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ASEAN is set to launch an internet-based mechanism to find solutions to intra-ASEAN cross-border trade issues

In August 2016, at the ASEAN Economic Ministers' (AEM) meeting to be held in Vientiane, Lao PDR, the 10 Member States of the Association of South-East Asian Nations (hereinafter, ASEAN) will launch the ASEAN Solutions for Investments, Services and Trade (*i.e.*, ASSIST), which is an internet-based, non-binding and consultative system to find solutions to the operational problems encountered by ASEAN-based enterprises on intra-ASEAN cross-border issues related to the implementation of ASEAN economic agreements. Once fully operational, ASSIST will provide a cost-free solution for ASEAN-based enterprises to lodge complaints *vis-à-vis* ASEAN Member States (hereinafter, AMSs), or to inquire about cross-border trade related issues within ASEAN, in a process that will take significantly less time and resources than other available dispute settlement options (*e.g.*, domestic court proceedings, international arbitration, mediation, conciliation, etc.). As such, ASSIST is not only an attractive option for ASEAN-based enterprises, but it also furthers the objectives of ASEAN Member States to increase regulatory transparency and achieve greater trade facilitation within the region.

Notably, ASSIST was endorsed at the ASEAN Senior Economic Officials Meeting (SEOM) in July 2015. Technically, ASSIST has been established to further implement the ASEAN Consultation to Solve Trade and Investment Issues (referred to as ACT), which itself was established under Article 88 of the ASEAN Trade in Goods Agreement (hereinafter, ATIGA). From a broader perspective, ASSIST acts as part of a group of tools to increase trade facilitation within ASEAN. In line with the ASEAN Economic Community (AEC) Blueprint 2025, AMSs are striving to further reduce the few remaining tariffs, streamline non-tariff measures (hereinafter, NTMs), eliminate non-tariff barriers (hereinafter, NTBs) to trade, integrate and expedite customs and transit procedures, including through the ASEAN Single Window and the piloting of the ASEAN Customs and Transit System (ACTS), and harmonize standards, technical regulations and conformity assessment procedures throughout ASEAN.

In this regard, the ASEAN Trade Repository (hereinafter, ATR) is a major component of the initiative to bring about greater regulatory transparency and, in the process, streamline NTMs and eliminate NTBs within the ASEAN region. As mandated under the ATIGA, AMSs must have a single, internet-based, point of access to all of the trade-related information available within their constituencies. As required by Article 13 of the ATIGA, 9 types of trade-related information are to be progressively uploaded onto the ATR, *via* the network of interlinked National Trade Repositories (hereinafter, NTRs) of all 10 AMSs, including: 1) tariff nomenclature; 2) most-favoured nation (*i.e.*, MFN) tariffs, preferential tariffs offered under the

ATIGA and other Agreements of ASEAN with its Dialogue Partners; 3) rules of origin (*i.e.*, ROOs); 4) non-tariff measures (*i.e.*, NTMs); 5) national trade and customs laws and rules; 6) procedures and documentary requirements; 7) administrative rulings; 8) best practices in trade facilitation; and 9) lists of authorised economic operators (*i.e.*, AEOs). In addition to solving specific cross-border trade issues affecting ASEAN-based enterprises, ASSIST will also provide valuable data and evidence pertaining to the 9 types of trade-related information present on the NTRs/ATR system, which will aid AMSs in their efforts to increase trade facilitation throughout ASEAN.

The scope of ASSIST includes any cross-border issue in the areas of trade in goods, services and investment related to the implementation of ASEAN economic agreements. However, when first launched, ASSIST will only be available for issues in the area of trade of goods, with the areas of services and investment to be added in the months after its initial launch, upon approval by the ASEAN Economic Ministers. ASSIST is available for use only by ASEAN-based enterprises (*i.e.*, companies, trade associations and/or chambers of commerce that are legally-registered in one of the 10 AMSs), which have a problem importing goods, or services, and investing, in other AMSs. ASSIST cannot be used by an ASEAN-based enterprise for an issue it is experiencing with its own Government. ASSIST can also not be used by natural persons (*i.e.*, individuals) and by companies based outside of ASEAN (if they do not have a representative office, or branch or subsidiary in one of the AMSs). Finally, ASSIST cannot be used to lodge complaints about grievances in countries outside of ASEAN (*e.g.*, the EU, the US, Japan, etc.).

From a practical perspective, ASSIST has been designed to be as simple to use as possible. ASSIST has been developed by ASEAN with the assistance of the ASEAN Regional Integration Support from the European Union (ARISE) programme, a technical assistance project financed by the EU and based at the ASEAN Secretariat in Jakarta, Indonesia. The design of the system has included the input of AMSs, the ASEAN Secretariat, as well as ASEAN-based enterprises, trade associations and chambers of commerce, in particular through a series of workshops held in each AMS during June and July 2016. The key actors in ASSIST are the ASEAN-based enterprises lodging the complaints, the Central Administrator (*i.e.*, the ASEAN Secretariat), which manages the proceedings and facilitates online communications among all actors, the Home Contact Point (*i.e.*, the ASSIST National Focal Point in the AMS from which a complaint is being lodged), the Destination Contact Point (*i.e.*, the ASSIST National Focal Point in the AMS receiving the complaint) and the Responsible Agencies (*i.e.*, the ministries, agencies or other government representatives tasked by the Destination Contact Point to develop a solution to the complaint).

Once a complaint is lodged by filling the online complaint form, the Central Administrator has 10 working days (*i.e.*, 2 calendar weeks) to decide whether to accept the complaint as valid or whether to reject it for lack of standing or for falling outside of the scope of ASSIST. If a complaint is incomplete, the Central Administrator will return the complaint to the ASEAN-based enterprise, which will have an unlimited amount of time to amend the complaint.

If the complaint is accepted by the Central Administrator, the Destination Contact Point will have 10 working days to decide whether its Government wishes to accept it or reject it. A rejection must be justified in writing. If the complaint is accepted by the Destination Contact Point, the AMS will have 30 to 50 working days (*i.e.*, 6 to 10 calendar weeks) to discuss the matter internally among all Responsible Authorities and propose a possible solution to the ASEAN enterprise. Throughout the entire process, all of the key actors receive e-mail notifications of the progress of the complaint, and they are also able to log-in to private '*dashboards*' where each complaint can be tracked. There are no costs to use ASSIST, the system is fully internet-based, and there is no physical interaction required.

Once fully operational, the ASSIST website will also include a '*public forum*' webpage, in which the public can view statistical data pertaining to ASSIST, as well as review case studies of complaints that have been stripped of any identifying information, but which may provide relevant stories of successful solutions to specific trade problems.

ASSIST will provide an avenue for ASEAN-based enterprises to receive answers to their problems and grievances within 2 to 3 months. Compared to other available options, such as domestic court proceedings (which can take months or years) and international dispute settlement mechanisms (such as within the context of the World Trade Organization's Dispute Settlement Mechanism, where disputes take years to be fully concluded), ASSIST serves as an efficient, and of course, cost-effective, option for ASEAN-based enterprises to pursue. As ASSIST will soon be '*open for business*' (*i.e.*, fully operational and available for ASEAN enterprises to lodge their complaints), interested businesses should start getting acquainted with its functioning (by visiting ASSIST's website) and should start preparing their complaints. Factual evidence and solid legal arguments will be key to convince AMSs to deal with the cases and propose viable and meaningful solutions. The system is ready, and making good use of it will be the best way to pay tribute to the foresight of the ASEAN Leaders and to the considerable resources and efforts that the ASEAN Secretariat, supported by the EU, have put in place to operationalize it. Time will tell whether ASEAN enterprises will take advantage of this innovative and ambitious tool of ASEAN trade facilitation.

The EU and the US again request WTO consultations with China in relation to Chinese export measures on certain raw materials

On 13 and 19 July 2016, the WTO published the requests by the European Union (hereinafter, EU) and the United States (hereinafter, US), respectively, for consultations with the People's Republic of China (hereinafter, China) concerning alleged export duties and quantitative export restrictions on the exportation of certain raw materials. The requests, published by the WTO on 14 and 25 July 2016, lay out the allegations and highlight the allegedly violated provisions of World Trade Organization (hereinafter, WTO) rules. At the same time, the EU is currently debating its future trade policies concerning China.

The recently filed complaints are not the first disputes lodged against China with respect to export restrictions. In previous cases, namely *China – Measures Related to the Exportation of Various Raw Materials* (see *Trade Perspectives*, Issue No. 3 of 10 February 2012) and *China – Measures Relating to the Exportation of Rare Earths, Tungsten, and Molybdenum* (see *Trade Perspectives*, Issue No. 6 of 23 March 2012), the WTO Appellate Body found that the concerned export restrictions were inconsistent with China's WTO obligations. Additionally, the Appellate Body did not consider China's measures to be justified by the general exceptions of Article XX of the General Agreement on Tariffs and Trade (hereinafter, GATT). The EU's Trade Commissioner Mrs. Malmström specifically referred to these earlier disputes, asserting that, like in previous cases, the EU believes that China is again violating international trade rules.

The US originally filed its complaint on 14 July 2016. This request for consultations only focused on alleged export duties applied to certain raw materials by China. The EU then tabled its request on 19 July 2016, raising the same complaint concerning export duties, but adding another raw material to the list and enlarging the scope of the request by encompassing quantitative export restrictions, and alleging the non-uniform, impartial, unreasonable and non-transparent nature thereof. On 19 July 2016, the US tabled an *addendum* supplementing its earlier request for consultations, and added the additional aspects raised by the EU.

The complaints raise three separate issues. Firstly, both requests allege that China imposes export duties on various forms of antimony, chromium, cobalt, copper, graphite, lead, magnesia, talc, tantalum and tin. The requests go on to list the laws and regulations through which the export duties are allegedly imposed and administered. The EU and the US note that these export subsidies appear to be inconsistent with Paragraph 11.3 of Part I of the Protocol on the Accession of China (hereinafter, Accession Protocol). Paragraph 11.3 of Part I of the Accession Protocol requires China to "*eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994*".

Secondly, the requests raise the issue of quantitative export restrictions. Namely, the complaints allege that China imposes quantitative restrictions (*e.g.*, quotas) on the export of various forms of antimony, indium, magnesia, talc and tin. The enumerated laws and regulations allegedly violate Article XI:1 of the GATT 1994, as well as China's commitments under Paragraph 1.2 of Part I of the Accession Protocol. Paragraph 1.2 of the Accession Protocol expressly notes that the protocol shall include the commitments referred to in Paragraph 342 of the Working Party Report on the Accession of China (hereinafter, Working Party Report). Paragraph 342, in turn, includes Paragraphs 162 and 165 of the Working Party Report related to export restrictions, noting, in particular, that such restrictions would be "*eliminated unless they could be justified under the WTO Agreement or the Draft [Accession] Protocol*".

Finally, the complaints refer again to the quantitative export restrictions and assert that, in addition to the mere existence of those restrictions, they are subject to additional requirements and procedures in relation to their administration and allocation. More specifically, the EU complaint asserts "*restrictions on the trading rights of enterprises seeking to export those products, such as prior export experience requirements and minimum capital requirements, and other conditions that appear to treat foreign-invested entities differently from domestic entities*", as well as licensing requirements. Thereby, according to the EU and the US, China is violating Article XI:1 of the GATT, Paragraphs 5.1 and 5.2 of Part I of the Accession Protocol, as well as China's commitments under the provisions of Paragraph 1.2 of Part I of the Accession Protocol, as Paragraph 1.2 again refers to Paragraph 342 of the Working Party Report, which also incorporates obligations in Paragraphs 83 and 84 of the Working Party Report. Paragraphs 83 and 84 refer to the right to trade for Chinese enterprises, as well as to certain licensing requirements. Additionally, the EU and the US assert that China "*administers all these export restrictions in a manner that is not uniform, impartial, reasonable, or transparent*". This, if determined to be the case, would be inconsistent with Article X:3(a) of the GATT 1994 and Paragraph 2(A)(2) of Part I of the Accession Protocol.

China does not appear to deny the existence of such measures, instead insisting that they are justified. Article XX of the GATT allows WTO Members to adopt and enforce measures with respect to certain policy objectives. Reportedly, the Chinese Ministry of Commerce declared that the controls, such as export duties and quotas regarding raw materials, are intended to protect the environment and preserve natural resources in China. Such measures could, in particular, fall under the exception of Article XX(g) that allows measures "*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*". However, according to the '*jurisprudence*' of the WTO Appellate Body, such measures must still remain the least trade distorting measures available. In its press release concerning the complaint, the EU emphasised that China's alleged objectives, related to the environment and to the protection of natural resources, could indeed be achieved more effectively and with less impact on trade through alternative measures. Noteworthy in this regard is that the WTO Appellate Body, in the previous raw materials dispute on *China – Measures Related to the Exportation of Various Raw Materials* (see *Trade Perspectives*, Issue No. 3 of 10 February 2012), agreed with the panel and confirmed that there is no legal basis in the Accession Protocol to allow the application of Article XX of the GATT with respect to China's obligations under Paragraph 11.3 of the Accession Protocol.

Key to this dispute, as it was to the previous raw materials and rare earth disputes, is the predominance of China in these sectors. China is the world's leading producer of four out of the ten raw materials at issue in this case (*i.e.*, cobalt, chromium, talcum and tin), and accounts for between 50 to 70% of the world production concerning four further raw materials (*i.e.*, lead, magnesia, antimony and indium). Moreover, Chinese production of only two of the raw materials concerned is of lesser global importance (*i.e.*, copper and tantalum). Therefore, the Chinese market measures appear to constitute a decisive factor potentially influencing the world market. The sectors most affected are the sectors of aerospace, automotive, electronics and chemicals. In the EU, the Commission has identified twenty raw materials "*as critical to Europe's economy and essential to maintaining and improving our quality of life*". Included on this list are several of the raw materials subject to this case,

namely, graphite, cobalt, chromium, magnesia, antimony and indium. The US has also analysed the significance of these raw materials for downstream products, emphasising their significance in particular for the chemicals, automotive, steel and metal industries. The availability and costs of such materials, therefore, affects a wide range of products and any change in policy may greatly benefit or harm industries and manufacturers around the world as they are dependent on Chinese supplies. The strong and ever-growing appetite for natural resources and the political and economic power that they confer to the countries that possess them, looks poised to perpetuate the recourse to this type of trade measures. While Article XX of the GATT provides for legitimate exceptions to the basic trade rules, it is not, however, intended to legitimise protectionist measures aimed at stimulating domestic industries and weakening foreign competitors.

In the broader context of such measures and policies, the Commission is currently debating the future design of its trade defence measures, in particular its approach *vis-à-vis* China. On 20 July 2016, the College of Commissioners discussed the EU's policies towards China and China's non-market economy status. The eventual approach adopted by the EU has the potential to substantially affect EU businesses that compete with China (see *Trade Perspectives*, issue No. 3 of 12 February 2016). Most recently, the overcapacity in Chinese steel production has led to a heated political debate in the EU. The Commission called on EU Member States to adopt the proposals to modernise EU trade defence instruments. The recently tabled requests for consultations constitute the first step in the filing of a WTO complaint. The parties must now try to reach a mutually agreed solution within 60 days through consultations. If by then no solution can be reached, the complaining parties may request the establishment of a WTO dispute settlement panel to examine the matter. This dispute looks poised to have considerable consequences for various important industry sectors in the EU, the US and globally. On 27 July 2016, Mexico requested the right to join the consultations. Further countries should assess their interests, particularly in view of their own raw materials production and supply needs, and swiftly decide whether or not to request to join the consultations. Interested parties should closely monitor these proceedings as well as the current debate on trade defence instruments in the EU.

A new round of EU duty suspensions and tariff quotas came into effect

On 30 June 2016, the EU published *Regulation 2016/1050 of 24 June 2016 amending Regulation (EU) No. 1388/2013 opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products* and *Regulation 2016/1051 of 24 June 2016 amending Regulation (EU) No. 1387/2013 suspending the autonomous Common Customs Tariff duties on certain agricultural and industrial products*. These new Regulations, which took effect on 1 July 2016, amend the lists of products imported into the EU benefiting from duty suspensions and tariff quotas. The products contained in the Annexes of the new Regulations are mainly '*chemical products and manmade fibres*', '*electrical and optical equipment*' and '*food products, beverages and tobacco*'. On 24 June 2016, the results of the *referendum* on the question of whether the UK should remain or leave the EU were released. The UK decided to exit from the EU (hereinafter, Brexit). Brexit looks poised to have certain legal and business consequences also on the EU's duty suspensions and tariff quotas.

Article 31 of the Treaty on the Functioning of the European Union (TFEU) provides that "*the EU Council may approve suspension arrangements proposed by the European Commission (hereinafter, Commission)*." Suspension arrangements allow products to enter the EU market duty free (*i.e.*, total suspensions) or at reduced duty rate levels (*i.e.*, partial suspensions). They may be granted for an unlimited quantity and for a period of 5 years (*i.e.*, duty suspensions) or for a limited quantity of imported products and for a period of six to twelve months (*i.e.*, tariff rate quota). Duty suspensions and tariff quotas are intended to stimulate the efficiency and competitiveness of EU industries by lowering the costs of raw materials, semi-finished goods or components that are not available (or not sufficiently available) in the EU, but which are needed by EU manufacturers to produce finished products. *Regulation (EU) No. 1387/2013 suspending the autonomous Common Customs Tariff duties on certain agricultural and industrial products and repealing Regulation (EU) No. 1344/2011* and

Regulation (EU) No. 1388/2013 *opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products, and repealing Regulation (EU) No. 7/2010,* provide a list of the products currently benefitting from duty suspensions. They are amended twice a year (in January and July, respectively) and take into consideration new requests presented by EU Member States.

Any request for suspension arrangements must fulfil several conditions that are prescribed in the *Communication from the Commission concerning autonomous tariff suspensions and quotas*. Firstly, such a request must be the initiative of one of these actors: any company established in the EU; users of the product in question; distributors applying on behalf of customers; subsidiaries of third country manufacturers applying on behalf of customers; and lawyers, accountants and/or consultants representing one of the above. Secondly, the application must be related to a product that cannot be sourced (or sourced in sufficient quantity) within the EU or that must undergo further processing within the EU. Thirdly, the relevant product should also not be available in any country with which the EU has a preferential trading agreement (*e.g.*, a free trade agreement or, if the exporting country benefits from the EU's Generalised System of Preferences, the GSP scheme). Fourthly, the level of duty saving must be at least EUR 15,000 per year. When the request is lodged with the administration of one of the EU Member States, EU-based producers have the opportunity to either support or oppose applications through their respective EU Member State Governments meeting within the EU's Economic Tariff Questions Group (hereinafter, ETQG), which is chaired by the Commission. Applications are discussed within the ETQG, which gathers representatives from each EU Member State. At the end of these meetings, the Commission prepares proposals for duty suspensions only when there is unanimous agreement. When the EU Council approves duty suspensions and tariff quotas, the benefits are not limited to the original applicant, but extended to all importers on products from all origins.

As soon as Article 50 of the Treaty on the European Union (TEU) is formally triggered by the UK (see *Trade Perspectives*, Issue No 13 of 1 July 2016), the UK will need to renegotiate its trade relationship with the EU. There are essentially four possible scenarios with varying degrees of integration (single market, customs union, FTA or WTO regime). The scope and magnitude of future changes for duty suspensions and tariff quotas in the UK will be determined by the outcome of the negotiations of Brexit for the next two years, as well as by the model of integration and trade relations that will apply to the EU/UK partnership. This means that, in the short term, existing duty suspensions and tariff quotas, accorded to EU Member States, will still apply in the UK. For instance, under Regulation 2016/1050, 9 new tariff quotas have been introduced, 4 amended and 1 ended. Under Regulation 2016/1051, 140 new duty suspensions have been introduced, 46 amended and 6 eliminated. The new regulations apply to the UK even in the perspective of Brexit until such time as the UK has actually exited the EU. However, at the moment, the Commission is preparing its proposal for the future update (January 2017) of duty suspensions and tariff quota regulations. There are approximately 250 duty suspensions and 38 tariff quotas that are being proposed by EU Member States. The UK proposed, with some other Member States, 16 new duty suspensions and tariff quotas, mainly for chemical products. The UK also proposed 18 duty suspensions and tariff quotas on its own initiative for the same type of products. Due to Brexit, EU Member States will likely oppose the stand-alone applications from the UK. Moreover, there is also a list of duty suspensions that will expire on 31 December 2016. Some of them will be renewed automatically for a new period of 5 years. But for certain goods, the renewal is not automatic. The UK will probably not have the opportunity to request renewal of duty suspensions and tariff quotas that are only of its own initiative. This is a bit of a grey-area, but one that like many others in the aftermath of the Brexit vote, will need to be thought out and managed by the EU and the UK.

Duty suspensions and tariff quotas constitute an essential tool for businesses seeking to lower their costs and stand to deliver phenomenal tariff advantages and cost savings to EU industry. Between 2007 and 2011, a study published by the Commission in 2013 found that, on average, the value of imports under suspension was EUR 18.4 billion per year, while the average value of foregone revenue (*i.e.*, the tax savings for EU businesses) stood at EUR 944 million per year. It will be particularly interesting to monitor the Brexit negotiations since

they will have important consequences on the EU's duty suspensions and tariff quotas requested by the UK on behalf of British companies and benefitting EU industry as a whole. Due to Brexit, certain British industries will soon no longer have the opportunity to benefit from the EU's duty suspensions and tariff quotas and equivalent tariff concessions will have to be negotiated by the UK with selected third countries. If the EU and the UK were to adopt a Customs Union approach at regulating their trade exchanges, as it is the case between the EU and Turkey, the criteria enacted in the *Communication from the Commission concerning autonomous tariff suspensions and quotas* will still apply to the UK. The latter could still submit requests for tariff suspensions and quotas and British delegates could participate in the meetings with the Member States and the Commission.

Whatever the case, businesses currently benefitting from duty suspensions and/or considering to seek the support of the UK Government to propose new duty suspensions within the EU should be aware that Brexit will inevitably complicate things and may soon bring that opportunity to an end. Interested businesses should seek advice to properly navigate the choppy waters ahead.

CJEU: NHCR applies to commercial communications to healthcare professionals, not only to final consumers

On 14 July 2016, the Court of Justice of the EU (hereinafter, CJEU) rendered its judgment in case C-19/15 *Verband Sozialer Wettbewerb* v *Innova Vital*, in which it confirmed that nutrition or health claims made in a commercial communication on a food that is intended to be delivered as such to the final consumer, even if that communication is not addressed to the final consumer, but exclusively to healthcare professionals, fall within the scope of *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foo*ds (hereinafter, NHCR). However, the CJEU did not object to operators communicating '*objective information*' to healthcare professionals about new scientific developments, provided that such communications are of a '*non-commercial nature*'.

In 2015, in a dispute between the independent German association *Verband Sozialer Wettbewerb* (hereinafter, VSW), which stands for fair competition, and *Innova Vital,* a company marketing the nutritional supplement '*Innova Mulsin® Vitamin D3*', before the Munich Regional Court I (Landgericht München I), the question arose as to whether the rules established in the NHCR, including the prohibition of referring to non-authorised health claims, were only applicable to communications addressed to final consumers or whether they were also applicable to communications to healthcare professionals such as doctors, pharmacists and nutritionists.

In November 2013, the director of *Innova Vital*, who is a doctor, sent exclusively to named doctors a written document (hereinafter, the document at issue), stating: "*… You are aware of the situation: 87% of children in Germany have blood vitamin D levels below 30 ng/ml. According to the DGE (German Nutrition Association), that level should be approximately 50 to 75 ng/ml. As has already been demonstrated in numerous studies, vitamin D plays an important role in the prevention of several illnesses, such as atopic dermatitis, osteoporosis, diabetes mellitus and MS [multiple sclerosis]. According to those studies, vitamin D deficiency in childhood is partly responsible for the subsequent development of those illnesses*". *Innova Vital*'s director went on to explain that "*[f]or that reason, I have given my son the recommended formula based on vitamin D and I have found that babies, young children and even school-aged children hardly like the traditional form in tablets. Very often my son spits out the tablets. As a doctor specialising in immunology, I considered this issue and developed a vitamin D3 emulsion (Innova Mulsin® D3) which can be administered in the form of drops [...]*". *Innova Vital*'s director describes the benefits of *Innova Mulsin®* emulsions as the rapid prevention or elimination of nutritional deficiencies (80% of the population is described as being vitamin D3-deficient in winter). Finally, *Innova Vital*'s director adds that "*[y]ou can find out how to place direct orders and obtain free information material for your surgery by calling [...]*". The document at issue contained an image of the nutritional supplement, information on its composition, its selling price and the daily cost of treatment based on the recommended dose of one drop per day.

VSW claimed that the document at issue contains two unauthorised health claims: 1) "*As has already been demonstrated in numerous studies, vitamin D plays an important role in the prevention of several illnesses, such as atopic dermatitis, osteoporosis, diabetes mellitus and MS [multiple sclerosis]. According to those studies, vitamin D deficiency in childhood is partly responsible for the subsequent development of those illnesses*"; and 2) "*Rapid prevention or elimination of nutritional deficiencies (80% of the population is described as being vitamin D3-deficient in winter)*".

VSW argued that the NHCR is applicable both to communications addressed to consumers and to professionals. *Innova Vital* claimed, to the contrary, that the NHCR is not applicable to the case at hand because the communications were addressed to doctors. The Munich Regional Court I filed a request for a preliminary ruling to the CJEU regarding the interpretation of Article 1(2) of the NHCR, which defines the scope of application of the NHCR as applying "*to nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer, including foods which are placed on the market unpacked or supplied in bulk […]*".

In its judgment of 14 July 2016, the CJEU ruled that the NHCR is not only applicable to commercial communications addressed to consumers, but also to commercial communications addressed to professionals. The CJEU held that, in a case such as that in the main proceedings, where the document at issue is not to be submitted as such to the final consumer, but is sent to healthcare professionals, those professionals are implicitly invited to recommend the food covered by the claims to that consumer. The ruling states that admittedly, healthcare professionals may be considered to have scientific knowledge superior to that of a final consumer (*i.e.*, an average consumer, who is reasonably well informed and reasonably observant and circumspect). However, the judgement reads that those professionals cannot be regarded as being in a position to permanently have all specialised and up-to-date scientific knowledge necessary to evaluate each food product and the nutrition or health claims used in the labelling, the presentation or advertising of those foods. The CJEU held that it cannot be ruled out that the healthcare professionals themselves may be misled by nutrition or health claims which are false, deceptive, or even mendacious. Therefore, those healthcare professionals risk forwarding, in all good faith, incorrect information on foods that are the subject of a commercial communication to final consumers with whom they have a relationship. That risk is all the more remarkable as such professionals are likely, because of the relationship of trust that generally exists between them and their patients, to exercise significant influence over the latter. Finally, the CJEU noted that, if such claims were excluded from the scope of application of the NHCR, there would be a risk that the food business operators would circumvent the obligations laid down by that regulation, addressing the final consumer through healthcare professionals, so that those professionals recommend their foods to the consumer.

The CJEU recalled that the aim of the NHCR is to ensure the effective functioning of the internal market whilst providing a high level of consumer protection. In that regard, referring to its judgment in *Deutsches Weintor* (see *Trade Perspectives*, Issue No. 17 of 21 September 2012), health protection is among the principal aims of that regulation. Accordingly, and reiterating its judgments in *Ehrmann* and *Neptune Distribution* (see *Trade Perspectives*, Issue No. 5 of 11 March 2016), it is necessary, in particular, to give the consumer the necessary information to make choices in full knowledge of the facts. It must be noted that the Court did not address in more detail the professional and deontological duties of healthcare professionals, who should ensure that the information that they pass on to consumers is double-checked and that the products they recommend can be trusted.

Regarding the practical impact of the judgment, when communicating on a commercial basis with healthcare professionals, food business operators must be careful not to use any non-authorised nutrition or health claim. It is important to note, however, that only commercial communications have to comply with the NHCR. The question to be evaluated on a case-by-case basis will be when a communication is deemed as '*commercial*' in nature, as the NHCR does not apply to claims that are made in non-commercial communications, such as dietary

guidelines or advice issued by public health authorities and bodies, or non-commercial communications and information in the press and in scientific publications (see recital 4 of the NHCR). The NHCR does not preclude the objective information for healthcare professionals about new scientific developments, involving the use of technical or scientific terminology, in a situation where the communication is of a non-commercial nature. It will be challenging for operators to advertise their new products in a non-commercial way, when they are not backed by approved nutrition and health claims.

With respect to the next steps, it is for the Munich Regional Court I to make a final decision in the main dispute, but it appears clear from the CJEU's preliminary ruling that commercial communications must be scrutinised in light of the NHCR, even when such communications are addressed only to healthcare professionals.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2016/1167 of 18 July 2016 amending Council Implementing Regulation (EU) No. 102/2012 imposing a definitive anti-dumping duty on imports of steel ropes and cables originating, inter alia, in the People's Republic of China, as extended to imports of steel ropes and cables consigned from, inter alia, the Republic of Korea, whether declared as originating in the Republic of Korea or not*

- *Commission Implementing Regulation (EU) 2016/1159 of 15 July 2016 imposing a definitive anti-dumping duty on imports of sodium cyclamate originating in the People's Republic of China and produced by Fang Da Food Additive (Shen Zhen) Limited and Fang Da Food Additive (Yang Quan) Limited*

- *Commission Implementing Regulation (EU) 2016/1160 of 15 July 2016 imposing a definitive anti-dumping duty on imports of sodium cyclamate originating in the People's Republic of China and Indonesia following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009*

Food and Agricultural Law

- *Commission Implementing Decision (EU) 2016/1215 of 22 July 2016 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean FG72 (MST-FGØ72-2) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council*

- *Commission Implementing Decision (EU) 2016/1216 of 22 July 2016 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean MON 87708 × MON 89788 (MON-877Ø8-9 × MON-89788-1) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council*

- *Commission Implementing Decision (EU) 2016/1217 of 22 July 2016 authorising the placing on the market of products containing, consisting of, or produced from genetically modified soybean MON 87705 × MON 89788 (MON-877Ø5-6 × MON-89788-1) pursuant to Regulation (EC) No. 1829/2003 of the European Parliament and of the Council*

- *Commission Implementing Decision (EU) 2016/1196 of 20 July 2016 amending the Annexes to Decision 2007/275/EC concerning the lists of animals and products to be subject to controls at border inspection posts under Council Directives 91/496/EEC and 97/78/EC*

- *Commission Implementing Decision (EU) 2016/1189 of 19 July 2016 authorising the placing on the market of UV-treated milk as a novel food under Regulation (EC) No. 258/97 of the European Parliament and of the Council*

- *Commission Implementing Decision (EU) 2016/1190 of 19 July 2016 authorising the placing on the market of trans-resveratrol as a novel food ingredient under Regulation (EC) No. 258/97 of the European Parliament and of the Council*

- *Commission Delegated Regulation (EU) 2016/1166 of 17 May 2016 amending Annex X to Regulation (EU) No. 1308/2013 of the European Parliament and of the Council as regards purchase terms for beet in the sugar sector as from 1 October 2017*

Customs Law

- *Council Regulation (EU) 2016/1184 of 18 July 2016 amending Regulation (EU) 2015/2265 opening and providing for the management of autonomous Union tariff quotas for certain fishery products for the period 2016 to 2018*

- *Commission Implementing Regulation (EU) 2016/1188 of 20 July 2016 suspending submission of applications for import licences under the tariff quotas opened by Regulation (EC) No. 891/2009 in the sugar sector*

NOTE TO SUBSCRIBERS

Dear Readers of Trade Perspectives©,

Please note that Trade Perspectives© will take an editorial break during the WTO's August recess and will resume its fortnightly publication schedule on 9 September 2016. We thank you for your continued interest in Trade Perspectives© and look forward to starting again with renewed energy and enthusiasm our dialogues on international trade as of this Fall.

The Trade Perspectives© Team

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