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Arduous ascent to the summit – last minute efforts to save the CETA continue

The European Commission (hereinafter, Commission) and Canada aim at reaching an agreement with the Belgian region of Wallonia to allow for the approval of the EU-Canada Comprehensive Economic and Trade Agreement (hereinafter, CETA) by all EU Member States by 24 October 2016. During the course of last week and over the weekend, the Commission and the Canadian Government engaged with Wallonia to accommodate the latter's remaining concerns. Other EU Member States also had to deal with concerns and internal discussions, but appeared ready to sign the trade deal. Whether or not the CETA will be signed at the EU-Canada summit scheduled for 27 October 2016, as planned, remains to be seen. At the time of publication of this newsletter, no breakthrough appears to have occurred.

The CETA negotiations were launched in 2009 and officially concluded in 2014. The process was difficult (see *Trade Perspectives*, Issue No. 2 of 28 January 2011, Issue No. 12 of 17 June 2011 and Issue No. 9 of 4 May 2012), and texts were renegotiated even after its official conclusion to take account of the EU's new approach with respect to investor state dispute settlement (see *Trade Perspectives*, Issue No. 5 of 11 March 2016). After a lengthy debate about the legal nature of the CETA, the Commission, on 28 June 2016, announced that it regards the CETA to be a '*mixed*' agreement, its content falling under the competence of the EU and, additionally, of the EU Member States. This position was taken despite previous consistent assertions by the Commission that the CETA was an '*EU-only*' agreement falling under the exclusive competence of the EU (see our detailed analysis in *Trade Perspectives*, Issue No. 13 of 1 July 2016). The qualification as a '*mixed*' agreement now requires all 28 EU Member States to concurrently sign and ratify the CETA. During the ratification process, the parts of the agreement that fall under EU competence, would, after adoption by the Council of the EU and consent of the European Parliament, be provisionally applied. Only after ratification by all EU Member States will the CETA fully apply. At the time of the Commission's announcement, Commission President Jean-Claude Juncker had dubbed the CETA as the EU's "*best and most progressive trade agreement*". However, despite the political decision to qualify the CETA as a '*mixed*' agreement, concerns over the CETA persisted in a number of EU Member States.

Firstly, on 13 October 2016, the German Constitutional Court (*i.e.*, the *Bundesverfassungsgericht* and, hereinafter, the Court) ruled in a preliminary decision on a number of emergency petitions aimed at preventing Germany from signing the CETA over constitutional concerns. In such a preliminary decision, the Court only determines if

irreversible damages might occur in case measures were not taken by the Court. The Court did not yet decide whether or not the CETA is compatible with the German Constitution. This will be dealt with in the main proceedings. The petitions referred to the German Constitutional Court were primarily based on concerns over the democratic rights of private German citizens and of the German Parliament, claiming that the CETA interferes with the separation of competences between the EU and its Member States. The Court linked its decision to three conditions that must be respected by Germany in order to be authorised to sign the CETA. Firstly, provisional application of the CETA may only cover those parts of the agreement that undoubtedly fall under EU competence. Secondly, by virtue of the CETA, a number of joint committees will be created and the Court requires that any decision by such a committee be authorised by a common Council decision. Thirdly, Germany must be able to terminate the provisional application of the CETA by unilateral decision. Article 30.7(3)(c) of the CETA provides for such termination. However, the CETA currently only considers the EU and Canada as parties to the agreement, not yet taking into account the '*mixed*' nature of the agreement. A decision by the German Constitutional Court on the merits in the main proceedings will be rendered at a later date.

Secondly, Bulgaria and Romania continued to express reservations against the adoption of the CETA. In their case, the reservations are not related to the CETA as such, but rather to Canada's visa policy. Canada has a visa-free regime in place with all EU Member States, except *vis-à-vis* Romania and Bulgaria. Both countries are using the approval of the CETA in order to resolve this issue. Meetings took place to accommodate the concerns, though both EU Member States requested written assurances from Canada in relation to the lifting of the visa restrictions. The EU Council Presidency called upon the relevant countries to resolve the matter as soon as possible. On 21 October 2016, both countries agreed that the resolution of this issue would be part of an interpretative declaration to be signed concurrently with the CETA and originally only intended to accommodate concerns by the Belgian region of Wallonia.

Thirdly, and most notably, concerns in the Belgian region of Wallonia have been repeatedly raised during the last several months and have now essentially blocked the adoption of the CETA. Back on 29 April 2016, the Walloon Parliament voted in favour of a resolution requesting the regional Walloon Government not to grant full powers to the Belgian Federal Government to sign the CETA. Despite an interpretative declaration prepared by the Commission in October, the Walloon Parliament renewed its opposition to the CETA in another vote on 12 October 2016, because of concerns regarding public services, agriculture and the investment court system. The interpretative declaration covers a wide range of contentious issues and touches on key issues such as the right to regulate, regulatory cooperation, investment protection, public services, as well as trade and sustainable development. The interpretative declaration was immediately criticised by civil society organisations, in particular concerning the investment protection provisions. It is true that the interpretative declaration is, at times, more descriptive than interpretative. However, it nonetheless clarifies a number of aspects and underlines the intentions of the negotiating parties. This declaration, aimed at accommodating Wallonia's concerns, appears not to have satisfied all critical voices and opposing interests. On 18 October 2016, EU Trade Ministers and the Commission announced the intention to seek an agreement with Belgium and its Wallonia region until Friday, 21 October 2016. This time appeared to be insufficient to resolve the issue and on 21 October 2016, the Canadian Trade Minister announced that talks had reached a stalemate and that she would return to Canada. Instead, the Canadian Trade Minister remained in Belgium and talks continued over the weekend. The EU will reportedly determine on the evening of 24 October 2016 whether or not the summit can take place or would have to be postponed.

Wallonia's regional Minister-President had rejected the EU's '*ultimatum*' on 19 October 2016 and called for the reopening of negotiations. Indications remain that the time-frame of

Monday evening would be deemed insufficient by Wallonia. Renegotiations would mean a considerable and unfortunate delay of the signature of the agreement and likely also of the subsequent provisional application of the parts of the agreement that fall under EU competence. Should Wallonia remain steadfast in its opposition, the signing of the CETA will be delayed, as ratifying the CETA without Wallonia is not a valid option. Another round of renegotiations is also poised to considerably damage the EU's negotiating position in other ongoing and future negotiating contexts and should, therefore, be avoided at all costs by the Commission. Opposition to the CETA by Wallonia at this late stage was purely political and is particularly incomprehensible because EU Member States (including Belgium) had initially provided the Commission with a specific negotiating mandate, were continuously informed about the CETA negotiations by the Commission, and regularly discussed the progress of negotiations with EU negotiators and, one would assume, with domestic constituencies such as Wallonia. It is interesting to note that Belgium, on a federal level, has been a strong proponent of the CETA. Internal Belgian contentions between the federal Government and the regional Governments should not be carried out to the detriment of the entire EU and its trade policy.

Implications for other free trade agreements currently under negotiation are unclear, as all negotiations have their own dynamic and not all negotiations are as controversial as the CETA or the TTIP. This hold-up, mostly caused by a single EU region, is poised to jeopardise and potentially damage EU bilateral trade policy in a more general way. Even if this situation and the opposition to the CETA can be resolved in due time, the approach to EU trade policy must be discussed and revisited. This is indeed something that the EU Commissioner for Trade already acknowledged herself in the midst of this week's contentions. She stressed that EU Trade Ministers must "*sit down […] after this is done and […] discuss how trade policy should be made in the future*". The Court of Justice of the European Union (CJEU) is also expected to weigh in on the general issue soon, delivering an opinion on the competences of the EU and of EU Member States with respect to the free trade agreement between the EU and Singapore. While political compromises do not always follow clear legal reasoning, they are often part of important solutions in the EU. However, key legal principles and, in particular, legal certainty and predictability, should be respected by all parties. The resolution of the contentions over the CETA will set an important precedent for all future EU trade deals, politically and legally.

The impact of the CETA on Brexit and beef quotas

On 12 October 2016, Jyrki Katainen, European Commissioner on Jobs, Growth, Investment and Competitiveness, replied to a Parliamentary question on the impact of Brexit on beef quotas agreed under the CETA between Canada and the EU. The interaction between the European Parliament and the Commission sheds some light on the issues that may arise following the potential adoption of the CETA and the exit of the UK from the EU.

The Parliamentary question, on the '*Impact of Brexit on beef quotas agreed under CETA*', was tabled on 13 July 2016 by certain Members of the European Parliament (hereinafter, MEPs) from the Group of the European People's Party (Christian Democrats) and European Democrats (PPE) (*i.e.*, Michel Dantin, Tokia Saïfi, Franck Proust and Angélique Delahaye). The MEPs recognized that the CETA is entering its '*ratification stage*', and pointed to two tariff-rate quotas (hereinafter, TRQs) for beef, the implementation of which is staged over a period of six years. The MEPs thus asked three specific questions. Firstly, what are the latest figures for beef exports (fresh, refrigerated and frozen) from Canada to the UK, and what proportion of the EU-Canada beef trade do they represent? Secondly, what method did the Commission use to calculate the quotas concerned? Thirdly, what impact will Brexit have on the tariff quotas for beef included in the agreement? Commissioner Katainen's answer indicated that: 1) EU data shows no imports of beef to the UK from Canada; 2) the

negotiations of quotas are aimed at a mutually satisfactory balance; and 3) until the UK officially notifies the EU of its intention to withdrawal, it retains all of its rights and obligations as an EU Member State.

Although the question and answer between the two parties was not particularly interesting, it does provide an opportunity to further analyse the potential impact of the CETA on Brexit and EU beef quotas. Of note is that the two TRQs referenced by the MEPs as being contained in the agreed upon text of the CETA are not the only relevant beef quotas contained in the agreement. Firstly, a TRQ on '*fresh or chilled beef and veal*', that increases from 5,140 to 30,840 metric tonnes carcass weight equivalent over six years, is supplemented by an additional 4,160 metric tonnes carcass weight equivalent of '*High-Quality Beef*' imported into the EU from Canada, as opened pursuant to Council Regulation (EC) No. 617/2009 of 13 July 2009. In addition, the CETA alters the in-quota tariff rate applicable to '*high quality fresh, chilled and frozen meat of bovine animals*' under the EU's existing WTO tariff quota, known as the '*Hilton Beef*' quota. Specifically, the CETA eliminates the 20% in-tariff quota on specific high-quality beef imported into the EU from Canada under the Hilton Beef Quota.

The first of such TRQs, the High Quality beef quota, is important because it was created through *Memoranda* of Understanding between the EU and Canada and the US and Canada, respectively, which intended to terminate the longstanding *EC – Hormones* dispute before the WTO (see *TradePerspectives*, Issue No. 18 of 2 October 2009). The annual quantity of imports allowed under the quota currently amounts to 48,200 metric tonnes, with an in-quota *ad valorem* tariff rate set at 0%. Entry within this quota is subject to a number of conditions, which are established in Annex II of Commission Implementing Regulation No. 481/2012 and which concern the carcasses' age, feeding practices and a requirement that the carcasses be evaluated by an evaluator employed by the national government of the exporting country according to given procedures. Although the agreements were made by the EU with the US and Canada, respectively, the most-favoured nation (hereinafter, MFN) principle applicable to WTO Members means that such a quota must be open to all meat exports from other WTO Members whose characteristics meet the standards outlined in the agreement. Other countries that produce beef that meets these characteristics, and thus may use the TRQ, include Australia, Argentina, New Zealand and Uruguay. However, the '*packaging*', so to speak, of the TRQ within the CETA means that if, and once, the EU and the US conclude the Transatlantic Trade and Investment Agreement (TTIP), which will likely also allocate part of the TRQ within that agreement, the EU, Canada and the US will then be able to terminate the conditions of the High Quality Beef *Memoranda*, and Australia, Argentina, New Zealand and Uruguay, *inter alia*, will no longer benefit from MFN access.

This potential future outcome may also be relevant with respect to imports of High Quality Beef into the UK. Currently, a majority of beef imported into the UK originates in Ireland. As noted by Commissioner Katainen's answer to the Parliamentary question introduced above, Canada does not currently export beef products directly to the UK (although, it may be that Canadian beef is exported to other EU Member States, such as the Netherlands, and then transported to the UK within the EU's single market). In addition, the US appears to export just a mere 65 metric tonnes of beef directly to the UK. Therefore, the adoption of the CETA and TTIP may not have a large impact on the beef trade between the UK and Canada and the US, respectively. Instead, the UK's withdrawal from the EU, and/or the potential termination of the High Quality Beef quota by the EU, is poised to impact other beef exporting countries, such as Australia (the No. 4 exporter of beef to the UK), Uruguay (the No. 7 exporter of beef to the UK) and New Zealand (the No. 12 exporter of beef to the UK). Said withdrawal will also affect other EU Member States that currently export beef products to the UK. EU countries with substantial beef exports to the UK include the Ireland, Netherlands, Poland, Germany, Italy, Spain and France, among others. Said countries are likely to see their duty-free access for beef products to the UK disappear in the coming years, and will need to renegotiate access once the Brexit process is formally initiated.

The beef sector serves as only one of numerous areas where the renegotiation of quotas, in the light of EU trade agreements and of the impending Brexit, will be commercially important and technically complex. This will be particularly the case for countries that benefit from such quotas due to the MFN principle. Interested stakeholders that export goods to the EU, and in particular whose goods are destined to the UK, need to strategize on how to position themselves as the UK begins transitioning out of the EU. There are opportunities to improve market access, which must be aggressively pursued, and considerable risks and negative impacts, which should be minimized.

EFSA's opinion on certain process contaminants in refined vegetable oils – explaining an oversimplified issue

Following a request of the Commission in July 2014, the Panel on Contaminants in the Food Chain of the European Food Safety Authority (hereinafter, EFSA) delivered on 3 May 2016 a scientific opinion on the risks for human health related to the presence of the process contaminants 3- and 2-monochloropropanediol (hereinafter, MCPD), and their fatty acid esters, and glycidyl fatty acid esters (hereinafter, GE) in processed vegetable oils. Following the publication of the opinion on certain process contaminants in food, there were reports highlighting, in an oversimplified and deceptive manner, that, *inter alia*, palm oil causes cancer. This article aims at clarifying the real meaning of the EFSA opinion on the matter.

Process contaminants are chemical substances that have not been intentionally added to food, but that are produced during food processing steps such as cooking, heating or purification of foods or ingredients. Process contaminants in edible vegetable oils and fats are formed during the processing (also known as refining) required to make these oils and fats suitable for use in food manufacturing. Palm oil, as other vegetable oils, is subject to refining. In order to transform crude palm oil, which has a bright orange-red colour, into an oil that can be used by the food industry, it undergoes three stages of processing. Firstly, it is degummed by separating the gum and fatty acid in the crude palm oil and crude palm kernel oil, with the removal of impurities such as trace minerals, copper and iron. In the second stage, it is bleached to remove colour pigments and other impurities. Finally, it is deodorised to remove the taste and smell by steaming it at high temperatures before cooling it down to room temperature.

3- and 2-MCPD and their fatty acid esters are members of the group of contaminants known as chloropropanols. They were first identified in the late 1970s in the composition of hydrolysed vegetable protein (HVP), which is used as a savoury flavour-enhancing food ingredient. 3- and 2-MCPD fatty acid esters and GE are created in vegetable oils during the refining process. EFSA notes that the toxicological relevance of GE has not yet been fully elucidated. EFSA analysed only the ester-bound forms because it considered the contribution of the '*free*' (*i.e.*, not esterified) forms of these substances to the total dietary exposure negligible in fats and oils. GE are only found in refined vegetable oils and fats and in foods that contain refined vegetable oils and fats. According to Fediol, the federation representing the European vegetable oil industry in Europe, it is likely that GE have been part of the human diet since humans started to eat cooked food.

According to Article 29(1)(a) of *Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety*, EFSA "*shall issue a scientific opinion: (a) at the request of the Commission, in respect of any matter within its mission […]*". In its opinion, EFSA states that 3- and 2-MCPD esters and GE were found in palm oil/fat, but most vegetable oil/fats (*e.g.*, maize oil, olive oil, peanut oil, rapeseed oil, soya bean oil, sunflower seed oil, walnut oil, and

coconut oil/fat) also contain substantial quantities. EFSA also said that further studies were needed on the mode of action of 2-MPCD, as well as long-term testing of the substance. Uncertainties in the risk assessment of glycidol and its esters could be addressed by more studies. The industry is aware of this issue and has already taken considerable steps to mitigate the presence in vegetable oils. EFSA specifically added that the level of GE in palm oils and fats has already been halved between 2010 and 2015 due to voluntary measures taken by producers. This has contributed to a fall in consumer exposure.

EFSA's 160-page opinion is by no means a '*cancer warning*' with respect to palm oil, contrary to what the usual constituency of palm oil's denigrators has advertised. This was claimed, in particular, in a campaign launched by the Italian consumer rights group Altroconsumo, which called on people to stop giving products containing palm oil to children due to the levels of carcinogenic contaminants. EFSA's opinion on certain process contaminants in refined vegetable oils in processed foods addresses MCPD esters and GE formed exclusively during the oil refining process, but the industry is already mitigating them and the problem is not limited to palm oil.

'*Free*' 3-MCPD is already covered by Section 4 of the Annex to *Commission Regulation (EC) No. 1881/2006 of 19 December 2006 setting maximum levels for certain contaminants in foodstuffs*. Maximum levels have been set for 3-MCPD in hydrolysed vegetable protein (20 µg/kg) and in soy sauce (20 µg/kg) taking into account the risk related to the consumption of these foods. Regulation 1881/2006 requests EU Member States to examine other foodstuffs for the occurrence of 3-MCPD, in order to consider the need to set maximum levels for additional foodstuffs. The Commission and EU Member States will now consider the EFSA opinion and decide what risk management measures to take to reduce consumer exposure. This will most likely include, for example, the introduction of maximum limit values for the presence of these process contaminants in concerned products.

Establishing standards for the reduction of process contaminants is another responsible approach. The *Codex Alimentarius* published a code of practice, based on good manufacturing practices, for the reduction of 3-MCPD during the production of acid-HVP and its products. Several approaches were recommended to reduce the formation of 3-MCPD during hydrolysis of vegetable protein products, including careful control of the temperature and heating time for the acid hydrolysis step, its subsequent neutralisation with alkali, use of sulphuric acid instead of hydrochloric acid, and substitution by fermentation. Similar standards should be considered for the reduction of formation of 2-MCPD, MCPD esters and GE.

There has been a significant improvement in analytical techniques for detecting 3-MCPD and glycidyl esters since safety concerns were first raised about these compounds in the late 1970s. Reliable testing methods allow for the detection of low levels of 2 and 3-MCPD and glycidyl esters in oils and fats, which allows for better monitoring of the impact of technologies that aim at reducing the levels of 3-MCPD and glycidyl esters. According to the Italian Union for Sustainable Palm Oil, palm oil that is harvested at the right moment, pressed quickly and processed at appropriate temperatures contains insignificant levels of contaminants, if any. Palm oil producing countries see the emphasis on palm oil only as further proof of Europe's biased stand and protectionist attitudes.

Reportedly, several palm oil manufacturers have been working to reduce levels of the process contaminants, to the extent that analytical tests conducted on chocolate spreads showed that products made with other vegetable oils contained higher levels than the palm-based spreads. The German consumer organisation *Stiftung Warentest* took a selection of 20 different chocolate spreads available on the German market and assessed them for a number of factors, such as taste and certified sustainability, as well as the presence of contaminants (*e.g.*, GE and 3-MCPD, mineral oils and others). Although the report does not

specify actual levels of contaminants, it found that the highest level of 3-MCPD was in a spread that happened to be advertised as '*palm oil-free*'.

With respect to the next steps, EFSA's assessments of consumer exposure and of risks associated with process contaminants is a continuous process. As new research emerges and consumption patterns change, the body of available evidence is re-assessed and measures may then be taken by the Commission or other stakeholders (for example the industry) to ensure the safety of the population. The outcomes of EFSA's risk assessment will be used by the Commission to implement measures to reduce or eliminate the potential health concerns related to process contaminants. Since May 2016, the matter is on the agenda of the Commission's Expert Committee on Industrial and Environmental contaminants. Further research is also ongoing to better understand the mechanisms of formation of 2 and 3-MCPD esters and GE during processing of vegetable fats and oils. This type of information is important for the oil industry to continue to develop and implement the strategies needed to reduce the level of the esters in oils and fats intended for food manufacturing. While food producers, especially oils and fats manufacturers, will no doubt continue their efforts to reduce the presence of these substances, developing processes to achieve this goal takes time. A number of different techniques may need to be combined as the refining steps that introduce process contaminants remain necessary for removing undesirable impurities that can affect the quality and safety of vegetable oils and fats and lead to unpleasant tastes. Voluntary measures by producers have already led to considerable improvements and EFSA's report can be regarded as another strong impetus for further steps by the industry.

EFSA is recommending that the metabolism and mode of actions of these substances be further investigated, in order to better characterise them in a near future. The concerns expressed by EFSA relate to long-term exposure, as is the case for other undesirable substances that occur in the food chain, either naturally or during food production. At no point has the Commission indicated that operators should withdraw products from the market or change their product formulations. Calling for the removal or the ban of products and/or ingredients from the market appears to be disproportionate and/or misleading. It must be noted that vegetable oil and fat refiners have already been actively and successfully working on effective mitigation technologies long before EFSA published its opinion. Implementing mitigation measures or the removal of the occurrence of these substances is complex and takes time as they need to take into account the specific process, plant design and location, whilst at the same time maintaining existing processing conditions that are required to ensure the quality and safety of vegetable oils and fats. The preparation of eventual risk-management decisions that may be taken by the Commission should be monitored and actively supported by data collected by the vegetable fats and oils industry. In parallel, misleading and deceptive campaigns that pursue anti-competitive agendas and that are not scientifically substantiated and balanced must be countered both by responsible market operators and the competent authorities.

Recently Adopted EU Legislation

Market Access

- *Stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2016/1842 of 14 October 2016 amending Regulation (EC) No. 1235/2008 as regards the electronic certificate of inspection for imported organic products and certain other elements, and Regulation (EC) No. 889/2008 as regards the requirements for preserved or processed organic products and the transmission of information*

Trade-Related Intellectual Property Rights

- *Commission Implementing Regulation (EU) 2016/1802 of 11 October 2016 amending Implementing Regulation (EU) No. 414/2013 specifying a procedure for the authorisation of same biocidal products in accordance with Regulation (EU) No. 528/2012 of the European Parliament and of the Council*

Other

- *Commission Implementing Regulation (EU) 2016/1852 of 19 October 2016 amending Regulation (EU) No. 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing*

- *Council Implementing Decision (EU) 2016/1818 of 10 October 2016 amending Implementing Decision 2014/170/EU to remove the Republic of Guinea from the list of non-cooperating third countries in fighting illegal, unreported and unregulated fishing*

- *Council Decision (EU) 2016/1795 of 29 September 2016 establishing the position to be adopted on behalf of the European Union with regard to the amendments to the Annexes to the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) and to the Annexed Regulations to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN)*

- *Decision No 1/2016 of the Joint Implementation Committee set up by the Voluntary Partnership Agreement between the European Union, of the one part, and the Republic of Indonesia, of the other part of 15 September 2016 concerning the start date of the Forest Law Enforcement Governance and Trade (FLEGT) licensing scheme [2016/1797]*

- *Commission Decision (EU) 2016/1796 of 7 July 2016 amending Decisions 2011/263/EU, 2011/264/EU, 2012/720/EU and 2012/721/EU in order to take account of developments in the classification of substances (notified under document C(2016) 4131)*

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