Section 232 of the US Trade Expansion Act 1962 (hereinafter, Section 232), which provides the US President with the authority to impose trade restrictions for reasons of national security.

Under WTO rules, measures taken for ‘essential security interests’ are expressly foreseen as an exception to the general rules under Article XXI of the GATT, which provides that “*Nothing in this Agreement shall be construed: [...] b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*”. However, there is uncertainty surrounding the justification of trade measures on the basis of Article XXI of the GATT. The ‘essential security interests’ exception can be considered an important clause for the balance of the WTO system and a very restrictive interpretation would endanger its viability, as well as possibly further alienate a number of WTO Members. At the same time, a broad interpretation of Article XXI of the GATT would likely risk reducing the relevance of the WTO rules and would further open the door for the use (or abuse) by WTO Members of such measures. Therefore, further guidance on the interpretation of the ‘essential security interests’ exception appears needed and the Panel in the case of *Russia – Measures concerning traffic in transit* provides some important elements of interpretation.

On 9 February 2017, Ukraine had requested the establishment of a WTO dispute settlement Panel, which was established on 21 March 2017. In its complaint, Ukraine referred to four measures introduced by Russia: 1) The ‘2016 general transit ban and other transit restrictions’; 2) The ‘2016 product-specific transit ban and other transit restrictions’; 3) The ‘De facto application of the 2016 general and product-specific transit bans in Decree No. 1, as amended, to traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan’; and 4) The ‘2014 transit bans and other transit restrictions’. Ukraine claimed that the restrictions and bans were inconsistent with Article V of the GATT on ‘Freedom of Transit’ and related commitments

in Russia's Protocol of Accession to the WTO. In its written submission, Russia did not specifically address the factual evidence or legal arguments alleged by Ukraine. Instead, Russia argued that certain measures and claims made by Ukraine were "*outside of the Panel's terms of reference*", basing this argument on two arguments: 1) "*Ukraine's panel request does not comply with the requirements of Article 6.2 [Establishment of panels] of the DSU*"; and 2) "*Ukraine has failed to establish the existence of one of the challenged measures*". Most notably, Russia argued that the measures referred to by Ukraine were measures that Russia considered "*necessary for the protection of its essential security*", which were taken in response to "*emergency in international relations*" in 2014, referring to the deteriorated relations between Ukraine and Russia, which, according to the respondent, constituted a threat to Russia. More specifically, Russia invoked Article XXI(b)(iii), which refers to measures "*taken in time of war or other emergency in international relations*", and argued that, consequently, the WTO Panel did not have jurisdiction to address the matter.

A number of WTO Members, namely Australia, Brazil, Canada, China, the EU, Japan, Moldova, Singapore, Turkey and the US, also submitted their arguments regarding the jurisdiction of the Panel. All WTO Members, except the US, argued that the Panel had jurisdiction to review the invocation of Article XXI(b)(iii) of the GATT by Russia, but pointed out that the Panel needed to be cautious in its assessment to preserve the balance between preventing abuses of Article XXI of the GATT and a WTO Member's right to protect its essential security interests. The EU went further in its arguments and stated that, in the absence of an equivalent to the *chapeau* (i.e., the introductory clause) in Article XX of the GATT on '*General exceptions*', the Panel should analyse under Article XXI of the GATT whether there was a sufficient link between the measure and the protected interest. The EU recognised that the wording "*which it considers*" in Article XXI(b) of the GATT implied that, in principle, it was for each WTO Member to determine whether a measure was "*necessary*" for the protection of its "*essential security interests*". However, the EU argued that a "*panel should nevertheless review this determination, albeit with due deference, to assess whether the invoking Member can plausibly consider the measure necessary and whether the measure is 'applied' in good faith*". In contrast, the US argued that the Panel lacked "*the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute*". The US considered the very language of Article XXI(b) of the GATT, referring to measures that a WTO Member "*considers necessary for the protection of its essential security interests*", to be "*self-judging*" and "*non-justiciable*", meaning that they should not be subject to findings by the Panel.

The Panel, therefore, proceeded to assess whether it had jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT. The Panel first noted that Article XXI(b) of the GATT did include an introductory part, also known as *chapeau*, namely noting that nothing in the GATT shall be construed "*to prevent any contracting party from taking any action which considers necessary for the protection of its essential security interests*". The Panel considered that, while the *chapeau* allowed a WTO Member to take action regarding the protection of its essential security interests, the three subparagraphs under Article XXI(b) of the GATT operate as "*limitative qualifying clauses*". In other words, the discretion of WTO Members under the *chapeau* is limited to the circumstances that objectively fall under subparagraphs (i) to (iii) of Article XXI(b) of the GATT. The Panel clarified that the adjectival clause in the *chapeau* of paragraph (b) (i.e., "*which it considers*") did "*not extend to the determination of the circumstances in each subparagraph*". In order for a measure to fall within the scope of Article XXI(b) of the GATT, it must objectively meet the requirements in one of the subparagraphs of Article XXI(b). The Panel also reviewed the negotiating history, which allegedly confirmed its interpretation of Article XXI(b) of the GATT "*requiring that the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself*". Therefore, the Panel concluded that Article XXI(b)(iii) of the GATT was not totally "*self-judging*" and that it had jurisdiction to determine whether "*the requirements of Article XXI(b)(iii) of the GATT are satisfied*", thereby rejecting Russia's argument, supported by the US, on the jurisdiction of the Panel.

The Panel then continued its assessment of whether the measures taken by Russia met the requirements of Article XXI(b)(iii) of the GATT and whether the conditions of the *chapeau* of Article XXI(b) were satisfied, interpreting the meaning of “*emergency in international relations*” and “*taken in time of*”. The Panel stated that the reference to “*emergency in international relations*” in Article XXI(b)(iii) of the GATT could only be understood in the context of the other matters addressed in Article XXI(b)(i) and (ii) of the GATT, regarding measures relating to fissionable materials or the materials from which they are derived, and relating to the traffic in arms, ammunition and implements of war, and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment, respectively. The Panel concluded that “*emergency in international relations*” referred to a situation of similar or convergent concerns. The Panel further explained that the conjunction “*or*” in Article XXI(b)(iii) of the GATT, with the adjective “*other*”, indicates that the word “*war*” was only an example of the larger category of “*emergency in international relations*”. The Panel concluded that “*the reference to ‘war’ in conjunction with ‘or other emergency in international relations’ in subparagraph (iii)*” suggested that “*political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations for purposes of subparagraph (iii)*”. Therefore, the Panel went on to state that an “*emergency in international relations*” appears to generally refer “*to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state*”. On the basis of this interpretation, the Panel recognised that the situation between Ukraine and Russia since 2014 constituted an “*emergency in international relations*” within the meaning of subparagraph (iii) of Article XXI(b) of the GATT. Consequently, the Panel analysed the measures taken by Russia and concluded that all measures were introduced during an “*emergency in international relations*”. The Panel added that, if the measures had been taken under normal circumstances, Ukraine would have “*made a prima facie case*” that the measures at issue were inconsistent with Article V(2) of the GATT.

With respect to the discretion of a WTO Member to justify measures under Article XXI(b), the Panel found that this discretion, granted under the *chapeau* of Article XXI(b), could generally be understood as referring to interests essentially relating to the protection of a WTO Member’s territory and population from external threats, and the maintenance of law and public order. The Panel observed that the specific interests would vary depending on the particular situation and perception of the WTO Member in question. The Panel held that it was up to each WTO Member to define what it considered “*to be its essential security interests*”. Additionally, the Panel found that it was for a WTO Member to decide on the “*necessity*” of its actions for the protection of its “*essential security interests*”. However, the Panel clarified that a WTO Member was not “*free to elevate any concern to that of an ‘essential security interests’*”. Rather, a WTO Member’s discretion is limited by the Member’s obligation to interpret and apply Article XXI(b)(iii) of the GATT in “*good faith*”, which would be subject to review by the Panel based on: 1) “*Whether there was any evidence to suggest that the Member’s designation of its essential security interests was not made in good faith*”; and 2) “*Whether the challenged measures were ‘not implausible’ as measures to protect those essential security interests*”. The Panel concluded that Russia met the conditions in the *chapeau* of Article XXI(b)(iii) of the GATT and, thereby, the requirements for invoking Article XXI(b)(iii) of the GATT.

This particular Panel report could have important implications for other ongoing WTO cases. Most notably, the ‘*essential security interests*’ exception can be expected to be invoked by the US in the nine cases of [US – Certain Measures on Steel and Aluminium Products](#), as well as earlier cases against the United Arab Emirates, the Kingdom of Bahrain, and the Kingdom of Saudi Arabia in three disputes initiated by Qatar ([DS526](#), [DS527](#) and [DS528](#)). While it is obviously not certain whether the respective Panels will refer to and follow the above interpretations, the case clearly provides an important point of reference for the interpretation of Article XXI of the GATT. It can be expected that the US will continue to argue that Article XXI of the GATT is “*non-justiciable*” and that the Panel would again be confronted with this question. Determining that the measures taken by the US classify as instances of “*emergency in international relations*”, as defined by the Panel, appears rather far-fetched.



The parties to the dispute now have 60 days to appeal the Panel report. If none of the parties appeals the report, it will be adopted by the DSB and become legally binding for the parties. All interested stakeholders should closely monitor any development on this matter and engage with their respective Governments, as the proceedings could likely move to the appeal-phase in the coming months. The implications for other ongoing cases should be also considered.

### **Serious negotiations ahead? The Council of the EU adopted the EU's negotiating directives for limited trade negotiations with the US**

On 15 April 2019, the Council of the EU (hereinafter, Council) adopted a *Council Decision authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods*, in combination with the *Directives for the negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods*, and a *Council Decision authorising the opening of negotiations with the United States of America for an agreement on conformity assessment* in combination with the *Directives for the negotiations with the United States of America for an agreement on conformity assessment*. While EU-US trade relations remain tense due to the still-imposed additional US tariffs on steel and aluminium, and under the continued threat of additional tariffs by the US Administration on cars, the adoption of the negotiating directives could contribute to the improvement of the trade relationship. However, the specific approach of limiting negotiations to tariffs for industrial goods might not only cause important questions of compliance with the rules of the World Trade Organization (hereinafter, WTO), but also does not appear to satisfy the US Administration, with US President Donald Trump already announcing that the EU would have to provide enhanced market access for agricultural products or the US Administration would indeed impose tariffs on imports of cars from the EU.

Between 2013 and 2016, the EU and the US conducted negotiations for a comprehensive Transatlantic Trade and Investment Partnership (TTIP). However, negotiations were suspended prior to the US Presidential elections in 2016. As part of a new approach on trade policy, on 8 March 2018, US President Trump then exercised his authority under Section 232 of the US *Trade Expansion Act of 1962* and announced the imposition of an additional 25% tariff on steel imports and an additional 10% tariff on aluminium imports, allegedly in order to protect US national security (see *Trade Perspectives*, [Issue No. 5 of 9 March 2018](#)). This led to the introduction of countermeasures by various affected trading partners and, later in 2018, to an important number of requests by other WTO Members for consultations under the WTO Dispute Settlement Understanding (see *Trade Perspectives*, [Issue No. 20 of 2 November 2018](#)). In view of the US Administration's threats to similarly impose additional tariffs on car imports from the EU, US President Trump and the President of the European Commission Jean-Claude Juncker, on 25 July 2018, agreed to a number of initiatives (see *Trade Perspectives*, [Issue No. 15 of 27 July 2018](#)). During the meeting, the EU and the US decided to set up an *Executive Working Group* to take the agenda forward. Both sides agreed in a joint statement that, while the work of the *Executive Working Group* was ongoing, they would not go against the spirit of the agreement reached, unless either party were to terminate the negotiations.

*Inter alia*, Presidents Juncker and Trump agreed to the following specific initiatives: 1) To work together towards zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods; and to work to reduce barriers and increase trade in services, chemicals, pharmaceuticals, medical products, as well as soybeans; and 2) To launch a close dialogue on standards in order to ease trade, reduce bureaucratic obstacles, and reduce costs. In the Autumn of 2018, various meetings of the *Executive Working Group* were held, further detailing potential areas of agreement. In January 2019, the European Commission (hereinafter, Commission) published the draft negotiating directives and submitted them to the Council, while the Office of the United States Trade Representative (hereinafter, USTR), on 11 January 2019, published its *Summary of Specific Negotiating Objectives* regarding the trade negotiations with the EU (see *Trade Perspectives*, [Issue No. 2 of 25 January 2019](#)).

The negotiation directives that were now adopted by the Council largely reflect the proposals submitted by the Commission earlier this year. The directives have been kept rather short, which can be attributed to their limited scope. The negotiation directives for an agreement on the elimination of tariffs for industrial goods is slightly more detailed and begins with defining industrial goods, which is said to refer to “*all goods other than those included in Annex I of the WTO Agreement on Agriculture*”. The negotiation directives then underline that “*potential economic, environmental and social impacts of the provisions of this Agreement should be examined by means of a Sustainability Impact Assessment (SIA) as soon as possible*” and that “*findings of the SIA should be taken into account in the negotiating process*”. As such impact assessments take at least several months to be completed, this appears to conflict with the Commission’s ambitious agenda to begin negotiations shortly and to conclude negotiations still during the term of the current Commission, which ends in November of this year. Article 4 then sets out the envisaged content of the agreement, namely the elimination of “*all duties for industrial goods on a reciprocal basis*”. While not intended to be a comprehensive trade agreement, the negotiation directives still call for the establishment of an appropriate institutional structure, as well as an effective and binding dispute settlement mechanism.

Most importantly, the negotiation directives provide two references to the recent developments affecting EU-US trade policy. Article 9 of the negotiation directives calls for the future agreement to include a sort of ‘snap back’ provision, which would allow the EU “*to suspend unilaterally the application of substantially equivalent concessions or obligations, if the United States adopts against the European Union any measures, under Section 232 of the Trade Expansion Act, Section 301 of the 1974 Trade Act or under any other similar United States law*”. Similarly, this time with respect to the negotiations, Article 12 of the negotiation directives requires the Commission to “*suspend the negotiations with the United States, if the United States does not respect the commitment made on 25 July 2018 to abstain during the course of the negotiations from adopting new measures, against the European Union under Section 232 of the Trade Expansion Act of 1962*” and “*if the United States adopts trade restrictions against European Union exports on the basis of Section 301 of the 1974 Trade Act or under any other similar United States law*”. Finally, as a precondition to conclude negotiations on industrial goods, Article 13 of the negotiation directives provides that the US must have “*removed any measures on exports of steel and aluminium originating in the European Union pursuant to Section 232 of the US Trade Expansion Act of 1962*”. An obvious addition vis-à-vis the proposed Council Decision by the Commission concerns a reference to the previous TTIP negotiations. In that regard, Article 3 of the Council Decision provides that the “*negotiating directives for the Transatlantic Trade and Investment Partnership have become obsolete*”, thereby officially ending efforts for such a comprehensive trade agreement. Indeed, Recital 4 of the Council Decision notes that previous efforts with the US had demonstrated difficulties in negotiating mutually acceptable commitments in areas identified as priorities by the EU and that it was, therefore, appropriate to pursue a more limited agreement covering the elimination of tariffs on industrial products only, and excluding agricultural products.

The negotiation directives related to an agreement on conformity assessment are even more succinct. The envisaged agreement is supposed to develop “*streamlined processes to ease the recognition of conformity assessment results that confirm compliance of products with a party’s technical regulations*”. In the same way as the negotiation directives for the elimination of tariffs on industrial products, the negotiation directives for an agreement on conformity assessment also require the Commission to suspend negotiations in case the US were to adopt measures against the EU under Section 232 of the Trade Expansion Act of 1962 or trade restrictions under Section 301 of the 1974 Trade Act or under similar US law.

Romania’s Minister for Business Environment, Trade and Entrepreneurship and current President of the Council, Ștefan-Radu Oprea, underlined that negotiations would not be extended to agriculture or public procurement. At the same time, the US Administration does not appear to be enthusiastic about such a limited agreement. Indeed, shortly after the Council adopted the negotiating directives, US President Trump reiterated statements that the EU was treating the US “*badly*” and again threatened the imposition of additional tariffs on cars.

Notably, with respect to tariff reductions, the USTR's negotiating objectives are not limited to industrial goods, but also refer to agricultural goods. More specifically, with regards to agricultural goods, the US intends to secure comprehensive EU market access for US agricultural goods by reducing or eliminating tariffs, to provide reasonable adjustment periods for US import-sensitive agricultural products, to eliminate practices that unfairly decrease US market access opportunities or distort agricultural markets to the detriment of the US, to promote better regulatory compatibility by reducing unnecessary burdens associated with existing differences in regulation and standards, and to include specific commitments for trade in products developed through agricultural biotechnologies. It remains to be seen if the US Administration will actually agree to the EU's intended approach for trade negotiations.

Both negotiation directives contain a short reference to WTO compliance, noting that the agreements "*should be fully consistent with World Trade Organization (WTO) rules and obligations*". With regards to the envisaged agreement on the elimination of tariffs for industrial goods, this remains rather doubtful. Article XXIV:8(b) of the GATT provides a definition for a '*free-trade area*', which then allows the establishment of preferential treatment outside of the WTO principles of non-discrimination vis-à-vis other WTO Members. According to Article XXIV:8(b) of the GATT, a free-trade area "*shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories*". However, how this requirement of '*substantially all the trade*' is to be defined, has been subject to debate. In 1999, the Appellate Body, in the case of *Turkey-Textiles*, concluded that WTO Members had not reached an agreement on the interpretation of the term. According to the Appellate Body, it was clear that '*substantially all the trade*' was not the same as '*all the trade*', and also that '*substantially all the trade*' was considerably more than '*some of the trade*'. The Appellate Body further agreed with the relevant Panel that this requirement offered '*some flexibility*' to the members of a free trade area or customs union when liberalising their internal trade. Due to the vagueness of the WTO legal texts, the definition of the term '*substantially all the trade*' remains controversial, and, on 2 March 2000, the Committee on Regional Trade Agreements to the General Council published a [Synopsis of Systemic Issues related to Regional Trade Agreements](#), which also addressed the definition of '*substantially all the trade*'. Notably, it remains unresolved whether '*substantially all the trade*' constitutes a quantitative (*i.e.*, a statistical benchmark, such as a certain percentage of the trade between the parties) or a qualitative (*i.e.*, no sector, or at least no major sector, is excluded from trade liberalisation) requirement, or if a mixed approach would be most appropriate. If it were to be quantitative only, it could be argued that a free trade area that were to exclude a specific sector, even a fundamental one such as agriculture, could still satisfy the "*substantially all the trade*" requirement, if that particular sector were to account only for very limited trade volumes and the trade covered amounted to around 90% or 95%. However, if '*substantially all the trade*' were to be considered a quantitative requirement, the exclusion of an entire sector, such as agriculture, would not meet the legal requirements. Similarly, a mixed approach would likely not allow for the exclusion of such a major sector.

The Commission appears to support the idea that the envisaged agreement on the elimination of tariffs on industrial goods meets the requirement of covering '*substantially all the trade*'. In January 2019, the Commission's proposed negotiating directives were discussed within the European Parliament's Committee on International Trade and the Commission's Director General for Trade Jean-Luc Demarty reportedly addressed this very issue. He explained to the Members of the Committee that, as long as the US refused to discuss cars, the envisaged agreement on industrial goods would only cover around 85% of EU-US trade, which would not be enough to meet the requirement. However, Director General Demarty then noted that if the scope of the agreement were to include cars, it would cover 95% of bilateral trade and would meet the requirement of covering '*substantially all the trade*', when interpreting it as a quantitative requirement only. However, on the basis of a qualitative or a mixed interpretation, the envisaged agreements on the elimination of tariffs on industrial goods would not meet the '*substantially all the trade*' requirement and, strictly legally speaking, the agreement would have to be made available on a most-favoured nation's (MFN) basis to all other WTO Members, which would hardly be the bilateral objective of the EU and the US.



At a press conference on 15 April 2019, European Commissioner for Trade, Cecilia Malmström, announced that, on the same day, the Commission would contact its counterparts in the US in order to agree on a date to officially launch the trade negotiations. Finally, Commissioner Malmström noted that the EU would aim at concluding such limited negotiations with the US before the conclusion of the term of the current Commissioners under Commission President Jean-Claude Juncker, which ends in November 2019. However, considering the statements by US President Trump in reaction to the adoption of the negotiating directives and with respect to the exclusion of agriculture, it appears rather unlikely that negotiations would commence anytime soon and, even more so, that negotiations could already be concluded by November of this year. Interested stakeholders and trading partners should closely monitor the developments and consider appropriate reactions.

## **The application of mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food in the EU**

Since 11 April 2018, food business operators (hereinafter, FBOs) are required to apply [\*Commission Regulation \(EU\) 2017/2158 of 20 November 2017 establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food\*](#). Despite calls for the EU to take a tougher stance, notably by setting maximum permitted levels, it appears that FBOs are complying with the framework and are indeed implementing mitigation measures. While other countries, such as the US, are also taking action, the issue of addressing the presence of acrylamide in food has been the subject of debate within *Codex Alimentarius*.

*Regulation (EU) 2017/2158* defines acrylamide as “a low molecular weight, highly water soluble, organic compound which forms from the naturally occurring constituents asparagine and sugars in certain foods when prepared at temperatures typically higher than 120 °C and low moisture”. According to Recital 3 of *Regulation (EU) 2017/2158*, it forms mainly in baked or fried carbohydrate-rich foods where raw materials contain its precursors, such as cereals, potatoes and coffee beans. In particular, starchy foods such as potato and cereal products, which have been deep-fried, roasted or baked at high temperatures, have been shown to be affected, as well as instant coffee and baby foods. On 4 June 2015, following a comprehensive review, the European Food Safety Authority (hereinafter, EFSA) had published its scientific opinion on acrylamide in food. The EFSA reconfirmed previous evaluations that acrylamide in food potentially increases the risk of developing cancer for consumers of all age groups. According to the EFSA, since acrylamide is present in a wide range of everyday foods, this concern applies to all consumers, while children are the most exposed age group on a body weight basis. Possible harmful effects of acrylamide on the nervous system, pre- and post-natal development and male reproduction were not considered to be a concern by EFSA, based on current levels of dietary exposure. However, the current levels of dietary exposure to acrylamide across age groups indicate a concern with respect to its carcinogenic effects.

*Commission Regulation (EU) 2017/2158* is based on [\*Regulation \(EC\) No 853/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs\*](#), which aims at ensuring a high level of consumer protection with regard to food safety and defines ‘food hygiene’ as a set of measures and conditions necessary to control hazards and to ensure fitness for human consumption of a foodstuff taking into account its intended use. Food safety hazards occur when food is exposed to hazardous agents, which cause contamination of that food. Food hazards may be biological, chemical or physical. *Commission Regulation (EU) 2017/2158* states that acrylamide is a contaminant as defined in [\*Council Regulation \(EEC\) No 315/93 of 8 February 1993 laying down Community procedures for contaminants in food\*](#) (i.e., according to Article 1(1) of *Regulation (EEC) 315/93*, “any substance not intentionally added to food which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food, or as a result of

environmental contamination”) and, as such, it is considered as a chemical hazard in the food chain.

*Commission Regulation (EU) 2017/2158* establishes mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food, but does not set maximum permitted levels as the EU has established for other chemical contaminants in certain foods, such as those set in *Commission Regulation (EC) No 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs* for 3-monochloropropane-1,2-diol (3-MCPD), glycidol and polycyclic aromatic hydrocarbons (PAH). Article 1 of *Commission Regulation (EU) 2017/2158* defines its scope: 1) French fries, other cut (deep fried) products and sliced potato crisps from fresh potatoes; 2) Potato crisps, snacks, crackers and other potato products from potato dough; 3) Bread; 4) Breakfast cereals (excluding porridge); 5) Fine bakery wares: cookies, biscuits, rusks, cereal bars, scones, cornets, wafers, crumpets and gingerbread, as well as crackers (i.e., a dry biscuit, a baked product based on cereal flour), crisp breads and bread substitutes; 6) Coffee: roast coffee and instant (soluble) coffee; 7) Coffee substitutes; and 8) Baby food and, processed cereal-based food intended for infants and young children.

FBOs that produce and place on the market products that fall within these eight groups of foodstuffs are required to apply detailed mitigation measures set out in Annexes I and II to *Commission Regulation (EU) 2017/2158*. Indeed, it appears that the levels of acrylamide in foodstuffs can be lowered by mitigation measures, such as the implementation of good hygiene practices and the application of procedures based on hazard analysis and critical control point (HACCP) principles. Annexes I and II to *Commission Regulation (EU) 2017/2158* list specific acrylamide mitigation measures for the specific products groups, which may include measures related to raw materials, agronomy, recipe and product design, and processing. For instance, for French fries and other deep-fried, or oven-fried cut potato products, mitigation measures are, *inter alia*: 1) That “potatoes shall be tested for reducing sugars prior to use. This can be done by fry testing using colours as an indicator of potential high reducing sugar content”; 2) That FBOs recommend end users “in particular to keep the temperature between 160 and 175 °C when frying, and 180-220 °C when using an oven”; 3) To “cook potatoes until a golden yellow colour”; and 4) To “turn oven products after 10 minutes or halfway through the total cooking time”.

Mitigation measures are applied in view of achieving levels of acrylamide as low as reasonably achievable (hereinafter, ALARA), below the benchmark levels set out in Annex IV to *Commission Regulation (EU) 2017/2158*. FBOs are required to take the safety of foodstuffs, specific production, and geographic conditions or product characteristics into account. Annex IV to *Commission Regulation (EU) 2017/2158* establishes, *inter alia*, the following benchmark levels for the presence of acrylamide in foodstuffs: French fries (ready-to-eat) 500 µg/kg; Potato crisps from fresh potatoes and from potato dough, Wheat based bread 50 µg/kg, Biscuits and wafers 350 µg/kg; Roast coffee 400 µg/kg, Instant (soluble) coffee 850 µg/kg; Coffee substitutes exclusively from cereals 500 µg/kg; Coffee substitutes exclusively from chicory 4,000 µg/kg; Baby foods, processed cereal based foods for infants and young children excluding biscuits and rusks 40 µg/kg; and Biscuits and rusks for infants and young children 150 µg/kg.

The mitigation measures set out in *Commission Regulation (EU) 2017/2158* are based on current scientific and technical knowledge and have already proven to result in lower levels of acrylamide without adversely affecting the quality and microbial safety of the product. The mitigation measures have been established following an extensive consultation of organisations representing affected FBOs, consumers and experts from competent authorities of EU Member States. The benchmark levels are performance indicators to be used to verify the effectiveness of the mitigation measures and are based on experience and occurrence for broad food categories. The benchmark levels have been determined taking into account the most recent occurrence data from the EFSA’s database, whereby it is assumed that, within a broad food category, the level of acrylamide in 10% to 15% of the production with the highest levels can usually be lowered by applying good practices. *Commission Regulation (EU)*



2017/2158 acknowledges that the specified food categories are in certain cases broad and that for specific foods within such a broad food category there may be specific production, geographic, or seasonal conditions or product characteristics for which it is not possible to achieve the benchmark levels despite the application of all mitigation measures. In such situations, the food business operator should be able to show the evidence that the relevant mitigation measures were applied.

The benchmark levels are regularly reviewed by the European Commission (hereinafter, Commission) with the aim to set lower levels, reflecting the continuous reduction of the presence of acrylamide in food. In addition to sampling and analysis by the business operators, *Regulation (EC) No 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules* requires EU Member States to regularly perform official controls to ensure compliance with feed and food law. Most importantly, *Commission Regulation (EU) 2017/2158* notes that, following its entry into force, complementary to the measures provided for in it, the setting of maximum levels for acrylamide in certain foods should be considered in accordance with *Regulation (EEC) No 315/93*. In fact, in February 2019, the Commission reportedly launched a targeted consultation on maximum levels for acrylamide in foods for infants and young children, aimed at reducing the respective levels based upon the ALARA principle.

In early 2019, the European consumer organisation *BEUC* and ten of its member organisations collected samples of foodstuffs known to be at risk of acrylamide contamination. Accredited laboratory analysis of the samples found that, for most of the food categories tested, results were compliant with benchmarks set in *Commission Regulation (EU) 2017/2158*. *BEUC* believes that the Commission should take a stricter stance and impose mandatory maximum levels of acrylamide content as the high levels of compliance demonstrate that benchmarks are easily met by most products in the category. According to *BEUC*, this means that it is possible to produce products with low acrylamide content. *FoodDrinkEurope* (FDE), in representation of the EU food industry, reportedly disputed *BEUC*'s interpretation that existing legislation failed to take a tough stance against acrylamide. The mandatory nature of *Commission Regulation (EU) 2017/2158* means that compliance is strictly assessed and enforced as part of the official controls conducted by EU Member States. According to FDE, it is crucial to allow FBOs to demonstrate their mitigation efforts before considering binding maximum limits.

Other countries around the world are also paying attention to acrylamide. In the US, in March 2016, the *Food and Drug Administration* (FDA) issued a *Guidance for Industry: Acrylamide in Foods*, intended to help growers, manufacturers, and foodservice operators to reduce acrylamide levels in certain foods. The guidance recommends that companies be aware of the levels of acrylamide in the foods they produce and consider adopting approaches, if feasible, that reduce acrylamide in their products. The non-binding guidance focuses on raw materials, processing practices, and ingredients pertaining to potato-based foods (such as French fries and potato chips), cereal-based foods (such as cookies, crackers, breakfast cereals, and toasted bread), and coffee, all of which are sources of acrylamide exposure. The guidance suggests a range of possible approaches to reducing acrylamide levels rather than identifying specific recommended approaches. The guidance also does not provide for any specific maximum recommended level or action level for acrylamide.

In addition, there are measures by individual US States. California's *Proposition 65* (formally entitled *The Safe Drinking Water and Toxic Enforcement Act of 1986*) requires warning signs on foods and beverages containing acrylamide and aims at protecting drinking water sources from toxic substances that cause cancer and birth defects and to reduce or eliminate exposures to those chemicals generally, for example in consumer products, by requiring warnings in advance of exposure. A so-called '*Prop 65 warning*' must be applied to any product containing a listed chemical (such as acrylamide), unless the level of exposure is below the regulatory '*safe harbour level*'. The content of the warning should include the words "*This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer/birth defects or other reproductive harm*".

California's Office of Environmental Health Hazard Assessment (OEHHA) established over 300 'safe harbour levels'. These include: No Significant Risk Levels (NSRLs) for cancer-causing chemicals (for example 0.2 µg/day for acrylamide) and Maximum Allowable Dose Levels (MADLs) for chemicals causing reproductive toxicity (for example 140 µg/day for acrylamide). A 'safe harbour level' is a daily exposure limit (µg/day). It is different to the chemical total content of a product and there is no way to directly convert one figure into the other as they refer to different conceptual measurements. Reportedly, the amount of French fries one would need to eat at once, for it to be labelled with a Prop 65 Acrylamide warning as a carcinogen, is 82.5 kg (*i.e.*, 182 pounds).

At the international level, a *Codex Alimentarius* Code of Practice for the Reduction of Acrylamide in Foods (CAC/RCP 67-2009) addresses acrylamide mainly formed in food by the reaction of asparagine (an amino acid) with 'reducing sugars' (particularly glucose and fructose) as part of the so-called Maillard Reaction.

Interested food industry stakeholders should continue to monitor the legislative procedures in relation to acrylamide, analyse any new proposal being made, develop a position, and engage with the key stakeholders and competent authorities at the EU and EU Member States level, as well as in other countries around the world.

## Recently Adopted EU Legislation

### Customs Law

- *Commission Implementing Regulation (EU) 2019/561 of 8 April 2019 granting Cape Verde a temporary derogation from the rules on preferential origin laid down in Delegated Regulation (EU) 2015/2446, in respect of prepared or preserved fillets of tuna*

### Other

- *Council Decision (EU) 2019/614 of 9 April 2019 on the position to be taken on behalf of the European Union within the Joint Committee established under the Agreement between the European Union and Japan for an Economic Partnership, as regards the adoption of the Rules of Procedure of the Joint Committee, the Rules of Procedure of a Panel, the Code of Conduct for Arbitrators and the Mediation Procedure*

*Ignacio Carreño, Rudy Cohen-Zardi, Tobias Dolle, Lourdes Medina Perez and Paolo R. Vergano contributed to this issue.*

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

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