FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 9 of 5 May 2017

A WTO arbitrator rules on the level of retaliatory measures that Mexico can pursue in *US – Tuna II (Mexico)*

On 25 April 2017, the WTO Dispute Settlement Body (hereinafter, DSB) published the Report of an arbitrator deciding on the level of retaliation that Mexico can request for approval in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereinafter, *US – Tuna II (Mexico)*). The dispute, which has been ongoing for over eight years, deals with issues surrounding the '*dolphin safe*' labelling on tuna products on the US market, but the soon-to-be-implemented retaliatory tariffs will likely have an impact on other sectors in the US, including (possibly) corn and sugar, as well as on the potential re-negotiation of the North American Free Trade Agreement (hereinafter, NAFTA) among Canada, Mexico and the US.

Mexico and the US have actually been disputing issues relating to '*dolphin-safe*' tuna requirements for decades. The related dispute (*i.e.*, *US – Tuna I (Mexico)*) under the General Agreement on Tariffs and Trade 1947 (*i.e.*, the panel process under the GATT 1947 that applied prior to the establishment of the WTO) was initiated in February 1991, with a subsequent panel report issued in September of that year. The panel determined that the US was acting inconsistently with the GATT by prohibiting imports of tuna due to the way in which it was produced under Mexican regulations, rather than the US applying its own standards on quality or content (*i.e.*, the origins of the '*product versus process*' debate). The panel also found that the GATT 1947 does not allow the extra-territorial enforcement of one Party's laws, even for purposes of protecting animal health or natural resources. Mexico did not pursue the adoption of the panel's report (likely because the procedures in place at the time would likely have not resulted in adoption), but did reach a bilateral agreement with the US.

In October 2008, Mexico filed a request for WTO consultations in what would become known as the *US – Tuna II (Mexico) dispute*, later requesting the establishment of a WTO panel in March 2009 (see *Trade Perspectives*, Issue No. 5 of March 2009). Mexico brought claims against three US measures: 1) the Dolphin Protection Consumer Information Act; 2) the Dolphin-safe labelling standards and the Dolphin safe requirements for tuna harvested in the Eastern Tropical Pacific Ocean by large purse seine vessels; and 3) the ruling in *Earth Island Institute v. Hogarth* (*i.e.*, a US Court of Appeals ruling holding that '*dolphin-safe*' labels cannot be used on tuna products if, *inter alia*, the tuna was harvested in the Eastern Tropical Pacific Ocean by a vessel using purse-seine nets and no certification, proving that no dolphins were killed or seriously injured during fishing activities, was provided). Mexico

argued that it was in compliance with the '*dolphin-safe*' standard established by the Inter-American Tropical Tuna Commission, a multilateral commission of which both Mexico and the US are members, and that, as a result, the US was discriminating against Mexican tuna imports. In a report published in May 2012, the Appellate Body agreed with the Panel (see *Trade Perspectives*, Issue No. 10 of 18 May 2012), finding in favour of Mexico that the measures constituted technical regulations under the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) and that the '*dolphin-safe*' labelling scheme in the US accorded treatment less favourable to (*i.e.*, discriminated against) Mexico under Article 2.1 of the TBT Agreement. The Appellate Body also reversed a Panel decision under Article 2.2 of the TBT Agreement, finding instead that the standard under the Agreement on the International Dolphin Conservation Program (AIDCP) did not qualify as a relevant international standard under the TBT Agreement.

Since the Report of the Appellate Body, there have been a series of developments and compliance proceedings. In July 2013, the US published a rule, the "*Enhanced Document Requirements to Support Use of Dolphin Safe Label on Tuna Products*" in an attempt to meet its obligations under the WTO dispute. Mexico later requested compliance proceedings under Article 21.5 of the WTO Understanding on Dispute Settlement (DSU), arguing that the new US rule did not bring it into compliance with the recommendations of the DSB. In November 2015, the Appellate Body circulated its Report under Article 21.5 of the DSU, finding that that the US had failed to bring its measures into compliance with its previous recommendations and that the labelling regime for tuna products was inconsistent with Article 2.1 of the TBT Agreement and Article I:1 and III:4 of the GATT.

In March 2016, Mexico requested that the DSB authorise it to suspend concessions or other obligations amounting to USD 472.3 million per year, but the matter was referred to arbitration under Article 22.6 of the DSU. One of the main procedural issues during the arbitration proceedings was whether the arbitrator should consider a new rule issued by the US National Oceanic and Atmospheric Administration modifying the '*dolphin-safe*' tuna labelling scheme, or whether it had to consider the 2013 rule. The arbitrator found that the 2013 was appropriate to consider because it was through the implementation of this rule that the US originally failed to comply with the relevant Appellate Body and Panel Reports. The arbitrator also concluded that, for the most part, the model put forth by Mexico, in order to determine the appropriate level of retaliation, was appropriate for the calculation, although some of its assumptions were unreasonable and needed to be rectified. Conversely, the arbitrator determined that the model of calculation put forth by the US was unreasonable because it based Mexico's share in the US tuna market on an inappropriate period of historical data. The ultimate assessment of the arbitrator based the analysis on: 1) the demand for canned tuna, 2) the supply of canned tuna, and 3) other parameters of the model, including duty rates, transport costs, and charges. The final result was a ruling that, in accordance with Article 22.4 of the DSU, allowed Mexico to request authorisation to suspend concessions or other obligations at a level not exceeding USD 163.23 million per year.

Reports indicate that Mexico will begin implementing retaliatory measures in a matter of weeks, and it is expected that they will come in the form of '*carousel*' retaliations. Perhaps ironically, the practice of '*carousel*' retaliations was actually popularised by the US in the notorious *Bananas* dispute (*i.e.*, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*), and involves the temporary suspension of concessions or other obligations in sectors other than the sector relevant to the dispute at hand, and periodically switching the relevant products/sectors over time, in an effort to stimulate powerful sectors to lobby governments to bring their systems into compliance with the WTO ruling. Here, it is expected that Mexico will first apply retaliatory measures against the US in the corn and sugar sectors, but it will be interesting to see how aggressively (or lightly) Mexico implements such measures given the mounting commercial and political tensions between the two countries. Notably, Mexico and the US have been attempting to renegotiate a sugar agreement from 2014, and Mexico recently suspended export permits of sugar to the US following the filling of a quota ahead of schedule and a reported lack of resources within the US Department of Commerce to negotiate new terms. Mexico and the US, along with Canada, appear to be poised to re-negotiate NAFTA in the near future, after US President

Donald Trump publicly announced his decision not to withdraw the US from the agreement. Given the recent decision by the arbitrator in *US – Tuna II (Mexico)*, the already powerful corn and sugar industries in the US are likely to take on substantial roles in advocating for their interests if NAFTA negotiations are indeed re-opened. Stakeholders should closely follow developments between the two countries and particularly in light of this WTO dispute.

Is the EU-Japan Free Trade Agreement soon to be concluded?

On 28 April 2017, the European Commission (hereinafter, Commission) published its report on the 18th round of the EU-Japan Free Trade Agreement (hereinafter, FTA) negotiations, which took place in Tokyo in the week of 3 April 2017. Shortly before that negotiation round, on 22 March 2017, the Commission published its text proposals on the Small and Medium-Sized Enterprises (hereinafter, SMEs) Chapter and the Chapter on Good Regulatory Practices and Regulatory Cooperation. The SMEs Chapter is a novelty in the EU's FTA negotiations and was not yet discussed during the latest round of negotiations. The Chapter on Good Regulatory Practices and Regulatory Cooperation is key to address non-tariff measures (hereinafter, NTMs) and to avoid the occurrence of new trade irritants, once the agreement is in force. This has particular significance considering the currently relatively high number of trade irritants due to NTMs in the trade relations between the EU and Japan.

The EU and Japan officially launched their FTA negotiations on 25 March 2013. For a considerable period of time, negotiations proceeded without significant progress. In 2016, the outcome of the various negotiation rounds demonstrated slow, but steady, progress, with various remaining obstacles, especially in the areas of agriculture, market access and NTMs. In October 2016, a report published by the Commission indicated better progress in the negotiations, noting, *inter alia,* that work on various chapters was nearly finalised. By now, negotiations are deemed to be well advanced and, on 17 February 2017, the Commission and the Government of Japan announced their "*commitment for an earlier conclusion*" of the bilateral trade negotiations by the end of 2017 (see *Trade Perspectives*, Issue No. 4 of 24 February 2017). This renewed commitment can be attributed to a shift in trade policy priorities due to the developments regarding the Trans-Pacific Partnership (hereinafter, TPP) and the Transatlantic Trade and Investment Partnership (hereinafter, TTIP), which had been under negotiation between the EU and the US from 2013 to 2016. After the US' withdrawal from the TPP, the fate of the TPP has become uncertain, undermining one of the key objectives of Japan's commercial internationalisation. On the other side, the new approach to trade policy of the US administration also brought uncertainty to the fate of the TTIP. TTIP and the TPP were at the centre of the EU's and Japan's respective trade agendas.

The EU report on the 18th round of negotiations with Japan now indicates further progress. Already the two previous rounds indicated stronger commitment, from both parties, to agree and move further in sensitive areas such as NTMs. However, remaining sensitive issues, such as food additives, audio-visual services, e-commerce and data flows, continue to act as obstacles to a speedy conclusion of negotiations. The EU report on the 18th round notes continuous progress *vis-à-vis* the 17th round, in particular vis-à-vis intellectual property rights, where the parties "*reached an agreement on almost all relevant non-contentious provisions of the Chapter text: on general rules and trademarks*". During the discussions, the EU addressed several requests for clarification by Japan. Noteworthy is the case of audio-visual services with respect to the video games industry. With respect to audio-visual services, the Belgium Entertainment Association stated recently that, due to the current developments in the video games sector, access to the Japanese market would provide important benefits to EU enterprises. Many EU technology companies and start-ups are very active in online video games, apps and video games for traditional game consoles, mainly of Japanese origin. The EU-Japan FTA could open the Japanese market to EU companies, allowing them to provide their services to Japanese customers. However, since the EU currently considers video game services to be part of audio-visual services and not as electronic services, it is currently not feasible to address this sector in EU-Japan FTA negotiations because the Commission does not have a mandate to negotiate the matter of audio-visual services. However, as argued by the industry, recent evolutions, such as online video games, smart

applications for electronic devices and 3D animation in the video game industry, could be used to redefine audio-visual services so that they fit within the definition of electronic services. This would, however, likely face opposition from EU Member States, especially at this advanced stage of negotiations.

The EU aims at including a Chapter on SMEs in the EU-Japan FTA. This is only the second time that a chapter on SMEs is proposed during the EU's FTA negotiations. After having been proposed during the, now suspended, TTIP negotiations with the US, the EU-Japan FTA could become the first FTA to include such a chapter. According to a European Parliament Resolution of 5 July 2016, all future EU's FTAs should include a specific chapter on SMEs that aims at enhancing the competitiveness of SMEs. The objective of this chapter is to facilitate access to information and to ensure that SMEs can fully benefit from trade and investment agreements. The Chapter on SMEs, proposed by the EU to Japan, includes provisions on '*information sharing*' and '*a contact point on SMEs issues*'. Each Party would be required to establish a public website where SMEs can access information on relevant regulations, such as different administrative requirements, custom regulations and procedures, sanitary and phytosanitary measures relating to importation and exportation, and other relevant information for SMEs. Noteworthy is the idea of a single website for SMEs, with the objective to simplify procedures, provide tools for new market access opportunities, reduce unnecessary non-tariff barriers and regulatory burdens and cut trading costs. The website would also contain the tariff measures and tariff related information, the tariff nomenclature and related non-tariff measures or regulations. The envisioned '*contact point on SMEs issues*' would address SMEs' needs and requests, also being responsible to monitor that SMEs' needs are duly taken into account in the implementation of the agreement. Contact points could also raise matters of interest in connection to the FTA to the SMEs and monitor the implementation of the provision on information sharing and exchange information for EU and Japanese SMEs.

On a separate issue, the text proposal for the Chapter on Good Regulatory Practices and Regulatory Cooperation, also tabled by the EU in March, was already discussed during the 18th round. This chapter would become an important tool to facilitate collaboration between FTA Parties in order to address NTMs, avoid non-tariff barriers (NTBs) and, in general terms, facilitate trade. The main objective of the chapter is to maintain and promote good regulatory practices and regulatory cooperation between the Parties. In the section on '*Good Regulatory Practices*', the chapter aims at providing transparency on the main regulatory measures of the Parties. Parties would be required to make public all major regulatory measures, together with a clear description of their scope and objectives. Regulatory authorities of each party would also be required to provide information regarding public consultations and impact assessments concerning the regulatory measures. They should provide an indication of whether such regulatory measures would have a significant impact on trade or investment and on SMEs. The section on regulatory cooperation promotes cooperative work between the Parties and encourages them to use good regulatory practices as a first step towards regulatory compatibility.

All recent EU FTAs provide for a Chapter on Regulatory Cooperation, but it is of particular significance in the EU-Japan FTA. Different regulatory approaches are of key importance for the EU-Japan negotiations and the high number of existing NTMs remains one of the issues preventing a speedy conclusion of the trade talks. Negotiations must address existing issues and provide for the means to avoid them or deal with them in a structured manner in the future. For instance, Japan maintains different merceological categories for what in the EU is known as '*beer*'. Japan categorises and labels such beverages as either beer or as '*bubbly spirit' (i.e., haposhu)*. Due to the high number of existing regulatory differences, a number of EU and Japanese regulatory agencies, with the support of the corresponding Ministries or Institutions, already conduct separate work on Good Regulatory Practices. One notable example pertains to the European Medicines Agency (EMA) and the Japanese Pharmaceuticals and Medical Devices Agency. Both agencies collaborate with the Commission and the Japanese Ministry of Health, Labour and Welfare in order to achieve a confidentiality arrangement to allow for the exchange of information (before and after a medicine has been approved), as part of their scientific and regulatory processes. The

proposed draft for the Chapter on Good Regulatory Practices and Regulatory Cooperation by the EU and the commitment by Japan to examine the consistency of the EU's proposal with its domestic laws and regulations underlines the shared commitment to find a way to bridge the gaps between the regulations of both Parties. The Chapter looks poised to be subject to further discussions during the upcoming rounds.

In February 2017, the EU and Japan announced their intention to conclude the FTA by the end of the year. Although there was no ultimate breakthrough in the most recent negotiation round of April 2017, progress was made in a number of areas. No specific date for the next round of negotiation is yet available, but a further round of negotiations can be expected shortly, likely still before the summer. Industry, businesses, trade associations and non-governmental organisations should remain actively involved and monitor any further development in the next negotiation rounds as negotiations approach their conclusion. The coming months will provide the final opportunities to shape the outcome of this important trade deal.

Fisheries, subsidies and the delicate task of ensuring sustainability and traceability while facilitating trade – An update on discussions within the UN and the WTO

On 18-22 April 2017, after five years of negotiations, a set of draft '*Voluntary Guidelines on Catch Documentation Schemes*' (hereinafter, Guidelines) was unanimously adopted during a technical consultation meeting within the Food and Agriculture Organization of the United Nations (hereinafter, FAO). The Guidelines are now submitted for adoption by all FAO Members at the FAO's upcoming bi-annual governing conference in July 2017. Additionally, the issue of fishery subsidies remains under the spotlight within the United Nations (hereinafter, UN) in the lead up to the UN Ocean Conference in June 2017, as well as within the WTO in preparation of the December 2017 WTO Ministerial Conference.

Fish is one of the world's most traded commodities, with an export value of around USD 142 billion in 2016. At the same time, it is estimated that illegal, unreported and unregulated (hereinafter, IUU) fishing accounts for up to 50% of catches in some regions. According to recent statistics, IUU fishing likely accounts for annual catches of more than 26 million metric tonnes, worth more than USD 23 billion. Further to that, the FAO estimates that more than 30% of commercial fish stocks (including commercially popular fish such as cod and tuna) are overfished and that 13% to 31%, and in some regions up to 50%, of catches must be attributed to IUU fishing. However, these FAO estimates are based on official data and a recent study indicates that the real number of fish caught may actually be much higher. For 2015, the FAO reported an 81.2 million metric tonne harvest, while the study showed that as much as 120 million metric tonnes of fish were actually caught in 2015. Thus, the actual numbers of overfishing may actually be considerably worse than currently estimated. Part of the problem is also the global fishery subsidies being provided, estimated at around USD 35 billion every year, with 60% of those being allocated as capacity-enhancing subsidies.

During the course of 2016, the UN Port State Measures Agreement, which builds on previous global instruments and adds the first set of binding minimum standards specifically intended to combat IUU fishing, finally entered into force after its adoption in 2009. The forthcoming adoption of the FAO's '*Voluntary Guidelines on Catch Documentation Schemes*' is now the next step in the global efforts to combat IUU fishing and to ensure sustainability and traceability. The Guidelines are supposed to become the standard reference for Governments and businesses alike, when establishing catch certification and traceability systems from capture through the entire supply chain to the point of sale (often referred to as '*from sea to plate*'). Catch documentation schemes intend to decrease IUU fishing, following the idea that fish shipments are inspected by national authorities and certified as having been caught legally and in compliance with a number of best practices. Relevant certificates and documentation accompany the fish throughout the supply chain.

So far, only a limited number of such schemes exist around the world and often only focus on certain high-value species (*e.g.*, Chilean seabass or Atlantic and Southern Bluefin Tuna). In the EU, since 2010, all marine fishery products (except aquaculture products and certain species), consigned by EU vessels and by third countries to the EU market, must be accompanied by a certificate signed by the master of the originating fishing vessel stating that the products were caught legally. However, the EU was recently criticised for its paper-based catch certification scheme, which renders the entire system partly ineffective (see *Trade Perspectives*, Issue No. 3 of 10 February 2017). In 2016, the US announced its own Seafood Import Monitoring Program (see *Trade Perspectives*, Issue No. 3 of 12 February 2016).

Moving beyond the deficiencies of paper-based certification schemes, the Guidelines call for a digital system that can be easily referenced and accessed throughout the supply chain (Section 4.6 of the Guidelines). The Guidelines also make extensive reference to important trade law principles, in particular the principle of non-discrimination (Section 4.2 of the Guidelines) and call for the recognition of different certification schemes as equivalent "*if they result in equivalent outcomes*" (Section 4.3 of the Guidelines). In general terms, the FAO's Guidelines are an important step towards streamlined global, public standards and systems to ensure traceability and thereby sustainability. Countries around the world should seek to implement these Guidelines, allowing for streamlined approaches and facilitating trade.

In the long term, a global system of catch certification and traceability should render private sustainability schemes, most notably the Maritime Stewardship Council's (hereinafter, MSC) '*MSC Certified Sustainable Seafood*' label, obsolete. In April 2017, about 12% of global marine catches are MSC certified. The MSC was founded in 1996 by the World Wide Fund for Nature (commonly known as the WWF) and the consumer goods manufacturer Unilever, but became independent of its founders in 1999. According to a strategy plan released in April 2017, the MSC still aims at achieving a level of 20% certified global marine catch by 2020 and to above 30% in 2030. Still, the ultimate goal must be to achieve reliable and trusted traceability through public certification of all traded fishery products. Globally streamlined catch documentation schemes and rules ensuring sustainability, and thereby tackling IUU fishing, will significantly enhance trade in fisheries and will allow for all actors to be part of the global fisheries market. The current piecemeal of catch certification schemes and sustainability labels renders it difficult, in particular for small fishery enterprises and fishermen, to comply and participate in this important market.

Additionally, the issue of fishery subsidies is garnering renewed attention, in particular ahead of the UN Ocean Conference taking place from 5-9 June 2017 and ahead of the upcoming 2017 WTO Ministerial meeting, which is scheduled to take place in December 2017 in Argentina. Already in 2016, a number of WTO Member States had launched an initiative aimed at the preparation of plurilateral negotiations in the WTO to prohibit harmful fishery subsidies (see *Trade Perspectives*, Issue No. 18 of 7 October 2016). The initiative noted that, fishery subsidies create significant distortions in global fishery markets and are a major factor contributing to overfishing and overcapacity and the depletion of fishery resources. The initiative appeared to be building on Article 20.16(5) of the Trans-Pacific Partnership Agreement (TPP), which provides that Parties shall not maintain any: 1) subsidies for fishing that negatively affect fish stocks that are in an overfished condition; or (2 subsidies provided to any fishing vessel, while listed by the flag State or a relevant Regional fisheries management organisation (RFMO) or Arrangement for IUU fishing. An agreement on fishery subsidies at this year's WTO Ministerial might also be jeopardised by other trade issues, as WTO Member States aim at achieving balanced outcomes in the various areas of negotiations. The eventual success of negotiations on fishery subsidies within the '*Negotiating Group on Rules*' also depends on the general balance of rules negotiations, taking into account negotiations in other sectors, notably controversial negotiations relating to anti-dumping, horizontal subsidies and regional trade agreements (see *Trade Perspectives*, Issue No. 18 of 7 October 2016). More specifically, on 14 April 2017, China reportedly circulated a document within the WTO, connecting a multilateral agreement on fishery subsidies to separate efforts to reform the WTO rules on trade remedies. While not expressly

linking the two areas, the document reportedly states that the two issues should both be considered under the architecture of WTO's '*Negotiating Group on Rules*'.

The initiatives to combat IUU fishing, and the new momentum to eliminate certain fishery subsidies, highlight a stronger focus on fisheries and sustainability. Apart from the economic importance of the fishery sector, this recent focus can also be attributed to the '*United Nations Sustainable Development Goals*' (hereinafter, SDGs), in particular SDG 14, entitled "*Conserve and sustainably use the oceans, seas and marine resources for sustainable development*". Target 14.4 of the SDGs calls on UN Member States to "*effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible*" by 2020, while Target 14.6 calls on UN Member States to "*prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies*" by 2020. From 5-9 June 2017, the UN Ocean Conference, specifically addressing SDG 14, will be the first SDG-specific event since the adoption of the SDG agenda in 2015. In general terms, the UN Ocean Conference aims at responding to a decline in ocean health and to develop solutions *vis-à-vis* issues such as overfishing, overcapacity of fisheries and the use of fishery subsidies. Work is well under way on the outcome declaration, entitled "*Our Oceans, Our Future: Call for Action*" and contains a strong call with respect to subsidies. Section 14(p) of the draft declaration calls on stakeholders to act decisively to prohibit certain forms of fishery subsidies, which contribute to overcapacity and overfishing, to eliminate subsidies that contribute to IUU fishing, and to refrain from introducing new such subsidies, including by completing the ongoing negotiations in the WTO on this issue without further delay. Work within the WTO is deemed to closely follow the debates within the UN and to build on the current *momentum*, due to the debate on the SDGs. From 15-17 May 2017, a number of WTO meetings are to be held with respect to a new proposal on fishery subsidies recently tabled by Iceland, New Zealand and Pakistan. Discussions will reportedly also cover connected issues, such as the scope of potential fishery subsidies' disciplines and the needs of developing countries, such as capacity building and technical assistance.

Globally, the issues of traceability and sustainability are of growing importance for an increasing number of sectors (see, for example, *Trade Perspectives*, Issue No. 7 of 7 April 2017 on conflict minerals). In order to avoid inconsistency with WTO rules, the international standards-setting and rule-making bodies should be the *fora* in which to address these issues. The WTO and the FAO should be and remain, therefore, the right *fora* to address IUU fishing and fishery subsidies. Furthermore, any proposed or applied measure must be non-discriminatory in nature and should not impose disproportionate burdens on exporting countries. Rather, countries must work together and should not engage in implementing a piecemeal approach that sometimes appears to distort the conditions of competition among countries, but rather apply the soon to be adopted Guidelines. Stakeholders should be vigilant as this appears to be an area of increased domestic (regulatory) activity, in particular leading up to the UN Ocean Conference and the December 2017 WTO Ministerial Conference. Additionally, countries, especially those with an important fishing sector, should make use of all available *fora*, in particular the WTO and bilateral or regional trade negotiations, in order to protect their interests and be active participants in the discussions.

France recommends to food business operators an additional form of presentation of the front-of-pack nutrition declaration

On 24 April 2017, the French Ministry of Social Affairs and Health notified the European Commission (hereinafter, Commission), under the TRIS procedure, *of* a draft *Order laying down the additional form of presentation of the nutrition declaration recommended by the State* (hereinafter, draft order). Under the draft order, the five-colour '*Nutri-Score*' (also referred to as 5-Colour Nutrition Label or 5-CNL) is the official (but voluntary) additional front-of-pack (hereinafter, FoP) nutrition label, which France is recommending to food business operators (hereinafter, FBOs) in order to promote healthier food choices. From September to

December 2016, four different logos had been tested in sixty *Casino, Carrefour Market* and *Simply Market* supermarkets across France for ten weeks, where 2 million labels were attached to approximately 1,200 food products in a bid to determine which one was most effective in promoting healthy eating.

The draft order with the recommendation of '*Nutri-Score*' is to be issued pursuant to Article 14-II of *Law No 2016-41 of 26 January 2016 on the modernisation of the French health system* and *Decree No 2016-980 of 19 July 2016 on additional nutrition information on foods (Articles L3232-8 and R3232-7 of the Public Health Code)*. France states, in its notification to the Commission, that these pieces of legislation were drawn up on the basis of Article 35 of *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, FIR). According to this provision, in addition to the forms of expression referred to in the FIR, the energy value and the amount of nutrients may be given by other forms of expression and/or may be presented using graphical forms or symbols in addition to words or numbers, provided that a number of requirements are met.

The Annex to the draft order describes the methods for calculating the unique, overall nutritional score of each food based on the nutrient content. On the one hand, nutrients, which according to the draft, should be limited in their intake (*i.e.*, saturated fats, simple sugars and salt), as well as calorie-dense foods, are taken into consideration with negative component scores. On the other hand, nutrients and ingredients, which, according to the draft, have beneficial effects (*i.e.*, fruit and vegetable, nuts, vitamins, fibres and protein), are taken into account with positive component scores. For three food categories (*i.e.*, added fats and oils, cheeses, and beverages), there are more specific requirements to calculate the nutritional score. Foods are then divided into five categories on the basis of the nutritional score attained, which results from subtracting the positive from the negative component scores. The relevant food category is shown on the '*Nutri-Score*' logo, which consists of five colours, each displaying a different letter from the best nutritional value to the worst (*i.e.*, from dark green A, light green B, yellow C, light orange D to dark orange E). According to the draft order, the logo shall be placed on the FoP. The FBOs that decide to adopt the recommendation on a voluntary basis, must inform the French Observatory of Food Quality.

According to Article 35(2) of the FIR, EU Member States may recommend to FBOs the use of one or more additional forms of expression or presentation of the nutrition declaration that they consider as best fulfilling the following requirements: "*1) They are based on sound and scientifically valid consumer research and do not mislead the consumer; 2) Their development is the result of consultation with a wide range of stakeholder groups; 3) They aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet; 4) They are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer; 5) In the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII of the FIR, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; 6) They are objective and non-discriminatory; and 7) Their application does not create obstacles to the free movement of goods*".

In order to justify the endorsement of '*Nutri-Score*', France states that the introduction of nutrition information that is visible, legible, simple and easy to understand, particularly for populations with a low socio-economic status or low education levels, is recommended among one of the many additional collaborative strategies and campaigns that, in France as at EU level, aim at achieving the objective of improving general nutrition. Furthermore, France argues that a number of scientific studies have proven the benefits and importance of a labelling system in improving the nutritional quality of people's grocery shopping, particularly for underprivileged households. Following consultations with a large number of stakeholders, scientists and consumers, France carried out an impact study (provided in Annexes 1 and 2 to the notification) showing that, of the four systems tested, the '*Nutri-Score*' logo was the most effective scheme in terms of the consumers' ability to rate their groceries and improve the nutritional quality of their grocery shopping. It is now for the

European Commission and the other EU Member States to assess whether the justification of the French recommendation satisfies the requirements 1) to 4) of Article 35 of the FIR.

The fifth requirement of Article 35 of the FIR provides that other forms of expression must be based either on the harmonised reference intakes (hereinafter, RIs) set out in Annex XIII of the FIR (*i.e.*, the average daily dietary intake of energy: 8,400 kJ/2,000 kcal, and nutrients: 70g total fat, 20g saturated fats, 260g carbohydrates, 90g sugars, 50g protein and 6g salt), or in their absence, on generally accepted scientific advice on intakes for energy or nutrients. However, it is not clear whether the draft decree takes them into account. There is no reference to the harmonised RIs in the description of the calculation of the nutritional score. Only for the three special cases (*i.e.*, added fats and oils, cheeses, and beverages), nutrient reference values according to the French Nutrition and Health Programme are taken into account in order to adapt the calculation method of the score. On the '*Nutri-Score*' logo itself, there is no reference at all to RIs. In comparison, the UK '*traffic light*' scheme is a '*hybrid*' FoP scheme that includes RIs (formerly known as '*guideline daily amounts*', or GDAs) and colour coding in the logo. The French-recommended logo and its colour codes appear to simply categorise foods from good foods to bad foods, without taking into account how much energy and nutrients are consumed per day. Regarding the sixth requirement of Article 35, namely that these additional forms of expression be objective and non-discriminatory, it appears that only saturated fats and '*simple*' sugars are relevant for the negative component of the calculation of the nutritional score. This appears to be a discrimination towards products containing saturated fats (which are not *per se* unhealthy) and presumably added sugars, which can also form part of a healthy diet, if consumed in moderation. France argues that the impact study showed that foods in the dark orange category are still being bought by consumers and that, from a public health perspective, additional studies (provided in Annex 3 to the notification) have shown that "*improving the nutritional quality of people's diets using the score on which the* '*Nutri-Score*' *is based, leads to a reduction in the risk of a number of non-communicable diseases such as cancer, weight gain, cardiovascular diseases and metabolic syndrome*."

Various questions remain unanswered. First, whether such schemes are actually '*voluntary*' in nature or whether they implicitly force competing FBOs to apply the same labels. Second, whether certain elements of such schemes can be classified as '*non-beneficial*' nutrition claims. Finally, the proliferation of different schemes may become an obstacle to the free movement of goods within the EU and be contrary to EU law. For the second and third question, reference is made to the similar discussions previously entertained on *Trade Perspectives* in relation to the UK's '*traffic light*' scheme and certain French schemes in the test phase (see *Trade Perspectives*, Issue No. 21 of 20 November 2015 and Issue No. 6 of 24 March 2016). Regarding the first question, France argues that the objective of protecting public health in no way affects competition between manufacturers as the additional information will only be recommended by public authorities, and is therefore in no way obligatory. However, France's '*Nutri-Score*' nutrition labelling scheme raises concerns as to whether it is, *de facto*, voluntary. Reportedly, the major French retailers *Intermarché*, *Leclerc* and *Auchan,* as well as the food manufacturers *Fleury Michon*, *Epi d'or* and *Chabrior* already committed to '*Nutri-Score*', without waiting for the adoption of the decree with the recommendation. This may put pressure on other food manufacturers, particularly small enterprises and own-label product suppliers, to apply the same colour labels. If evidence were to suggest that the FBOs not using the '*Nutri-Score*' label are being pushed out of the French retail market, it would appear as though the scheme is not, at least *de facto*, '*voluntary*'.

The Pan-European industry group FoodDrinkEurope (FDE) issued a statement that discussions on a coordinated approach to FoP labelling should take place at EU level in close consultation and agreement with all stakeholders. The approach should also be consistent with the RI-approach that the European food and drink sector had pioneered and should ensure meaningful, science-based and non-discriminatory information to consumers. In its statement, the FDE regrets that the French scheme adds yet another potential layer of complexity to what should be an EU approach to FoP labelling. Any proliferation of national

schemes should be avoided, as this may affect the free movement of goods in the EU's Single Market.

It is now for the Commission and for the other EU Member States to assess whether the French recommendation complies with EU rules, particularly with the FIR. It should be noted that, back in October 2014, the EU Commission initiated infringement proceedings against the UK (which have never been taken further and will likely not be concluded in view of '*Brexit*') over its '*traffic light*' FoP nutrition labelling scheme (see *Trade Perspectives*, Issue No. 19 of 17 October 2014), following complaints from food and retail operators that the use of such scheme would negatively affect the marketing of several products. The Commission is also required to submit a report on the effects of '*visual labelling*' schemes to the Council of the EU and the European Parliament by December 2017. Therefore, the debate will likely heat up again. The '*standstill*' period under the TRIS procedure, during which the Commission and EU Member States can give an opinion on the draft decree, ends on 25 July 2017. Food business stakeholders with an interest in the matter should work with their legal advisors and respective governments to have their views and interests duly voiced and considered. The matter of FoP nutrition labelling schemes should be carefully monitored by interested stakeholders as further national legislation may be drafted by other EU Member States.

Recently Adopted EU Legislation

Customs Law

- *Commission Implementing Regulation (EU) 2017/754 of 28 April 2017 opening and providing for the management of Union tariff quotas for certain agricultural and processed agricultural products originating in Ecuador*

- *Commission Delegated Regulation (EU) 2017/750 of 24 February 2017 amending Council Regulation (EC) No 673/2005 establishing additional customs duties on imports of certain products originating in the United States of America*

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/777 of 4 May 2017 initiating a review of Council Implementing Regulation (EU) No 501/2013 (extending the definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China to imports of bicycles consigned from Indonesia, Malaysia, Sri Lanka and Tunisia, whether declared as originating in Indonesia, Malaysia, Sri Lanka and Tunisia or not) for the purposes of determining the possibility of granting an exemption from those measures to one Tunisian exporting producer, repealing the anti-dumping duty with regard to imports from that exporting producer and making imports from that exporting producer subject to registration*

- *Commission Implementing Regulation (EU) 2017/763 of 2 May 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea*

- *Commission Implementing Regulation (EU) 2017/724 of 24 April 2017 imposing a definitive anti-dumping duty on imports of certain continuous filament glass fibre products originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council*

Food and Agricultural Law

- *Commission Regulation (EU) 2017/771 of 3 May 2017 amending Regulation (EC) No 152/2009 as regards the methods for the determination of the levels of dioxins and polychlorinated biphenyls*

- *Commission Regulation (EU) 2017/752 of 28 April 2017 amending and correcting Regulation (EU) No 10/2011 on plastic materials and articles intended to come into contact with food*

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