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Warning draft acrylamide law on dodgy legal ground

By Sara Lewis

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The draft regulation that would make compliance mandatory with now-voluntary industry codes of conduct on acrylamide reduction does not comply with EU law and could face legal challenge, according to a trio of non-governmental organisations.

Lawyers for the three – Safe Food Advocacy Europe (SAFE), Corporate Europe Observatory (CEO) and Client Earth - have written to the EU Health and Food Safety Commissioner Vytenis Andriukaitis and Commission First Vice President Frans Timmermans to warn "it remains doubtful if the Draft Regulation complies with higher-ranking law."

The letter underlines that "the fundamental parameter" for food policy and regulation is "a high level of human health protection" in line with the (Lisbon) Treaty on the functioning of the European Union's article 168. While the letter acknowledges that the Commission's aim of rendering mandatory FoodDrinkEurope's Acrylamide Toolbox, which is a series of codes of conduct for reducing acrylamide in different food products, is "currently operating within such an objective", it says the preparatory work "presents various troubling elements that should be corrected before the approval of the final text."

EU Member States are due to discuss the draft regulation this week in a 25 November meeting of the Standing Committee on Plants, Animals, Food and Feed, toxicological safety of the food chain section.

The letter raises three main concerns, starting with the legal basis for the draft regulation. Surprisingly, although acrylamide is a naturally occurring contaminant produced when starchy foods like chips or bread is cooked at high temperatures and linked to the Maillard reaction whereby foods brown and gain taste, the draft would not regulate it under EU contaminants legislation, but rather hygiene law. Instead of using the 2006 regulation setting the maximum level of contaminants in food (1881/2006), the draft is based on the 2004 regulation on the hygiene of foodstuffs (852/2004).

"Such error could justify the future annulment of the regulation at hand, as already occurred in similar cases," the letter warns. Moreover, the letter points out that the European Food Safety Authority's (EFSA's) Panel on contaminants in the food chain (CONTAM) said in its opinion on acrylamide in food that it must be dealt with as a contaminant and that 1881/2006 is the correct legal basis for regulation.

Acrylamide, which is carcinogenic, also falls under the EU definition of a contaminant laid down as far back as 1993 and which the 2006 legislation refers to. A contaminant is defined as "any substance not intentionally added to food which is present in food as a result of the production [...], manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food, or as a result of environmental contamination."

The letter argues that settled EU case law establishes that where a specialist piece of legislation exists it should be used as a legal basis considering the measure's aim and content.

As far as the trio of organisations are concerned "it is difficult to understand how the Hygiene Regulation, which exclusively establishes rules on hygiene of foodstuffs, can be applied to contaminants. Contaminants are not food and have always been dealt with by the legislator as a special category."

The second point in law raised in the letter is that the choice of a hygiene legal basis means that the Commission is following the wrong procedure for the draft's adoption, scheduled for February 2017.

The third legal point in the letter is the indicative values set for acrylamide. Although compliance with the codes of practice will be mandatory, the maximum limits set will be indicative not obligatory. However, according to Commission officials, the limits would be mandatory in practice since any company whose products exceeded them would be forced to apply the Toolbox to bring acrylamide levels down.

Ineffective and counterproductive

But the trio are not buying this argument and the letter states: "We consider that the Draft Regulation, if adopted as currently drafted, will be ineffective and even counterproductive."

The letter argues that these indicative limits, first published in a 2011 Commission recommendation for monitoring, are considered inaccurate as they are based on EFSA's 2007 and 2008 monitoring data. The letter says that further monitoring has been carried out since then and the values "do not reflect the current levels of acrylamide in food and were only intended to indicate the need for an investigation".

For the three organisations, "the Commission is fully aware of the most recent investigations and, consequently, is capable of identifying accurate and up to date values."

They continue that the future regulation "should embody accurate maximum limits as low as technically possible, in compliance with the risk analysis conducted by EFSA."

The letter points out that EFSA concluded acrylamide in food potentially increases cancer risk in all age groups, is genotoxic and potentially damages DNA and considered it inappropriate to set a tolerable daily intake (TDI) for the contaminant. It argues that "the sole fact that EFSA has expressed concerns with respect to the carcinogenic effects of acrylamide and believed inappropriate to establish adequate tolerable daily intake, obliges the European Union to guarantee human health protection with the adoption of *ad hoc*and effective measures".

The letter goes on to say: "The protection of human health is even more important in cases as the present where a concrete health concern has been recognised but safety thresholds have not yet been established, especially when exposure estimates for toddlers and other children are close to the value that might be of concern for neurotoxity."

It argues that by adopting out of date indicative values that only serve as benchmarks to verify codes of practice are being applied, the EU "is explicitly violating" the obligation in the Lisbon treaty's Article 168 to guarantee a high level of health protection "and is jeopardising its objective to reduce the levels of acrylamide in food present on the market."

The letter ends by stating that the regulation must contain maximum values considered as safety thresholds under Article 168, which must "be concretely lower" than those in the current draft and that they "must be accurately determined on the basis of the most recent investigations completed."

"Because of the wrong legal basis in the Draft Regulation there is an absence of maximum levels of acrylamide in food which is contrary to high standards of protection for human health," SAFE Secretary General Floriana Cimmarusti told ***EU Food Law***. Cimmarusti continued: "SAFE stresses that the choice of legal basis must rest on objective factors which are amenable to judicial review".