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New EU import requirements on citrus fruits from South Africa enter into force

On 2 July 2014, the EU Commission adopted a new set of requirements on imports of citrus fruits from South Africa to the EU. The measures, included in *Commission Implementing Decision of 2 July 2014 setting out measures in respect of certain citrus fruits originating in South Africa to prevent the introduction into and the spread within the Union of Phyllosticta citricarpa (McAlpine) Van der Aa* (hereinafter, the EU Commission's Decision), aim at raising the level of protection in the EU to ensure that the citrus black spot (hereinafter, CBS) disease does not enter or spread within the EU.

CBS is a plant disease caused by the *fungus Guignardia citricarpa* Kiely (renamed *Phyllosticta citricarpa* (McAlpine) Van der Aa), which affects citrus fruits. Although the disease is harmless to humans, it damages fruits' appearance by causing spots on fruit leaves and blemishes in fruits, as well as potentially reducing both quality and quantity of harvests. Although CBS disease is present in regions of Africa, Asia, Oceania and South America, where citrus fruits are produced, it has never been detected in Europe. *Guignardia citricarpa* Kiely (all strains pathogenic to *Citrus*) is classified as a harmful organism under *Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community* (hereinafter, Directive 2000/29), which, in relevant part, lays down requirements for the importation into the EU of plants and fruits susceptible of carrying this and other harmful organisms.

The EU Commission's Decision comes after emergency measures (now lapsed) were adopted by the EU in December 2013. In that case, certain import restrictions were put in place following a number of interceptions (*i.e.*, notifications received by the EU Commission's rapid alert system concerning plant health – EUROPHYT) driven by the presence of CBS disease in South African citrus fruits at the EU's points of importation, exceeding the limits set by the EU (see Trade Perspectives, Issue No. 1 of 10 January 2014).

The EU Commission's Decision applies to fruits of *Citrus* L., *Fortunella* Swingle, *Poncirus* Raf., and their hybrids, other than fruits of *Citrus aurantium* L. and *Citrus latifolia* Tanaka

(*i.e.*, the specified fruits), whether destined for fresh consumption or for processing. Imports are required to be accompanied by a phytosanitary certificate stating that the specified fruits originate from a field of production that was subject to treatments against CBS and where an official inspection has revealed no symptoms of CBS. In addition, the specified fruits need to be systematically sampled and (where CBS symptoms appear) tested for CBS. Phytosanitary certificates accompanying imports of the sub-group *Citrus sinensis (L.)* Osbeck '*Valencia*' must state that a sample of fruits has been tested for latent infection and found free of CBS. The new import criteria also require full traceability of fruits. In this sense, the field of production, packing facilities, exporters and any other operator involved must be officially registered. Likewise, details of pre- and post-harvest chemical treatments must be kept, together with documentary evidence of all movements issued by the plant protection authorities in South Africa.

Additionally, imports will be visually inspected at the point of entry or place of destination in the EU and, where CBS symptoms are detected, fruits will be tested. Should tests confirm the presence of CBS, the entire shipment will be denied entry into the EU or be destroyed (by means other than by processing).

The EU's efforts to remain CBS-free have long been a recurrent matter of discussion within the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee). In March this year, South Africa reiterated its concerns that the restrictive import requirements imposed in December 2013 were more stringent than justified and disproportionate, while the EU responded that its measures were in line with findings of the European Food Safety Authority (*i.e.*, EFSA). In fact, in February 2014, EFSA issued a Scientific Opinion confirming (as anticipated in a July 2013 draft) that it was '*likely*' that the *fungus* entered the EU and '*moderately likely*' that it would establish and spread (see Trade Perspectives, Issue No. 5 of 7 March 2014).

The WTO legal framework allows for measures to be adopted for the protection of human, animal or plant life or health, provided that they comply with a number of requirements. In particular, Article 2.2 of the SPS Agreement requires that such measures be necessary, that they be based on scientific principles and that they not be maintained without sufficient scientific evidence. Article 5 of the SPS Agreement elaborates on these requirements and mandates, *inter alia*, that SPS measures be based on an appropriate risk assessment and that they not be more trade-restrictive than required to achieve the chosen level of protection.

Moreover, Article 6 of the SPS Agreement requires that SPS measures be adapted to the characteristics of the area "*from which the product originated and to which the product is destined*" on the basis of a number of factors, including the level of disease prevalence, the eradication or control programmes in place and the existence of relevant guidelines. Although '*regionalisation*' in South Africa appears to be undisputed, it may be argued that the same principle applies to the EU. To the extent that the CBS disease affects fruits' appearance, but is harmless to humans, it appears that the EU's concerns relate to the economic impacts of the hypothetical entry and establishment of the CBS disease on EU citrus-producing areas.

In this light, the argument can be made that (despite the limitations arising from the functioning of the EU's internal market) '*regionalisation*' in the EU could have provided for significantly less trade-restrictive measures *vis-à-vis* imports of the specified fruits from South Africa. Article 2(h) of Directive 2000/29 foresees that '*protected zones*' be established in the EU, *inter alia*, in areas where, due to favourable ecological conditions, a harmful organism not endemic or present in the EU (such as the *fungus* causing the CBS disease) might establish. Arguably, this could have allowed for restrictive measures not to be applied uniformly throughout the EU, but solely in selected areas where conditions would allow for

the establishment of the harmful organism (*i.e.*, citrus-producing areas). In fact, this option was contemplated by EFSA in its recent Scientific Opinion, where it identified the demarcation of endangered and non-endangered areas in the EU as a possible avenue for the reduction of risk of entry, establishment and spread of the CBS harmful *fungus*. EFSA clarified that, under this option, while no restrictions would be placed on trade with non-endangered areas, the introduction and movement of citrus fruits within endangered areas (*i.e.*, '*protected zones*') would be subject to import requirements or even to a complete ban. EFSA considered this option to be highly effective, although it believed that it was of low technical feasibility.

The EU Commission's Decision (which entered into force on 24 July 2014), has been adopted in the middle of this year's growing season of citrus fruits in South Africa (which extends from April to November, approximately), while last year's measures were enacted when the season 2012-2013 was virtually over. Therefore, concerned industries reportedly expect that the trade impact of the requirements in the EU Commission's Decision will be substantial and sources suggest that the possibility to halt exports of the specified fruits to the EU may even be considered by South Africa, in order to avoid a high number of interceptions triggering more stringent requirements. Thus far, only one interception has been notified. Regardless, the EU's assertion that additional restrictions may be imposed "*before the sixth interception has been notified*" can certainly be read as a strong declaration of intent.

The EU sources one third of its citrus imports from South Africa, where this industry greatly contributes to job creation and economic prosperity. Restrictive measures are admissible, provided that they comply with the applicable regulatory frameworks and contribute to facilitate both trading partners' commercial relations. Nonetheless, South Africa must be aware of the available legal avenues (including WTO dispute settlement proceedings) that may be triggered in the event that restrictions unduly disrupt the market and bring prejudice to the legitimate interest of its economic operators and citrus industry. In this light, concerned businesses are advised to stay abreast of any forthcoming developments and to timely liaise with their relevant authorities, which may find it appropriate and useful to seek early advice on possible remedial action.

Recently released WTO panel report addresses the use of a '*rebuttable presumption*' by the US Department of Commerce that state-owned enterprises are '*public bodies*'

On 14 July 2014, the WTO Dispute Settlement Body (hereinafter, DSB) circulated the panel report in *United States – Countervailing Duty Measures on Certain Products from China*. Though a large portion of the dispute was fact specific, one '*as such*' claim by China against the use of a '*rebuttable presumption*' by the US Department of Commerce (hereinafter, USDOC) regarding the determination of a '*public body*' provides further clarity on the ongoing debate concerning the impact of state-owned enterprises (hereinafter, SOEs) under the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, ASCM).

On 25 May 2012, China requested WTO consultations with the US concerning countervailing duty measures (hereinafter, CVDs) imposed by the USDOC between 2007 and 2012. After failing to reach an agreement with the US during consultations, China's initial request for the establishment of a WTO panel, on 20 August 2012, advanced 22 '*as applied*' claims against USDOC's CVD investigations. China's first written submission, however, only advanced those claims on 17 of the investigations at issue, pertaining to a range of products including thermal paper, pressure pipes, line pipes, citric acid, lawn groomers, kitchen shelving, oil country tubular goods, wire strand, magnesia bricks, seamless pipes, print graphics, drill pipes, aluminium extrusions, steel cylinders, solar panels, wind towers and steel sinks

(though the panel found that the claims against wind towers and steel sinks were outside the scope of the dispute because they were not within its terms of reference). Of the 10 conclusions handed down by the panel, 8 dealt directly with China's '*as applied*' claims. Where China found success on 3 of those claims, the US successfully defended 4 of China's claims and both parties found mixed results with respect to one panel conclusion.

The Chinese arguments established, *inter alia*, that: 12 of the USDOC's CVD investigations wrongly found SOEs to be public bodies within the meaning of Article 1.1(a)(1) of the ASCM; 6 CVD investigations were WTO-inconsistent under Article 2.2 of the ASCM because they made '*positive determinations of regional specificity while failing to establish that the alleged [subsidies were] limited to certain enterprises located within [designated geographical regions] within the jurisdiction of the granting authority*'; and that in 2 CVD investigations, the USDOC acted inconsistently with Article 11.3 of the ASCM by initiating investigations in respect of certain export restraints. However, the most pertinent issues addressed by the panel were whether the policy by the USDOC that majority government-ownership in an enterprise creates a '*rebuttable presumption*' that a '*public body*' exists could be challenged '*as such*', and if so, whether that policy is WTO-consistent.

The facts surrounding the '*rebuttable presumption*' of a '*public body*' issue in this dispute dealt with preliminary and final CVD determinations by the USDOC on kitchen shelving from China. In that decision, the USDOC relied upon a '*longstanding practice*' to treat SOEs as the government itself through the use of a '*rebuttable presumption*' that the relevant SOEs were '*public bodies*' within the meaning of Article 1.1(a)(1) of the ASCM. With regard to the first relevant issue, the panel reaffirmed previous WTO jurisprudence that, in principle, the practices and policies of investigating authorities can be considered as '*measures*' subject to WTO dispute settlement proceedings. In the present dispute, the USDOC's own reference to the '*rebuttable presumption*' as a '*policy*' was enough for the panel to find in China's favour, though the panel added that the repeated previous and subsequent use of the '*rebuttable presumption*' provided further support for its finding. With regard to whether the '*rebuttable presumption*' could be challenged '*as such*', the panel relied on *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body stated that measures consist '*not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application*'. The Appellate Body added that, in order to bring an '*as such*' challenge against a '*rule or norm*', a complaining party must establish: (i) that the alleged '*rule or norm*' is attributable to the responding Member; (ii) the precise content or the '*rule or norm*'; and (iii) that the '*rule or norm*' does indeed have general and prospective application. Even though the US argued that its domestic law does not stop the USDOC from changing its polices or practices, and thus no '*rule or norm*' was created, the panel sided with China, finding that the express terms of the USDOC in the kitchen shelving investigation established that the USDOC set forth a rule or norm that applied in a general and prospective manner, as it was intended to (and did) apply to future investigations.

Having found that the '*rebuttable presumption*' could be challenged '*as such*', the panel then turned to examine whether the policy was inconsistent with Article 1.1(a)(1) of the ASCM, which, in the context of defining a subsidy, refers to a '*financial contribution*' by a government or any '*public body*' within the territory of the WTO Member. Citing the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, the panel followed a two-step approach based on: (1) whether the policy at issue obliged the USDOC to consider majority ownership as a sufficient basis for finding the existence of a '*public body*'; and (2) whether the policy restricted the USDOC's consideration of evidence relating to factors other than ownership in a particular investigation. During the first step of the approach, the panel was not satisfied by the use of the word '*normally*' in the relevant USDOC CVD determination, with regard to the existence of a '*public body*' when majority government-ownership is present, because it felt as though the presumption was still presented in a conclusive

manner. With regard to step 2 of the panel's approach, it found that the '*rebuttable presumption*' forces the responding party to present evidence, rather than the USDOC procuring evidence on its own accord, and thus restricts the consideration of additional evidence. As a result, the panel found that '*rebuttable presumption*' policy by the USDOC, to consider majority government-owned enterprises as '*public bodies*', is inconsistent with Article 1.1(a)(1) of the ASCM.

The ruling provides added clarity to the application of the ASCM when SOEs are providing the financial contribution at issue. However, the panel decision will almost certainly be appealed within 30 days of its circulation. Circulation of the panel report took almost 20 months following the composition of the panel, thus it can be expected that the eventual Appellate Body report will not be circulated until well into 2015. Nonetheless, in addition to interested parties in the US and China, other businesses who are affected by economies with SOEs, especially in Asia, should monitor the dispute closely.

Lithuania bans the sale of energy drinks to minors

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 (hereinafter, FIR) introduces stricter health warnings that apply as of 13 December 2014 in relation to the caffeine content in energy drinks (for more details, see TradePerspectives, Issue No. 7 of 4 April 2014). Stricter health warnings on energy drinks were already adopted in Lithuania in 2013. In a more restrictive move, on 15 May 2014, the Republic of Lithuania's Parliament overwhelmingly voted to ban the sale of high-caffeine energy drinks to minors.

The FIR repeals and consolidates a wealth of EU food labelling acts, including, *inter alia*, *Commission Directive 2002/67/EC on the labelling of foodstuffs containing quinine, and of foodstuffs containing caffeine* (hereinafter Directive 2002/67/EC). Caffeine and quinine are considered ingredients or substances that may adversely affect some people. Quinine and caffeine are used in the production or preparation of certain foodstuffs, either as flavourings or, in the case of caffeine, as an ingredient. For most consumers, the consumption of these substances in moderation is unlikely to present any health risks (for more details, see TradePerspectives, Issue No. 7 of 4 April 2014). Directive 2002/67/EC established labelling rules to give the consumer clear information on the presence of quinine or caffeine in a foodstuff and, in the case of caffeine, to provide a warning message and an indication of the amount of caffeine, where it is in excess of a specific level, in beverages that do not naturally contain caffeine. Therefore, quinine and/or caffeine used as flavouring in the production or preparation of a foodstuff must be mentioned by name in the list of ingredients immediately after the term '*flavouring*'. Where a beverage contains caffeine, from whatever source, in a proportion in excess of 150 mg/l, the message '*high caffeine content*' must appear on the label in the same field of vision as the name under which the product is sold. This message must be followed by the caffeine content expressed in mg/100 ml.

In the proposal for the FIR of 30 January 2008, the EU Commission maintained the '*high caffeine content*' warning message and added a compulsory message '*added caffeine*' for other foods, where caffeine is added with a nutritional or physiological purpose. In the course of the legislative procedure, the message: '*High caffeine content. Not recommended for children or pregnant or breast-feeding women*' was introduced and will be compulsory as of 13 December 2014 on energy drinks in the same field of vision as the name of the beverage, followed by a reference in brackets to the caffeine content expressed in mg/100 ml. A further warning message '*do not mix with alcohol*' was proposed in the legislative procedure by the EU Parliament, but in the end, it was not adopted in the FIR.

As stated above, the Republic of Lithuania has now banned the sale of high-caffeine energy drinks to minors. Lithuania adopted *Law No. XII-885 amending the Food Law No. VIII-1608* (hereinafter, Law No. XII-885). Article 2 of Law No. XII-885 supplements Article 6 of the Food Law No. VIII-1608 (which concerns market restrictions for food and other related food products). In relevant part, it states that the sale, purchase, or otherwise transfer of energy drinks to children under 18 years of age is prohibited. Energy drink sellers are entitled to request identity documents to check the age. According to Article 1 of Law No. XII-885, a definition of energy drinks is added as No. 20 of Article 2 of the Food Law No. VIII-1608 as follows: '*Energy drink is a non-alcoholic beverage containing more than 150 mg/l of caffeine (regardless of the source), or containing more than 150 mg/l of caffeine and one or more other stimulants of the central nervous system like glucuronolactone, inositol, guarana, ginsenosides, ginkgo extract and taurine. Energy drink may contain carbohydrates, vitamins, minerals, amino acids, food additives, fruit juices and plant extracts*'. It must be noted that the list of other stimulants of the central nervous system is an open list and could include substances not expressly listed. The Lithuanian ban on the sale of energy drinks to minors will take effect in November 2014.

In 2012, prior to the adoption of Law No. XII-885, the Nutrition unit of the National Food and Veterinary Risk Assessment Institute of Lithuania (*Nacionalinis maisto ir veterinarijos rizikos vertinimo institutas*) carried out a risk assessment on energy drinks entitled "*Analysis of the impact assessment of energy drinks and their ingredients on human health, based on laboratory testing*". The risk assessment found, *inter alia*, that "*for pregnant women, too much caffeine (more than 200 mg) might result in a baby having a lower birth weight than it should, which can increase the risk of some health conditions in later life. There is also some evidence which suggests that high levels of caffeine can result in spontaneous miscarriage. Children and adolescents are more sensitive to caffeine*" and that "*consumption of energy drinks with alcohol causes a simultaneous diuretic effect and an increased risk of dehydration and also has negative effects on the central nervous system*".

It has been reported that Lithuania, an EU Member State since 2004, hopes that other Member States that only have recommendations in place, not sales bans to minors, will follow suit. When other EU Member States legislate similarly to Lithuania, this would ultimately lead to a fragmentation of the rules applicable in the EU's Single Market. The provisions established in Lithuania, banning the sale of energy drinks to minors, are arguably justifiable on grounds of consumer protection and protection of human health, and would therefore likely not violate the provisions on the free movement of goods set out in Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU). However, in view of national initiatives on the marketing of energy drinks, a harmonised approach in the EU would be welcomed.

In this context, it must be noted that Lithuania already adopted, on 7 November 2013, *Law No. XII-577 on the amendment of the Advertising Act No. VIII-1871*, which provides in Article 2, *inter alia*, that paragraph 7 is added to Article 14 of the Act, which states that energy drink advertisements must include the wording '*do not consume with alcoholic beverages*'. This is exactly the wording that the EU Parliament proposed for the FIR and that, in the end, was not included in the regulation. Under Lithuania's Advertising Act No. VIII-1871, it is already prohibited to: (i) indicate energy drinks as products of sponsors or to advertise them in any other way in educational establishments attended by persons under the age of 18; and (ii) distribute energy drinks for advertising purposes to persons under age of 18. The draft Lithuanian measure amending the Advertising Act No. VIII-1871 was notified on 13 March 2013 to the EU Commission under the so-called TRIS (*i.e.*, Technical Regulation Information Service) procedure set up under *Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.* The aim of TRIS is to provide transparency and avoid unjustified barriers between EU Member States. The TRIS procedure imposes an obligation

on EU Member States to notify the EU Commission and the other EU Member States of all the draft technical regulations concerning products and information society services before they are adopted in national law. In the course of the TRIS procedure relating to the draft Lithuanian measure, Spain and the UK have provided comments on the amendment of the Lithuanian Advertising Act, while Austria, the Czech Republic, Italy and Slovenia issued a detailed opinion. However, the amendment was adopted. It must be noted that Lithuania has not notified the draft law amending the Food Law No. VIII-1608 banning the sale of high-caffeine energy drinks to minors under TRIS. The sales ban does not appear to be considered a '*technical standard*' that has to be notified under the TRIS procedure, while labelling rules are normally notified under the TRIS procedure.

Labelling of caffeinated energy drinks and sales' bans are not only being discussed in Europe. In the study "*Young adolescents' perceptions, patterns, and contexts of energy drink use - A focus group study"*, Australian academics warn that young adolescents can easily identify energy drinks brands, but are unaware of key ingredients including caffeine, guarana and taurine. The study finds that young adolescents use energy drinks without knowing what they are drinking and how they are contributing to their personal risk of harm. The study concludes that, since the advertising, appeal, and use of energy drinks by adolescents appear to share similarities with those applicable to alcohol and tobacco, the regulation, labelling and advertising rules for energy drinks should be tightened. The energy drinks industry is rapidly growing, and other substances with a physiological purpose, which are added to drinks, may come under the scrutiny of EU and EU Member States' regulators. Manufacturers of such drinks are advised to monitor regulatory developments in this sector, such as labelling requirements, sponsorship restrictions, sales restrictions, and safety assessments by EFSA and EU Member States' authorities in order to ensure regulatory compliance. This task is becoming increasingly difficult, when energy drinks are banned for specific parts of the population by certain EU Member States on health grounds. Stricter health warnings on energy drinks, similar to those on alcoholic beverages and tobacco products, are arguably disproportionate. Furthermore, in light of the many new botanical substances or extracts used in energy drinks, expert advice should be sought to ensure regulatory compliance.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) No. 803/2014 of 24 July 2014 amending Council Implementing Regulation (EU) No. 412/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tableware and kitchenware originating in the People's Republic of China*

Food and Agricultural Law

- *Commission Regulation (EU) No. 752/2014 of 24 June 2014 replacing Annex I to Regulation (EC) No. 396/2005 of the European Parliament and of the Council*

- *Commission Implementing Decision of 23 July 2014 as regards measures to prevent the introduction into and the spread within the Union of Xylella fastidiosa (Well and Raju)*

Other

- *Commission Implementing Regulation (EU) No. 771/2014 of 14 July 2014 laying down rules pursuant to Regulation (EU) No. 508/2014 of the European Parliament and of the Council on the European Maritime and Fisheries Fund with regard to the model for operational programmes, the structure of the plans for the compensation of additional costs incurred by operators in the fishing, farming, processing and marketing of certain fishery and aquaculture products from the outermost regions, the model for the transmission of financial data, the content of the ex ante evaluation reports and the minimum requirements for the evaluation plan to be submitted under the European Maritime and Fisheries Fund*

- *Decision No. 1/2014 of the Joint European Union/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 9 July 2014 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport*

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The Trade Perspectives© Team

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