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France tries once again to single out palm oil: sustainable criteria vs. unsustainable fiscal policies

On 11 July 2016, the French Senate adopted an almost final version of the Bill proposing the '*Law for the Recapture of Biodiversity, of Nature and Landscapes*' (hereinafter, the Bill). While previous versions of the Bill included a provision aimed at establishing a special tax on palm oil, palm kernel oil and coconut oil, this provision has been replaced by a request for the French State to harmonise the taxation of all vegetable oils and to privilege oils that are produced in a sustainable way. Additionally, a Commission of the French National Assembly recently published a report on the taxation of '*agro-alimentary products*'.

On 26 March 2014, the French Government introduced the Bill, which in large part includes amendments to the Environmental Code. The National Assembly held its first reading and vote on 24 March 2015. The Bill was then submitted to the Senate, where a high number of amendments was tabled. Amendment No. 367, by various Senators and generally by the members of the '*Groupe écologiste*' (*i.e.*, the '*Ecology Group'*, comprised of senators from various green and ecological parties), provided for an additional tax to a special tax for vegetable oils. The provision would have increased the taxes on palm oil, palm kernel oil and coconut oil, in their natural state and in food products, to EUR 300 per tonne in 2017, EUR 500 in 2018, EUR 700 in 2019 and EUR 900 starting in 2020, and been subjected to annual increases. Its stated objective was based on the notion that "*the use of palm oil poses environmental and health problems.*" On 26 January 2016, the French Senate adopted the Bill, including Amendment No. 367 as Article 27A (see *Trade Perspectives*, Issue No. 2 of 29 January 2016). This marked the return of the infamous so-called *'Nutella tax'* proposal in France, whose discriminatory nature already led to heated debates during the last several years (*see Trade Perspectives,* Issue No. 21 of 16 November 2012).

In March 2016, the French National Assembly held the second reading of the Bill and adopted a revised version, setting the applicable tax rates at reduced rates of EUR 30 per tonne in 2017, EUR 50 in 2018, EUR 70 in 2019 and EUR 90 in 2020. This version also included a provision stating that oils that meet criteria for environmental sustainability would have been exempt from the tax. The Bill was submitted to the Senate for a second reading. Transcripts of the debate indicate that Senators were aware of the potential conflicts of the proposed tax with international trade rules established by the World Trade Organization (hereinafter, WTO) and, on 13 May 2016, the Senate decided to eliminate Article 27A. As no consensus was reached, a Joint Commission of members from each chamber was established, but still did not manage to achieve a compromise Bill and the French Prime Minister submitted it for a new reading. Members of the National Assembly, as well as the French Government, tabled amendments that reintroduced Article 27A and the controversial palm oil tax. In view of reaching a compromise with the Senate, however, the French National Assembly eliminated the palm oil tax and replaced it with a request for the French

State to establish, within six months from the promulgation of the biodiversity law, a "*simple, harmonised and non-discriminatory*" taxation of all vegetable oils that privileges oils that are produced in a sustainable way. Sustainability is supposed to be certified based on objective criteria. The National Assembly adopted the revised Bill on 23 June 2016. In its subsequent reading on 11 July 2016, the French Senate accepted the revised Article 27A and, with a number of further changes, submitted the Bill for a final and definitive reading before the French National Assembly, which is set for 19 July 2016.

Continuous efforts by trade law experts, as well as interventions by relevant stakeholders, have so far prevented the legally dubious establishment of the palm oil tax. However, the current Article 27A of the Bill all but ensures that the debate will continue. Moving forward, the debate must be based on sound legal and economic facts and considerations. Article 27A of the Bill calls for "*simple, harmonised and non-discriminatory*" taxation. A key issue has been the assumption that palm oil has so far been taxed to a lesser degree than comparable vegetable oils and that, at least according to the more recent debates in the French Parliament, a harmonisation of the taxation of vegetable oils intended for human consumption is desirable. This assumption must be put in the correct economical perspective. At first sight, palm oil may appear to be taxed less than other vegetable oils in France. The special tax on vegetable oils, established by Article 1609 vicies of the French General Tax Code, and determined by an annual order of the French Finance Minister, provides for excise taxes based on the weight (per 100 kg) or volume (per 100 litres) of the products. For the year 2016, the following amounts were fixed in terms of weight: olive oil: 18.896 EUR; peanut oil and corn oil: 17.013 EUR; copra oil and palm kernel oil: 11.324 EUR; palm oil: 10.371; and rapeseed and rapeseed oil: 8.716 EUR. At first sight, the excise tax on palm oil would appear to be considerably lower than the one for olive oil and peanut oil. From an economic perspective, however, this does not give an accurate indication of the taxation of vegetable oils. More economically relevant is a comparison of the amount of tax due in relation to the actual price of the product (*i.e.*, the *ad-valorem* equivalent of the excise rates). Considering the significantly higher prices of olive oil (3,852.65 EUR per metric ton in December 2015) and peanut oil (1,176.90 EUR per metric ton in December 2015), compared to that of palm oil (478.67 EUR per metric ton in December 2015) in relation to their prices leads to a clearly different picture. The *ad-valorem* equivalent of the excise duty imposed on palm oil, based on the 2016 excise rates, is 21.7%, for peanut oil it is 14.5% and for olive oil stands at a mere 4.9%. An *ad-valorem* advantage of palm oil does obviously not exist. Thus, any increase in the taxation of palm oil, or the '*harmonisation'* of all vegetable oils to the same or a similar excise rate, would lead to significantly different *ad-valorem* equivalents and continue to discriminate against certain oils (primarily the ones that are not domestically produced). When determining future excise rates, the *ad-valorem* equivalents must be taken into account in order to avoid potentially trade-distorting differences and *de facto* discrimination.

A further aspect that so far lacks any sound basis is the so-called '*sustainability exception*'. The proposed palm oil tax included the provision that a product would be exempt from the tax if it can be proven that it meets certain criteria of environmental sustainability. The current request for tax reform calls for a harmonised taxation of all vegetable oils that would privilege oils that are produced in a sustainable way. Neither provision contains an indication of those criteria. This does not surprise, as there are currently no internationally recognised criteria or standards for sustainable palm oil or sustainable vegetable oils in general. In absence of such a standard, the reference to such sustainability criteria appears to be legally questionable and would complicate the implementation. So far, the debate has largely focused on the issue of deforestation, but further aspects must not be ignored. The issue of deforestation may certainly be an issue, but efforts by palm oil producing countries have considerably improved the impact of palm oil production on the environment. At the same time, France appears to have developed a much larger portion of its territory into farmland than any developing country. The yield of the product and the land use must also be considered as the oil crops currently used in France need significantly more land than palm oil for the same amount of oil. Palm oil covers only 0.3% of the global agricultural land, while having the highest yield of any oilseed crop. Finally, the rate of pesticide use and their effect is another issue that must be taken into consideration, particularly as, once again, palm oil is comparatively much '*greener*' than competing vegetable oils. At the same time, it is not clear

why this debate is not also being conducted in relation to the sustainability of all other vegetable oils and, for that matter, of all other animal fats that compete with vegetable oils and that must be considered '*like products*'. If, as stated by the French proponents of the additional tax, the objective is also one of health policy, any taxation would need to be scientific in nature and applied consistently *vis-à-vis* all vegetable oils and animal fats used in the food industry.

The implementation of such a tax would raise serious WTO concerns. 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 to not discriminate between foreign and '*like*' domestic products. While the discriminatory nature of a fiscal policy is always determined on a case-by-case basis, the significant differences in the taxation regarding palm oil and other vegetable oils suggest a potential inconsistency. Article XX(a) and (b) of the GATT allow WTO Members to set their own policies and to deviate from WTO rules in order to attain their policy objectives as long as they are necessary to protect human, animal or plant life or health or to protect public morals. Concerning environmental protection, the WTO Appellate Body has developed a process of weighing and balancing a number of factors, such as the contribution of the environmental measure to the policy objective, the importance of the common interests or values protected by the measure and the impact of the measure on international trade. The sustainability exception raises potential WTO-consistency issues also in light of the Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). The inclusion of environmental sustainability criteria would, arguably, lead to a technical regulation (as further clarified in the WTO *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.

This debate is far from settled and there are calls for both the French Government and the EU to conduct studies aimed at defining fiscal policies that would discourage consumption of unsustainable palm oil. Any such policies or measures should be resisted if they were to single out a single vegetable oil and even more so if they were to be unilateral in nature and not based on sound science. The French Government will likely table a proposal as part of the upcoming finance law later this year and the debate in the French Parliament will begin anew. A legally and economically sound basis is necessary for a debate that should be based on facts, in particular in relation to the popular issues of the environment and public health. As taxes on palm oil are currently debated in other countries, such as Russia, the debate in France remains of particular importance. The overarching issue of the sustainability criteria must be tackled as soon as possible and, if so, it should extend beyond palm oil. Interested stakeholders (including the producing countries) must continue to monitor the developments in France and around the world and take a pro-active stand in the development of science-based, non-discriminatory and international standards. Anything less than that will not be sustainable and will likely be inconsistent with the applicable WTO and EU rules.

An update on the harmonisation of EU customs infringements and sanctions

On 13 July 2016, the Internal Market and Consumer Protection (hereinafter, IMCO) Committee of the European Parliament voted for the adoption of a draft report with amendments to the proposed Directive on the legal framework of EU customs infringements and sanctions (hereinafter, Proposed Directive). On 22 November 2016, this long-awaited report will be presented at the plenary session of the EU Parliament. The *Rapporteur* of this report before the IMCO Committee, Ms. Kaja Kallas, recalled that this topic is "*politically sensitive*" for certain European Union (hereinafter, EU) Member States, but it is extremely important for the proper working of the EU customs system.

Customs is an exclusive competence of the EU. It is enacted under Chapter I and II of Title II on '*Free Movement of Goods*' of the Treaty on the Functioning of the European Union (hereinafter, TFEU). This primary law is accompanied by a secondary law corpus: the Union Customs Code (hereinafter, UCC) and its three supportive legal acts, namely the UCC Delegated Act and the UCC Implementing Act, which apply from 1 May 2016 onwards, as well as the UCC Transitional Delegated Act, which establishes transitional rules for operators and customs authorities pending the upgrading or the development of the relevant IT systems to create a fully electronic customs environment (*i.e.*, until 2020). These legal acts aim at harmonising and simplifying customs rules and procedures by offering greater certainty and uniformity to businesses and customs officials. However, the enforcement of EU customs law is still in the ambit of the 28 Member States. Indeed, there is no EU authority that investigates, supervises, controls, applies and enforces EU customs law. This is confirmed by Article 42(1) of the UCC, which states that "*Each Member State shall provide for penalties for failure to comply with the customs legislation*." It means that the Member States apply different rules regarding the qualification of infringements and the imposition of sanctions on an economic operator. For example, if an operator falsifies documents to obtain preferential treatment, it might receive a criminal sanction in one Member State and a non-criminal sanction in another, depending on the administrative and legal traditions of those Member States.

Due to this situation, the European Commission (hereinafter, Commission) established, in 2008, a *Project Group on Customs Penalties* comprising 24 Member States. This group assessed the different types of sanctions and applicable regulations for customs infringements in the Member States. It concluded that there are significant disparities. Only 8 out of 24 Member States have criminal sanctions. Interestingly, the financial thresholds of penalties range from 266 to 50,000 EUR. Also, the time limits to initiate a proceeding to impose customs sanctions and to execute them vary from 1 to 30 years. Based on this study and on the results of private consultations held by the Commission with national customs authorities, EU trade associations and small and medium enterprises (hereinafter, SMEs), the Commission published the Proposed Directive and an impact assessment on 13 December 2013. The Commission would like EU customs law to be applied uniformly and effectively. The legal basis of the Proposed Directive is Article 33 of the TFEU. That provision favours customs cooperation between Member States and the Commission. As prescribed by this article, the ordinary legislative procedure (Article 294 of the TFEU) applies. At this stage, the European Parliament has not yet adopted the text in its first reading. The IMCO Committee, which is in charge of the report on the Proposed Directive, requested a study from private consultants that was published in January 2016. On 3 February 2016, the IMCO Committee drafted a report on the Proposed Directive, which was amended on 17 March 2016. Before the adoption, on 13 July 2016, of the draft report with amendments, the same Committee received the opinions of the Legal Affairs Committee of the European Parliament (on 25 April 2016) and of the International Trade (hereinafter, INTA) Committee of the European Parliament (on 25 May 2016).

In order to point out the legal and commercial aspects of the Proposed Directive, it is necessary to look at its content. Firstly, the Proposed Directive provides a common nomenclature of behaviours that must be considered infringements of the EU customs law (Articles 3 to 6), namely: 1) *acts subject to strict liability* (failure by an economic operator to keep the documents and information related to the accomplishment of customs formalities by any accessible means for the period of time required by customs legislation); 2) *acts committed by negligence* (failure by an economic operator to present the goods brought into the customs territory of the EU to customs authorities); and 3) *acts committed with intent* (processing of goods in a customs warehouse without an authorization by customs authorities). Secondly, the Proposed Directive circumscribes the application of sanctions by Member States. It provides minimum and maximum limits for sanctions and it specifies that sanctions must be effective, proportionate and dissuasive. It also requires Member States to take into account the involvement of an Authorized Economic Operator (hereinafter, AEO), the amount of evaded duties, and the nature and circumstances of the infringement (Articles 9 to 12). Thirdly, the Proposed Directive lays out procedural rules (Articles 13 to 15), such as for determining the jurisdiction of Member States to examine a case, for setting time limits on

the initiation of a procedure, and for suspending ongoing administrative proceedings if criminal proceedings are opened. Fourthly, there are provisions on the liability of legal persons (Article 8), the co-operation between customs authorities (Article 16), and the seizure of goods as a temporary measure (Article 17).

On 23 July 2014, the Lithuanian Parliament transmitted, according to Article 6 of the Protocol (No. 2) of the TFEU, its reasoned opinion to the European Parliament arguing that the principle of subsidiarity may be infringed and that Article 33 of the TFEU on the customs cooperation does not constitute the only valid legal basis for the Proposed Directive. On the one hand, the IMCO Committee did not agree with the fact that the enforcement of EU customs law should remain a competence of EU Member States. This was sufficiently demonstrated by the various studies conducted by the Commission. On the other hand, the IMCO Committee, following the opinions of both, the Legal Affairs and INTA Committees, recognised that Article 33 of the TFEU must be combined with Article 114 of the TFEU, which relates to the approximation of laws for the establishment and functioning of the internal market. It is settled case law of the Court of Justice of the European Union (CJEU) that "*the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure*". In this case, the Proposed Directive needs a dual legal basis, since it aims at strengthening customs cooperation *and* correcting the distortion of the internal market.

In addition, the IMCO Committee stressed that the Proposed Directive will enhance the correct and uniform application of customs legislation through common enforcement and compliance. This will be in line with the international obligations of the EU under the World Trade Organization (hereinafter, WTO). The EU must implement the case European Communities - Selected Customs Matters in its legal order. The WTO Panel report of 16 June 2006 and the Appellate Body report of 13 November 2006 defined the scope of a customs union under WTO law. Taking into consideration this definition, it is not acceptable that huge disparities in customs sanctioning systems still exist between the EU Member States. Similarly, if the EU wanted to be a credible actor during the negotiations of its Free Trade Agreements with third countries, it would have to adopt a single customs sanctioning system for the economic operators active in its market.

The Proposed Directive should have positive commercial consequences. Firstly, it will bring greater legal certainty to businesses. Until now, the existing differences in customs sanctions create a distortion of competition because of the possibility of '*forum shopping*'. The latter takes place with both legitimate and illegitimate trade. For honest business, moving to avoid more controls and sanctions can be a legitimate commercial practice. For other business, different levels of controls and sanctions throughout the EU can be very helpful in carrying out their illegitimate activities. Secondly, it will facilitate the flow of goods in and out of the EU. Businesses operate in a globalised world with increased cross-border operations and strong pressure on the safety and security of the supply chain. When there is a common framework for infringements and sanctions, the system is more transparent and efficient. Thirdly, it will treat economic operators equally across the EU. This proposed system will be complementary with the AEO scheme foreseen in the UCC. Any trustable economic operator that complies with EU customs law will not be sanctioned.

To summarise, the IMCO Committee of the European Parliament underlined that the Proposed Directive is not a full harmonisation of the infringements and sanctions under the different legal and administrative traditions of EU Member States. It is rather a step-by-step approach. The choice of a directive, instead of a regulation, will allow more flexibility and time for the transposition of the new provisions. However, some of the EU Member States (*i.e.*, Denmark, the Netherlands, Malta, Slovenia and Sweden) do not see the added-value of the project whereas other EU Member States (*i.e.*, Italy) are ready to accept the Proposed Directive if certain aspects are reviewed (for instance, making the sanctioning system more proportional and decriminalizing customs infringements). The Commission appears to be open to amendments of its Proposed Directive at the condition that the sanctioning system is efficient and not burdensome *vis-à-vis* the economic operators across the EU.

France introduces mandatory COOL for milk and meat in prepared foods for a two-year test period

On 4 July 2016, France's Agriculture Minister confirmed in a statement that France will introduce, for a two-year test period, a decree establishing mandatory country of origin labelling (hereinafter, COOL) for milk and meat used as an ingredient in processed foods (*i.e.*, *Projet de décret relatif à l'indication de l'origine du lait et des viandes utilisées en tant qu'ingrédient*, hereinafter, the Decree). France submitted the draft measure on 11 March 2016 under Article 45 of *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) and, at the end of the prescribed three months period, the EU Commissioner for Health and Food Safety informed the French authorities that the Commission was not opposed to a two-year test period.

Several food products are subject to mandatory COOL in the EU, including honey, fruits and vegetables, fish, certain meats and olive oil. COOL was made mandatory for unprocessed fresh beef and beef products in the aftermath of the bovine spongiform encephalopathy (*i.e.*, BSE) crisis by means of *Regulation (EC) No. 1760/2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products*. The FIR further requires that unprocessed fresh, chilled or frozen meat of swine, poultry, sheep and goats be accompanied by COOL (the relevant implementing rules, which apply since 1 April 2015, are set out in *Commission Implementing Regulation (EU) No. 1337/2013 laying down rules for the application of Regulation (EU) No. 1169/2011 as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry* (see *Trade Perspectives*, Issue No. 23 of 13 December 2013). Likewise, the FIR requires that COOL be mandatory in instances where a failure to provide such information could mislead consumers. The scope of mandatory COOL in the EU may be further expanded by specific provisions in the FIR that enable the Commission to table legislative proposals on mandatory COOL for, *inter alia*, meat used as an ingredient in processed foods (see, for more details, *Trade Perspectives*, Issue No. 10 of 20 May 2016).

Article 45 of the FIR provides a notification procedure for national measures that establish new food information legislation. EU Member States must notify in advance the Commission and the other EU Member States of the measures envisaged, providing the reasons justifying them. The Decree notified under Article 45 of the FIR imposes the following requirements. Article 1 states that it applies to prepacked foods containing: 1) milk; 2) milk used as an ingredient in dairy products (listed in an annex to the Decree); and 3) one or more meats (listed in an annex to the Decree) used as an ingredient in a processed product. An order of the Ministers of Agriculture and Consumers will fix the weight percentages of ingredients in prepacked foods below which labelling is not subject to the provisions of this Decree. Therefore, origin must be indicated if the prepacked food consists of at least 50% of milk and/or meat.

According to Article 2 of the Decree, the indication of the origin of meat must include, for each category of meat, the following information: 1) country of birth; 2) country of fattening; and 3) country of slaughter. When a category of meat comes from animals born, raised and slaughtered in the same country, the indication of origin may be given as '*Origin: (name of country)*'. Similarly, Article 3 of the Decree provides that the indication of the origin of milk or milk used as an ingredient in dairy products must include the following information: 1) '*country of collection: (name of country)*' 2) '*country of packaging: (name of country)'*, and 3) '*country of transformation: (name of country)'*. When milk or milk used as an ingredient in dairy products mentioned in Article 1 has been collected, processed and packaged in the same country, the indication of origin may appear as '*origin: (name of country)*.'

Under Article 4 of the Decree, when the steps referred to in Articles 2 and 3 of the Decree are carried-out on the territory of several EU Member States, the mention '*EU'* can be used instead of the name of the country or countries to designate the location of the steps involved. In addition, when the steps referred to in Articles 2 and 3 of the Decree are carried-out on the territory of several countries located outside the EU, the words '*Outside EU*' can be used instead of the name of the country or countries to designate the location of the

relevant steps. According to Article 5 of the Decree, products lawfully produced or marketed in another EU Member State or in Turkey, or legally manufactured in another state party to the Agreement on the European Economic Area, are not subject to the provisions of the Decree. In a response to a written question before the French Senate, the Secretary of State at the Ministry of Economy stated that the Decree will only apply to French companies because only harmonised provisions, taken by the EU in the framework of its legislation, could make this indication compulsory in other EU Member States.

Other EU Member States are already moving to adopt similar COOL legislation, in the case of Italy for dairy products only. On 31 May 2016, the Italian Ministry for Agriculture, Food and Forestry Policies sent to the Commission a draft decree introducing mandatory COOL for dairy products. This instrument is intended to indicate to consumers the origin of the ingredients of many products such as milk, butter, yogurt, mozzarella, cheese and dairy products. In particular, the draft decree provides that the milk or its derivatives will compulsorily indicate the origin of the raw material on the label with the following text: 1) '*country of milking: (name of country)*'; 2) '*country of packaging: (name of country)*'; and 3) '*country of transformation: (name of country)*'. Where milk or milk used as an ingredient in dairy products has been milked, packaged and processed in the same country, the indication of origin may be made with, for example, the label '*origin of milk: Italy*'. If the different phases take place in the territory of several countries, other than Italy, depending on the origin, the following indications may be used: 'origin of milk: *EU Member States*', '*origin of milk: Non-EU Countries*, '*origin of milk: EU and Non-EU countries*'. Foods that have a Protected Designation of Origin (PDO) or Protected Geographical Indication (PGI) status will be exempt from the COOL requirements.

The Commission does not appear to be inclined to introduce legislation for mandatory COOL for milk and meat used as an ingredient, and appears to prefer voluntary COOL. In 2014, the Commission issued a report on meat as ingredient in foods, based on an external study, which concluded that mandatory COOL in the EU does not appear to be an appropriate way forward. It based this conclusion on the fact that: 1) consumers are not willing to pay for such information; 2) this would imply a considerable administrative burden; and 3) it would have a far-reaching impact, including on EU competitiveness and trade. Another report published by the Commission on 20 May 2015, regarding the mandatory indication of the country of origin or place of provenance for milk and milk used as an ingredient in dairy products, concluded that mandatory origin labelling would entail higher regulatory burden for some of the products assessed. The report found that, in spite of a consumers' interest for the origin of milk and milk used as an ingredient in dairy products, consumers' overall willingness to pay for this information appears to be modest. Although the cost of labelling the origin of milk could be generally modest, the Commission states that its impact among operators will be uneven with some of them having to introduce additional traceability systems with substantial increases of costs, particularly for those located in border regions or in areas non-self-sufficient in milk. Mandatory COOL of milk used as an ingredient in dairy products can result in adverse economic impacts, further traceability requirements and would be burdensome for highly processed products.

An exchange of views on the French Decree took place at the Commission's Standing Committee on Plants, Animals, Food and Feed on 12 April 2016 (Section General Food Law). The French delegation informed that the COOL rules would only apply to food produced in France and, in a first stage, for a test period until 31 December 2018. Before the end of this period, France would provide a report, which would allow for an opportunity to review data on consumer interest and willingness to pay, and on the potential impact on the internal market. A number of EU Member States raised concerns relating to the negative impact of the French measure on the access of non-French ingredient suppliers, particularly SMEs, to food production and distribution in France. They questioned the link between the quality of the foods concerned and their origin, expressing a preference for voluntary COOL and for existing food quality schemes. They also expressed concerns relating to the disproportionately high costs that would result from a pilot project, also in view of possible detrimental effects as regards food waste. Other delegations did not oppose mandatory COOL as such, but expressed a preference for a harmonised approach at EU level, while a few delegations supported the French draft decree.

COOL is only permitted under EU law where there is a proven link between certain qualities of food and its origin or provenance. A specific reference to the Article 45 notification procedure is found in Article 39(1) of the FIR, which states that, in addition to the mandatory labelling particulars referred to in Article 9(1) and in Article 10 (notably, Article 9(1)(i) requires COOL in certain cases), EU Member States may adopt measures requiring additional mandatory particulars for specific types or categories of foods, justified on grounds of at least one of the following: (a) the protection of public health; (b) the protection of consumers; (c) the prevention of fraud; and (d) the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition. Paragraph 2 of Article 39 provides that, by virtue of paragraph 1, EU Member States may introduce measures concerning COOL only where there is a proven link between certain qualities of the food and its origin or provenance. When notifying such measures to the Commission, EU Member States must provide evidence that the majority of consumers attach significant value to the provision of that information. It needs to be assessed whether the French and Italian Decrees fulfil these requirements. They appear to be based on consumer preferences, but is there a proven link to quality?

Another matter is that the proposed decrees will inevitably lead to labels similar to the notorious COOL '*blend of EU and non-EU honeys*' on honey. EU law requires that the country or countries of origin, where the honey has been harvested, 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 be replaced with one of the following statements, as appropriate: 1) '*blend of EU honeys*'; 2) '*blend of non-EU honeys*'; or 3) '*blend of EU and non-EU honeys*'. It cannot be excluded that manufacturers in France or Italy will have to use similar wordings for their meat and milk ingredients. It also needs to be seen whether current voluntary labels, which provide for alternatives and state, *inter alia*, '*produced in Belgium with poultry of Belgium, Germany or the Netherlands, rice of Pakistan and spices of Thailand*' would be acceptable under the new rules.

The European trade group FoodDrinkEurope (FDE) states that, while the French initiative is framed as a '*test*' and applies only to France, it is a mandatory measure that will have an immediate market impact, with considerable negative consequences for producers and for consumers, namely burdensome changes in the supply chain, difficulties in the labelling process and higher prices. Moreover, of crucial importance in today's context for Europe, FDE argues that this protectionist measure also sets an irreversible precedent for the fragmentation of the EU Single Market for foods and drinks.

The introduction of COOL requirements has consistently proved to be a controversial matter, as already shown by the FIR's negotiating history, which evidences severe disparities of opinion at the very heart of EU Institutions, EU Member States and relevant stakeholders. These disparities are ongoing. The adoption of EU Member States' measures making COOL mandatory for milk and meat used as an ingredient must also take into account the EU's international trade obligations (*i.e.*, WTO). In this respect, there is a number of lessons learnt from the US experience on mandatory COOL for certain agricultural commodities, which gave rise to a landmark (not-yet-settled) WTO dispute triggered in 2008 (for a more detailed assessment of the WTO compatibility of such COOL measures, see *Trade Perspectives*, Issue No. 3 of 6 February 2015). The next steps taken in the EU and its Member States on COOL should be monitored and stakeholders should be prepared to participate in shaping upcoming legislation by interacting with relevant Institutions, trade associations and other affected parties. The Decree has now been sent to the French *Conseil d'Etat*, which has two months to deliver its opinion, and could enter into force on 1 January 2017 for a test period of two years.

Recently Adopted EU Legislation

Trade Remedies

- *Notice of initiation of an anti-dumping proceeding concerning imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia, Serbia and Ukraine*

- *Commission Implementing Regulation (EU) 2016/1077 of 1 July 2016 imposing a definitive anti-dumping duty on imports of silicon originating in the People's Republic of China following an expiry review under Article 11(2) and a partial interim review under Article 11(3) of Council Regulation (EC) No. 1225/2009*

- *Commission Implementing Decision (EU) 2016/1072 of 29 June 2016 terminating the anti-dumping proceeding concerning imports of certain ceramic foam filters originating in the People's Republic of China*

Food and Agricultural Law

- *Commission Regulation (EU) 2016/1067 of 1 July 2016 amending Annex III to Regulation (EC) No. 110/2008 of the European Parliament and of the Council on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks*

- *Council Decision (EU) 2016/1080 of 27 June 2016 establishing the position to be taken on behalf of the Union with regard to certain decisions to be adopted in the framework of the International Olive Council (IOC)*

- *Council Decision (EU) 2016/1062 of 24 May 2016 on the conclusion on behalf of the European Union of the Sustainable Fisheries Partnership Agreement between the European Union and the Republic of Liberia and the Implementation Protocol thereto*

Customs Law

- *Commission Implementing Regulation (EU) 2016/1142 of 13 July 2016 adding to the 2016 fishing quotas certain quantities withheld in the year 2015 pursuant to Article 4(2) of Council Regulation (EC) No. 847/96*

Other

- *Commission notice concerning the date of application of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin or the protocols on rules of origin providing for diagonal cumulation between the Contracting Parties to this Convention*

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