FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 5 of 11 March 2016

- **Canada and the EU finalise their trade deal and include revised provisions on investment protection and investment dispute settlement**
- **The good, the bad and the ugly: recent developments that may affect international trade in palm oil**
- **CJEU: With respect to nutrition claims on mineral water, the calculation of total content must consider all of the chemical compounds of sodium**
- **Recently Adopted EU Legislation**

Canada and the EU finalise their trade deal and include revised provisions on investment protection and investment dispute settlement

On 29 February 2016, Canada and the EU announced two important milestones regarding the conclusion of the Comprehensive Economic and Trade Agreement (hereinafter, CETA). Firstly, the legal review of the agreement, already reached in 2014, has been concluded. Secondly, and more notably, Canada and the EU announced that they agreed on a new approach to investment protection and investment dispute settlement. The new text is inspired by all of the main elements of the EU's general new approach on investment protection.

The EU's new approach was developed as part of the EU's negotiations with the US regarding the Transatlantic Trade and Investment Partnership (hereinafter, TTIP). It was preceded by a period of '*Public consultation on modalities for investment protection and ISDS in TTIP*' (see *Trade Perspectives*, Issue No. 2 of 23 January 2015). On 13 January 2015, the EU Commission published its report on the responses to this public consultation. Its analysis showed widespread opposition to the inclusion of investor-to-state dispute settlement (hereinafter, ISDS) in the TTIP. The EU Commission's Report concluded that improvements should be pursued, in particular regarding: 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. On 16 September 2015, the EU Commission adopted its new approach on investment protection and investment dispute settlement, taking into account the outcome of the consultations (see *Trade Perspectives*, Issue No. 17 of 25 September 2015). In November 2015, this approach was proposed as part of the TTIP negotiations and subsequently included in the EU-Viet Nam Free Trade Agreement (hereinafter, EU-Viet Nam FTA), which was concluded in December 2015.

Although Canada and the EU announced the conclusion of negotiations of the CETA in 2014, the continuance of discussions concerning investment protection put the agreed CETA texts back into play. This is partly due to public pressure after the consultation process not to conclude any agreement containing the previous approach and not taking account of the evolved approach and of public opinion. The legal revision of the CETA text then allowed for

a certain period of time that was apparently used by the two negotiating parties to revise the approach to investment protection and investment dispute settlement. High-level discussions are said to have been held during the WTO Ministerial in Nairobi and the *World Economic Forum* in Davos. This can be considered a crucial step on the path to concluding the agreement and avoiding political and public debate that could potentially compromise the signing of the agreement. The CETA will now be translated into the other official languages of Canada and the EU before being submitted to the European Parliament and then the Council for approval.

The EU's new approach, which has now become part of the CETA, includes various novelties compared to the previous provisions. The original CETA text, agreed to in 2014, already provided the most progressive system for the protection of investment and the settlement of investment disputes at the time (see *Trade Perspectives*, Issue No. 2 of 25 January 2013). Several aspects of this '*new approach*' must be highlighted. The CETA now includes an additional provision underlining a Party's right to regulate and safeguarding Parties' policy and regulatory space. Said provision – Article 8.9(1) of the CETA – is prominently placed as the first article of Section 8D on investment protection and provides that, '*for the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*'. Generally, the inclusion of an ISDS mechanism in investment chapters of international agreements does not, by itself, impair the regulatory space of the parties. An ISDS mechanism is merely a tool that provides investors with the ability to seek remedial action in the presence of alleged violations of their rights granted under an investment agreement (see *Trade Perspectives*, Issue No. 2 of 23 January 2015). Thus, new provisions underlining the right to regulate have mostly a declaratory character, rather than creating new rights for the Parties. In terms of the relationship between the CETA and the respective domestic legal systems, two more aspects may be highlighted. Article 8.18(2) of the CETA refers to the scope of the investment dispute settlement provisions. The article provides that claims '*with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment*'. The emphasis on existing business operations is intended to avoid recourse to ISDS proceedings aimed at enhancing an investor's market access. Finally, the CETA establishes that the CETA tribunals shall only apply the CETA and do so in accordance with the relevant principles of international law. However, with respect to domestic law, Article 8.31(2) of the CETA provides that the '*Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party*'. It further stresses that the Tribunal may only '*consider, as appropriate, the domestic law of the disputing Party as a matter of fact*'. This is particularly relevant considering the competence of the Court of Justice of the European Union in interpreting EU law.

The more notable aspects of the EU's new approach, accepted by Viet Nam and Canada, however, concern the institutional aspects of investment disputes. The CETA now establishes a Tribunal and an Appellate Tribunal. The Tribunal is permanent and made up of 15 Members. Generally, subdivisions of three Members will hear the cases (Article 8.27(6) of the CETA), unless disputing parties agree that a case be heard by a sole Member of the Tribunal (Article 8.27(9) of the CETA). Arguably, the most notable innovation of the EU's new approach, now included in the CETA text, is the establishment of an Appellate Tribunal. Article 8.28 of the CETA details the jurisdiction of this appeals court and sets a certain number of rules regarding the Members of the Appellate Court. However, compared to the EU-Viet Nam FTA, the CETA text leaves open a number of important issues and procedural aspects. These missing rules can surely be attributed to the last minute inclusion of the relevant aspects of the EU's new approach on investment dispute settlement and show that

the primary focus consisted in the inclusion of the important aspects while leaving the details to be spelled out at a later moment. Article 8.28(7) of the CETA calls on the future CETA Joint Committee to promptly adopt decisions on those matters. One of the more interesting aspects consists in the call for a decision on '*procedures for referring issues back to the Tribunal for adjustment of the award*'. While this referral back to the original tribunal (a remand procedure) was not included in the TTIP proposal of November 2015, it has already been included in the EU-Viet Nam FTA. Article 28(4) of the EU-Viet Nam FTA provides that, '*where the facts established by the Tribunal so permit, the Appeal Tribunal shall apply its own legal findings and conclusions to such facts and render a final decision on the matter. Where this is not possible, it shall refer the matter back to the Tribunal*'. It is still unclear what the rules of procedure will be for the CETA, though the inclusion of a remand procedure, not existing, for example, in state-to-state dispute settlement before the WTO's Dispute Settlement Body, will likely become part of the final rules of procedure.

The final CETA text differs in further aspects from the TTIP proposal and the EU-Viet Nam FTA. This includes mostly minor issues, like the absence of a dedicated article on the amicable resolution of a dispute. Other differences include the number of Members of the Tribunal (TTIP proposal: 15; EU-Viet Nam FTA: 9; and CETA: 15) and the duration of the term of the Members of the Tribunal (TTIP proposal: six years; EU-Viet Nam FTA: four years; and CETA: five years). These examples show different outcomes of negotiations with negotiating Parties trying to shape the future agreement. Common to all three texts, however, is a dedicated article calling for a multilateral investment tribunal. Article 8.29 of the CETA provides that the '*Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes*'. Interestingly, the article already calls for transitional arrangements passing over CETA investment disputes to the envisioned future multilateral court and rendering the CETA investment dispute tribunals obsolete.

Critical opinions of ISDS will likely continue to be voiced regardless of the changes following the EU's new approach or other future developments. However, a good and reliable system of investment protection and ISDS are vital components of modern comprehensive trade and investment agreements. The continuous efforts to improve the relevant provisions are laudable particularly from a legal and juridical perspective. The establishment of a permanent court and, as part of this new approach, of an appellate tribunal can be considered important steps in bringing the settlement of investment disputes to a higher level. This structure may allow for the accumulation and development of case law that will eventually lead to better legal certainty and legal predictability. The example of the standing WTO Appellate Body, its '*jurisprudence*' and the trust that WTO Member States vest in that procedure shows the significance of such development. However, while these are important steps in ensuring legal certainty and restoring public trust in investment dispute settlement proceedings, the provisions and mechanisms must not render investment dispute resolution too complicated and too costly, thereby deterring investors from launching proceedings. In addition, the increasing emphasis on the right to regulate may lead to a very strict interpretation of the law by the Members of the Tribunal, which may then also deter interested parties from having recourse to it and/or allow for abuses of this exception. A legitimate concern regards the general issue of costs and duration, both of which will likely increase due to the appeal procedure. Short time limits and respect thereof will be essential to avoid extended periods of legal proceedings and legal uncertainty.

These latest developments bear significance in various ways. It can be regarded as a strong success by the EU to have reached agreement with Canada on this delicate issue. It is particularly remarkable for the negotiating parties to have reached this kind of agreement after the official conclusion of negotiations and during the legal revision period of the agreed text. This is especially noteworthy considering Canada's economic importance and its previous reluctance to reopen the CETA negotiations. Finally, the inclusion of the EU's new

approach in the CETA is an important step on the way to its inclusion in the TTIP, though US negotiators (and, later on, the US Congress) are said to remain very sceptical *vis-à-vis* this institutionalised ISDS court system with a permanent court and an appellate tribunal. The issue of investment protection has become one of the most strongly debated and contested issues surrounding the current generation of preferential trade agreements. While the EU has addressed several issues identified during its public consultations, the new approach has yet to be tested and possibly refined.

It should be noted that countries other than the US, Viet Nam and Canada, that currently have bilateral investment treaties (or trade agreements that address investment protection) with the EU, could raise valid concerns that their own investors will now be subject to less favourable investment terms with the EU. This, coupled with the apparent intention of the EU to continue proposing versions of its investment court system in comprehensive trade and investment agreements, arguably leads to the logical next step of a plurilateral or multilateral investment court system based on the EU's most recent model. However, as analysed above, the ISDS mechanisms in the TTIP, EU-Viet Nam FTA and the CETA include notable differences. It is unclear how the investment court will work in practical terms. Will there be multiple sets of judges to comprise each tribunal, or will the same judges apply separate provisions depending on the dispute? Will rulings under one agreement create '*precedent'* that will be persuasive, or even binding, in disputes under another agreement? Will the courts be financed by multiple fund accounts, or will a joint account be created to finance a broadly-applied investment court system? While these questions may appear more relevant in the long term, the EU and its trade and investment partners are laying the foundation for a modern investment court system. The strong public debate surrounding the issue is paving the way for more intensive discussions and negotiations in the not so distant future. Interested stakeholders should, therefore, continue to monitor the developments in the field of investment protection, exchange views with negotiators and decision-makers and try to shape the upcoming agreements in order to safeguard their legitimate interests.

The good, the bad and the ugly: recent developments that may affect international trade in palm oil

During the last few weeks, there have been a number of developments that may affect the market access of palm oil in different parts of the world. In particular, a recent opinion by the Italian health body finding that palm oil is no more harmful than other fats, such as butter, the proposed inclusion of palm oil on the list of excisable products in Russia, and the re-emergence of the '*Nutella Tax*' in France, this time *via* a proposed amendment to the French Biodiversity Law, have made headlines in relation to palm oil. These developments account for only a minute sample of those that have impacted in recent years the palm oil industry, which has been singled out in a variety of contexts and with several measures, both by governments and private constituencies. While science and facts continue to endorse the consumption of palm oil, governments either directly attack palm oil, or indirectly allow private constituencies to do so, often under the guise of health or environmental concerns.

The '*good*'

In Italy, on 25 February 2016, the *Istituto Superiore di Sanità* (*i.e.*, the Italian Superior Health Institute, and hereinafter, ISS) issued an opinion on the possible health consequences related to the use of palm oil as a food ingredient. The opinion was prepared following a request by the Directorate General of Food Hygiene and Nutrition of the Italian Ministry of Health (hereinafter, the Ministry) for a scientific and technical opinion on the '*possible toxicity of palm oil as a food ingredient*'. In its opinion, the ISS emphasises that no food or ingredient can be defined as '*toxic*', in and of itself, and that any adverse health effects are to be measured on the basis of exposure levels. The evaluation of the health effects of a food or

ingredient cannot be separated from the analysis of the overall diet and, more generally, from the lifestyle of consumers. In simple terms, the ISS confirmed that palm oil is not unhealthier than butter, and that, in general, there are no health risks other than those associated with excessive consumption of saturated fats.

The opinion issued by the ISS contains four main points. Firstly, when describing the uses and composition of palm oil, the ISS recognises that palm oil is a widely-used ingredient in the food industry and represents a significant source of saturated fatty acids. In this regard, palm oil is composed of 50% saturated fatty acids, 40% monounsaturated fatty acids and 10% polyunsaturated fatty acids. In addition to fatty acids, crude palm oil contains vitamin E and other important components such as carotenoids and phytosterols. Although palm oil has a higher content of saturated fatty acids than most other vegetable fats used in alimentation (*e.g.*, sunflower oil, soybean oil and vegetable margarines), it has a lower content of mono/polyunsaturated fatty acids. Only butter has a percentage of saturated fatty acids similar to that of palm oil, while coconut oil has an even higher content. Secondly, the ISS concludes that the scientific literature reviewed does not report the existence of specific components of palm oil that have negative health effects. Epidemiological evidence does attach negative effects on health to the excess of saturated fatty acids in the diet and, in particular, links that to increased risk of cardio-vascular diseases, but independently of the source of such fats, whether vegetable or animal.

Thirdly, the ISS estimated the contribution of palm oil to the overall intake of saturated fatty acids in the diet. In fact, in addition to those contained in palm oil added to food during the industrial processing, saturated fatty acids are ingested through the consumption of many unprocessed foods that naturally contain such acids, such as milk and dairy products, eggs and meat. The ISS states that, overall, the major national and international health organisations recommend that the level of intake of saturated fatty acids does not exceed 10% of the total calories. Using data of food consumption in Italy for the years 2005-2006 (the only data available at the time), the ISS reported an intake of saturated fatty acids by the general adult population of about 27g per day, with palm oil contributing between 2.5 and 4.7g. Regarding children aged 3-10 years, estimates indicate a consumption of saturated fatty acids of 24 to 27g per day, with a contribution of saturated palm oil of between 4.4 and 7.7g. An update of these figures may lead to different levels of exposure to saturated fatty acids by the Italian population, as the food industry has shifted from the use of margarine and butter to palm oil.

Fourthly, the ISS concludes that there is no direct evidence in the scientific literature that palm oil, as a source of saturated fatty acids, has a different effect on cardiovascular risks than other fats with a similar percentage of composition of saturated fats and mono/polyunsaturated fats, such as, for example, butter. Minor effects of other vegetable fats, such as sunflower oil, in modifying the plasma lipid levels is due to the lower intake of saturated fatty acids and, at the same time, the higher intake of polyunsaturated fats. Palm oil's consumption is not correlated to higher risk factors for cardiovascular diseases in normocholesterolemic individuals, normal-weight people, and young people taking the appropriate amount of polyunsaturated fats simultaneously. At the same time, population groups such as children, the elderly, patients with dyslipidemia, obesity, previous cardiovascular events, and hypertension may present a greater vulnerability than the general population. For this reason, in the context of a varied and balanced diet, including foods naturally containing saturated fatty acids (such as meat, dairy and eggs), the ISS reiterates the need to limit the consumption of foods bearing high amounts of saturated fats.

The ISS also recognised that saturated fatty acids play numerous important physiological functions: they are components of cell membranes, regulate the intra-cellular communication, are precursors of hormones and long-chain polyunsaturated acids and regulate cell growth and gene expression. In addition, a gram of saturated fatty acids provides 9 kcal of energy.

The necessity of saturated fatty acids varies according to age and is greater in the first years of life when the metabolic processes mediated by this class of nutrients are most active. The ISS stresses that 40% of the total fatty acids in human milk are saturated and of the latter 50% is represented by palmitic acid.

Overall, the opinion issued by the ISS confirms that palm oil used as food ingredient does not, *per se*, have any negative consequences for health. The problem is not palm oil. If anything, the issue may be the intake of saturated fats and they exist, in varying degrees and amounts, in all vegetable oils and animal fats. Yet, palm oil seems to be the only product under the spotlight and a '*convenient scapegoat*'. In fact, while the opinion issued by the ISS demonstrates scientific support for the fact that palm oil is safe, just like all other vegetable oils or animal fats, the palm oil industry continues to be subject to repeated instances of anti-competitive behaviour and deceptive advertisements (*e.g.*, the '*no palm oil*' campaigns popular in France and Belgium), while governments stand idle or, even worse, advocate themselves or imply palm oil's nutritional dangerousness and responsibility for all sorts of non-communicable diseases. The most notable recent developments in this regard come from Russia and France.

The '*bad*'

In February, Russia published an implementation plan to add, *inter alia*, palm oil to its list of excisable goods. The plan, which it appears will enter into effect on 1 July 2016, will would raise taxes on palm oil by 30%, or USD 200 per tonne. Informed sources report that Indonesia raised a specific trade concern on Russia's proposed measure at the meeting of the WTO Committee on Technical Barriers to Trade that took place in Geneva on 9-10 March 2016, where Indonesia voiced its opinion that palm oil as such is not the appropriate product on which an excise tax should be applied, and that it appears that the measure is just a way for Russia to improve its trade balance by decreasing the amount of imported palm oil while increasing recourse to other vegetable oils and augmenting its own tax revenues. Reportedly, Russia countered that the inclusion of a product on list of excisable goods comes as the result of broad public discussion and that, nonetheless, the tax would apply equally to imported and domestically produced palm oil and that concerns relating to excise taxes are outside the scope of the TBT Agreement. Again, it seems that a measure as the one being proposed by Russia should target all '*like*' products (domestic or imported) that contain saturated fats, not just palm oil or products containing palm oil. This is perhaps a legitimate health and tax policy, but implemented in a '*bad*' manner.

The '*ugly*'

More disturbing, perhaps, are the continued efforts by members of the French Parliament to propose excessive taxes on palm oil. On 14 January 2016, the infamous '*Nutella Tax*' debate from 2012 and 2014 re-emerged in the French Senate, this time *via* the proposed amendment of a special tax on oils for food products under the French Biodiversity Law. The amendment called for a specific tax on palm oil, palm kernel oil, and coconut oil to be levied in the amount of EUR 300 per tonne in 2017, EUR 500 per tonne in 2018, EUR 700 per tonne in 2019, and EUR 900 per tonne in 2020. After 2020, the tax would have been increased annually as established by France's Ministry of Finance. Palm oil is currently taxed at EUR 103.71 per tonne in France, and palm kernel oil and coconut oil at EUR 113.24. Comparatively, olive oil is taxed at EUR 188.96 per tonne in France, and corn and peanut oil at EUR 170.13 per tonne, thus indicating that such an amendment would subject palm oil to significant price discrimination compared to other competing vegetable oils.

Fortunately, informed sources indicate that the proposed amendment was rejected by the French National Assembly's Sustainability Biodiversity Commission at its sitting in Paris on 8 March 2016. It is likely that the proposal's evident profiles of inconsistency with WTO and EU

law, together with strong international pressure, may have defeated the will of its proponents. However, it appears that another amendment will likely be proposed before the next hearing of the Parliament. This new amendment would reportedly aim at aligning the palm oil tax to that imposed on olive oil. Therefore, palm oil could see an increase in tax from the current level of EUR 103.71 per tonne to 188.96 EURO per tonne. It appears that there is also a plan to exonerate sustainable palm oil from such increased taxation, but it is by no means clear how that system would work. It appears that the next hearing of the French National Assembly is scheduled for Tuesday, 15 March 2016, when the new amendment will be voted and potentially sent back to the French Senate for its consideration.

The amendment, and its predecessors, should raise a number of concerns for stakeholders. In particular, issues are presented with respect to: (1) transparency, in that it is unclear whether the newly proposed amendment will be provided to the public at large, for review and comment, as soon as possible by the French Parliament and with enough notice ahead of formal adoption; (2) the intended objectives, insomuch as it is unclear whether, as the name of the Law, to which the amendment is attached, would seem to imply, the objective is one of biodiversity and protection of the environment, or whether the tax increase has a nutritional goal; and (3) discrimination and protectionism (*de facto*, if not *de jure*) by the French Government, given that it is unclear how France could justify the varied treatment of oils (and animal fats) used for purposes similar to those of palm oil, in particular as a vegetable oil in the food industry. Informed sources indicated that Indonesia raised a specific trade concern on this legislative amendment at the most recent meeting of the WTO TBT Committee, where Brazil was reported to have shared Indonesia's concerns. It appears as though the EU clarified that the objective of the measure is better protection of natural resources and ecosystems, but that, in its view, as a tax amendment, the measure is outside the scope of the TBT Agreement. Independently of the objective that its proponents, rather confusingly, appear to be using to justify the measure, this new proposal has all the '*ugly*' features of previous discriminatory proposals against palm oil. Hopefully, wisdom will prevail.

CJEU: With respect to nutrition claims on mineral water, the calculation of total content must consider all of the chemical compounds of sodium

On 17 December 2015, the Court of Justice of the European Union (hereinafter, CJEU) handed down its judgment in *Neptune Distribution v the French Minister for Economic Affairs and Finance* (Case C-157/14, and hereinafter, *Neptune Distribution*). Most importantly, the CJEU confirmed its jurisprudence in *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (Case C-195/14, and hereinafter, *Teekanne*), confirming that a holistic approach must be taken when assessing whether food labelling is misleading, taking into consideration all elements of a label (*e.g.*, images displayed, logos, nutrition labelling, eventual claims, product names and list of ingredients). That is to say, while individual items on a label may be correct and not misleading on their own, when considered in their aggregate form, the items on a label may still mislead consumers, in violation of EU law.

Neptune Distribution sells and distributes the natural sparkling mineral waters denominated '*Saint-Yorre*' and '*Vichy Célestins*'. Pursuant to its decision of 5 February 2009, the Head of the Departmental Unit of the Regional Directorate for Competition, Consumption and Suppression of Fraud (DGCCRF) for the Auvergne region in France served formal notices on Neptune Distribution to remove the following indications from labels and advertising for those waters: '*The sodium in St-Yorre is essentially sodium bicarbonate. St-Yorre contains only 0.53 g of salt (or sodium chloride) per litre, that is to say less than a litre of milk!!!*'; '*Salt and sodium must not be confused — the sodium in Vichy Célestins is essentially from sodium bicarbonate. Above all, it must not be confused with table salt (sodium chloride). Vichy Célestins contains only 0.39 g of salt per litre or 2 to 3 times less than is contained in a litre*

of milk!'; and generally, any statement leading the consumer to believe that the waters in question are low or very low in salt or in sodium. Neptune Distribution challenged that decision. Hearing the case as the court of last instance, the French *Conseil d'État* (*i.e.*, Council of State) asked the CJEU whether the sodium content of the waters at issue must be calculated solely on the basis of sodium chloride (table salt), or whether it must also be calculated on the basis of the total amount of sodium in those waters in all its forms (thus including sodium bicarbonate).

Indeed, consumers might be misled if mineral water were to be described as low in sodium or salt, or as being suitable for a low-sodium diet, even though it contained high levels of sodium bicarbonate. If sodium bicarbonate had to be taken into account in the calculation of the sodium content, the *Conseil d'État* stated that distributors of natural mineral waters could be deprived of the opportunity to rely on information that is nonetheless correct, which could limit the freedom to conduct a business and freedom of expression and advertising. Sodium bicarbonate might be regarded as less damaging to human health than sodium chloride, given that, currently, there is no scientific data confirming that sodium bicarbonate brings on or aggravates arterial hypertension in the same manner and proportions as table salt.

In its judgment, the CJEU declares, first of all, that *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods* (hereinafter, NHCR) expressly prohibits, in its Annex entitled '*Nutrition claims and conditions applying to them*', the use of the claim '*very low in sodium/salt*' with respect to natural mineral waters and other waters. In the light of Article 9(2) and Annex III (entitled '*Indications and Criteria*') of *Directive 2009/54/EC on the exploitation and marketing of natural mineral waters*, claims or indications suggesting to the consumer that the waters concerned are low in sodium or salt or are suitable for a low-sodium diet may be used provided that the total sodium content, in all the chemical forms present, is, in both cases, less than 20 mg/l.

The CJEU recalls that the EU legislature wishes to ensure that consumers have appropriate and transparent information as to the sodium content of drinking waters. Since sodium is a component of various chemical compounds (such as sodium chloride and sodium bicarbonate), the quantity present in natural mineral waters must be determined by taking account of the total amount present in the natural mineral waters concerned, whatever its chemical form. Thus, the consumer might be misled where the packaging, labels and advertising for natural mineral waters suggest that those waters are low in sodium or salt or are suitable for a low-sodium diet, whereas, in reality, they contain 20 mg/l or more of sodium.

Interestingly, the CJEU draws an analogy to its judgment in *Teekanne* (see *Trade Perspectives*, Issue No. 12 of 12 June 2015) and holds that packaging, labels and advertising for natural mineral waters, which, regardless of the indication of the total sodium content of those waters on the label, contain an indication referring to a low sodium content of the waters, might also mislead the consumer if they suggest that those waters are low in sodium or salt or are suitable for a low-sodium diet, whereas, in reality, they contain 20mg/l or more of sodium. Article 7(2)(a) of Directive 2009/54/EC states that it is mandatory for the labelling of natural mineral waters to provide a statement of the analytical composition, giving its characteristic constituents. *Teekanne* concerned a tea whose packaging comprised, in particular, depictions of raspberries and vanilla flowers and was labelled as *fruit tea with natural flavourings - raspberry - vanilla taste*', while the list of ingredients did not state that it contained vanilla or raspberry. There, the CJEU held that the list of ingredients, even though correct and comprehensive, may in some situations not be capable of sufficiently correcting the consumer's erroneous or misleading impression concerning the characteristics of a foodstuff that stems from the other items comprising its labelling. Therefore, in *Teekanne*, the CJEU held that, where the labelling of a foodstuff and methods used for the labelling, taken as a whole, give the impression that a particular ingredient is present in said foodstuff, even

though that ingredient is not in fact present, such labelling could mislead the purchaser as to the characteristics of the foodstuff. In *Neptune Distribution*, the CJEU applied a similar reasoning, holding that an indication on the label referring to a low sodium content (not including, *e.g.*, sodium bicarbonate) may not be '*corrected*' by the simultaneously given analytical composition, (giving all characteristic constituents, including the content of bicarbonate) and, taking a holistic approach, might mislead consumers.

The judgement also contains interesting language in relation to marketing statements being protected by the freedom of expression and information under Article 11 of the Charter of Fundamental Rights of the EU and corresponding rules in Article 10 of the European Convention on Human Rights, as well as with the freedom to conduct business under Article 16 of the Charter. The CJEU indeed recognises that there is significant scope of protection for marketing and advertising claims, under their right to freedom of expression and information. However, in *Neptune Distribution*, with respect to the validity of the prohibition of displaying on packaging, labels and in advertising for natural mineral waters, any claim or indication that they have a very low sodium chloride or table salt content (which might mislead the consumer as to the total sodium content of the waters concerned), the CJEU considers that it is justified and proportionate. It is necessary for consumers to have the most accurate and transparent information possible to ensure the protection of human health in the EU. The CJEU added that a risk to human health caused by a high level of consumption of sodium present in various chemical compounds, in particular sodium bicarbonate, cannot be excluded with certainty, and thus the precautionary principle justifies the adoption of measures restricting fundamental rights.

The judgment of the CJEU in *Neptune Distribution* is important for a number of reasons. In assessing food business operators' food labels and claims, the human rights of freedom of expression and information and freedom to conduct business are relevant. However, a strict proportionality test applies (and limits these rights), in which elements such as the precautionary principle are relevant. Food labelling and advertising jurisprudence is a complex matter. In conclusion, food business operators should note that, when assessing whether a food labelling might be misleading, the CJEU is increasingly taking a holistic approach, assessing all elements of a label even where individual items may be correct and not misleading as such, and establishing firm case law that the context of a product's labelling as a whole is what must be considered.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) 2016/330 of 8 March 2016 suspending the tariff preferences for certain GSP beneficiary countries in respect of certain GSP sections in accordance with Regulation (EU) No. 978/2012 applying a scheme of generalised tariff preferences for the period of 2017-2019*

Trade Remedies

- *Commission Implementing Regulation (EU) 2016/315 of 4 March 2016 amending Council Regulation (EC) No. 329/2007 concerning restrictive measures against the Democratic People's Republic of Korea*

- *Commission Implementing Regulation (EU) 2016/306 of 3 March 2016 amending Implementing Regulation (EU) No. 1283/2014 imposing a definitive anti-dumping duty on imports of certain tube and pipe fittings, of iron or steel, originating in the Republic of Korea and Malaysia following an interim review pursuant to Article 11(3) of Council Regulation (EC) No. 1225/2009*

- *Commission Implementing Decision (EU) 2016/299 of 2 March 2016 terminating the anti-dumping proceedings concerning imports of silico-manganese originating in India*

- *Commission Implementing Regulation (EU) 2016/278 of 26 February 2016 repealing the definitive anti-dumping duty imposed on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not*

Food and Agricultural Law

- *Commission Regulation (EU) 2016/324 of 7 March 2016 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 food additives permitted in all categories of foods*

- *Commission Implementing Decision (EU) 2016/321 of 3 March 2016 adjusting the geographical scope of the authorisation for cultivation of genetically modified maize (Zea mays L.) MON 810 (MON-ØØ81Ø-6) (notified under document C(2016) 1231)*

Other

- *Commission Regulation (EU) 2016/314 of 4 March 2016 amending Annex III to Regulation (EC) No. 1223/2009 of the European Parliament and of the Council on cosmetic products*

- *Commission Regulation (EU) 2016/293 of 1 March 2016 amending Regulation (EC) No. 850/2004 of the European Parliament and of the Council on persistent organic pollutants as regards Annex I*

Ignacio Carreño, Tobias Dolle, Anna Martelloni, Bruno G. Simões and Paolo R. Vergano contributed to this issue.

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:

FRATINIVERGANO
EUROPEAN LAWYERS

Rue de Haerne 42, B-1040 Brussels, Belgium Tel.: +32 2 648 21 61 - Fax: +32 2 646 02 70
www.FratiniVergano.eu

Trade Perspectives© is issued with the purpose of informing on new developments in international trade and stimulating reflections on the legal and commercial issued involved. Trade Perspectives© does not constitute legal advice and is not, therefore, intended to be relied on or create any client/lawyer relationship.

To stop receiving Trade Perspectives© or for new recipients to be added to our circulation list, please contact us at:
TradePerspectives@FratiniVergano.eu