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Italy's plan to introduce mandatory labelling of place of production or packaging on food: consumer protection or protectionist tool?

On 10 September 2015, the Italian Government approved a draft bill that would reintroduce a requirement to indicate the establishment of production or packaging (where different) on the labels of certain foodstuffs sold to consumers. This requirement, which is included in a draft bill for the implementation into Italian law of *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) has caused concerns among some operators that perceive it as discriminatory and overly restrictive, in violation of the provisions of the FIR.

In relevant part, the draft bill (*Schema di Disegno di Legge Recante Delega al Governo per il Recepimento delle Direttive Europee e l'Attuazione di Altri Atti dell'Unione Europea – Legge di Delegazione Europea 2015*) provides that the legislative decree for the implementation of the FIR is to contain a provision on the mandatory indication, on food product labels, of the address of the establishment where the food has been produced or packed. A press release from the Italian Ministry of Agriculture (hereinafter, MIPAAF) clarifies that the mandatory indication will concern food produced in Italy and destined to the Italian market. According to the draft bill, the aim of this provision is to guarantee that consumers are properly informed (consumers would be informed about the actual source of the food), and to facilitate traceability, which would render the protection of consumers' health more effective.

The mandatory indication of the establishment of production or packaging on food products' labels was foreseen in Italian legislation by the *Decreto Legislativo No. 109/102*, but was repealed by the entry into force on 13 December 2014 of the FIR. The FIR contains rules for mandatory labelling requirements on food. The list of mandatory particulars to be included on labels is provided in Article 9. In relevant part, this article requires that the business name and address of the food business operator be indicated on the labels (defined, under Article 8 of the FIR, as the operator under whose name or business name the food is marketed or the importer), but makes no reference to the address of the establishment of production or packaging. In short, the substantive provisions of the FIR do not warrant the introduction of requirements of the kind currently contemplated by Italy. It appears that, in Italy, this indication may currently be affixed on labels on a voluntary basis.

Can Italy introduce such requirement? Article 38(1) of the FIR prohibits EU Member States from adopting or maintaining national measures in areas that are harmonised by the FIR, unless authorised by EU law and provided that such measures do not give rise to obstacles to the free movement of goods or discrimination as regards foods from other EU Member States. Therefore, Italy would not be able to adopt this labelling requirement if it concerns an area that is fully harmonised. The essential requirements of fully harmonised EU food labelling law are established in Article 9 of the FIR. Arguably, provisions that require the indication of the place of production may have an indirect discriminatory character. On the other hand, EU Member States may, under Article 38(2) of the FIR, adopt national measures concerning matters not specifically harmonised by the FIR, provided that they do not prohibit, impede or restrict the free movement of goods and that are in conformity with the FIR. Article 38(2) of the FIR applies "*without prejudice to Article 39*", which permits (under certain circumstances) national rules in harmonised areas. Article 38(2) of the FIR is, therefore, relevant for food information provisions that are not harmonised by the FIR. On the other hand, if Italy's measure would be in a fully harmonised area, Article 39(2) of the FIR foresees that EU Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods, only where there is a proven link between certain qualities of the food and its origin or provenance. Italy would then need to notify and pass the test of Article 45 of the FIR procedure. Italy would need to prove quality as a reason for its measure.

The Italian Government has indicated its intention to avail itself of the provisions of Article 38 of the FIR (presumably, Article 38(2) thereof), and to notify its draft to the EU Commission under the so-called TRIS (*i.e.*, Technical Regulation Information Service) procedure set up under *Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services* (which replaces Directive 98/34/EC (the TRIS Directive) as of 7 October 2015), justifying its measures with the need to ensure a more effective protection of consumers' health (which should arguably result from the increased information to consumers and enhanced traceability). However, it is questionable whether a requirement to indicate the address of the establishment of production or packaging would be a necessary and proportionate measure to meet the stated objectives.

Italy's intent is to allow consumers to make informed choices by requiring information in relation to the establishment of production or packaging to be clearly indicated. In practice, the requirement will tell consumers if the product has been manufactured or packaged in Italy. Because Italian food is associated with quality, concerns have been raised that this requirement would direct consumers to choose food produced or packed in Italy over imported products. However, it appears that the indication of the establishment of manufacture or packaging as a '*quality*' parameter would not achieve the intended objective, to the point that it could actually be misleading (and, therefore, contrary to the FIR, which provides that country of origin or place of provenance of the food be mandatorily indicated in case of potential deception (*i.e.*, where the appearance of the food may create the false belief that the product has a different provenance)). For example, the indication of an Italian address, where the product has been packed according to Italy's proposed requirement, could induce consumers to think that a product is, in fact, '*made in Italy*' when it is, for example simply packed there. From a consumer's perspective, the notion that a particular product has been produced, let alone packaged, in an establishment physically located in Italy does not necessarily add to the actual quality of the produce, this being commonly linked to a number of different elements of the supply chain, spanning from the quality of the raw materials used up to the food operator's management and '*know-how*'. In short, the indication of the place of establishment or packaging would not necessarily inform consumers about the quality of products, but would likely have a discriminatory impact and create extra burdens for food operators.

With respect to traceability – which is arguably a '*legitimate objective*' directly related to consumers' health, and likely the one providing the strongest grounds for the legal justification that Italy needs in order to defend its measure – this appears to be already ensured by the mandatory indication of the name and address of the food business operator and with the indication of the lot under *Directive 2011/91/EU on indications or marks identifying the lot to which a foodstuff belongs*. Traceability requirements are usually addressed at food control authorities and not at consumers. It remains to be seen if, when assessing Italy's proposed measure, the EU Commission will conclude that this additional labelling requirement is necessary and proportionate to ensure the protection of consumers' health.

Italy's proposed measure must be seen in light of the country's efforts to increase the competitiveness of its industry through country of origin ('*made in*') labelling requirements as a result of the reputation of high quality that Italian products hold in consumers' minds. Italy's proposed requirement, in fact, intends to allow consumers to make informed choices about the products based on their source, which is linked to the establishment of production or packaging. According to MIPAAF, an on-line public consultation revealed that Italians want to be informed about the provenance of their food. Whereas this objective is *per se* legitimate, and understandable, it is questionable whether the '*origin*' and, therefore, the quality of a food product should be determined by the establishment of production or packaging. In addition, any such scheme needs to comply with EU rules, and, therefore, needs to be proportionate and not constitute a restriction to trade in products that comply with the provisions of the FIR.

Once the Italian draft bill is notified according to TRIS, the EU Commission and other EU Member States will have three months to evaluate the proposed labelling requirements in light of the provisions of the EU Treaty on the Functioning of the EU, in particular Article 36 thereof and related EU case law. Trade Perspectives© will continue to monitor this legislative development and will embark on a legal review, under the applicable EU and WTO frameworks, of the key categories that need to be understood and applied when regulating these aspects and pursuing the stated objectives: the rules on product marking (*i.e.*, '*Made in*'), the rules of origin (for customs purposes), the labelling rules (for consumers' safety, consumers' information), and the rules on intellectual property rights (*i.e.*, geographical indications and trademarks). By wisely combining these rules and ensuring that the proposed measure is not discriminatory, protectionist or disproportionate, Countries would be able to design legal instruments that can pass EU and WTO scrutiny. Judging from the recent history of EU and WTO litigation on country of origin labelling (COOL), it does not seem as if such approach has been the preferred, thereby resulting in trade irritants or disputes, loss of legal certainty and commercial predictability, and a growing confusion in the minds of regulators, consumers and producers alike.

The EU Commission adopts its proposal for an '*Investment Court System*' in the Transatlantic Trade and Investment Partnership

On 16 September 2015, the EU Commission adopted its proposal for a new investor-to-state dispute settlement (hereinafter, ISDS) system, which, at least in the short term, it plans to table in negotiations on the Transatlantic Trade and Investment Partnership (hereinafter, TTIP) with the US. The EU Commission's proposal appears to address many of the concerns raised during its '*Public consultation on modalities for investment protection and ISDS in TTIP*', but new concerns have been raised that it may arguably include too many conditions on the scope of protection afforded to investors. As a result, the proposal needs to be further assessed to ensure that ISDS will not be devoid of its role and continue to serve as an instrument to protect investors' rights.

ISDS allows investors, whose investments have been undermined by the actions of a host country, to bring a claim against the authorities of the host country in front of an international

tribunal (for more information, see Trade Perspectives Issue No. 23 of 12 December 2014). The inclusion of ISDS provisions in international agreements creates an additional option for investors to pursue when host countries do not adhere to obligations created in said agreements. As a result, investors have greater legal certainty that foreign governments will comply with the obligations that were contracted in such agreements. In its 2010 Communication, "*Towards a comprehensive European international investment policy*", the EU Commission indicated that EU international investment agreements are to cater for ISDS, which it states is "*an established feature of investment agreements*" and that "*its absence would in fact discourage investors and make a host economy less attractive than others*".

In June 2013, EU Member States unanimously instructed the EU Commission to start negotiating a free trade agreement with the US, now known as TTIP. The negotiating mandate to the EU Commission provides for the inclusion of ISDS provisions. Nonetheless, by early 2014, EU Member States, the public and special interest groups had started to voice concerns on the inclusion of ISDS provisions in the TTIP. Accordingly, on 27 March 2014, the EU Commission launched the '*Public consultation on modalities for investment protection and ISDS in TTIP*', which included 13 questions, with explanations, and an Annex with the relevant examples of investment protection provisions from traditional bilateral investment agreements (hereinafter, BITs) and the Comprehensive Economic and Trade Agreement (hereinafter, CETA) between Canada and the EU. Through said public consultation document, the EU Commission made clear that the ISDS provisions in the CETA would serve as a basis for its proposed ISDS provisions in the TTIP.

On 13 January 2015, the EU Commission published its Report on the responses to its public consultation on investment protection and ISDS in the TTIP. Its analysis revealed that the collective submissions reflected widespread opposition to the inclusion of ISDS in the TTIP. In large part, the responses were concerned with the potential for investment agreements to undermine countries' regulatory space (*i.e.*, whether such agreements provide adequate protection of the '*right to regulate*' for States). Many respondents were also worried about the impartiality of arbitrators and general transparency issues. The EU Commission's Report concluded that further improvements should be explored, including: i) the protection of the right to regulate; ii) the supervision and functioning of arbitral tribunals; iii) the relationship between ISDS arbitration and domestic remedies; and iv) the review of ISDS decisions for legal correctness through an appellate mechanism. The Report also indicated that the EU Commission would implement said exploration "*with a view to enabling the Commission to developing concrete proposals for the TTIP negotiations*" (see Trade Perspectives Issue No. 2 of 23 January 2015).

On 16 September 2015, the EU Commission did so by publicly releasing its internally approved proposal for an Investment Chapter in the TTIP (hereinafter, the Proposed TTIP Investment Chapter). A review of the Proposed TTIP Investment Chapter reveals the manners in which the EU Commission implemented the '*further improvements*' that it set out to explore following its public consultation. Although the '*right to regulate*' was arguably sufficiently addressed in modern ISDS provisions (see Trade Perspectives Issue No. 2 of 23 January 2015), the proposed chapter attempts to re-affirm this right. The CETA and the EU-Singapore FTA limit awards under ISDS to: (a) monetary damages; or (b) restitution of property, including in the form of monetary damages. The CETA also clarified that, with respect to expropriation, "*non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations*". The EU-Singapore FTA includes general exceptions to National Treatment (*i.e.*, providing treatment no less favourable to foreign investors and their investments than that accorded, in like situations, to domestic investors and their investments) necessary to meet public policy objectives similar to Article XX of the WTO General Agreement on Tariffs and Trade. The Proposed TTIP Investment Chapter goes changes the EU's approach by including language in Article 2 on "*Investment and regulatory*

measures/objectives", stipulating that "*[t]he provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity*". Arguably, the structure of said provision, as compared to that of the EU-Singapore FTA, provides less clarity on the scope of investment protection, and may add additional conditions that hinder investment. The Proposed TTIP Investment Chapter also includes language, in Article 28 on the "*Provisional Award*", stating that "*[t]he Tribunal may not order the repeal, cessation or modification of the treatment concerned*". With regard to the relationship between ISDS arbitration and domestic remedies, the Proposed TTIP Investment Chapter includes Article 14 on "*Other claims*", which requires an ISDS dispute to be dismissed if the claimant has a pending domestic or international claim that has not been withdrawn before a final judgment, award or decision has been delivered under the ISDS claim.

However, the most novel aspect of the EU Commission's Proposed TTIP Investment Chapter is the new "*Investment Court System*" (hereinafter, ICS). Where current ISDS provisions in international agreements call for *ad hoc* investment tribunals to be established, the Proposed TTIP Investment Chapter creates a permanent dispute settlement system that includes both a '*Tribunal of First Instance*' and an '*Appeal Tribunal*'. The text of the Proposed TTIP Investment Chapter refers to the WTO's dispute settlement mechanism, although there are some notable differences. The Tribunal of First Instance is comprised of (at least initially) 15 '*Judges to the Tribunal*', who would serve on a rotational basis (with three, or in some cases one, judge serving on each tribunal). To contrast, in the context of the WTO, the WTO Secretariat maintains a list of several approved panellists from which parties to a dispute may select for each given dispute (if the parties cannot agree, panellists are appointed by the WTO Director-General). The Appeal Tribunal is comprised of six Members, whereas the WTO Appellate Body is composed of seven Members. In addition, although many of the references to remuneration for the Judges of the ICS use the WTO as a benchmark, the fact that one party to a dispute is a private investor creates a different funding situation. Costs of disputes at the WTO, including remuneration of panellists and Appellate Body Members, are included in the budgets of the WTO Secretariat and of the WTO Appellate Body, respectively, and are funded by WTO Members. In the Proposed TTIP Investment Chapter, the funding system for the ICS is arguably unclear. The Parties to the agreement (*i.e.*, the EU and the US) would pay equally for the remuneration of the Members of the Tribunal of First Instance and the Appeal Tribunal, as well as for support staff expenses. However, the Proposed TTIP Investment Chapter also includes a '*loser pays*' provision, in which, in most cases, the "*reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party*". As written, it appears that this refers only to the costs directly incurred by either party. Yet, Article 9(9) of the Proposed TTIP Investment Chapter includes the possibility of the dispute being heard by a sole Judge during the lower-tribunal stage if the claimant is a small or medium-sized enterprise. Said provision appears to imply that the option to use a sole Judge was included to lower the costs incurred by small or medium-sized enterprises, even though elsewhere, as discussed above, remuneration for Members of the Tribunal of First Instance and the Appeal Tribunal appears to be funded by the Parties to the agreement (*i.e.*, the EU and the US).

The Proposed TTIP Investment Chapter also includes improvements to the transparency of ISDS disputes. In general, the rules of dispute settlement of the ICS follow standard arbitration practice, in which the parties to a dispute may select from rules of: the Convention on the Settlement of Investment Disputes (hereinafter, ICSID); the United Nations Commission on International Trade Law (hereinafter, UNCITRAL); or any other rules agreed to by the disputes parties at the request of the claimant. With respect to transparency, the ICS adopts the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration, but improves upon them by adding additional disclosure requirements.

With its Proposed TTIP Investment Chapter, the EU Commission has built on the investment provisions contained in the CETA and the EU-Singapore FTA, which themselves already represented a large departure from traditional BITs, but further improvements are needed in order to adequately promote investment domestically and abroad. Generally, the ICS has the potential to significantly improve access to relief for harmed investors, as well as add consistency to rulings by adjudicators of ISDS disputes. The rotation of static Members of the Tribunal of First Instance, as opposed to the use of panellists who do not regularly serve, should foster uniformity in lower-court rulings. Moreover, the publication of decisions by the tribunals should create a larger body of jurisprudence to serve as precedent, even if it is in a *de facto* manner. Nonetheless, some substantive aspects of the EU Commission's Proposed TTIP Investment Chapter, as well as procedural and cost aspects of the ICS, could be further addressed. Concerns have been raised that the proposed text may pose issues with respect to the appropriate scope of protection afforded to investors. When structuring the rights of governments and investors, respectively, it is important to avoid creating an imbalance against investors by introducing too many conditions that render the agreement impractical.

An updated proposal should also clarify the funding mechanism for the ICS. If disputing parties are not responsible for any of the costs of the Judges serving on their disputes, or their associated support staff, then the ICS has the potential to significantly increase access to investment arbitration for small and medium-sized enterprises. However, if the EU Commission intends for those costs to be borne by the disputing parties, access to relief for smaller investors may be hampered. In addition, as indicated by reports on the reactions by businesses, the '*loser pays*' provision of the EU Commission's Proposed TTIP Investment Chapter creates unnecessary duplication of expenses and might prevent small and medium-sized enterprises from enforcing their rights with the ICS. Under the current approach to costs, private investors, who do or intend to contribute to the tax revenue and economy of a host country, could be ordered to pay the expenses of said country's publicly-funded legal team.

Such access could be especially important in the future, given that the EU Commission has stated that it intends for the Proposed TTIP Investment Chapter to serve as a basis for all ongoing and future EU investment negotiations. In this respect, the ICS, if extended to countries other than the EU and the US, needs to be implemented in a manner that allows investors from developing countries to have access. For example, the EU Commission announced on 4 August 2015 that it reached an agreement on a free trade deal with Vietnam, but that provisions on investment protection and ISDS were still being negotiated in light of the new EU approach on investment dispute settlement. This concern was articulated by Members of the European Parliamentary Committee on International Trade, following the release of the EU Commission's Proposed TTIP Investment Chapter. Members of the European Parliament also questioned the ability of such a system to be included in the EU-China Investment Agreement, negotiations for which launched in November 2013. In this regard, the concerns were related to the challenges faced by foreign investors in China, which, according to the EU Commission's impact assessment of the EU-China Investment Agreement, include legal uncertainty and lack of transparency, and thus act as the main obstacle encountered by EU investors in China.

Reports indicate that the EU and the US will hold their next negotiating round for the TTIP in October. However, before tabling a formal version of the proposal with the US, the EU Commission will have discussions regarding the content of the proposal with the Council and the European Parliament. The EU Commission has not indicated whether a formal proposal will be ready in time for October TTIP negotiating round, but interested parties in the EU should begin coordinating with relevant decision makers as soon as possible. Given that the EU Commission intends to use the TTIP investment chapter as a template for other international agreements, the upcoming discussions with the Council and the European Parliament, as well as with US negotiators, will likely have a significant impact on the level of investment protection afforded to businesses around the world. Interested parties should

monitor developments and exchange views with decision-makers to ensure that their legitimate interests are safeguarded.

Request for a preliminary ruling on where mandatory labelling particulars must appear in the case of a '*multipack*' consisting of individual portions of honey

I. Introduction

On 15 June 2015, the request for a preliminary ruling from the Court of Justice of the European Union (hereinafter, CJEU) in Case C-113/15 was published in the Official Journal of the EU. The request concerns the decision of 11 February 2015 of the Bavarian Higher Administrative Court (*Bayerischer Verwaltungsgerichtshof)* in the proceedings *Breitsamer* v *Landeshauptstadt München* in relation to the question of where mandatory labelling particulars must appear on a '*multipack*' consisting of individual portions of honey.

II. Background

Breitsamer is a major food business operator active in Europe in the field of production and filling of honey. *Breitsamer* places the honey '*Breitsamer Beekeepers Gold*' on the market, which includes 120 individual portions of 20g of the same honey each with fused aluminium lids, which in turn are packaged and sealed in a cardboard package. On the label of the latter, the entire net quantity, the number of individual portions and the country of origin of the honey are indicated, in addition to other labelling elements required under *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR). On the other hand, the individual portions do not indicate the country of origin of the honey. For this reason, on 30 October 2012, the City of Munich imposed a fine on *Breitsamer's* management. The administrative appeal against this decision was rejected. The Bavarian food inspectorate observed that it is a principle of food labelling that complete and detailed information about the food being offered be provided to consumers. Furthermore, the Bavarian food inspectorate argued that such principle would be deprived of legal effect in circumstances where individual portions were to remain '*pre-packaged food*', but could be repeatedly repackaged in bulks of ever-greater size. It would suffice for the country of origin to only be indicated on the outermost layer of the packaging.

On 25 November 2013, the Administrative Court of Munich (*Verwaltungsgericht München*) dismissed *Breitsamer*'s appeal. It found, *inter alia*, that it is known to the Court that such portions are delivered individually in the pre-packaging in breakfast cafes, canteens and also, as in the case at hand, in retirement homes. The Court noted that these portions are partly also sold individually. For this reason, in line with the German Honey Regulation, the country of origin must also be indicated on the portions in order to protect consumers against deception. The Administrative Court of Munich permitted a revision to the Bavarian Higher Administrative Court because the questions concerning the interpretation of the labelling provisions have fundamental importance. In the revision proceedings, the Bavarian Higher Administrative Court asked the CJEU the following question:

"Are individual portions of honey, which are packaged in bulk in a carton containing all the labelling elements, including the indication of the country of origin, and which are not sold as individual portions to final consumers nor supplied individually to mass caterers, 'pre-packaged foodstuff' or 'pre-packed food' within the meaning of Article 1(3)(b) of Directive 2000/13/EC […] and Article 2(2)(e) of Regulation (EU) No 1169/2011 […] respectively, for which there is a corresponding labelling requirement, or are such portions of honey not subject to the labelling requirements for pre-packaged foodstuff/pre-packed foods due to their not being offered for sale as a single item?"

Please note that instead of '*sale as a single item',* a more precise translation of the term '*Verkaufseinheit*' in the original German text would be '*sales unit*'. In a second question, the Bavarian Higher Administrative Court asked the CJEU if the answer should be different when those individual portions are supplied in mass catering establishments not only in meals that are paid for as a whole, but that are also sold individually.

III. Comment

The questions to be answered by the CJEU are, essentially, whether such individual honey portions are not pre-packaged sales units and, therefore, whether they do not require full labelling, and whether it makes a difference if indirect sales by mass caterers are involved.

For pre-packed foods, Article 12(2) of the FIR provides that mandatory particulars required under Articles 9 and 10 of the FIR (such as the name of the product, the list of ingredients, the date of minimum durability or the '*use by*' date and the country of origin, where it is required for the product at hand) must appear directly on the package or on a label attached thereto. According to Article 8(7) of the FIR, this obligation applies to food business operators, within the businesses under their control, (a) where pre-packed food is intended for the final consumer, but it is marketed at a stage prior to sale to the final consumer and where sale to a mass caterer is not involved at that stage; and (b) where pre-packed food is intended for supply to mass caterers for preparation, processing, splitting or cutting up.

The FIR defines '*pre-packed food*' in Article 2(2)(e) thereof (in similar terms to Article 1(3)(b) of its predecessor *Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuff*) as "*any single item for presentation as such to the final consumer and to mass caterers, consisting of a food, and the packaging into which it was put before being offered for sale, whether such packaging encloses the food completely or only partially, but in any event in such a way that the contents cannot be altered without opening or changing the packaging*".

Article 2 of *Directive 76/211/EEC on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain pre-packaged products*, as last amended by Directive 2007/45/EC of 5 September 2007, states that a pre-package is the combination of a product and the individual package in which it is pre-packed. In the definition of '*pre-packed food*' in Article 2(2)(e) of the FIR, there is an emphasis on "*any single item for presentation as such to the final consumer and to mass caterers*". Arguably, individual portions of honey in a multipack are not presented as such to the final consumer and to mass caterers. Something different may apply if mass caterers were to act as indirect sellers and sell those single portions. In that case, the answer to the second question of the preliminary request would be relevant to see who is responsible under Article 9 FIR for the detailed labelling: the producer of the multipack with individual portions or the mass caterer re-selling them.

In the case of honey, in addition to the mandatory labelling particulars required under the FIR, the indication of the country of origin is mandatory. Article 3(4) of the German Honey Regulation implements Article 2 No. 4(a) of *Directive 2001/110/EC relating to honey (hereinafter, the Honey Directive)*, which requires that the country or countries of origin where the honey has been harvested must be indicated on the label and that, if the honey originates in more than one EU Member State or third country, the indication of the countries of origin may be replaced with one of the following statements, as appropriate: (i) '*blend of EU honeys*', (ii) '*blend of non-EU honeys*', or (iii) '*blend of EU and non-EU honeys*'.

Breitsamer maintained that its individual portions of honey are not subject to the labelling requirements as sales units. The simple reason is that the portions are not being offered for sale as single units. In that context, *Breitsamer* also noted that an EU Commission Questions

& Answers document of 31 January 2013 (hereinafter, the Q&A document) states that individual portions of foodstuffs (such as marmalade, honey, or mustard) were not to be treated as '*single items*' and that the labelling requirement applies to the packaging that surrounds the individual items.

Indeed, following an informal working practice, the EU Commission's Health and Consumer Directorate General (DG Sanco, now DG Sante) has set up a Working Group with experts from EU Member States in order to provide answers to a series of questions concerning the application of the Regulation. The Q&A document on the application of the FIR stems from this practice. The answer to question 2.1.3 thereof (*i.e.*, "*In the case of a 'multipack' package sold to mass caterers in the context of Article 8(7) of the FIR and consisting of individually packed items, where shall the mandatory particulars required under Articles 9 and 10 of the FIR appear?*") is that "*in the case of a 'multipack' package to be sold to mass caterers and consisting of individually packed items, the mandatory particulars must appear directly on the 'multipack' package or on a label attached thereto. However, if the individually packed items (within the 'multipack package') are units of sale destined for the final consumer, the mandatory information must appear on each individual item as well*." The Q&A document goes on to say that "c*onsidering the different forms of delivering food to the final consumer in catering establishments, it should be noted that portion-cups (e.g., jams, honey, mustard), which are presented as part of a meal to the guests of mass caterers, should not be considered as units of sale. Therefore, it would be sufficient that, in such cases, the food information appear on multipacks.*" It must be noted that this document aims at assisting all players in the food chain, as well as the competent national authorities, to better understand and correctly apply the FIR. However, it has no formal legal status and in the event of a dispute, ultimate responsibility for the interpretation of the law lies with the CJEU.

A systematic argument supports the view that, in the case of portions, it is sufficient that the mandatory food information appears on multipacks. A new provision, which introduces the term '*individual pre-packed portion*' in EU food labelling law, has been set out in Annex X to the FIR (on the date of minimum durability, '*use by*' date and date of freezing). Point 2(d) thereof states that the '*use by*' date must be indicated on each '*individual pre-packed portion*'. Such provision on the '*use by*' date on individual pre-packed portions was missing in the respective list of exemptions for a '*use by*' date in Article 10 of Directive 2000/13/EC, the FIR's predecessor. If a specific provision is needed to mandate the indication of the '*use by*' date on '*individual pre-packed portions*', it is arguably also required for the indication of the country of origin on '*individual pre-packed portions*'. Such a provision, similar to the one of the '*use by*' date, is missing in the FIR and in the Honey Directive. The relevance of the indication of the country of origin is described in recital 5 of the Honey Directive, which states that, in view of the close link between the quality of honey and its origin, it is indispensable that full information on those matters be available so that the consumer is not misled regarding the quality of the product: "*The particular consumer interests as regards the geographical characteristics of honey and the full transparency in this regard necessitate that the country of origin where the honey has been harvested be included in the labelling*." This is comparable to the reason of food safety for indication of a '*use by*' date on highly perishable food (not to be mistaken with the date of minimum durability, which means the date until which the food retains its specific organoleptic properties when properly stored).

EU and national law foresee, as an essential element of a pre-packaged food, that it is a sales unit. However, the '*individual pre-packed portions*' in Point 2(d) of Annex X of the FIR are not sales units. This is also supported by the UK Food Standards Agency, which specifies, in its guidance on the FIR, that '*use by*' dates must be indicated "*on individual pre-packed portions where these exist within the complete unit which is actually sold*". The FIR does not provide for specific rules for individual items sold in '*multipacks*', which are not offered for sale individually. Arguably, if the regulator had thought of individual portions of honey in a

'*multipack*' being pre-packaged food (and sales units), it would have established requirements for mandatory labelling particulars other than just the '*use by*' date for them.

A practical option for food business operators may also be to manufacture individual portions where the largest surface has an area of less than 10 cm^2 (*e.g.*, in rectangular form of 4x2.5 cm). Article 16 of the FIR provides that, if the largest surface of an individual item is less than 10 cm^2, only the particulars listed in points (a), (c), (e) and (f) of Article 9(1) of the FIR (*i.e.*, the name of the food; ingredients or processing aids causing allergies or intolerances; the net quantity of the food; and the date of minimum durability or '*use by*' date, respectively) are mandatory on the package. The country of origin required under Article 9(1)(i) of the FIR is not listed as one of those '*essential*' particulars and the Honey Directive is silent to that extent, referring only to the general EU food labelling rules.

IV. Conclusion

There are arguments to support the view that individual portions should not be labelled with all mandatory labelling particulars, including the country of origin. The judgement in Case C-113/15, which is not expected before 2017, may determine how reliable the EU Commission's Q&A document is. The judgment is poised to become a landmark ruling relating to the terms '*pre-packaging*' and '*pre-packaged portion*' and to indirect sales, not only of honey, but also of marmalades or jams or other foodstuffs marketed in individual portions in '*multipacks*'.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2015/1559 of 18 September 2015 imposing a provisional anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India*

- *Commission Implementing Regulation (EU) 2015/1518 of 14 September 2015 imposing a definitive anti-dumping duty on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009*

- *Commission Implementing Regulation (EU) 2015/1519 of 14 September 2015 imposing definitive countervailing duties on imports of biodiesel originating in the United States of America following an expiry review pursuant to Article 18 of Council Regulation (EC) No. 597/2009*

Customs Law

- *Commission Implementing Regulation (EU) 2015/1550 of 17 September 2015 laying down rules for the application of Regulation (EU) No. 1308/2013 of the European Parliament and of the Council as regards the import and refining of sugar products of CN code 1701 under preferential agreements, for the marketing years 2015/2016 and 2016/2017*

- *Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015 amending Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and*

cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters

- *Commission Delegated Regulation (EU) 2015/1538 of 23 June 2015 supplementing Regulation (EU) No. 1308/2013 of the European Parliament and of the Council with regard to import licence applications, release for free circulation and proof of refining of sugar products of CN code 1701 under preferential agreements, for the marketing years 2015/16 and 2016/17 and amending Commission Regulations (EC) No. 376/2008 and (EC) No. 891/2009*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2015/1607 of 24 September 2015 amending Annex I to Regulation (EC) No. 669/2009 implementing Regulation (EC) No 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and food of non-animal origin*

Other

- *Council Decision (EU) 2015/1570 of 18 September 2015 establishing the position to be taken on behalf of the European Union within the Council for Trade in Services of the World Trade Organization on the approval of preferential treatment notified by WTO Members, other than the Union and its Member States, as regards services and service suppliers of least-developed country Members, on the application of measures other than those described in Article XVI of the GATS*

- *Commission Implementing Decision (EU) 2015/1554 of 11 September 2015 laying down rules for the application of Directive 2006/88/EC as regards requirements for surveillance and diagnostic methods (notified under document C(2015) 6188)*

- *Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 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*

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