

**Issue No. 1 of 9 January 2015**

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**The ILUC Proposal has proceeded to the second reading of the legislative procedure**

On 18 December 2014, the *rapporteur* of the EU Parliament's Committee on the Environment, Public Health and Food Safety (hereinafter, ENVI Committee) tabled its Draft Recommendation for Second Reading (hereinafter, the ENVI Committee's Draft Recommendation) within the framework of the legislative procedure aimed at the adoption of a directive amending the EU's regulatory framework on biofuels. The ENVI Committee's Draft Recommendation concerns the position of the EU Council at first reading, which was formally adopted earlier in December 2014.

The legislative procedure at hand initiated when the EU Commission tabled, in October 2012, a *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 (i.e., ILUC Proposal)*. In relevant part, this proposal aims at amending the EU's *Fuel Quality Directive* and *Renewable Energy Directive* in order to minimise the impact of emissions arising from indirect land use change (*i.e., ILUC*) on GHG (*i.e., greenhouse gas*) emissions stemming from the production of biofuels (*i.e., 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*). In this sense, the ILUC Proposal also aims at 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).

In particular, the ILUC Proposal envisages a primary distinction between '*first generation*' biofuels (also called '*conventional*' biofuels, originating from food crops) and '*second generation*' or '*advanced*' biofuels (originating from alternative sources, such as forest residues, algae or municipal waste). On this basis, the proposal suggests capping the contribution of '*first generation*' biofuels within 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 proposal suggests incentivising the use of '*advanced*' biofuels and attributes estimated ILUC emissions factors to different biofuels according to the feedstock used to produce them.

In accordance with the ordinary legislative procedure (formerly, 'co-decision'), the EU Parliament adopted, under the guidance of the ENVI Committee, its position at first reading on the ILUC Proposal in September 2013 (see Trade Perspectives, Issue No. 17 of 20 September 2013). The EU Member States' position on the amendments proposed by the EU Parliament was reflected in the EU Council's position at first reading, which was formally adopted on 9 December 2014, following a political agreement reached on 13 June 2014 (see Trade Perspectives, Issue No. 13 of 27 June 2014).

In its Draft Recommendation, the ENVI Committee's *rapporteur* (i.e., MEP Nils Torvalds, appointed after the newly elected EU Parliament) indicates that many of the amendments he proposes are based on the amendments that the EU Parliament tabled at first reading, to address key issues that at this stage remain unresolved and that will, according to the *rapporteur*, "determine the effectiveness of this legislation". By way of example, with regards to the cap on the share of 'conventional' biofuels that can contribute to the *Renewable Energy Directive* target, the ENVI Committee's *rapporteur* indicates to be concerned by the further increase of the cap introduced by the Council (which raised it to 7%, up from the 5% originally proposed by the EU Commission and the 6% suggested by the EU Parliament) and, accordingly, re-tables the 6% cap proposed at first reading. The Draft Recommendation is also in line with the previous EU Parliament's position in relation to ILUC factors. The *rapporteur* proposes that ILUC factors be factored-in the lifecycle GHG emissions from biofuels after 2020 under the *Fuel Quality Directive*, but that they remain only for monitoring and reporting purposes under the *Renewable Energy Directive* (although there is a mandate for the EU Commission to revise the factors by 2016). With regards to the national targets for 'advanced' biofuels, the *rapporteur* recommends that a binding niche of 2.5% be introduced in 2020, in line with the EU Parliament's position at first reading and contrary to the Council's views, which proposed that the target be non-binding and significantly lower. In addition, the *rapporteur* recommends that a number of provisions be included in the text, highlighting the need for the EU Institutions to design a post-2020 policy in relation to biofuels.

The *rapporteur's* proposals stand to have a potentially strong impact on biofuel producers and exporters, should they be reflected in the final directive. In particular, the inclusion of ILUC factors in the accounting under the *Fuel Quality Directive* (which, *inter alia*, requires EU Member States to reduce the GHG intensity of transportation fuels), as well as the binding target for 'advanced' biofuels, look poised to have particularly deleterious effects for 'first generation' biofuel operators.

The ENVI Committee's Draft Recommendation was issued little after the EU Commission tabled its Communication to the EU Parliament on the Council's position at first reading, where the EU Commission stated that, although it "*regrets that, with regard to its original proposal, the Council position at first reading has significantly lowered the level of ambition*", it will, "*in order to allow the legislative process to move forward [...] not oppose the Council's position at first reading*".

Following the adoption of the *rapporteur's* Draft Recommendation by the ENVI Committee, it will be discussed by the EU Parliament's Plenary. According to the stricter timeframes that bind EU Institutions at second reading, the EU Parliament is required to either approve, reject or amend the Council's position at first reading within three months (four months if an extension has been agreed) after it was communicated to the EU Parliament. Should the EU Parliament fail to act within such timeframe, the draft directive will be deemed to have been adopted according to the Council's position at first reading. Once the EU Parliament has concluded its second reading and has referred its position to the EU Council, the latter will have, in turn, a further three months (four months, if an extension is agreed) to approve the amendments tabled by the EU Parliament (in which case, the draft directive will be adopted). Should the EU Council not be able to do so, the Conciliation Committee will be convened.

In this light, it appears that the legislative procedure for a draft directive amending the EU's biofuel framework will be concluded during the course of the new year, if not in the coming months. The heated controversy that has surrounded this procedure from its very early stages certainly reflects the sensitive nature (including at a commercial and environmental level) of the issues at stake. Fully aware and cognisant of the challenges and opportunities that the remainder of the legislative procedure presents, operators with an interest in this dossier (including producers, exporters and Government officials from countries with an interest in the relevant issues, including those producing and exporting commodities that are used as 'first generation' biofuel feedstock (e.g., Indonesia, Malaysia, etc.)) are advised to continue maintaining (if not intensifying) regular communications with the competent authorities, in order to ensure that their interests are duly and timely considered at all the relevant instances of the EU decision-making process. Failure to act within the right *fora* and at the right time may have extremely negative effects for the relevant industries, which may find themselves *de facto* excluded from one of its most important export markets.

### **EPA peer-review report confirms that palm oil-based biofuel is not 'renewable'**

In December 2014, the US Environmental Protection Agency (hereinafter, EPA) released the *Peer-Review Report on Emission Factor for Tropical Peatlands Drained for Oil Palm Cultivation* (hereinafter, the Peer-Review Report). This report supports the previous decision by the EPA that palm oil-based biodiesel and renewable diesel do not qualify as 'renewable' fuel under the US Renewable Fuel Standard (hereinafter, RFS) programme because of insufficient greenhouse gas (hereinafter, GHG) emission savings achieved compared to fossil fuels.

The RFS programme, created under the Energy Policy Act of 2005, was developed to ensure that transportation fuel sold in the US contains a minimum volume of 'renewable' fuel. Under the Energy Independence and Security Act (EISA) of 2007, the RFS programme further expanded on a number of aspects, including the application of lifecycle GHG performance threshold standards to ensure that each category of renewable fuel qualified under the RFS programme emits fewer GHG than the petroleum fuel it replaces. In particular, the RFS requires that 'renewable' fuels sold in the US represent a 20% GHG emission reduction over their lifecycle, including consideration of indirect land-use change (*i.e.*, ILUC) associated with the production of the biofuel's feedstock. In 2012, the EPA published its findings (in the *Notice of Data Availability Concerning Renewable Fuels Produced From Palm Oil Under the RFS Programme*, hereinafter, NODA) regarding the GHG lifecycle emission savings from various biofuels. Palm oil-based biofuel was found not to satisfy the 20% GHG emissions reduction threshold (in particular, palm oil biodiesel was found to achieve a reduction of 17%, and palm oil renewable diesel, a reduction of 11%). As a consequence, US gasoline producers cannot use palm oil-based biofuel for purposes of complying with the minimum volume blending mandate set out by the aforementioned Energy Independence and Security Act (EISA) of 2007.

This decision was not only challenged by a large number of public comments from affected stakeholders, but also by affected trading partners of the US (such as Indonesia and Malaysia) in the context of several meetings of the WTO Committee on Technical Barriers to Trade (*i.e.*, TBT Committee). Informed sources indicate that, at the WTO TBT Committee meeting held in October 2013, Indonesia expressed concerns that the US RFS programme and the relevant threshold therein were not based on international standards and that the measurements of the GHG emissions of palm oil-based biofuel were based on assumptions and estimations. In fact, Indonesia has been directly interacting with the EPA since March 2012, after the EPA's decision was published. Reportedly, Malaysia delivered a similar statement. In order to achieve a better understanding between the parties, Indonesia invited EPA officials to conduct field trips and associated consultations in Indonesia in October 2012.

At the WTO TBT Committee meeting held in March 2014, Indonesia reiterated its concern over the RFS programme and received the response from the US that the EPA was undertaking a peer-review process evaluating the peat soil drainage factor (which was consistently challenged in a large number of public comments) used in the EPA's assessment.

The Peer-Review Report is composed of scientific opinions from five independent experts selected from a list of twenty-seven candidates recommended by various relevant entities and NGOs. According to the EPA, the five experts were selected to form an independent and balanced panel (one each from the Office of the Ambassador of Indonesia, the Embassy of Malaysia, the International Council on Clean Transportation, and two experts independently identified by RTI International (*i.e.*, a non-profit scientific research institute tasked by the EPA to facilitate the independent peer-review)), to provide scientific opinions on five major questions identified by the EPA on the basis of the discussions arising from the public comments. In particular, three out of five experts reconfirmed that EPA's measurement of GHG emissions generated from peat soil drainage was appropriate, on the basis of current scientific understanding. However, the other two experts specifically pointed out that the EPA likely overestimated the GHG emissions from peat soil drainage and suggested the use of alternative scientific studies.

It is worth noting that the Peer-Review Report, although confirming the previous EPA's assessment by three votes to two, still identifies substantial drawbacks of the EPA's assessment (such as, *inter alia*, the exclusion of the root respiration and the assumptions regarding peat soil bulk density, peat organic carbon content, and groundwater table depth). In addition, where commenting on eight factors identified by EPA that might have been overestimated or underestimated, two experts believed those factors to be overestimated, two experts believed them to be underestimated, and one expert believed them to be properly assessed. The dissenting views from the panel demonstrate a high level of uncertainty in the scientific evidence that the EPA relied upon, mostly due to the complexity of the issue or lack of sufficient scientific evidence. The problem is also reflected in the public comments submitted to EPA's original assessment. Over 70,000 comments were received, with commenters citing various studies and proposing emission factors ranging from 26 to 103 tonnes CO<sub>2</sub> emissions per hectare per year, thus deviating from EPA's choice (*i.e.*, 95 tonnes CO<sub>2</sub> emissions per hectare per year, based on a study that appeared to be the only source that EPA relied upon). Moreover, and even if three experts supported EPA's choice, all of them emphasised the necessity to re-evaluate the emission factors when additional research becomes available. In simple terms, the EPA's choice of peat soil drainage emission factor appears not to be firmly sustained by a large number of scientific studies. The existing ones come to different conclusions. In this light, it appears that there is still great uncertainty as to the scientific evidence that the EPA relied upon in order to disqualify palm oil-based biofuel from the RFS programme.

The US is not the only country imposing standards to boost domestic use of renewable energy sources. Similar approaches, embodying GHG emission thresholds directed at '*grading*' fuels based on the feedstock they originate from exist in other jurisdictions (*e.g.*, the EU) (see Trade Perspectives, Issue No. 17 of 20 September 2013). Albeit applying '*internally*', these regulations inevitably impact trade in commodities used as feedstock for biofuels, such as palm oil and other vegetable oils. In order to minimise international trade disruptions arising from these frameworks, WTO Members must act in compliance with the relevant WTO rules, particularly the provisions of the General Agreement on Tariffs and Trade (*i.e.*, GATT) and the Agreement on Technical Barriers to Trade (*i.e.*, TBT Agreement). '*Grading*' systems put in place by WTO Members might lead to instances of *de facto* discrimination between '*like*' products (*e.g.*, in the case of the US RFS programme, biofuel qualifying as '*renewable*' and biofuel not qualifying as such). Determination of the appropriate standard regarding '*likeness*' under WTO law is in itself a highly debated topic, but the traditional approach typically includes consideration of: (i) the properties, nature and quality of the products; (ii) the end-

uses of the products; (iii) consumers' perceptions and behaviour with respect to the products; and (iv) the tariff classification of the products. Arguably, the GHG emissions saving rate (in turn, established on the basis of an arbitrary threshold) would not constitute a valid element to challenge 'likeness' between the two products, to the extent that it does not appear to have an impact on any of the factors listed above. Accordingly, there appears to be a strong case to argue that the differential treatment accorded by the US to 'like' biofuels is in contradiction with the WTO mandate of non-discrimination between 'like' products (for further background on the WTO analysis, see Trade Perspectives, Issue No. 7 of 4 April 2014).

In addition, the EPA's assessment envisaged a '*middle point approach*' to decide whether palm oil is a qualified feedstock (meaning that the actual GHG emission saving rate of at least half of the production of palm oil-based biodiesel and renewable diesel may be higher than the assessment result of 17% and 11% savings, respectively). According to the EPA, companies that believe that their production method may surpass the 20% GHG emissions saving threshold are required to apply for a '*new fuel pathway*' to be qualified as '*efficient producers*' (and table a substantial amount of required evidence). However, this approach clearly imposes additional burdens on '*greener*' biofuel producers and may lead to instances of *de facto* discrimination against small and medium producers. According to WTO rules (both under the TBT Agreement and the GATT), WTO Members are not allowed to impose measures that are more trade-restrictive than necessary to achieve their legitimate policy goals. Therefore, the question remains whether the RFS programme, which uses an arguably arbitrary threshold and a '*midpoint approach*' that leads to extra heavy burdens for a number of producers, would pass WTO scrutiny.

In the case at hand, and taking into account that bilateral communications between relevant palm oil producing and exporting countries and the US did not deliver the expected results, interested parties should consider, within the shortest delay, exploring alternative avenues that stand to deliver tangible results in a cost-effective manner. In the first place, businesses involved in the palm oil industry in the concerned countries should continue to pool efforts and resources to further expand and strengthen the existing body of growing research and evidence demonstrating that lifecycle GHG emissions vary hugely between palm oil plantations, thereby proving that a fixed GHG emissions saving threshold is likely not an appropriate standard to measure biofuels' environmental impact and, on that basis, subject them to differential treatment. Secondly, parties should evaluate the potential benefits of launching WTO action. Argentina already filed a complaint before the WTO Dispute Settlement Body in May 2013, alleging that the '*sustainability criteria*' embedded in the EU's biofuel framework discriminate against Argentina's soybean diesel (see Trade Perspectives, Issue No. 11 of 31 May 2013).

## **Recent WTO jurisprudence has added to the understanding of the market benchmark analysis under the SCM Agreement**

On 8 December 2014 and 18 December 2014, the WTO Dispute Settlement Body circulated the Appellate Body reports in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (hereinafter, *US – Carbon Steel (India)*) and *United States – Countervailing Duty Measures on Certain Products from China* (hereinafter, *US – Countervailing Measures (China)*), respectively. The two reports are significant with respect to the legal understanding of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement) for governments and trade lawyers. The Appellate Body reports in *US – Carbon Steel (India)* and *US – Countervailing Measures (China)* provide further clarification on the application of the SCM Agreement and on the procedures used by the US in its countervailing duty (hereinafter, CVD) investigations. However, of particular importance are the approach, analysis and findings of the Appellate Body in relation to the market benchmark analysis in a distorted market under Article 14 of the SCM Agreement.

A market benchmark analysis is commonly used when assessing (and later calculating) whether a subsidy confers a *'benefit'* to its recipient(s) within the meaning of the SCM Agreement. According to Article 1 of the SCM Agreement, a subsidy is deemed to exist if there is a *'financial contribution'* by a government or public body (or if there is any form of income or price support) that thereby confers a *'benefit'*. To be illegal in the context of the WTO, the subsidy must also be *'specific'* within the meaning of Article 2 of the SCM Agreement. In assessing these legal elements (*i.e.*, *'financial contribution'*, *'benefit'* and *'specificity'*), WTO adjudicators have turned to Article 14 of the SCM Agreement for guidance when analysing whether a *'benefit'* has been conferred. Whereas sub-paragraphs (a)-(c) of Article 14 provide guidelines for the calculation of the benefit when CVDs are being imposed on the provision of equity capital, loans and loan guarantees by governments, Article 14(d) applies to the provision of goods or services or purchase of goods by a government. In relevant part, Article 14(d) states that the benefit calculation involves a comparison "*in relation to prevailing market conditions for the good or service in question in the country of provision or purchase*". Traditionally, the relevant *'precedent'* (technically, previous WTO panel and Appellate Body reports do not serve as binding precedent on future disputes, but in practice past reports are highly-relied upon by WTO adjudicators and interpreters), in disputes dealing with market benchmark analyses in distorted markets, is the Appellate Body Report in *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* (hereinafter, *US – Softwood Lumber IV*).

In *US – Softwood Lumber IV*, the US challenged prices charged by Canadian provinces for timber harvesting rights (*i.e.*, stumpage), which the US claimed subsidised Canadian lumber producers in a WTO-inconsistent manner. There, in relevant part, the Appellate Body addressed whether it was appropriate for the American investigating authorities to use stumpage prices in the US (*i.e.*, out-of-country benchmarks) as market benchmarks rather than prices in the domestic Canadian market, which were distorted by government intervention, when using Article 14(d) during the *'benefit'* analysis. Whereas the panel in *US – Softwood Lumber IV* applied a relatively strict textual interpretation when finding that the use of out-of-country benchmarks was WTO-inconsistent, the Appellate Body reversed the panel's interpretation, finding instead that the language "*in relation to*" in Article 14(d) was sufficiently broad to allow for the use of out-of-country benchmarks when the domestic market is distorted, as long as the benchmarks are adjusted to reflect a competitive domestic market. A similar finding occurred in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (hereinafter, *US – Anti-Dumping and Countervailing Duties (China)*). There, when analysing the calculation of a *'benefit'*, the Appellate Body upheld the panel when it found that the US investigating authorities acted consistently with Article 14(d) of the SCM Agreement when they rejected in-country private prices that were distorted as a consequence of the Chinese government's predominant role in the market.

More recently, this issue was tackled by the Appellate Body in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program* (hereinafter, referred to jointly as *Canada – Renewable Energy*). In *Canada – Renewable Energy*, the EU and Japan took issue with Ontario's Feed-in Tariff (hereinafter, FIT) Programme, which granted contracts to, *inter alia*, wind and solar photovoltaic electricity providers and set fixed, guaranteed prices per kilowatt-hour for 20 or 40 years if the providers met local content requirements for the development and construction of electricity generation facilities. A threshold issue was whether, under the facts of the dispute, a *'market benchmark'* analysis was even necessary. The complainants argued that here it was an uncontested fact that the relevant electricity providers would not have obtained remuneration absent Ontario's FIT Programme, and thus a *'benefit'* was clearly conferred. Indeed, there is no obligation in the SCM Agreement to use Article 14 as guidance during the existence of a *'benefit'* analysis under Article 1.1(b) of the SCM Agreement. Then again, no explicit factors to consider are provided either. Regardless, the panel relied on Article 14(d)

and *US – Softwood Lumber IV* as guidance and found that reliance on out-of-country benchmarks under the facts of the dispute would be appropriate because the wholesale electricity prices in Ontario were significantly affected by government intervention and, as a result, were not reflective of an ‘*equilibrium price*’ determined by supply and demand. The Appellate Body disagreed with the approach of panel, but its conclusion was ultimately the same: the market was distorted and an out-of-country benchmark was appropriate, but that there was insufficient evidence available on the record to complete the analysis.

The recent Appellate Body reports in *US – Carbon Steel (India)* and *US – Countervailing Measures (China)* further develop this area of WTO law. In *US – Carbon Steel (India)*, India challenged CVDs imposed by the US on imports of certain hot-rolled steel flat products in conjunction with India’s Captive Mining of Iron Ore and Captive Mining of Coal Programmes, as well as the National Mineral Development Corporation, which is a state-owned enterprise (hereinafter, SOE). There, when analysing the challenge under Article 14 of the SCM Agreement, the Appellate Body found that, in addition to a government or public body, an analysis under Article 14(d) of the SCM Agreement could be applied to ‘*government-related entities*’ (i.e., SOEs that were not deemed to be ‘*public bodies*’ within the meaning of Article 1.1 of the SCM Agreement). In *US – Countervailing Measures (China)*, China took issue with 17 CVD investigations by the US, 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 (for more information, see Trade Perspectives, Issue No. 15 of 25 July 2014). However, with regard to the application of Article 14 of the SCM Agreement, the Appellate Body found that ‘*government-related prices*’ other than the ‘*financial contribution*’ at issue may be included in the in-country market benchmark analysis where the prices are reflective of the market. This finding by the Appellate Body arguably runs contrary to the finding in *US – Anti-Dumping and Countervailing Duties (China)*, where the Appellate Body accepted the US position that prices from SOEs should not be included in a market benchmark analysis.

The Appellate Body reversed the panel in both disputes and was unable to complete its own analyses. This has been a reoccurring issue in disputes involving market benchmark analyses. When analysing the existence of a ‘*benefit*’ under Article 1.1(b) of the SCM Agreement, rather than the calculation under Article 14, it is not necessary to use a market benchmark analysis, and thus alternative standards, such as the ‘*commercial reasonableness*’ test accepted by the Appellate Body in *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea* and *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*. However, a fully completed analysis in a CVD dispute must eventually apply Article 14 of the SCM Agreement in order to calculate the ‘*benefit*’ conferred. The developments in *US – Carbon Steel (India)* and *US – Countervailing Measures (China)* have the potential to simplify the market benchmark analysis. By allowing ‘*government-related prices*’, especially from ‘*government-related entities*’ that have not been deemed to be ‘*public bodies*’, the application of Article 14 of the SCM Agreement may more easily use adjusted in-country benchmarks, even in distorted markets, rather than attempting to search for comparable out-of-country benchmarks. It remains to be seen whether, in practice, future disputes will result in more satisfactory outcomes than the ‘*jurisprudence*’ to date.

## **The new allergen labelling rules under the FIR and ‘precautionary’ allergen labelling in the EU**

*Regulation (EU) No. 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers* (hereinafter, the FIR) establishes important changes to the food labelling rules relating to ingredients that can cause food allergies and/or

intolerances. In particular, the presentation of allergens in the list of ingredients of prepacked foods has been harmonised and mandatory allergen information for non-prepacked food has been introduced. However, the new EU legislation does not establish requirements for the so-called '*precautionary*' allergen labelling, which is increasingly used on pre-packaged foods by statements like '*may contain...*' or '*produced in a factory which uses...*' or '*produced on shared equipment...*'.

When used in the production of foods and still present therein, certain ingredients or other substances or products can cause allergies or intolerances in some people, and some of those allergies or intolerances may constitute a danger to their health. Information on the presence of such substances or products with a scientifically proven allergenic or intolerance effect must be provided in order to enable consumers, particularly those suffering from a food allergy or intolerance, to make informed choices that are safe for them. The first harmonised EU rules on the labelling of food allergens were established by *Directive 2003/89/EC of the European Parliament and of the Council as regards indication of the ingredients present in foodstuffs*, which introduced Annex IIIa to the FIR's predecessor, *Directive 2000/13/EC on the labelling and presentation of foods*. The new rules entered into effect in 2005 and foresaw that any ingredient listed in Annex IIIa had to be indicated on the labelling comprising the word '*contains*' followed by the name of the ingredient(s) concerned. Annex IIIa, as amended over time, listed the following fourteen categories of allergens: cereals containing gluten and products thereof; crustaceans and products thereof; eggs and products thereof; fish and products thereof; peanuts and products thereof; soybeans and products thereof; milk and products thereof; nuts and products thereof; celery and products thereof; mustard and products thereof; sesame seeds and products thereof; sulphur dioxide and sulphites at concentrations more than 10mg/kg or 10mg/litre expressed as SO<sub>2</sub>; lupin and products thereof; and molluscs and products thereof. A number of exceptions have been granted for products that fall under these categories, such as one for fish gelatine or isinglass used as fining agent in beer and wine, with the consequence that beer and wine containing such fining agent does not have to be labelled with '*contains fish*'.

Article 21 of the FIR, which applies as of 13 December 2014, addresses the labelling of certain substances or products causing allergies or intolerances. The name of the substance or product as listed in Annex II (which provides for the fourteen categories listed above) must be indicated in the list of ingredients emphasised through a typeset that clearly distinguishes it from the rest of the list of ingredients, for example by means of the font, style or background colour. This is the main novelty of the new rules. Only in the absence of a list of ingredients (e.g., on fresh fruit and vegetables, which have not been peeled, cut or similarly treated), the indication of the word '*contains*', followed by the name of the substance or product as listed in Annex II, is required.

The FIR acknowledges that evidence suggests that most food allergy incidents can be traced back to non-prepacked food. Therefore, according to Article 44(1)(a) of the FIR, where foods are offered for sale to the final consumer or to mass caterers without prepackaging, or where foods are packed on the sales premises at the consumer's request or prepacked for direct sale, the indication of any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form, is mandatory. EU Member States may adopt national measures concerning the means through which this information is to be made available to consumers and, where appropriate, its form of expression and presentation. The provision of allergen/intolerance information must be available and easily accessible, so the consumer is informed that the non-prepacked food raises issues relating to allergens and intolerances. According to the EU Commission, it is not sufficient to provide only allergen/intolerance information upon request by the consumer.



An additional form of voluntary labelling, the so-called '*precautionary*' allergen labelling, has evolved on a wide range of prepackaged foods. Foods can become contaminated with residues of allergenic foods at many points along the food production chain, including transport and packaging, and different products may be produced on shared equipment, some having been in touch with allergenic ingredients. It has been argued that application of '*precautionary*' allergen labelling remains inconsistent across industry and that it does not represent a defined risk that can be communicated to consumers. Furthermore, it is suspected that some manufacturers use '*precautionary*' allergen labelling as an alternative to allergen risk management, rather than as a means to communicate the actual risk of cross-contamination following a risk assessment and intervention to minimise risk according to Good Manufacturing Practice (GMP).

With such labelling, food manufacturers try to minimise risk to customers and the negative impact on its business (*inter alia*, questions on liability) that might result from exposure to trace amounts of food allergens present due to cross-contamination. This has sometimes resulted in an indiscriminate use of '*precautionary*' allergen labels, which confuse consumers as to their significance. Indiscriminate use of '*precautionary*' allergen labels might be construed as misleading under Article 7 of the FIR. However, it has been argued that the mere suspicion of any risk of contamination may be used to justify use '*precautionary*' allergen labelling.

The FIR does not establish specific labelling requirements for the potential contamination with allergens in the food production chain. However, Article 36(3)(a) of the FIR states that the EU Commission must adopt an implementing act providing that voluntary information on the possible and unintentional presence in food of substances or products causing allergies or intolerances must not mislead the consumer; be ambiguous or confusing for the consumer; and, where appropriate, be based on the relevant scientific data. The FIR does not establish a timeframe within which such implementing regulation must be adopted.

The question is whether there are already requirements in EU food law with a view of protecting allergic consumers from potential contamination with allergens. Article 14(1) of *Regulation (EC) No. 178/2002 of the European Parliament and of the Council laying down the general principles and requirements of food law* provides that food shall not be placed on the market if it is unsafe. Under paragraph 2, food must be deemed to be unsafe if it is considered to be (a) injurious to health; or (b) unfit for human consumption. Article 14(4)(c) sets out that, in determining whether any food is injurious to health, regard shall be had to, *inter alia*, the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers. It can be argued that this requirement can be construed as meaning that manufacturers have to take account of the special needs of minority groups such as individuals with food allergies. An argument can be made that, under the HACCP (*i.e.*, hazard analysis and critical control points) principles established in *Regulation (EC) No. 852/2004 of the European Parliament and of the Council on the hygiene of foodstuffs*, food business operators are obliged to ensure that '*allergen-free*' products are not manufactured in contaminated environments. Whether manufacturers using '*precautionary*' statements are always exempted from possible liability due to contamination with allergens is not clear and requires a more detailed assessment.

Allergen labelling has also been addressed at the international level through the Food Agriculture Organisation/World Health Organisation's Codex Alimentarius General Standard for the labelling of prepacked foods (CODEX STAN 1-1985, last amended in 2010). Section 4.2.1.4 of the standard lists foods and ingredients that are known to cause hypersensitivity and, therefore, always need to be declared, similar to Annex II of the FIR. However, the Codex does not go as far as the EU rules, having left out mustard, celery, sesame seeds, lupin and molluscs from the list of ingredients and foods that are known to cause hypersensitivity. Thus, EU law provides for stricter labelling for more substances than the respective Codex Alimentarius standard. Arguably, the EU rules are justifiable because of health protection.

The new EU allergen labelling rules establish important new requirements for the labelling of pre-packaged foods. Since 13 December 2014, information on allergens has to be provided also for non-prepackaged food available in, *inter alia*, bakeries, restaurants or canteens. Modalities on how to provide allergen information may be adopted by EU Member States. The urgent adoption of an EU Commission implementing regulation on 'precautionary' allergen statements, which might be present in food due to cross-contamination, appears to be necessary in view of the plethora of such statements that are increasingly confusing consumers and that, arguably, do not provide legal certainty to businesses making such statements.

## Recently Adopted EU Legislation

### Market Access

- *Commission Implementing Regulation (EU) No. 1331/2014 of 15 December 2014 making imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan subject to registration*

### Trade Remedies

- *Commission Implementing Regulation (EU) No. 1346/2014 of 17 December 2014 imposing a definitive anti-dumping duty on imports of sulphanilic acid originating in the People's Republic of China and repealing the definitive anti-dumping duty on imports of sulphanilic acid originating in India following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009*
- *Commission Implementing Regulation (EU) No. 1347/2014 of 17 December 2014 repealing the definitive countervailing duty on imports of sulphanilic acid originating in India following an expiry review pursuant to Article 18 of Council Regulation (EC) No. 597/2009*
- *Commission Implementing Decision of 16 December 2014 terminating the anti-subsidy proceeding concerning the imports of polyester staple fibres originating in the People's Republic of China, India and Vietnam*
- *Commission Implementing Regulation (EU) No. 1379/2014 of 16 December 2014 imposing a definitive countervailing duty on imports of certain filament glass fibre products originating in the People's Republic of China and amending Council Implementing Regulation (EU) No. 248/2011 imposing a definitive anti-dumping duty on imports of certain continuous filament glass fibre products originating in the People's Republic of China*

### Customs Law

- *Council Regulation (EU) No. 1340/2014 of 15 December 2014 amending Regulation (EU) No. 1388/2013 opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products*

- *Council Regulation (EU) No. 1341/2014 of 15 December 2014 amending Regulation (EU) No. 1387/2013 suspending the autonomous Common Customs Tariff duties on certain agricultural and industrial products*

## Food and Agricultural Law

- *Commission Regulation (EU) 2015/9 of 6 January 2015 amending Regulation (EU) No. 142/2011 implementing Regulation (EC) No. 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive*
- *Commission Regulation (EU) No. 1320/2014 of 1 December 2014 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein*

## Other

- *Commission Implementing Regulation (EU) No. 1358/2014 of 18 December 2014 amending Regulation (EC) No. 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007 as regards the origin of organic aquaculture animals, aquaculture husbandry practices, feed for organic aquaculture animals and products and substances allowed for use in organic aquaculture*
- *Commission Implementing Decision of 11 December 2014 determining quantitative limits and allocating quotas for substances controlled under Regulation (EC) No. 1005/2009 of the European Parliament and of the Council on substances that deplete the ozone layer, for the period 1 January to 31 December 2015*
- *Commission Delegated Directive 2014/109/EU of 10 October 2014 amending Annex II to Directive 2014/40/EU of the European Parliament and of the Council by establishing the library of picture warnings to be used on tobacco products*

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FratiniVergano specializes in European and international law, notably WTO and EU trade law, EU agricultural and food law, EU competition and internal market law, EU regulation and public affairs. For more information, please contact us at:

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