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The EU Commission adopts draft rules under the EU's Fuel Quality Directive

On 6 October 2014, the EU Commission adopted a draft measure aimed at implementing specific obligations under the EU's Fuel Quality Directive (*i.e.*, *Directive 1998/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels as amended by Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 as regards the specifications of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions*). Following the EU Member States' failure to agree on a previous proposal (see Trade Perspectives, Issue No. 5 of 9 March 2012), the EU Commission has now tabled a substantially revised draft (*i.e.*, *Proposal for a Council Directive on laying down calculation methods and reporting requirements pursuant to Directive 98/70/EC of the European Parliament and of the Council relating to the quality of petrol and diesel fuels* – hereinafter, the proposed Directive).

The EU's Fuel Quality Directive lays down technical specifications on the quality of fuels used for road vehicles and non-road mobile machinery, as well as a target for the reduction of life-cycle greenhouse gas (hereinafter, GHG) emissions from such fuels. In relevant part, EU Member States must require fuel suppliers to reduce by 6% the GHG intensity of transportation fuels by 2020. This target, framed within the wider objective of triggering a transition from fossil fuels to energy from renewable sources in the EU's transportation sector, requires a calculation of the life-cycle GHG intensity of fossil fuels on the basis of default values attributed to each fuel. In particular, the proposed Directive addresses the mandate contained in paragraph 5 of Article 7a of the Fuel Quality Directive, which establishes that implementation measures be adopted to, *inter alia*, lay down the methodology for the calculation of life-cycle GHG emissions of fossil fuels.

In the Impact Assessment accompanying the proposed Directive, the EU Commission examines a number of policy options concerning the said methodology. In relevant part, the EU Commission concludes that the simplest and less costly option, which consists of not differentiating between fuel feedstocks included in the fuel mix, is to be endorsed. The EU Commission notes that this option, which provides for an average default GHG intensity value for each of the four main types of fuel consumed in the EU (*i.e.*, petrol, diesel/gasoil, liquefied gas and compressed natural gas) regardless of the feedstock used, may be less accurate than other options, to the extent that, *inter alia*, it does not capture GHG intensity variations between feedstock categories (*i.e.*, those of conventional fuels (*i.e.*, from crude oil) *vis-à-vis* those of unconventional fuels (such as fuel obtained from tar sands and shale oil)). However,

the Impact Assessment concludes that, despite some "*risks with regards to the accuracy of the reported average EU emissions*" the preferred option would enable EU Member States to verify compliance in an uncomplicated manner at the same time as minimising fraud risks.

Accordingly, the proposed Directive sets out that, when calculating the GHG intensity of fuels, suppliers use the "*weighted life cycle unit GHG intensity*" foreseen for petrol, diesel/gasoil, liquefied gas and compressed natural gas, independently of the raw materials sourced. By way of example, Annex I to the proposed Directive attributes an average value of 93.3 gCO2eq/MJ (*i.e*., grams of CO2 per megajoule of energy) to petrol and 95.1 gCO2eq/MJ to diesel, whether they originate from conventional crude, natural gas-to-liquid, coal-to-liquid, natural bitumen or oil shale. The proposed Directive retains differentiated life-cycle unit GHG intensity values for each feedstock, some of which are significantly higher that the weighted average (*e.g*., petrol from natural bitumen is attributed a value of 107 gCO2eq/MJ and diesel from the same feedstock is accorded 108.5 g CO2eq/MJ). However, the draft measure provides that these values be relevant solely for purposes of reporting requirements.

In this manner, the proposed Directive, as anticipated a few months ago (see Trade Perspectives, Issue No. 12 of 13 June 2014), contains a scheme that is arguably less likely to trigger potential WTO scrutiny. Concerns that this avenue would be explored by certain trading partners of the EU were raised in relation to the previously proposed draft, which essentially suggested that the different default values attributed to '*conventional fuels*' and '*unconventional fuels*' be factored in the methodology for the calculation of life-cycle GHG emissions. Natural bitumen (commonly referred to as '*tar sands*') was granted a remarkably higher value than that granted to other feedstocks for which (albeit arguably equally polluting) no separate default value was proposed. In this context, Canada (which hosts major tar sands reserves) expressed that the proposed scheme may have led to instances of discrimination against Canadian fuels *vis-à-vis* fuels from other WTO Members, in violation of Articles I and III:4 of the GATT. Additionally, such proposal may also have been found inconsistent with Article 2.1 of the WTO Agreement on Technical Barriers to Trade, should it have been deemed to perform a regulatory distinction on the basis of a process and production method (*i.e.*, the feedstock's environmental impact) not affecting the final product's physical characteristics (*inter alia*).

As per the mandate in the EU's Fuel Quality Directive, which foresees that measures in the sense of its Article 7a(5) undergo the regulatory procedure with scrutiny, the proposed Directive will be examined by the EU Council within a period of two months, following which, it will be transmitted to the EU Parliament.

Although exports of fuel from natural bitumen from Canada to the EU are currently rather modest, the proposed Directive will (if adopted) signify the removal of a potential major obstacle to increased exports in the future. It could be argued that the order of the EU's priorities between the environment, energy and trade portfolios may have been affected by the increasing unreliability of the EU's traditional energy suppliers, as well as by ongoing trade negotiations with its trans-Atlantic trading partners. In any event, it is clear that effective, intense and targeted lobbying efforts from the Canadian Government and concerned industry sectors to the relevant EU authorities appear to have been successful. These developments showcase the results that smart strategies and actions in the relevant sectors stand to achieve, and constitute a valuable lesson that other industry sectors (in particular, the biofuel industry, including palm oil, soybean, etc.) in key EU trading partners (*i.e.*, Argentina, Indonesia, Malaysia, etc.), should examine very closely, in order to avoid that they be negatively affected by instances of (*de facto*, if not *de jure*) discrimination arising from certain EU policies such as, *e.g.*, the EU's Fuel Quality Directive, Renewable Energy Directive and Indirect Land Use Change (*i.e*., ILUC) schemes.

EU Commission initiates infringement proceeding against the UK over its '*traffic light*' nutrition labelling scheme

On 1 October 2014, the EU Commission announced that, with a formal letter of notice, it had initiated infringement proceedings against the UK over its so-called '*traffic light*' nutrition labelling scheme. The UK scheme is a hybrid front-of-pack (hereinafter, FoP) food labelling scheme that includes '*percentage reference intakes*' (formerly known as guideline daily amounts or GDAs) and colour coding, which indicates whether or not the product is high (*i.e.*, red), medium (*i.e.*, amber) or low (*i.e.*, green) in fat, saturated fat, sugar and salt (depending on their content per 100g). The scheme is, in principle, voluntary, but it was recommended in June 2013 by the UK Food Standards Agency (hereinafter, FSA) and the Department of Health.

The EU Commission's formal letter of notice states that the EU Commission shares the objectives of public health and the fight against obesity pursued by the UK Government in recommending the scheme. However, following complaints from food and retail operators, which claimed that the use of such scheme would negatively affect the marketing of several products, the EU Commission decided to seek information from the UK about the '*traffic light*' scheme for pre-packed food products. The EU Commission has given the UK two months to respond. The EU Commission reportedly argues that the simplistic character of the '*traffic light*' scheme might in certain cases create a negative inference on products labelled with red lights and to a lesser extent with amber lights, in a way which shows that the product is inferior. Thus the scheme is '*negative'* in its ranking of '*bad*' nutrition contents. This may adversely affect the consumer's perception of the products in question. Misconceptions as to the nutritional quality of certain foodstuffs, such as nuts, seeds, cheese, oils and oily fish, which are naturally high in fats, may make the marketing of these products more difficult and create obstacles to trade. The EU Commission's decision to initiate formal proceedings against the UK was preceded by an investigation earlier this year into the compatibility of the '*traffic light*' scheme with EU law.

The initiation of infringement proceedings by the EU Commission appears to mark a change in its point of view regarding the UK '*traffic light*' scheme. On 21 October 2013, in an answer to a parliamentary question, the EU Commission emphasised that the '*traffic light*' scheme for nutrition labelling introduced in the UK is a voluntary system and retailers and food manufacturers cannot be forced to use it. The EU Commission estimated that, because of its voluntary character, such scheme does not create a *de jure* barrier to trade. The fact that some UK companies announced publicly that they would use the scheme, while others announced they would not, showed that, as the situation stood at that time, the system cannot be considered a *de facto* mandatory system either. In the answer published by the EU Commission, it expressly stated that it was not considering initiating an infringement proceeding against the UK.

Earlier that month, on 4 October 2013, the meeting of the Standing Committee on the Food Chain and Animal Health (hereinafter, the SCoFCAH) addressed a request from Italy for a discussion on the voluntary 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. The EU Commission recalled 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 *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers* (hereinafter, 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. At that time, the EU Commission argued that: a) the UK scheme did not constitute *de jure*

mandatory labelling, as no legislation imposed it; and b) on the basis of the available information, it could not be considered as *de facto* mandatory labelling. The EU Commission shared the UK's view that recital 46 of the FIR considered such scheme as nutritional information and not as '*non-beneficial*' nutrition claims.

Three legal issues are of particular relevance in this context: 1) whether a scheme like the UK's '*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 Treaty on the Functioning of the EU (hereinafter, TFEU) (see TradePerspectives, Issue No. 21 of 15 November 2013).

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 '*traffic light*' nutrition labelling scheme raises concerns as to whether it is, in fact, voluntary. It should be noted that, already last year, major UK retailers signed-up to the '*traffic light*' nutrition labelling scheme, as well as some major food manufacturers and, in particular, that the FSA had recommended its use and provided for guidelines on how to comply with the scheme on its website.

The initiation of infringement proceedings by the EU Commission may indicate that it has collected new evidence regarding a potential *de facto* barrier to trade created by the UK '*traffic light*' nutrition labelling scheme. If new evidence suggests that retailers, who do not use the '*traffic light*' scheme, are being pushed out of the retail market in the UK, this could demonstrate that the scheme is not, at least in practice, '*voluntary*'. In the same regard, if most major food manufacturers are using the scheme, it may no longer be '*voluntary*' to retailers, who have limited options regarding which products to place on their shelves.

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 *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods* (hereinafter, 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*'. There is a societal learned association between a red light meaning '*stop*' and a green light meaning '*go*'. 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 could also be argued that the '*traffic light*' scheme has the potential to have a negative effect on the UK's population. Many of the products that carry '*red lights*' have

components that (in moderation) are needed for a healthy diet, such as sugars, fat and sodium. If consumers are steered towards only buying products with '*green lights*', their diets may fall short of adequate nutrition standards.

In relation to the assertion 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 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 the UK system highly discriminates many quality agro-food products like cheese, meat, marmalade and sweets, which would be labelled with '*red traffic lights*' due to their content of salt, sugars or fats. Consumers could understand this as a form of discrimination towards certain foods. 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. The EU Commission is the guardian of the treaties and must look for the most appropriate and the less trade restrictive means to achieve this objective, while preserving the achievements of the internal market and preventing obstacles to free movement of goods. There are concerns about EU Member States taking an individual approach, such as in the UK, as this may generate a proliferation of different national voluntary schemes across the EU. This could fragment the EU Internal Market and cause confusion for consumers. It must be noted that, this year, France also announced plans for its own colour-coded nutrition labelling scheme, illustrating the sugar, fat, salt and calorie content of foods using a five-colour code (*i.e.*, green, yellow, orange, fuchsia and red – almost a rainbow), as opposed to the UK's '*traffic-light*' scheme. Reportedly, the scheme is part of a proposal for a new public health law, which will be presented to the French Council of Ministers and will be debated in the French Parliament from the beginning of 2015.

The letter of formal notice represents the first stage in the pre-litigation procedure in which the EU Commission requested the UK to submit within two months its observations on the '*traffic light*' scheme. According to Article 258 TFEU, if the EU Commission were to consider that an EU Member State has failed to fulfil an obligation under the Treaties, it would have to deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the EU Member State concerned does not comply with the opinion within the period laid down by the EU Commission, the latter may bring the matter before the Court of Justice of the European Union. The purpose of the reasoned opinion is to set out the EU Commission's position on the infringement and to determine the subject matter of any action, requesting the EU Member State to comply within a given time limit. The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the EU Member State concerned has failed to fulfil its obligations under the Treaties or secondary legislation. Referral by the Commission to the Court of Justice opens the litigation procedure.

In the next months, interested parties should continue observing whether or not the UK scheme hinders intra-EU trade. 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 (as, arguably, the UK scheme) or other '*beneficial claims*' in the overall context of promotion of a product are permitted.

Recent developments in relation to investor-to-state dispute settlement provisions in trade agreements

On 26 September 2014, Canada and the EU announced that they had concluded negotiations on the Comprehensive Economic and Trade Agreement (hereinafter, CETA), and that the text of the agreement would next undergo a '*legal scrubbing*'. Since the announcement, reports have resurfaced that Germany continues to oppose the inclusion of investor-to-state dispute settlement (hereinafter, ISDS) in the CETA. The inclusion of ISDS provisions in international trade and investment agreements has also been scrutinised following the recent declassification by the Council of the European Union of the *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America* (hereinafter, the TTIP Negotiating Directives), and recent reports of potential sectoral '*carve-outs*' in the Trans-Pacific Partnership Agreement (hereinafter, TPP).

Canada and the EU began negotiating the CETA in 2009. The EU's negotiating mandate provides for the inclusion of ISDS provisions, but in the past few years criticism over the use of the mechanism in international agreements has increased. ISDS provisions first appeared over 50 years ago in a bilateral agreement between Germany and Pakistan. The use of ISDS is intended to serve as an alternative to traditional state-to-state dispute settlement mechanisms, which arguably do not always provide sufficient recourse for investors (for more information, see Trade Perspectives Issue No. 3 of 7 February 2014). Accordingly, ISDS provides investors with the ability to directly sue host governments, when those governments violate the investment protection to which the relevant investor is entitled. Some commentators have argued that ISDS favours investors, especially large multi-national corporations from developed countries, limits or even removes a government's ability to set its own laws and adds unnecessary expenses to government budgets. Commentators have also argued that ISDS mechanisms are especially unnecessary in agreements between developed economies where domestic legal systems are more predictable. In the case of CETA, reports indicate that Germany is particularly concerned with the potential for ISDS provisions to grant foreign investors more rights than those available to domestic investors.

Governments and negotiating teams are fully aware of these criticisms and appear to be incorporating solutions into new international agreements. In February 2014, Australia and South Korea released the text of their free trade agreement, which included clarifications, reservations, exclusions and general exceptions in an attempt to improve upon areas where previous agreements lacked clarity (see Trade Perspectives, Issue No. 5 of 7 March 2014). The CETA similarly includes detailed definitions and clarity regarding, *inter alia*, fair and equitable treatment. More recently, the Council of the European Union declassified the TTIP Negotiating Directives. There, one main objective of the investment protection provisions in the TTIP is to allow EU Members States to retain the rights to adopt and enforce measures that address issues related to social policy, environmental policy, security, stability of the financial system, public health and safety in a non-discriminatory manner. The TTIP Negotiating Directives also state that the TTIP should include effective and state-of-the-art provisions regarding transparency, independence of arbitrators and predictability, as well as potentially include an appellate ISDS mechanism. In this regard, the EU Commission even went so far as to open public consultations with respect to the ISDS provisions in the TTIP. The final results have not yet been released, though the key issue on which the consultation was based was whether the EU's proposed approach for TTIP will achieve the right balance between protecting investors and safeguarding the EU's right and ability to regulate in the public interest.

To address specific concerns by the public arising from the potential application of ISDS, some governments have even considered the use of blanket sectoral '*carve-outs*' regarding the potential use of ISDS mechanisms. For instance, recent reports indicate that the US negotiating team for the TPP may have informed other countries that it is willing to include a tobacco '*carve-out*' with respect to the TPP's ISDS provisions. Such a concession by the US may be due to criticisms over the use of ISDS provisions in a bilateral agreement between Australia and Hong Kong, pursuant to which one tobacco company is defending its rights against the potential expropriation of its intellectual property due to standardised cigarette packaging regulations in Australia. Though the alleged US proposal is not as far-reaching as Malaysia's initial proposal, tabled last year, regarding a tobacco carve-out (Malaysia proposed that tobacco be removed from the ISDS and state-to-state dispute settlement mechanisms), such a proposal may still raise some concerns.

The role and functions of ISDS are important, as it is this mechanism that can prevent instances of regulatory abuse, ensure that international trade and/or investment agreements are properly negotiated and that their obligations, commitments and concessions are reliable and give rights, as well as duties, to investors. Whereas some clarifications to the application of ISDS could, in certain instances, be useful, removing ISDS entirely or even just sectorally with exclusion lists or sector/product-specific '*carve-outs*' appears to be fundamentally wrong, a simplistic and dangerous approach, and one that will likely have a significant negative impact on cross-border investment, in addition to raising concerns of systemic nature.

In fact, the inclusion by negotiators of reservations, exclusions, general exceptions or '*carve-outs*' will inevitably encourage a practice of investment protection '*a la carte*', which would increase fragmentation and create confusion among investors. This cannot, but complicate, the landscape for businesses, diminish the significance of the protection granted by investment agreements and the rule of law that ISDS fosters, and expand the scope for certain governments to take advantage of these tailored exceptions, which may harbour *de facto* if not *de jure* discrimination, and in general terms discourage investment. Whereas countries should be able to preserve their right to regulate and adopt (non-discriminatory and not arbitrary) measures for the protection of health, safety, the environment and other important societal values, investment agreements must be designed in such a way as to enable affected investors to seek redress before an independent arbitrator, when in the presence of discretionary and/or discriminatory conducts put in place by governments, and to receive adequate compensation against instances of expropriation. This is a fundamental right and one that must be safeguarded. Again, an outright exclusion of ISDS, or even sectoral carve-outs, will set a problematic precedent and may undermine the role that such instruments play in attracting investments and in securing the application of the rule of law.

Recently Adopted EU Legislation

Market Access

- *Council Decision of 24 September 2012 on the signing, on behalf of the European Union and its Member States, and the provisional application of the protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, to take account of the accession of the Republic of Bulgaria and Romania to the European Union*

Food and Agricultural Law

- *Commission Regulation (EU) No. 1092/2014 of 16 October 2014 amending Annex II to Regulation (EC) No. 1333/2008 of the European Parliament and of the Council as regards the use of sweeteners in certain fruit or vegetable spreads*

- *Commission Regulation (EU) No. 1093/2014 of 16 October 2014 amending and correcting Annex II to Regulation (EC) No. 1333/2008 of the European Parliament and of the Council as regards the use of certain colours in flavoured ripened cheese*

- *Commission Implementing Directive 2014/96/EU of 15 October 2014 on the requirements for the labelling, sealing and packaging of fruit plant propagating material and fruit plants intended for fruit production, falling within the scope of Council Directive 2008/90/EC*

- *Commission Implementing Decision of 9 October 2014 amending Decision 2003/467/EC as regards the declaration of certain regions of Poland as officially enzootic-bovine-leukosis-free*

- *Commission Implementing Decision of 9 October 2014 concerning animal health control measures relating to African swine fever in certain Member States and repealing Implementing Decision 2014/178/EU*

Other

- *Commission Implementing Decision of 14 October 2014 identifying a third country that the Commission considers as a non-cooperating third country pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing*

- *Commission Delegated Regulation (EU) No. 1078/2014 of 7 August 2014 amending Annex I to Regulation (EU) No. 649/2012 of the European Parliament and of the Council concerning the export and import of hazardous chemicals*

- *Commission Delegated Regulation (EU) No. 1062/2014 of 4 August 2014 on the work programme for the systematic examination of all existing active substances contained in biocidal products referred to in Regulation (EU) No. 528/2012 of the European Parliament and of the Council*

Ignacio Carreño, Eugenia Laurenza, Songyuan Li, Anna Martelloni, Blanca Salas, Bruno G. Simões and Paolo R. Vergano contributed to this issue.