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On behalf of the Faroe Islands, Denmark filed a request for WTO consultations with the EU with respect to the latter's sanctions on certain fisheries products

On 4 November 2013, the Kingdom of Denmark, representing the Faroe Islands, filed a request for WTO consultations with the EU with respect to the use by the EU of coercive economic measures related to Atlanto-Scandian herring. The measures at issue are established in *Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock* (hereinafter, the *Implementing Regulation*), based on *Regulation (EU) No. 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing* (hereinafter, the *Basic Regulation*).

In order to ensure the sustainable fishing of herring, the EU, Iceland, Norway, Russia and the Faroe Islands (hereinafter, the '*coastal States*') agreed in 2007 to establish the Total Allowable Catch (hereinafter, TAC) and allocated a certain catch share of the TAC to each '*costal State*' (*i.e*., 6.51% for the EU, 5.16% for the Faroe Islands, 14.51% for Iceland, 61% for Norway and 12.82% for Russia). However, at the end of 2012, the International Council for the Exploration of the Sea, responsible, *inter alia,* for the scientific assessment of the sustainable level of overall fishing volumes, recommended the reduction of the TAC for herring stock by 26%. During the negotiations among the '*coastal States*' concerning the new catching shares, the Faroe Islands was unable to agree on a new share. Eventually, an agreement was reached by the four remaining '*coastal States*', which excluded the Faroe Islands from the agreement and cancelled the share foreseen for it. On 26 March 2013, the Faroe Islands unilaterally introduced a catch limit for 2013 equal to 17% of the recommended TAC which, according to the EU, could lead to the increased risk of stock collapse, undermining the purpose of the stock management arrangements previously agreed by the '*coastal States*'. In response, the EU implemented against the Faroe Islands (i) a prohibition to import into the territory of the EU fish or fishery products consisting of Atlanto-Scandian herring or mackerel caught under the control of the Faroe Islands; and (ii) a prohibition for vessels flying the flag of the Faroe Islands and fishing or transporting Atlanto-Scandian herring or mackerel products to use EU ports (this provision is subject to certain limited exceptions catering for emergency situations). The EU included mackerel in the scope of restrictive measures by classifying it as a necessary by-catch during the fishing of herring (see Trade Perspectives, Issue No. 16 of 6 September 2013).

In the request for WTO consultations, the Faroe Islands challenges the aforementioned measures under Article I:1, Article V:2 and Article XI:1 of the General Agreement on Tariffs and Trade (hereinafter, GATT). The Faroe Islands considers that, with the adoption and imposition of these measures, the EU violates the most favoured nation principle (hereinafter, MFN principle) contained in Article I:1 of the GATT, inasmuch as it discriminates between '*like*' products (*i.e*., Atlanto-Scandian herring and mackerel products

originating from the Faroe Islands and those originating from other countries). Secondly, the Faroe Islands claims a violation of Article V:2 of the GATT on the grounds that the application of the EU's aforementioned measures allegedly leads to the denial of freedom of transit through the territory of the EU and discriminates on the basis of the flag of vessels, place of origin and other related characteristics. With respect to this claim, the findings of the Panel in *Colombia – Ports of Entry* may be of use, inasmuch as it established that Article V:2 of the GATT requires that '*goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit*'. It is noted that Article 5.2 of the *Implementing Regulation* expressly prevents all vessels flying the flag of the Faroe Islands which transport Atlanto-Scandian herring or mackerel products from using EU ports, which appears to suggest that the measure falls at least within the notions of '*distinction… based on the flag of vessels*' and '*distinction… based on the place of origin*' outlined in Article V:2 of the GATT. In any case, it must be borne in mind that the application of Article V of the GATT is restricted to goods and vessels in transit, where the complete journey begins and terminates beyond the EU's frontiers. Finally, the Faroe Islands invokes Article XI:1 of the GATT, claiming that the EU's measures amount to prohibitions or restrictions other than duties, taxes or other charges on the importation of Atlanto-Scandian herring or mackerel products. It appears that the prohibition to export herring and mackerel products to the EU from the Faroe Islands may constitute a '*prohibition*' within the meaning of Article XI of the GATT. In addition, applying the reasoning of the Panel in *Colombia – Ports of Entry*, the prohibition for the Faroe Islands' vessels to use EU ports may also arguably fall within the scope of Article XI:1, inasmuch as such limitation could act as a '*restriction*' or '*prohibition*' and be proven to '*create constraints*' and '*limit competitive opportunities*' of such products in the EU.

Should such dispute not be solved through WTO consultations, the EU may be expected to invoke Article XX of the GATT, which allows WTO Members to adopt, under certain circumstances, measures otherwise inconsistent with WTO law. Inasmuch as the EU's measures are intended to preserve fisheries' stocks and ensure the maintenance of sustainable fishing practices, the EU will likely base its defense on subparagraph (g) of Article XX of the GATT, which refers to the '*conservation of exhaustible natural resources*'. In light of the finding of the Appellate Body in *US – Shrimp*, which held that the term '*exhaustible natural resources*' may also include '*living resources*', the EU may be able to argue that subparagraph (g) of Article XX covers Atlanto-Scandian herring. However, the Faroe Islands may challenge the coverage of mackerel by the EU's measure on the basis of the Appellate Body's reasoning in the same dispute, claiming that there is no '*close and real relationship*' between the prohibition on mackerel sales and the policy objective to preserve the stock of Atlanto-Scandian herring, therefore rendering the measure '*disproportionately wide*' in its scope. The EU would also need to prove that the measure complies with the '*chapeau*' of Article XX of the GATT, which requires measures not to constitute '*a means of arbitrary or unjustifiable discrimination*' or a '*disguised restriction on international trade*'. In light of the findings of the Appellate Body in *US – Shrimp* and *US – Gasoline,* the EU would need to show that prohibitions on importation and use of ports were '*inadvertent or unavoidable*' and that no '*alternative course of action*' was reasonably available to the EU to preserve the stock of herring. In this respect, the reasoning of the Appellate Body in *US – Shrimp* (*Appellate Body Report* and *Appellate Body Report - Article 21.5*) on the interpretation of the requirements related to an '*unjustifiable discrimination*' and a '*disguised restriction*' contained in the '*chapeau*' of Article XX of the GATT, which was developed in the context of import restrictions applied by the US on environmental grounds, may be of particular relevance. It may be taken into account, among other factors, that, according to the Appellate Body, reasonable efforts to '*negotiate*' an international agreement rather than an obligation to '*conclude*' it are sufficient for a country seeking for justification of a measure under Article XX of the GATT.

This dispute looks poised to raise a number of questions and observations of legal nature if no settlement between the parties is reached. At the jurisdictional level, the dispute is particularly interesting to the extent that the Faroe Islands constitutes a semi-autonomous Danish territory that, as per Article 355(5)(a) of the Treaty on the Functioning of the EU, is not part of the EU. This territory is however covered by the WTO legal framework, inasmuch as Denmark did not make any territorial reservation at the time of its accession to the WTO. In this light, it will be of interest to see how a dispute brought by an EU Member State (on behalf of a semi-autonomous territory) against the EU develops at the procedural level, as well as the precise outcome that may be eventually reached by the WTO Dispute Settlement Body.

In parallel to the WTO proceedings described above, it appears that the Faroe Islands initiated, in August 2013, arbitral proceedings against the EU under the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS), reportedly alleging the EU's failure to cooperate in respect of shared stocks. The Faroe Islands' ability to initiate such proceedings appears to stem from the fact that, upon ratification of UNCLOS in 2004, Denmark submitted a declaration whereby it recalled that, as an EU Member State, it had transferred certain competences covered by the UNCLOS to the EU. Denmark's statement also clarified that the Faroe Islands were expressly excluded from such transfer, which arguably suggests that the semi-autonomous territory retained certain competences under UNCLOS. The dispute at hand recalls the controversy between Chile and the EU concerning Chile's prohibition to allow that EU vessels unloaded swordfish in Chilean ports. The EU requested WTO consultations with Chile in April 2000 (*i.e.*, *Chile – Swordfish*), while the case was also presented before UNCLOS' International Tribunal for the Law of the Sea in December 2000. Although both disputes were suspended at the request of the parties, which claimed to have reached an amicable solution in 2009, this circumstance arguably suggests that there may be a potential for concurring pending cases before the WTO and UNCLOS.

Another controversial issue relates to the alleged legality of the application of economic coercive measures by the EU to '*force*' compliance with environmental concerns. This dispute, therefore, adds to the ongoing debate concerning the relationship between trade and sustainable development, continuously fuelled by the application of trade-restrictive measures often adopted on legitimate environmental grounds. The outcome of this controversy looks poised to clarify the scope of these types of measures, which continue to pose complex legal challenges to the WTO adjudicating bodies. Meanwhile, businesses operating in the fishing sector are strongly advised to closely monitor all further developments of the dispute and are encouraged to cooperate with their governments to ensure that their interests are fully taken into account.

The long-time US export ban on crude oil likely violates international trade regulations

Recent reports indicate that the American Petroleum Institute (hereinafter, API), a crude oil industry group, is exploring possible legal arguments to show that the US ban on crude oil exports is WTO-inconsistent. Though the API's reported assertion may be justified, it remains to be seen whether any third party country would bring any claims, or whether that would be necessary.

The *US Energy Policy and Conservation Act of 1975* directed the President to promulgate a rule prohibiting the export of crude oil produced in the US, but allows an exemption for exports determined to be consistent with the '*national interest*'. Generally, US Export Administration Regulations are enforced by the Bureau of Industry and Security (hereinafter, BIS) within the US Department of Commerce (hereinafter, DOC). The relevant BIS regulation is 15 C.F.R. § 754.2, pertaining to *Short Supply Controls* of crude oil. Under 15

C.F.R. § 754.2(b)(1), 7 types of applications may be granted export licenses, which act as exceptions to the general prohibition on the export of crude oil. Those include, *inter alia*, exports to Canada, exports in connection with refining in the US and exports that are consistent with international agreements cited later in the regulation. According to 15 C.F.R. § 754.2(b)(2), applications are reviewed on a case-by-case basis and are approved if they are consistent with the '*national interest*'. In effect, the export of crude oil produced in the US is limited to Canada and certain, very specific, circumstances under the discretion of the BIS.

The most likely challenges under WTO law would be under Articles I and XI of the GATT. Article I of the GATT articulates the MFN principle of international law, which states that '*any advantage, favour, privilege or immunity*' granted to one WTO Member must also be granted to other WTO Members. Article XI of the GATT deals with import and export restrictions. According to Article XI, WTO Members may not impose prohibitions and restrictions on exports, including through the use of export licenses. In practice, WTO jurisprudence suggests that any '*discretionary*' or '*non-automatic*' licenses would violate Article XI. However, a number of exceptions may be applicable. Within Article XI, paragraph 2(a) excludes export prohibitions '*temporarily*' applied to prevent '*critical shortages*' of products essential to the exporting country. Article XX of the GATT contains general exceptions to GATT provisions. Those include, *inter alia*, measures relating to the conservation of exhaustible natural resources, measures involving restrictions on exports necessary to ensure essential quantities of the exported materials and measures essential to the distribution of products in general or local short supply. Lastly, Article XXI of the GATT provides general security exceptions, one of which allows a WTO Member to take '*any action which it considers necessary for the protection of its essential security interests*' taken in time of an '*emergency in international relations*'.

Article I of the GATT may be violated because of the express exception in C.F.R. § 754.2(b)(1)(ii) that allows the export of crude oil to Canada. Article XXIV of the GATT allows for WTO Members to grant more favourable treatment to other countries as part of free trade agreements. Though Canada and the US are parties to the North American Free Trade Agreement (hereinafter, NAFTA), the exception allowing the export of crude oil to Canada was not made pursuant to any NAFTA regulations. Moreover, the exception does not include Mexico, which is also a party to NAFTA. Turning to Article XI of the GATT, potential US arguments relying on paragraph 2(a) would likely be rejected. In the recent *China — Measures Related to the Exportation of Various Raw Materials* dispute, the US was successful in challenging numerous export restraints on raw materials imposed by China. The WTO Appellate Body found that '*temporarily*' meant '*applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need*' and that '*critical shortages*' referred to '*deficiencies in quantity that are crucial*' and of '*decisive importance*'. It does not appear that the US would satisfy these requirements with respect to crude oil.

Under the general GATT exceptions, an argument under Article XX(g) would likely prove unsuccessful because the relevant measure was not made '*in conjunction with restrictions on domestic production or consumption*'. Any attempt to use subparagraph (i) would also likely prove unsuccessful, as the export restriction does not appear to be part of a government stabilisation plan, and because the allowance of exports to Canada is discriminatory. In regards to subparagraph (j), historical GATT documents indicate that '*general or short supply*' refers to world markets for the product in question. Here, there is no evidence that the world market for crude oil is in short supply. Instead, if challenged before the WTO Dispute Settlement Body, the US may have to attempt to rely on the general security exceptions to the GATT in Article XXI. Article XXI allows for actions taken in response to an '*other emergency in international relations*'. During a GATT panel dispute with Nicaragua in 1985, the US argued that Article XXI left it to each Contracting Party to judge what action it considered necessary for the protection of its essential security interest, but the case was determined on other grounds. Many countries and commentators have

since accepted this '*self-judging*' standard and it remains to be tested before a WTO adjudicating body. The broad nature of this language may arguably be useful to the US if a challenge was brought.

Though a WTO challenge against the US could prove successful, no third countries have yet filed a request for consultations with the WTO. The API has been the most vocal about the potential WTO-inconsistency of the US export restraints. However, it does not have standing before the WTO and would need to resort to a WTO Member, likely one suffering prejudice from the US measures, to challenge the restrictions. Some reports indicate that the EU has pushed for the US to lift export restrictions on crude oil as part of the Transatlantic Trade and Investment Partnership, which is currently being negotiated by the two parties. But, that agreement may be years from being completed, and would only apply to the EU and US. One possibility for crude oil producers in the US may be found in the NAFTA. Under the investor-state dispute settlement provisions in Chapter 11, Article 1101(c) allows for investors of any party (not just of '*another Party*') to bring disputes relating to performance requirements or environmental measures. For US crude oil producers, it may be worthwhile to explore whether a viable claim is possible under NAFTA Article 1106, based on the restrictions to the volume of exports.

Although no country has so far been incentivised to bring a claim against the US export restraints on crude oil, the US trade balance, and related economics effects, regarding crude oil may be changing. Some analysts have said that with the rapid increase in US crude oil production, the US could be the top producer of crude oil in the world within the next 10 years, and that it would likely have a surplus of crude oil. If this happens, it may be in the best interests of US and foreign companies and consumers to remove the US export restrictions. Interested parties should consider commencing actions now if they think they may be positively benefited by a removal of the ban in the future, as legal proceedings and negotiations can take years.

The EU Commission considers the UK traffic light nutrition labelling scheme as voluntary nutritional information and not as a '*non-beneficial*' nutrition claim

The meeting of the Standing Committee on the Food Chain and Animal Health (hereinafter, the SCoFCAH) held in Brussels on 4 October 2013 (Section General Food Law), addressed a request from Italy for a discussion on the voluntary front-of-pack (hereinafter FoP) nutrition labelling scheme recommended by the UK authorities. A number of EU Member States shared the concerns of Italy *vis-à-vis* the scheme recommended in the UK and some recalled their position in favour of a harmonised system and requested the EU Commission's views.

Under point (l) of Article 9(1) and Article 55 of *Regulation (EU) No. 1169/2011 on food information to consumers* (hereinafter, FIR), a nutrition declaration including the energy value; and the amounts of fat, saturates, carbohydrate, sugars, protein and salt (eventually supplemented by the amounts of mono-unsaturates; polyunsaturates; polyols; starch; fibre; and certain vitamins or minerals), expressed in tabular format (if space permits), is mandatory on the labelling of foodstuffs as of 13 December 2016. According to Article 35(1) of the FIR, in addition to the mandatory forms of expression and presentation defined in the FIR, the energy value and the amount of nutrients may be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers.

On 19 June 2013, following discussions with the UK food industry, health organisations and other interested parties, the UK Food Standards Agency (hereinafter the UK FSA) launched a new FoP nutrition labelling scheme with the intention of helping consumers see at a glance how healthy a food is. The new labelling scheme combines '*percentage reference intakes*' (formerly known as guideline daily amounts or GDAs), highlighting how much fat, saturated fat, salt, sugar and energy is in a product, with traffic light colours (*i.e.*, red, amber and green). According to the UK FSA, red colour coding means that the food or drink is high in this nutrient (fat, saturates, sugars and salt) and should be consumed less often or only in small amounts; amber means '*medium*', and if a food contains mostly amber, it can be consumed most of the time; and green means '*low*', and the more green lights a label displays, the healthier is the choice. The UK FSA affirms that the provision of FoP traffic light nutrition information by food business operators is voluntary, but if it is provided, it must meet the requirements set out in the FIR.

In the SCoFCAH meeting on 4 October 2013, Italy expressed concerns *vis-à-vis* the new UK nutrition labelling scheme, in particular the '*voluntary*' character of the colour coded scheme was questioned. According to the Italian authorities, the scheme should have been notified under *Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations* (hereinafter, Directive 98/34/EC), and the red lights attributed to the level of energy or nutrients would constitute '*non-beneficial*' nutrition claims, which also would have to be notified under Directive 98/34/EC following recital (6) of *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods* (hereinafter, NHCR). Italy also claimed that the UK scheme would constitute a barrier to trade in breach of Article 34 of the Treaty on the Functioning of the EU (hereinafter TFEU), and that the multiplication of similar systems would undermine the EU harmonisation efforts.

The UK authorities, in the SCoFCAH meeting on 4 October 2013, claimed that the colour coded scheme has been subject to public consultation, was based on scientific studies on its understanding by consumers and that companies were free to adopt it (so far, 31 companies have done so), for their entire product offer or for some categories of products only. The UK underlined that no action was taken against any producer not following the scheme and signalled that, in accordance with recital 46 of the FIR, such scheme should be considered as a nutrition declaration and not as individual nutrition claims. In relation to the use of the scheme by retailers, the UK stated that a retailer committed to use the scheme would use it for its own product ranges only.

The EU Commission recalled in the meeting of the SCoFCAH that the possibility of voluntary additional forms of presentation and expression of nutrition information to be developed (both by food business operators and EU Member States) was agreed during the negotiations on the FIR and that consequently, the development of additional forms of expression or presentation of the nutrition information is compatible with the system established in the relevant EU legislation as long as it complies with the criteria established therein. On the need to notify the scheme under Directive 98/34/EC, the EU Commission analysed that: a) it does not constitute a *de jure* mandatory labelling, as no legislation imposes it; and b) on the basis of the available information, it cannot be considered as *de facto* mandatory labelling. The EU Commission argued that the commitment by food business operators to use the scheme was not a voluntary agreement where the EU Member State is a contracting party, another condition leading to the need to notify under Directive 98/34/EC. The EU Commission shared the UK's view that recital 46 of the FIR was considering such scheme as nutritional information and not as '*non-beneficial*' nutrition claims having to be notified. The EU Commission finally clarified that point (g) of Article 35 of the FIR about potential obstacles to the free movement of goods must be considered as a reference to Articles 34 to 36 of the TFEU.

Three legal issues are of particular relevance here: 1) the question of whether a scheme like the UK FoP traffic light nutrition labelling scheme is a '*voluntary scheme*'; 2) whether certain elements of such scheme can be classified as '*non-beneficial*' nutrition claims; and 3) whether the proliferation of such schemes are obstacles to the free movement of goods in the EU, contrary to the TFEU.

Directive 98/34/EC imposes an obligation on EU Member States to notify the EU Commission and the other EU Member States of all draft mandatory technical regulations concerning products before they are adopted in national law, to provide transparency and to avoid unjustified barriers between EU Member States. Article 35 of the FIR allows voluntary additional forms of expression and presentation of the nutrition information on top of the mandatory nutrition information. Voluntary nutrition labelling cannot be given in isolation; it must be provided in addition to the full mandatory ('*back of pack*') nutrition declaration, which comprises energy, fat, saturates, carbohydrate, sugars, protein and salt (under Article 30(1) and (3) of the FIR). However, the UK FoP traffic light nutrition labelling scheme raises concerns as to whether it is in fact voluntary. It should be noted that, apparently, the major UK retailers (including Sainsbury, Tesco, Asda, Morrisons, the Co-operative and Waitrose) have signed-up to the voluntary FoP nutrition labelling scheme, as well as some major food manufacturers (including Mars UK, McCain Foods, Nestlé UK, and Premier Foods) and, in particular, that the UK FSA has recommended its use and provides for guidelines on how to comply with the scheme on its website.

The whole discussion recalls the debate on private voluntary standards in the WTO, in particular, in the areas of food safety and animal health, where retailers require from their suppliers compliance with certain requirements (*inter alia*, BRC and Global GAP, which may be stricter than the statutory ones) and non-compliance with the standard acts as a trade barrier (for more details on private standards, see Trade Perspectives Issues No. 14 of 16 July 2010 and No. 8 of 19 April 2013), with the difference that, for the UK FoP nutrition labelling scheme, there is even a governmental recommendation. In case products of food business operators cannot, in practice, enter or stay on the UK retailer's market because of not following the FoP traffic light nutrition labelling scheme, the question arises if there is really just an additional voluntary requirement or whether the scheme, recommended by the UK FSA, may be considered a *de facto*, if not a *de jure,* barrier for producers that do not want to adhere to it. In the latter case, the scheme would need to be notified under the procedure set out in Directive 98/34/EC to the EU Commission and the other EU Member States.

In relation to the question of whether certain elements of the UK traffic light nutrition labelling scheme can be classified as '*non-beneficial*' nutrition claims, it must be noted that nutrition claims are by nature '*beneficial claims*' since the operator, who places them on its products, intends to highlight something nutritionally '*positive*'. This is the reason why '*non-beneficial*' nutrition claims (like '*rich in fat*') do not fall under the scope of the NHCR, which states in recital 6 that '*[n]on-beneficial nutrition claims are not covered by the scope of this Regulation; Member States intending to introduce national schemes relating to non-beneficial nutrition claims should notify such schemes to the Commission and to other Member States in accordance with Directive 98/34/EC (...)*'.

Recital 46 of the FIR states, in fact, that '[*t]he declaration in the same field of vision of the amounts of nutritional elements and comparative indicators in an easily recognisable form to enable an assessment of the nutritional properties of a food should be considered in its entirety as part of the nutrition declaration and should not be treated as a group of individual* claims'. However, arguably, a number of red traffic lights on the FoP of a product could indeed act as sort of '*non-beneficial*' nutrition claim, inasmuch as the whole group of red traffic lights could be interpreted as a claim that this product is nutritionally disadvantageous. On the other hand, a number of green colour codes could act as a '*beneficial*' nutrition claim.

Arguably, the question to answer, in order to establish whether the NHCR applies, is whether the whole '*ensemble*' of the nutrition labelling given in colour codes (in its overall context) has a positive or a negative connotation and, therefore, is a claim and not a part of the nutritional declaration. It appears that the large UK breakfast cereal companies have not yet signed-up to the scheme, presumably because many of their products would carry a number of red colour codes, particularly for salt and sugar. To give an example, the UK FoP scheme requires a '*red light*' in the fat category if the content exceeds 17.5g/100g and in the saturate fats category if the content is above 5g/100g. Even olive oil, which is usually considered a healthy choice in the category of fats, because of its high content of unsaturated fats, would carry two '*red lights*' since it contains 100% fat and about 14g of saturated fat for each 100g, possibly (and disturbingly) resulting in it being classified as unhealthy in consumers' minds.

In relation to the claim that the UK scheme would constitute a barrier to trade in breach of Article 34 TFEU, and that the multiplication of similar systems would undermine the EU's harmonisation efforts and fragmentise the internal market, it has been argued, in particular in a joint letter by Italian trade associations (*i.e.*, FEDERALIMENTARE, CLITRAVI, ISB and EDA), that classifying foods into green, amber and red categories is overly-simplistic and does not take into account how different foods are combined in a total dietary context. Moreover, it has been stated that this system will highly discriminate many quality agro-food products like cheese, meat, marmalade and sweets, which would be labelled with a '*red traffic light*' due to their content of salt, sugars or fats. Consumers could understand this as a form of discrimination towards certain foods, conflicting with the '*EU Quality Policy*' promoting certain traditional agro-food products. To answer the question of whether the UK scheme constitutes a barrier to trade in breach of Article 34 TFEU, it is essential to differentiate between mandatory regulations and voluntary schemes where there is no interference of the respective EU Member State (see discussion above). Article 35(1)g) of the FIR, in fact, provides that, in addition to the mandatory nutrition information in the EU format, additional nutritional information may be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers provided that their application does not create obstacles to the free movement of goods. Obstacles to the free movement of goods may, according to Article 36 TFEU, be justified on grounds of, *inter alia*, the protection of health and life of humans, animals or plants. Whether this justification applies, in case the UK scheme is not considered a voluntary one, would need to be analysed. In principle, it appears that there are no good or bad foods, only good or bad overall diets. Nutrition claims are strictly limited to the ones defined in Annex I to the NHCR. This is why no additional '*non-beneficial*' claims or other '*beneficial claims*' in the overall context of promotion of a product are permitted.

In the next months, interested parties should observe whether or not the UK scheme hinders intra-EU trade. The EU Commission invited UK authorities to follow the development of the use of the scheme on the market in order to avoid obstacles to trade. It must be recalled that the ultimate interpretation of EU law is the prerogative of the Court of Justice of the EU. Operators and trade associations concerned with the UK traffic light nutrition labelling scheme are advised to observe the UK market closely, and if there are obstacles to trade, analyse the situation and take action.

The EU's recent legislative developments raise interesting questions concerning vegetable oils

On 17 October 2013, the EU Parliament's Committee on the Environment, Public Health and Food Safety (hereinafter, ENVI Committee) failed to achieve the necessary two thirds majority to grant MEP Corinne Lepage, the '*rapporteur*' to the legislative procedure in the proposed amendments to the EU biofuels' framework, the mandate to open '*early second*

reading' negotiations with the EU Council. This vote came after the Plenary of the EU Parliament adopted, on 11 September 2013, its first reading position on the EU Commission's *Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources* (hereinafter, the EU Commission's Proposal).

The EU Commission's Proposal aims at amending the EU's regulatory framework on biofuels (*i.e.*, the '*Fuel Quality Directive*' and the '*Renewable Energy Directive*') in order to minimise the impact of emissions arising from indirect land use change (hereinafter, ILUC) on greenhouse gas (hereinafter, GHG) emissions stemming from the production of biofuels (*i.e*., the emissions created as a result of increased land demand for the production of biofuels, where such land could have been used for food, feed or fibre production) and starting the transition from biofuels produced from food crops to biofuels obtained from non-food crops (for further background on the EU Commission's Proposal, see Trade Perspectives, Issue No. 15 of 26 July 2013 and Issue No. 17 of 20 September 2013).

If adopted, the proposed amendments stand to result in a particularly restrictive framework for biofuels originating from vegetable oils, inasmuch as they are based on a primary distinction between food crop-based biofuels (*i.e*., '*first generation biofuels*') and biofuels originating from alternative sources, such as forest residues, algae or municipal waste (*i.e*., '*advanced biofuels*'). On this basis, the proposed amendments suggest capping to 6% the contribution of '*first generation biofuels*' to the mandatory target of the '*Renewable Energy Directive*' which requires that, by 2020, 10% of the energy used in the EU for the transport sector originate from renewable sources. In addition, the amendments foresee that specific ILUC factors be attributed to '*first generation biofuels*', according to the feedstock they originate from. In particular, proposed ILUC factors amount to 12 gCO2/MJ (grams of carbon dioxide per megajoule of energy) in the case of biofuels obtained from cereals and other starch-rich crops, 13 gCO2/MJ for biofuels obtained from sugars, and 55 gCO2/MJ for biofuels originating from oil crops, such as those based on palm oil or soybean oil. Conversely, '*advanced biofuels*' would be attributed an ILUC factor equivalent to zero. As proposed, the attribution of ILUC factors would serve the purposes of, at least during the '*transitional*' phase (*i.e*., until 2020), monitoring and reporting under the '*Fuel Quality Directive*' and the '*Renewable Energy Directive*', although they may, after that, be factored-in the calculation of biofuels' overall environmental impact.

The foreseen amendments would add up to a fairly restrictive framework, with the '*Fuel Quality Directive*' and the '*Renewable Energy Directive*' already operating a classification of biofuels according to their '*sustainability*' on the basis of two drivers: (i) a requirement that GHG emissions savings from the use of biofuels amount to at least 35% of the GHG emissions that would have resulted if fossil fuels had instead been used (this threshold is foreseen to increase as of 2017); and (ii) a requirement that the land used to produce biofuels have certain characteristics, *i.e*., that it does not have high biodiversity value nor high carbon stock (see Trade Perspectives, Issue No. 10 of 21 May 2010). In this light, only '*sustainable*' biofuels are valid for compliance with the respective targets set by the EU framework, and eligible for financial support.

As employed in the food industry, vegetable oils are also subject to relevant regulatory developments in the EU. In particular, *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (*i.e*., the Food Information Regulation) requires that as of 13 December 2014, the specific origin of each vegetable oil be expressly disclosed in the list of foods' ingredients. It follows that, after the entry into force of such requirement, it will no longer suffice that foodstuffs' labels include the expression '*vegetable oils*' without any further information, but a specification such as, *e.g*., '*rapeseed oil*', '*sunflower oil*' or '*palm oil*' will be needed.

The impact of requirements adopted at EU-level needs to be coupled with the relevant regulatory frameworks of individual EU Member States and other European countries, which may result particularly burdensome for operators of certain vegetable oils. With the aim of protecting public health by discouraging consumption of obesity-related foodstuffs, measures adopted include not only '*sin taxes*' (see Trade Perspectives, Issues No. 18 of 7 October 2011, No. 1 of 13 January 2012 and No. 16 of 7 September 2012), but also legislation limiting the content of trans fats in foodstuffs. The latter is in place in Denmark (see Trade Perspectives, Issue No. 15 of 26 July 2013) and Austria, while Belgium and Switzerland are in the process of introducing similar requirements. Of particular interest is the draft law proposed before the Belgian Senate in March 2013, which proposes to extend the limitation of trans fats to the content of specific vegetable oils which are not trans fats (*i.e*., coconut oil and palm oil, in foodstuffs' oil or fat content).

Indeed, palm oil appears to be particularly targeted not only by regulatory measures such as those described above, but also by identified worrying strains of commercial actions and initiatives waged by private operators (*i.e*., retailers and food manufacturers) seeking to '*shape*' consumers' preferences. In particular, a number of labelling campaigns directed at denigrating palm oil have been identified in at least two EU Member States (*i.e.*, France and Belgium). These practices, focussed on the alleged, but largely unsubstantiated, environmental and nutritional damaging effects of palm oil, severely harm the image of palm oil in consumers' minds and, when coupled with the aforementioned legal requirements, look poised to favour a progressive exclusion of palm oil from the market. '*Palm oil-free*' nutrition claims are not permitted under EU legislation and arguably illegal and deceptive. The same can be said of the environmental grounds used in these campaigns, which unfairly and indiscriminately target all palm oil and never provide evidence to back the general allegations.

The biofuel sector stands to benefit from the EU Parliament's ENVI Committee's lack of consent to open '*early second reading*' negotiations with the EU Council, which means that the legislative procedure to amend the '*Fuel Quality Directive*' and the '*Renewable Energy Directive*' will, in all likelihood, be concluded after the May 2014 elections of the EU Parliament. Additional time, as well as a new composition of the EU Parliament, will certainly help to mitigate the '*uncertainties and limitations*' present in the EU Commission's Proposal concerning, in particular, the nature and quantification of ILUC factors. Operators involved in the biofuels' sector should therefore plan their actions during the upcoming months carefully and wisely, and follow a strategy that ensures that their interests are taken into consideration at all relevant stages of the EU's legislative procedure. This strategy should factor-in the repercussions that the proposed measures would have also on the reputation of palm oil as a food ingredient.

Operators are also advised to engage to carefully monitor all legislative changes related to the food industry, and ensure that commercial interests are duly taken into account within the applicable legal framework. Irrespective of the voluntary or mandatory nature of foodstuffs' labelling requirements, they must comply with a number of basic conditions, including that nutrition and health claims made on foods not be ambiguous or misleading, as per *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods*. At the national level, administrative and judicial mechanisms are in place to safeguard consumers' rights, as well as those of companies harmed by illegal, fraudulent or deceptive practices.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Decision of 6 November 2013 terminating the anti-dumping proceeding concerning imports of certain seamless pipes and tubes of iron or steel, of an external diameter exceeding 406,4 mm, originating in the People's Republic of China*

- *Council Implementing Regulation (EU) No. 1106/2013 of 5 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain stainless steel wires originating in India*

Customs Law

- *Regulation (EU) No. 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances*

- *Commission Delegated Regulation (EU) No. 1083/2013 of 28 August 2013 establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No. 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) No. 1150/2013 of 14 November 2013 amending Implementing Regulation (EU) No. 540/2011 as regards the conditions of approval of the active substance rape seed oil*

- *Commission Recommendation of 8 November 2013 on investigations into the levels of acrylamide in food*

Other

- *Commission Implementing Decision of 31 October 2013 on the adjustments to Member States' annual emission allocations for the period from 2013 to 2020 pursuant to Decision No. 406/2009/EC of the European Parliament and of the Council*

- *Regulation (EU) No. 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur)*

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