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Comparing '*sin taxes*': the real '*sin*' is to discriminate between '*like products*'

On 16 March 2016, Her Majesty's Treasury (hereinafter, the HM Treasury) and The Right Honourable George Osborne Member of Parliament, in his role as Chancellor of the Exchequer of the United Kingdom (hereinafter, UK), presented his 2016 Budget (hereinafter, the 2016 UK Budget) to the UK Parliament. Notably, the Budget includes an unexpected tax on sugary drinks, adding to an increasing trend of '*sin taxes*' or '*fat taxes*' proposed or implemented in the EU. While some of these taxes are applied in a neutral manner, others appear to be discriminatory and inconsistent with international legal obligations.

In the weeks leading up to the presentation of the UK Budget for 2016, reports mostly indicated that a tax on sugary drinks would not be included. However, in order to address one of its stated purposes of providing security for working people and opportunity for the next generation, the 2016 UK Budget includes, *inter alia*, the introduction of a new soft drinks industry levy to help tackle childhood obesity, aimed at incentivising companies to reduce sugar in the drinks they sell. The levy, which is expected to raise GBP 520 million in its first year, and decrease as companies adjust, is expected to fund a number of educational initiatives related to sports, healthy diets and active lifestyle. The 2016 UK Budget document released by the HM Treasury cites an October 2015 study by Public Health England titled '*Sugar Reduction: the Evidence for Action*' as scientific justification supporting the objective of the levy. The levy, to be implemented from April 2018, will be charged on volumes according to total sugar content, with a main rate charge for drinks above 5g of sugar per 100ml and a higher rate for drinks with more than 8g of sugar per 100ml. There will be an exclusion for small operators, and the levy will also not apply to milk-based drinks or fruit juices. Although the 2016 UK Budget document released by the HM Treasury states that the details will be developed during Summer 2016, for legislation in the Finance Bill 2017, reports indicate that the tax rate will likely be equivalent to GSP 0.18 per litre for drinks with more than 5g of sugar per 100ml and GSP 0.24 per litre for drinks with more than 8g of sugar per litre. Accordingly, a standard-sized soft drink product (*i.e.*, 330ml) would likely be subject to a levy of GBP 0.06 or GBP 0.08, respectively.

The UK's levy on sugar drinks is an example of the increasing use of '*sin taxes*' or '*fat taxes*' aimed at influencing the behaviour of businesses and consumers. Elsewhere in the EU, the most recent notable example is an amendment to an additional special tax on palm oil, palm kernel oil and coconut oil added to the Draft Law for the Recapture of Biodiversity, of Nature and Landscapes (hereinafter, the Draft Law), which is currently under consideration in the French Parliament. The Draft Law was first tabled in the French National Assembly in March

2014, where, for the most part, it included amendments to the French Environmental Code. The French National Assembly adopted the Draft Law at its first reading a year later in March 2015, and it was then sent to the French Senate for consideration. In January 2016, French Senators, including members of the '*Groupe écologiste*', tabled, and later adopted, an amendment to the Draft Law that would have increased the tax on palm oil, palm kernel oil and coconut oil, in their natural state and in food products, to EUR 300 per tonne in 2017, EU 500 per tonne in 2018, EUR 700 per tonne in 2019 and EUR 900 starting in 2020, and which would have then been raised again each year on 1 January starting in 2021. After returning to the French National Assembly for its second reading, amendments were again made to the Draft Law so that the current tax rates applicable to palm oil, palm kernel oil and coconut oil would be increased by EUR 30 per tonne in 2017, EUR 50 per tonne in 2018, EUR 70 per tonne in 2019, and EUR 90 per tonne in 2020. In addition, members of the French National Assembly proposed an exemption to said special tax, so that oils qualifying under (un-specified) environmental sustainability criteria would not be taxed. The French National Assembly adopted the revised version of the Draft Law, which is now again under consideration by the French Senate.

The implementation of such '*sin or fat taxes*' raise potential WTO concerns, as evidenced by reports of the discussions taking place during meetings of the WTO Committee on Technical Barriers to Trade (hereinafter, TBT Committee). Reports indicate, for instance, that at the most recent meeting of the TBT Committee on 9-10 March 2016, Indonesia raised a '*specific trade concern*' with respect to the French Draft Law on Biodiversity. Indonesia emphasised that the relevant provision in the Draft Law creates prices discrimination *vis-à-vis* other oils, which will make palm oil and palm kernel oil uncompetitive against other vegetable oils used by the food industry. In the context of the WTO, the most relevant international obligations are found in Article III:2 of the General Agreement on Tariffs and Trade 1994 (hereinafter, the GATT), which requires WTO Members not discriminate foreign products against '*like*' domestic products. The first sentence of Article III:2 of the GATT provides that the products of the territory of any WTO Member imported into the territory of any other WTO Member shall not be subject, directly or indirectly, to internal taxes or other internal charges in excess of those applied, directly or indirectly, to '*like*' domestic products. Additionally, the second sentence of Article III:2 of the GATT requires that directly competitive and substitutable products be similarly taxed and that duties, charges or other charges not be applied so as to afford protection to domestic products. According to, *inter alia*, the WTO Appellate Body Report in *Korea – Alcohol*, the scope of products protected under the second sentence of Article III:2 is broader than under the first sentence. Regardless, singling out specific products to be taxed in a certain way and differently than '*like products*' raises the question of a possible discriminatory measure. While this is always determined on a case-by-case basis, the vast differences in the envisaged taxation regarding palm oil and the indirect protection of other vegetable oils suggest that Draft Law is likely inconsistent with WTO law.

The inclusion of an exemption for palm oil, palm kernel oil and coconut oil that meet environmental sustainability criteria also raises potential WTO-consistency issues under the TBT Agreement. The TBT Agreement applies to technical regulations, which are defined as documents that '*lay down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory*'. WTO '*jurisprudence*' demonstrates that technical regulations: (i) apply to an identifiable product or group of products; (ii) lay down one or more product characteristics, which may be intrinsic (such as composition and size) or related to the product (such as identification, presentation, and appearance), positive or negative; and (iii) be mandatory. The inclusion of environmental sustainability criteria in the Draft Law likely makes it a technical regulation, inasmuch as it can be argued that it is contained in a document (*i.e.*, the Draft Law); it relates to an identified group of products (*i.e.*, palm oil, palm kernel oil and coconut oil); and its application is mandatory, insomuch as the exemption only applies if the criteria is met (as further clarified in the *US-Tuna II* dispute, see *Trade Perspectives*, Issue

No. 10 of 18 May 2012). Article 2.1 of the TBT Agreement requires WTO Members to ensure that technical regulations do not result in discriminatory treatment *vis-à-vis* the like product of national origin or originating in any other country, reflecting the national treatment obligations under Article III of the GATT. Article 2.2 of the TBT Agreement requires WTO Members to ensure that technical regulations are not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade and that are based on a risk assessment that factors-in, *inter alia*, available scientific information. In addition to the discriminatory nature of the additional tax on palm oil, palm kernel oil and coconut oil contained in the Draft Law, there is no evidence that France completed a risk assessment based on scientific information. In fact, the Draft Law contains no reference to the actual environmental sustainable criteria that would apply, if implemented.

Although the UK's levy on sugary drinks appears to include some exemptions for milk-based drinks and fruit drinks, which would need to be better understood, it does not appear to discriminate between types of sugar. That is to say, for instance, that drinks are taxed regardless of whether they include beet sugar or cane sugar, or whether they include brown sugar or white sugar. To contrast, the French Draft Law on Biodiversity singles out and discriminates against palm oil, palm kernel oil, and coconut oil. If the measure were to be truly dictated by otherwise legitimate health policies and objectives (*i.e.*, the fight against obesity and the prevention of cardiovascular diseases), French taxation should tackle the excessive consumption of saturated fats in food products, independently of the origin of the fat. In other words, the level of taxation should be tailored to the amount of saturated fats present in food products, thereby impacting all '*like products*' (*i.e.*, all fats in food products derived both from vegetable oils and animal fats). It must be scientifically-based and neutral in its application. Sadly, as the proposed amendment currently stands, it does not appear to be scientifically-based and it is certainly not neutral. It singles out a handful of vegetable oils and targets them instead of targeting saturated fats. The level of taxation among vegetable oils appears to remain different and animal fats, which are often more dangerous than fats from vegetable oils, do not appear to be taxed at all. In terms of the applicable WTO and EU principles of non-discrimination, that is as big a '*sin*' as the one that the French legislator claims to intend to fight with its '*sin tax*'. The UK proposal, as it stands and as it is currently understood, shows that a non-discriminatory alternative exists. Hopefully, the final French measure, if adopted, will not require WTO and EU litigation to achieve such a non-discriminatory and product-neutral alternative approach.

Regulatory cooperation and good regulatory practices – the '*secret stars*' of the TTIP are slowly taking shape

The issues of regulatory cooperation and good regulatory practices are becoming increasingly important elements of preferential trade agreements (hereinafter, PTAs). This is especially true for the upcoming Transatlantic Trade and Investment Partnership (hereinafter, TTIP), which the EU and the US have been negotiating since 2013. In April 2015, the EU tabled its first proposal for the Chapter on '*Regulatory Cooperation*' to be included in the TTIP. After further discussions, revised proposals for the Chapter's sections on '*Regulatory Cooperation*', as well as on '*Good Regulatory Practices*' (hereinafter, GRPs), have been developed, were tabled during the twelfth round of negotiations at the end of February 2016, and have subsequently been officially published by the EU Commission on 21 March 2016.

Almost three years ago, in June 2013, the Council of the EU adopted the directives for the negotiation by the EU Commission of the TTIP (*i.e.*, the TTIP '*negotiating mandate*'). The mandate includes a decision by the Council of the EU authorising the opening of negotiations, a decision from the EU Member States authorising the EU Commission to negotiate on their behalf those TTIP provisions that fall outside the scope of the EU competence, and a series of directives for the conduct of negotiations. The directives provide

that negotiations will be based on three pillars: 1) market access; 2) regulatory issues and non-tariff measures (hereinafter, NTMS) that act as barriers to trade; and 3) rules under which the agreement will operate. NTMs include all those measures, other than tariffs, that may affect trade, including border measures (such as customs procedures) and behind-the-border measures based on domestic regulation, whether at EU or US Federal level, or at EU Member State or US State level. Trade and investment between the EU and the US are affected by different regulatory environments and NTMs may result in costly procedures that businesses operating in a variety of sectors are required to comply with and which are particularly burdensome on small- and medium-sized enterprises (hereinafter, SMEs) (see *Trade Perspectives*, Issue No. 13 of 28 June 2013). In the public debate surrounding TTIP, regulatory cooperation has been criticised by some as a threat to democracy and sovereignty. However, the tackling of trade barriers resulting from some NTMs and establishing regulatory cooperation are vital components of TTIP negotiations aimed at improving the environment to conduct transatlantic business (see *Trade Perspectives*, Issue No. 1 of 15 January 2016).

While GRPs mostly apply to the domestic process of the parties to the PTA, regulatory cooperation establishes mechanisms to increase cooperation on legislation and other regulatory projects. The TTIP follows an ambitious approach regarding these two aspects. GRPs are intended to promote good governance in the domestic regulatory process, especially covering issues such as transparency, predictability and accountability. The EU has now substantially modified its proposal on GRPs. While refining the basic provisions covering definitions, scope and other general provisions, the substantial articles are much more elaborated than in the previous proposal. The new proposal places particular emphasis on assessing the impact of proposed regulatory measures on SMEs. The EU Proposal for the Good Regulatory Practices Chapter (hereinafter, the EU Proposal) expressly refers to the impact on SMEs regarding the issue of early information (Article 5(2) of the EU Proposal) and regarding the regulatory impact assessment itself (Article 8(3) of the EU Proposal). Article 6 of the EU Proposal on stakeholder consultations also provides for enhanced transparency, requiring parties to publish drafts, consultation documents, comments and explanations of the results of the consultation process. Article 7 of the EU Proposal includes an innovative mechanism, expressly allowing any natural or legal person to submit views on improvements to existing regulatory frameworks. Article 8 of the EU Proposal now provides more detailed rules on conducting regulatory impact assessments, calling on parties to consider the actual need for the proposed regulatory act (Article 8(2)(a) thereof), to examine feasible regulatory and non-regulatory alternatives (Article 8(2)(b) thereof), as well as to assess potential short- and long-term social, economic and environmental impacts (Article 8(2)(c) thereof). A further innovation of the new proposal is the inclusion of Article 9, entitled '*Retrospective Evaluation*'. This article will require parties to periodically engage in evaluating existing regulatory frameworks and to make findings of such evaluations public. The article does not, however, specify any timeframes related to such evaluations.

The EU has also substantially modified its proposal on regulatory cooperation, refining the various aspects and taking into account the ongoing discussions with the US, as well as the discussions held during the course of 2015 with civil society, consumers, the business community and other stakeholders, the European Parliament and EU Member States. A key aspect of this new proposal is the emphasis of the domestic regulator as the future initiator of cooperation, while at the same time increasing the role of input from the public and interested stakeholders. A notable open question is the future scope of the mechanisms on regulatory cooperation as it will be limited to certain sectors of goods and services that are yet to be identified (see Article x.3 (1)(a) of the proposed Chapter on Regulatory Cooperation). The accompanying documents of the EU Commission list, as examples, the automotive, professional services and pharmaceutical sectors. The essence of regulatory cooperation is provided in the proposed Articles x.4 and x.5. Article x.4 requires parties to provide opportunities for cooperation and information-exchange, as well as to take into account the

approaches of the other party on the same or a related matter. Article x.5 then reiterates important aspects of regulatory coherence, namely common principles, mutual recognition and equivalence. Public participation and transparency are dealt with in the proposed Article x.6 providing, on the one side, the opportunity for the general public to review and give input on regulatory issues (Article x.6(1) of the EU Proposal) and, on the other side, establishing a '*Joint EU-US Annual Cooperation Program*', which would provide regulatory overview through consultations with a domestic *Advisory Group* composed of businesses (including SMEs), trade unions and public interest groups. The further institutional set-up of the regulatory cooperation is still left out and the proposal mentions that the EU intends to develop and submit such provisions at a later stage after the February 2016 round of negotiations. While substantial changes have been made, important aspects are still under discussion and will continue to be discussed during upcoming negotiating rounds.

With respect to regulatory issues, the EU Commission's approach in the TTIP negotiations is gradually becoming clear. In the documents accompanying the new proposals, the EU Commission expressly states the role model function of the TTIP. The EU Commission documents emphasise that the proposed TTIP provisions are intended to be innovative as regards regulatory cooperation and ambitious as regards both parties' commitment to GRPs. Moreover, they intend to serve as inspiration to third countries and help promote regulatory coherence and cooperation at the international level. This reemphasises the idea of the TTIP as a standards-setting agreement, establishing examples and standards for future agreements with other trading partners, as well as for other countries among themselves. The relatively ambitious approach by the EU and the US, as compared, for example, to the Trans-Pacific Partnership Agreement (hereinafter, TPPA), signed in February 2016 by 12 Pacific Rim countries, including the US, can be expected to be proposed in future PTA negotiations undertaken by the EU and the US. Other recent agreements also generally include such provisions, but they are usually less elaborated than the current TTIP proposals. For instance, Chapter 25 of the TPPA, on Regulatory Coherence, encompasses a good number of provisions ranging from domestic cooperation (calling on TPPA Parties to ensure that there are processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures), GRPs (with particular emphasis on the conduct of regulatory impact assessments) and regulatory cooperation (taking a minimal approach only mandating information exchanges, dialogues and meetings between parties). Chapter 25 of the TPPA also establishes a Committee on Regulatory Coherence responsible for considering issues associated with the implementation and operation of the Chapter, as well as an article on transparency requiring parties to notify implementation measures regarding the Chapter on regulatory coherence.

The issue of regulatory cooperation and regulatory coherence is another strong example of how preferential trade agreements can and will affect and shape domestic legislation. These new EU proposals show that such changes are not only triggered by provisions on specific sectors or issues in the agreements, but also through the mechanisms put in place. This influence may, in fact, be more important and more consequential because it will establish a continuous dialogue that – at least according to the current proposals – will also be open to input from the public and interested stakeholders. While emphasising regulatory sovereignty and independence of domestic regulatory entities, the envisioned mechanism will be an important future tool to shape domestic legislation with a view to facilitate trade. The EU Commission itself, in its accompanying documents, highlights certain areas of possible future regulatory cooperation. Regulatory cooperation may, for example, allow the parties to the PTA to remove unnecessary duplication of factory inspections in pharmaceutical and medical devices products, to better share the results of medical trials, which could result in fewer risks for patients and faster approval of generic medicines; establish equivalency of parties' respective car safety requirements; and work towards harmonisation in a manner that fully respects both parties' protection levels; and generally get rid of small, but costly, differences, such as the colour of wiring, the placing of clothing labels, or unduly long approval processes

for products that have already been tested and sold in one of the two parties. Considering the sectorial approach now proposed by the EU, and thus not opting for horizontal regulatory cooperation across all sectors, the issue of which sectors will be covered by the final agreement is eminently important.

Regulatory issues and the tackling of NTMs that act as barriers to trade remain at the core of the TTIP negotiations. Tariffs are already low in many sectors and thus hopes are high that the dismantling of current, and the prevention of future, trade barriers caused by regulatory incoherence and incompatibilities will deliver important trade facilitation results on both sides of the Atlantic. The EU Commission expressly highlights, in its documentation on regulatory cooperation, the need for substantiated input from stakeholders regarding legislative developments. The revised proposals, drafted after intensive discussions with interested stakeholders, show that this input should not only be given after the conclusion of the negotiations, but continue to be voiced during the negotiations. Thus, interested stakeholders need to actively follow the negotiations and make their voice heard to attain to key targets and to make sure that the relevant sectors are covered by the proposed mechanisms of regulatory cooperation. The thirteenth round of negotiations is foreseen for April 2016, and further negotiating rounds can be expected with a bimonthly frequency. Negotiations look poised to gain momentum during the course of this year and, therefore, interested parties need to act swiftly in order to have their interests considered and their suggestions incorporated into the final agreement.

Seven EU Member States oppose '*hybrid*' nutrition labelling schemes

At the Agriculture and Fisheries Council on 14 March 2016, the delegations of seven EU Member States (*i.e.*, Italy, Cyprus, Greece, Portugal, Romania, Slovenia and Spain) presented a note on "*'Hybrid' Nutrition Labelling System recommended in some Member States*". The note, *inter alia*, argues that '*traffic light*' food labelling schemes, which are aimed at classifying food as more or less '*healthy*' mainly by assigning a specific colour based on the content of certain ingredients, violate Article 35 of *Regulation (EU) No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, FIR).

The seven EU Member States indicate in the note that they would also like to receive an update from the EU Commission on the foreseen initiatives on this sensitive issue. Without explicitly naming it, the note appears to address, in particular, the UK's '*traffic light*' nutrition labelling scheme. In fact, in October 2014, the EU Commission initiated infringement proceedings against the UK over its '*traffic light*' nutrition labelling scheme (see *Trade Perspectives*, Issue No. 19 of 17 October 2014). The UK scheme is a hybrid front-of-pack (hereinafter, FoP) food labelling scheme that includes '*percentage reference intakes*' (formerly known as '*guideline daily amounts*', or GDAs) and colour coding indicating whether or not the product is high (*i.e.*, red), medium (*i.e.*, amber) or low (*i.e.*, green) in fat, saturated fat, sugar and salt (depending on its content per 100g). The scheme is, in principle, voluntary, but was recommended in June 2013 by the UK Food Standards Agency (hereinafter, FSA) and the Department of Health. The EU Commission's formal letter of notice initiating infringement proceedings stated that the EU Commission shares the objectives of public health and the fight against obesity pursued by the UK Government in recommending the scheme. However, following complaints from food and retail operators that the use of such scheme would negatively affect the marketing of several products, the EU Commission decided to open an investigation. Reportedly, a spokesperson for the EU Commission at the Agriculture and Fisheries Council meeting on 14 March 2016 was only able to comment that the infringement procedure, which concerns the legal consistency of the UK's '*traffic light*' scheme with the FIR, is pending.

As of 13 December 2016, point (l) of Article 9(1) and Article 55 of the FIR require a nutrition declaration on the labelling of all foodstuffs that includes the energy value; and the amounts of fat, saturates, carbohydrate, sugars, protein and salt (eventually supplemented by the amounts of mono-unsaturates; polyunsaturates; polyols; starch; fibre; and certain vitamins or minerals), expressed in tabular format (if space permits). On top of the mandatory forms of expression and presentation defined in the FIR, Article 35(1) of the FIR allows the energy value and the amount of nutrients to be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers. Such voluntary nutrition labelling cannot be given in isolation; it must be provided in addition to the full mandatory ('*back of pack*') nutrition declaration. Any additional labelling of foodstuffs must be objective, non-discriminatory and must not create obstacles to the free movement of goods. Such supplementary form of expression of the nutritional content of the food must be based on sound and scientific researches and should not mislead the consumers. It should indeed aim at facilitating consumers in understanding the contribution and importance of the food product to the energy and nutrient content of a diet.

The simplistic character of the '*traffic light*' scheme might, in certain cases, create a negative inference on products labelled with red lights and, to a lesser extent, with amber lights, in a way that suggests that the product is, comparatively speaking, from a nutritional or dietary perspective, '*inferior*' or '*worse*'. Thus, the scheme is '*negative*' in its ranking of '*bad*' nutrition contents. This may adversely affect the consumer's perception of the products in question. Misconceptions as to the nutritional quality of certain foodstuffs, such as nuts, seeds, cheese, oils and oily fish, which are naturally high in fats, may make the marketing of these products more difficult and create obstacles to trade, incidentally also '*demonizing*' products that are safe and healthy if consumed in reasonable amounts as part of a diverse and balanced diet.

Three legal issues are of particular relevance in this context: 1) whether a scheme like the UK's '*traffic light*' nutrition labelling scheme is indeed '*voluntary*'; 2) whether certain elements of such schemes can be classified as '*non-beneficial*' nutrition claims; and 3) whether the proliferation of such schemes are obstacles to the free movement of goods in the EU, contrary to the Treaty on the Functioning of the EU (hereinafter, TFEU).

Firstly, the UK '*traffic light*' nutrition labelling scheme raises concerns as to whether it is, *de facto*, voluntary. Major UK retailers signed-up to the '*traffic light*' nutrition labelling scheme, as well as some major food manufacturers and, in particular, the FSA recommended its use and provided for guidelines on how to comply with the scheme on its website. The timing of the seven countries' note, almost two years after the issue regarding the UK's scheme was first raised by the EU Commission, appears to be related to new evidence regarding a potential *de facto* barrier to trade created by the UK '*traffic light*' nutrition labelling scheme. According to *Coldiretti*, the Italian farmers association, 98% of UK retailers, including *Tesco*, *Sainsbury's*, *Asda*, *Morrisons* and *Waitrose*, use the colour labels. This puts pressure on food manufacturers, particularly small firms and own-label product suppliers, to apply the colour labels. This new evidence appears to suggest that food business operators not using the '*traffic light*' labels are being pushed out of the UK retail market. It thus appears as though the scheme is not, at least *de facto*, '*voluntary*'.

Secondly, nutrition claims are, by nature, '*beneficial claims*' because the operator, who places such claims on its products, intends to highlight something nutritionally '*positive*'. Accordingly, '*non-beneficial*' nutrition claims (like '*rich in fat*') do not fall under the scope of *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods* (hereinafter, NHCR), which states in recital 6 that "*[n]on-beneficial nutrition claims are not covered by the scope of this Regulation; Member States intending to introduce national schemes relating to non-beneficial nutrition claims should notify such schemes to the Commission and to other Member States in accordance with*

Directive 98/34/EC (...)". Recital 46 of the FIR states, in fact, that "*[t]he declaration in the same field of vision of the amounts of nutritional elements and comparative indicators in an easily recognisable form to enable an assessment of the nutritional properties of a food should be considered in its entirety as part of the nutrition declaration and should not be treated as a group of individual claims*".

There is a societal learned association between a red light meaning '*stop*' and a green light meaning '*go*'. Arguably, a number of red traffic lights on the FoP of a product could indeed act as sort of '*non-beneficial*' nutrition claim, inasmuch as the whole group of red '*traffic lights*' could be interpreted as a claim that this product is nutritionally disadvantageous. On the other hand, a number of green colour codes could act as a '*beneficial*' nutrition claim. Arguably, the issue to address, in order to establish whether the NHCR applies, is whether the whole '*ensemble*' of the nutrition labelling given in colour codes (in its overall context) has a positive or a negative connotation and, therefore, is a claim and not a part of the nutritional declaration. It could also be argued that the '*traffic light*' scheme has the potential to have a negative effect on the UK's population. Many of the products that carry '*red lights*' have components that (in moderation) are needed for a healthy diet, such as sugars, fat and sodium. If consumers are steered towards only buying products with '*green lights*', their diets may fall short of adequate nutrition standards. In this context, a statement reportedly issued by the Italian Ministry of Agriculture, Food and Forestry cited a 2014 *YouGov* survey of over 2,000 UK citizens, which found that 70% of UK consumers interpreted a red light to signal '*do not buy*' rather than '*consume in moderation*'.

Thirdly, it has been argued that classifying foods into green, amber and red categories is overly-simplistic and does not take into account how different foods are combined in a total dietary context. In regards to the question of whether the UK scheme constitutes a barrier to trade in breach of Article 34 TFEU, it is important to note that obstacles to the free movement of goods may, according to Article 36 TFEU, be justified on grounds of, *inter alia*, the protection of health and life of humans, animals or plants. The EU Commission is the guardian of the treaties and must look for the most appropriate and the less trade restrictive means to achieve this objective, while preserving the achievements of the internal market and preventing obstacles to free movement of goods. There are concerns about EU Member States taking an individual approach, such as in the UK, as this may generate a proliferation of different national voluntary schemes across the EU. This would undermine the EU's harmonisation efforts, fragment the EU's Internal Market and cause confusion among consumers. It must be noted that, in France in particular, a number of own colour coded nutrition labelling schemes are also being developed (see *Trade Perspectives*, Issue No. 21 of 20 November 2015).

At an event parallel to the Agriculture and Fisheries Council on 14 March 2016, organised by Italian food industry groups *Federalimentare* and *Coldiretti*, Maurizio Martina, Italy's Minister of Agriculture, criticised the '*traffic light*' labelling scheme for classifying foods with '*questionable parameters*'. As an example, Minister Martina asked how it would be possible that a litre of whole milk has a red light, while a diet soda with artificial sweeteners has all green. He reportedly went on to affirm that it is unacceptable that quality products that are certified PDO (*i.e.*, EU Protected Designation of Origin) and PGI (*i.e.*, EU Protected Geographical Origin) are classified with a red light, as it occurs with other foods that are part of the Mediterranean diet, such as fish and olive oil, or the great Italian tradition of sweets. In fact, these EU protected designations require strict adherence to certain production methods, which makes is difficult to change formulations to gain an amber or green light label. Conversely, products that do not have protected designations can freely be reformulated to get a '*green label*', changing the content of fat, sugar or salt. The '*traffic light*' labelling would thus be in contraposition with the EU quality policies because, on the one hand, PDO, PGI, TSG (*i.e.*, EU protected Traditional Specialities Guaranteed) goods are recognised as '*quality products*' at the EU level and, on the other hand, by getting a '*red label*', they could be

identified as '*unhealthy products*' and consequently refused by the consumers. The Italian Minister Martina also emphasised that the '*traffic light*' labelling scheme is negatively affecting trade and pointed to an important matter. He referred to the results of a survey conducted by the *Nomisma Research Institute* (on the basis of data provided by *Nielsen UK*) commissioned by *Federalimentare*, which found that sales and market share for PDO Prosciutto di Parma, Parmigiano Reggiano and French Brie cheese fell after being labelled with a red '*traffic light*' due to high salt and fat levels. This ranged from an 8% fall in sales for Brie to 14% for Prosciutto di Parma and 13% for Parmigiano Reggiano, according to the report.

In a comment made to an EU Council of Ministers meeting on 14 March 2016, UK officials reportedly disagreed and said that its '*traffic light*' labelling scheme was welcomed by consumers and retail groups as a clear and consistent system to make healthier choices easier, and that it met the demands of the FIR. An EU Commission official at the meeting reportedly acknowledged that the FIR did allow different standards to be used, adding that a thorough review of its requirements was due by 2017. In fact, Article 35(5) of the FIR requires, by 13 December 2017, in the light of the experience gained, that the EU Commission submit a report to the EU Parliament and the Council on the use of additional forms of expression and presentation, on their effect on the internal market and on the advisability of further harmonisation of those forms of expression and presentation. For this purpose, EU Member States must provide the EU Commission with relevant information concerning the use of such additional forms of expression or presentation on the market in their territory. The EU Commission may accompany this report with proposals to modify the relevant provisions of the FIR.

It appears unlikely that the EU Commission will swiftly act ahead of the abovementioned impact assessment in 2017. There appears to be growing evidence that the UK's '*traffic light*' labelling scheme hinders trade in the EU, as contended by Italian industry associations. In addition, *FoodDrinkEurope*, the EU food and drink industry association, reportedly stressed that, while mandatory traffic light labelling would not be allowed under the FIR, it was not happy with optional national schemes that, "*whatever they are, are potential obstacles to the [EU's] single market*". In the next months, interested parties should continue collecting evidence as to whether the UK scheme hinders intra-EU trade. It can only be repeated that, in principle, there are no good or bad foods or single ingredients, only good or bad overall diets. Nutrition claims are strictly limited to the ones defined in Annex I to the NHCR, and as such, no additional '*non-beneficial*' claims (as, arguably, is the UK scheme) or other '*beneficial claims*' in the overall context of promotion of a product, are permitted.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2016/415 of 21 March 2016 withdrawing the acceptance of the undertaking for two exporting producers and repealing Decision 2008/577/EC accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia*

- *Commission Implementing Regulation (EU) 2016/387 of 17 March 2016 imposing a definitive countervailing 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) 2016/388 of 17 March 2016 imposing a definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India*

Customs Law

- *Commission Implementing Regulation (EU) 2016/379 of 11 March 2016 amending Regulation (EC) No. 684/2009 as regards the data to be submitted under the computerised procedure for the movement of excise goods under suspension of excise duty*

- *Commission Delegated Regulation (EU) 2016/341 of 17 December 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards transitional rules for certain provisions of the Union Customs Code where the relevant electronic systems are not yet operational and amending Delegated Regulation (EU) 2015/2446*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2016/442 of 23 March 2016 amending Implementing Regulation (EU) No. 170/2013 laying down transitional measures in the sugar sector by reason of the accession of Croatia*

- *Commission Implementing Regulation (EU) 2016/443 of 23 March 2016 amending Annex I to Regulation (EC) No. 669/2009 as regards the list of feed and food of non-animal origin subject to an increased level of official controls on imports*

- *Commission Regulation (EU) 2016/371 of 15 March 2016 refusing to authorise certain health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health*

- *Commission Regulation (EU) 2016/372 of 15 March 2016 refusing to authorise a health claim made on foods and referring to the reduction of disease risk*

- *Commission Regulation (EU) 2016/355 of 11 March 2016 amending Annex III to Regulation (EC) No. 853/2004 of the European Parliament and of the Council as regards the specific requirements for gelatine, collagen and highly refined products of animal origin intended for human consumption*

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