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Negotiations on a WTO agreement on fisheries subsidies continue to progress

Reports indicate that on 11-12 September 2017, WTO Members in the Negotiating Group on Rules (hereinafter, NGR) discussed proposals on the issue of fisheries subsidies in the context of a recent document prepared by the WTO Secretariat. The document, published by the WTO on 28 July 2017, has been referred to as a '*compilation matrix*' of seven proposals pertaining to an agreement on fisheries subsidies, as submitted by members of the NGR. The document is intended to assist WTO Members in their continuing consultations and negotiations of the agreement, which is intended to be finalised by the upcoming WTO Ministerial in Argentina in December 2017.

Within the context of the WTO, efforts to address fisheries subsidies began back in 2001, when Ministers agreed in the Doha Ministerial Declaration to "*clarify and improve WTO rules that apply to fisheries subsidies*". In 2005, the Hong Kong Ministerial Declaration included, in provision 9 of its Annex D, language recognising the "*broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing*". Provision 9 also stated that the *"[a]ppropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns*". Provision 10 of Annex D went on to "*direct the Group to intensify and accelerate the negotiating process in all areas of its mandate, on the basis of detailed textual proposals*" and complete the process as soon as possible. Provision 11 shows that the expected timeline in 2005 was for consolidated texts (which were to serve as the basis for the final stage of negotiation) to be prepared "*early enough to assure a timely outcome within the context of the 2006 end date for the Doha Development Agenda*".

Although negotiations did not ultimately progress under the anticipated timeline, during the past year substantial progress has been made within the Negotiating Group on Rules. In particular, releases by the WTO and statements published by WTO Members have shown that a core aim of the negotiations shifted towards meeting the United Nations' Sustainable Development Goal (hereinafter, SDG) 14.6. SDG 14.6 states the following objective: "*by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part*

of the WTO fisheries subsidies negotiation". Perhaps more importantly, a series of textual proposals were submitted by WTO Members that now serve as the basis for the discussions on the future agreement. In July 2017, following the request of WTO Members, the WTO Secretariat began compiling a matrix of the seven proposals received in order to aid in consultations and negotiations. The proposals were submitted by New Zealand, Iceland and Pakistan; the EU; Indonesia; the African, Caribbean, Pacific (hereinafter, ACP) Group of States; a Latin American group composed of Argentina, Colombia, Costa Rica, Panama, Peru and Uruguay; the Least-Developed Countries (hereinafter, LDC) Group; and Norway.

The '*compilation matrix*' provides a side-by-side comparison of the corresponding texts, and is organised into rows, representing the topics and sub-topics, and columns, representing the proposals. Reports indicate that, at the 11-12 September 2017 meeting of the NGR, discussions focussed on the "*General Provisions*" section of the '*compilation matrix*' created by the WTO Secretariat. Core similarities of the proposals include definitions of some keys terms, including illegal, unreported and unregulated (hereinafter, IUU) fishing, as well as the legal definition of subsidies. The proposals, as expected, incorporate by reference the definition of IUU fishing from paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the United Nations Food and Agriculture Organisation (UN FAO). Essentially, under Paragraph 3 of the Plan of Action, IUU fishing refers to fishing that: (1) lacks authorisation, does not comply with conservation and management measures developed by regional fisheries management organisations (hereinafter, RFMOs), or violates national laws or international obligations (*i.e.*, is illegal); (2) is not properly reported under international, RFMO or national laws and regulations (*i.e.*, is unreported); and (3) is performed by vessels with no national flag or that jeopardise fish stocks (*i.e.*, is unregulated). With respect to the definition of subsidies, the parties incorporate by reference subsidies within the meaning of Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter, SCM Agreement), and that are '*specific*' within the meaning of Article 2 of the SCM Agreement. According to Article 1.1 of the SCM Agreement, a subsidy exists if there is a financial contribution by a government or public body, or if there is any form of income or price support, and a benefit is thereby conferred. The compilation matrix notes that the EU also proposes that the agreement not apply to fuel de-taxation schemes (*i.e.*, fuel subsidies provided through tax exemptions).

With respect to the seven proposals, some of the key topics that have arisen during the negotiations include the reach of the eventual agreement, at least in terms of enforcement against smaller, or '*artisanal*' fishing operations in national waters, compared to larger-scale companies operating in international waters. In addition, discussions have also reportedly focussed on the obligations of developed countries compared to developing countries and LDCs, including in particular as they relate to notification obligations. With respect to the size of fishing operations, five of the proposals include relevant definitions. The EU defines '*subsistence fishing*' as, *inter alia*, fishing activities undertaken for consumption by members of that household, only a part of which can be sold or exchanged commercially. Other proposals focus on '*artisanal fisheries*' or '*small-scale fisheries*', and tend to include definitions of operations within territorial waters and closer to shore, or as defined by national laws and/or international agreements. These definitions are important because, in line with SDG 14.6, the proposals also emphasise the need for special and differential treatment for developing countries and LDCs. In particular, the proposals call for flexibilities to be afforded to subsistence fishing, artisanal and small-scale fishing operations. That is to say, the agreement would allow subsidies to be provided by developing countries and LDCs to such operations. Reportedly, there has been some contention regarding whether it is appropriate to apply varying standards to smaller-scale fishing operations compared to larger scale operations, even if smaller-scale operations do contribute, to some extent, to the issues associated with IUU fishing. However, the proposals appear to tie these flexibilities to the special and differential treatment for developing countries and LDCs, which, at least in general, appears to be supported by all parties. Nonetheless, that would mean that the scope of the agreement would still potentially extend to subsistence, artisanal and small-scale fishing operations in developed countries. Proposals from the EU and Indonesia do attach

conditions to such special and differential treatment, in particular that such subsidies do not target fish stocks that are in overfished conditions and as long as assurances are in place to avoid overcapacity. With respect to transparency, the ACP Group includes language in its proposal that notification requirements should not be burdensome on developing countries and LDCs, and the LDC Group goes so far as to flatly state that notification requirements should not apply to LDCs. One positive development is that, where previously there were concerns that China would tie issues relating to trade remedy reform to negotiations of the fisheries subsidies agreement, officials from Beijing reportedly pledged in July that said subject would not be tied to these negotiations.

The nature of the proposals, in general, especially in light of the difficulties seen in negotiating new and reformed agreements within the context of the WTO in the last 20 years, shows hope for progress within the WTO. As WTO Membership has grown, the dynamic between the interests of developed countries and developing countries has slowed progress in other areas of negotiation. However, with respect to the negotiations on fisheries subsidies, it appears that due accord has been given to the needs of developing countries and LDCs, in particular their small-scale and subsidence fishing operations. This acknowledgement is important, given the practical realities of small-scale fishing, and the relative impact of these operations compared to larger-scale operations. Not only is this hopeful for the successful completion of an agreement at the WTO Ministerial in Argentina in December 2017, but it may also signal the potential for similar distinctions in other areas of WTO negotiation. Like fisheries, sustainability is also a continued topic of discussion, one where the practical realities of small-scale farming have arguably not been considered, but which would benefit from flexibilities of the kind seen in the negotiations on fisheries subsidies.

Although, at the most recent meeting of the NGR, WTO Members reportedly addressed only the "*General Provisions*" section of the compilation matrix, additional sections are expected to be discussed at the next meeting of the group on 26-29 September 2017. Interested stakeholders should study the compilation matrix published by the WTO Secretariat and reach out to officials in their capitals to ensure that their interests are indeed met in the final iteration of the future agreement.

The EU's '*trade package*' – EU trade policy takes centre stage in European Commission President Juncker's State of the Union address

On 21 September 2017, the Comprehensive Economic and Trade Agreement (hereinafter, CETA) between the EU and Canada provisionally entered into force, an important milestone for EU trade policy. Already on 13 September 2017, in his annual State of the Union address, European Commission President Jean-Claude Juncker made EU trade policy a priority for the remainder of the current European Commission's (hereinafter, Commission) mandate until the beginning of 2019. Juncker raised various important trade issues, such as the negotiation of trade agreements, presented a new initiative on screening of foreign direct investment in the EU, and assured greater transparency. Shortly after the State of the Union address, the Commission published a Communication highlighting those and additional initiatives by the Commission.

EU trade policy has been going through a complicated year, for political and legal reasons, and the State of the Union address aimed at setting the stage and the tone for the new political year that has just begun. This time a year ago, the EU and Canada were on the final stretch to conclude the CETA. After a long internal struggle primarily caused by the Belgian region Wallonia's objections to certain elements of the CETA (see *Trade Perspectives*, Issue No. 19 of 21 October 2017), the CETA finally provisionally entered into force on 21 September 2017. Earlier this year, the Court of Justice of the EU (hereinafter, CJEU) rendered its Opinion on the division of competences with respect to the EU-Singapore free trade agreement (hereinafter, EUSFTA). Most notably, the CJEU determined that the

provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States, do not fall within the exclusive competence of the EU, so that the EUSFTA cannot, as it stands, be concluded without the ratification by EU Member States' national parliaments. However, the CJEU deemed all other contentious areas to be of exclusive EU competence, unexpectedly opining against the preceding opinion of one of the Court's Advocate Generals (see *Trade Perspectives*, Issue No. 1 of 13 January 2017 and Issue No. 10 of 19 May 2017). The EU and Singapore still need to discuss and agree on the way forward to allow for the entry into force of the EUSFTA. Additionally, Singapore is reportedly already considering the renegotiation of the EUSFTA, after Brexit will have removed the UK's market from the scope of the agreement. Indeed, current EU trade initiatives are further complicated by the – slowly progressing – Brexit negotiations and the uncertainty of the future EU-UK relationship.

It is, therefore, no surprise that Commission President Jean-Claude Juncker now described the Commission's trade priorities for the months ahead and did so as the first major point in his annual address. He started by putting trade policy into context, underlining the positive effects of trade on the EU's job market and noting that trade was also about exporting EU standards, be they social or environmental standards, data protection or food safety requirements. President Juncker went on to talk about two main aspects: First, EU negotiations for free trade agreements (hereinafter, FTA) and, second, a new EU legislative framework for the screening of foreign direct investments. The '*trade package*', published after the State of the Union address, additionally includes the recommendation to open multilateral negotiations to establish a multilateral court for the settlement of investment disputes, an idea that the Commission has been discussing since the autumn of last year.

The overall list of EU trade policy initiatives and engagements is long, but trade negotiations with an increasing number of countries is one of the most important elements and were highlighted as the first element of the speech. President Juncker referred to the provisional entry into force of the CETA, the political agreement on the FTA that was recently reached with Japan, and noted that there was a good chance of securing political agreements with Mexico and with South American countries (referring in the latter case to the EU-Mercosur FTA negotiations) by the end of this year. It must be added that the EU is currently also involved in further negotiations, most notably with Indonesia, and has recently proposed to update the trade agreement with Chile. President Juncker then used the State of the Union to officially propose the opening of FTA negotiations with Australia and New Zealand, respectively. This move has been widely awaited and expected, as the preparatory scoping exercises were concluded earlier this year (see *Trade Perspectives*, Issue No. 8 of 21 April 2017). At the same time, President Juncker used this opening of negotiations with two new countries for a transparency initiative, stating that the days of no transparency were gone. In light of this transparency push, the Commission immediately published in full the draft negotiating directives for negotiations with Australia and New Zealand, respectively, and vowed to do so for any future agreement. President Juncker further noted that the Commission would ensure that the Members of the European Parliament, as well as the Members of national and regional EU Member States' parliaments, are kept fully informed on the progress in the negotiations.

Already the first sentence of the proposed negotiating directives shows the EU's new approach to the content of its trade agreements, arguably having '*learned the lessons*' from the EUSFTA and the CETA: in the section on the nature and scope of the agreement, the Commission notes that the "*Agreement should exclusively contain provisions on trade and foreign direct investment related areas applicable between the parties*". This means that there would be no provisions on investments other than foreign direct investment. Throughout the negotiating directives, any references to investments specifically only refers to foreign direct investment. The negotiating directives and the accompanying documents are silent, however, as to the fate of the other types of investments and investment protection, including investor state dispute settlement (ISDS). While the latter is generally being addressed by the EU's initiative for a multilateral court for the settlement of investment

disputes, the former remains unclear and it remains to be seen if the EU and EU Member States will pursue a second agreement of shared competence with respect to investments other than foreign direct investment, in particular portfolio investments, and investment protection. The question of separating the content of trade agreements based on the competences is far from resolved and EU Member States might actually be in favour of the current approach and including all investment provisions in the mandate in order to achieve agreements of shared competences and requiring EU Member States' agreement and ratification. This potential disagreement looks poised to prolong the internal debate within the EU on the negotiating directives and might delay the opening of negotiations with Australia and New Zealand. Apart from the issue of investment protection, the respective negotiating directives for negotiations with Australia and New Zealand include the areas commonly covered by FTAs negotiated by the EU and remain in accordance with the results of the preparatory scoping exercises. It becomes clear that the EU aims for a relatively high level of ambition. This includes full liberalisation at the moment of entry into force for most tariff lines. With respect to services, the directives specifically note that the negotiations should aim at an agreement that goes beyond the Parties' WTO commitments and beyond the offers submitted in the context of the negotiations on a plurilateral Trade in Services Agreement (TiSA).

In addition to the publication of the proposed mandates, and unmentioned by President Juncker, the Commission has also decided to establish a permanent '*Advisory Group*' on EU trade agreements, which is supposed to facilitate the Commission's interaction with civil society and gather input from "*a wide and balanced group of stakeholders*" (ranging from trade unions, employers' organisations, consumer groups and other non-governmental organisations). It remains to be seen whether this increased transparency and outreach will also lead to a higher degree of public acceptance of trade negotiations and trade agreements. Nonetheless, the efforts are an important step forward and will also facilitate the participation and engagement of affected stakeholders, within the EU and within its trading partners around the world. At the same time, EU trade policy must also regain trust with its international trading partners, after the '*turbulence*' and lengthy processes concerning the CETA and the EUSFTA approval processes.

As the second trade-related aspect of his address, Commission President Juncker addressed another controversial issue related to concerns on foreign investment within the EU and concerning strategic EU assets (*e.g.*, an EU harbour, part of the EU's energy infrastructure, or a defence technology firm) being taken over by foreign investors, in particular by subsidised and/or state-owned enterprises. This matter was already announced during the summer, but was now officially presented. Reportedly, the move is a reaction to concerns raised by France, Germany and Italy following increased investment and company acquisitions by Chinese state-owned enterprises. Noting that the EU and the EU Member States were not "*naïve free traders*", President Juncker announced the Commission's proposal of a new EU framework for the screening of foreign investment in the EU. He noted that such undertakings should only happen in transparency, with scrutiny and debate. The screening framework is supposed to ensure that foreign direct investment does not compromise the EU's strategic interests with respect to security and public order. More specifically, the Commission published a *Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union* on grounds of security and public order. Most importantly, the framework would encompass a cooperation mechanism between the Commission and EU Member States, which could be activated in case of a relevant foreign direct investment. The proposed Regulation also provides for the Commission to be able to review foreign direct investments in certain cases, but does not impose on all EU Member States to establish domestic review and scrutiny procedures. Hence, the proposed framework falls short of the approach taken by the US through its Committee on Foreign Investment in the United States (hereinafter, CFIUS). The CFIUS is an inter-agency committee, which is authorised to review transactions that could result in control of US businesses by foreign entities, in order to determine the effect of such transactions on the

national security of the US. Arguably, the EU Member States' concerns also relate to the risk of intellectual property being transferred to companies based outside of the EU, thereby weakening EU businesses. The Commission stressed that the EU's general openness to foreign direct investment would remain, but that a screening of investments concerning strategic areas appeared appropriate in order to safeguard the EU's security and public order. Still, it must be noted that the EU should be careful and avoid spiralling into protectionist policies, while condemning such trends in other countries. The Commission will now launch the legislative process with the European Parliament and the Council of the EU. All interested stakeholders should carefully analyse the proposed framework and get involved before the process progresses further.

The European Commission's President has given his State of the Union address a clear trade policy focus. Apart from the various initiatives, President Juncker appears resolved to regain the greater public's trust with respect to EU trade and investment protection policies. The State of the Union determines the priorities for the year to come, the last full year of the current Commission's term. Trade policy will clearly be one of those priorities. All interested parties should carefully analyse the published documents and the new initiatives related to trade and investment and take part in the process.

The debate on '*dual quality*' branded food products – an initial legal analysis

On 13 September 2017, the European Commission's President Jean-Claude Juncker, in his address on the State of the European Union, after saying that in a Union of equals there can be no second class citizens and second class workers, went on to say that "*in a Union of equals, there can be no second class consumers*" either. He was referring to consumers in Central and Eastern EU Member States, where earlier this year different branded food products of a number of food manufacturers were found with a lower content of primary ingredients or cheaper substitutes than the same branded products in Western EU Member States. This article provides an initial legal analysis of such practices, commonly referred to as '*dual quality*' branded food products and the likely way forward.

In detail, Commission President Juncker said that he "*will not accept that in some parts of Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical. Slovaks do not deserve less fish in their fish fingers. Hungarians less meat in their meals. Czechs less cacao in their chocolate. EU law outlaws such practices already. We must now equip national authorities with stronger powers to cut out any illegal practices wherever they exist*". Recent tests on branded food in Croatia, Slovakia, Hungary and the Czech Republic have shown that the taste and composition of these products, sold under the same name (and brand) and in the same packaging, sometimes differ from the '*same*' products sold in neighbouring '*Western*' EU Member States. While the ingredients were generally properly labelled and the products were considered safe for consumption, some of those products in Central and Eastern EU Member States were considered to be of inferior quality and less healthy, and some were also more expensive. Food manufacturers change the composition of their branded products for various reasons, for example to adjust to local taste, to use local ingredients or to take divergent purchasing power into account. Adjusting products to local tastes, expectations and prices is a standard procedure for multinational companies. However, consumers might assume that a product sold under a certain brand within the EU internal market is the same and have limited practical means of checking whether this is true or not.

The question to answer is whether, as the Commission's President remarked in his speech, EU law outlaws such practices already. Thus, this practice needs to be analysed under a wide array of EU law, including food safety law, food labelling law, law on unfair commercial practices and trademark and competition law. In general, food safety in the EU is regulated by *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* (General

Food Law Regulation, or GFL). It lays down rules for protecting public health by prescribing that unsafe food (*i.e.*, food that is harmful to health and unfit for human consumption) may not be placed on the internal market. It also lays down principles for protecting the interests of consumers by banning fraudulent, deceptive and misleading practices and the adulteration of food. The tests carried out on branded food products in the respective EU Member States revealed that some branded products had a lower amount of certain ingredients, or contained different ingredients, than those in other EU Member States. However, the products were in no way deemed '*unsafe*' or '*unfit for human consumption*' in terms of the GFL.

However, '*dual quality*' branded products might infringe food labelling rules. EU consumer protection policy includes the provision of correct information for consumers, including through food labelling. *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) provides in Article 18 that the entries on the list of ingredients be listed in descending order of weight used in the manufacturing of the food. However, according to Article 22 of the FIR, the actual percentages of ingredients in the finished product need only to be provided for those ingredients that appear in the name of the food or are usually associated with that name by the consumer. The percentage of ingredients must also be indicated if they are emphasised on the labels in words, pictures or graphics; and if they are essential to characterise a food and to distinguish it from products with which it might be confused, because of its name or appearance. This means that the labels of the same branded food products marketed in different EU Member States appear to be technically in line with EU food labelling legislation, and would not necessarily need to show small differences in the composition of products, as long as the descending order of ingredients remains the same. The labels would, however, need to show the difference in the amount of some key ingredients. This requirement explains why the labels of fish fingers of a certain brand (and named '*fish fingers*') revealed that the product contains less fish meat (58%) in Slovakia than in Austria (65%), but also less in other EU Member States like the Netherlands.

In addition, the FIR establishes in Article 7(1) rules on fair information practices. Food information shall not be misleading, particularly: (1) as to the characteristics of the food and, in particular, as to its nature, identity, composition, quantity; and (2) by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient. In the debate on '*dual quality*' branded food products, it has been said that the labelling of those products is factually correct. However, it must also be determined on a case-by-case basis whether the labelling of '*dual quality*' branded products might nevertheless mislead consumers and the jurisprudence of the Court of Justice of the European Union (hereinafter, CJEU) on misleading food information must be taken into account. The CJEU held, *inter alia*, that the labelling of a foodstuff must not mislead the consumer by giving the impression that a particular ingredient is present, even when it is possible to determine from the list of ingredients that said ingredient is not present (see *Trade Perspectives*, Issue No. 12 of 12 June 2015). Factually correct information, therefore, not always prevents the overall label from not being misleading.

The marketing of '*dual quality*' branded products might constitute an unfair commercial practice under *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* (hereinafter, the Unfair Commercial Practices Directive or UCPD). The UCPD protects consumers from commercial practices that would materially distort their economic behaviour, for instance, prompting them to buy a product that they otherwise would not buy. Under Article 6(1) of the UCPD, a commercial practice shall be regarded as misleading if it contains false information and is, therefore, untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to, *e.g.,* the nature of the product or its main characteristics, and

in either case causes or is likely to cause him/her to take a transactional decision that he/she would not have taken otherwise. According to the jurisprudence of the CJEU, the average consumer is considered to be reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. However, according to Recital 6, the UCPD, this "*does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision*". On 25 May 2016, the Commission issued a legally non-binding guidance on the implementation and application of the UCPD, which states that, under the UCPD, commercial practices to market branded products with a different composition are not *per se* unfair. Goods of the same brand and having the same or similar packaging may differ as to their composition depending on the place of manufacture and the destination market, which means they may vary from one Member State to another. However, the guidance states that the UCPD needs to be considered in cases where traders promote a product as having the same quality and composition as the products of the relevant brand marketed in other EU Member States. This appears to be a possible angle for the detection of an unfair commercial practice. If such commercial claims are incorrect or misleading, they could be considered misleading under Article 6(1)(b) of the UCPD, in case they could cause the average consumer to take a transactional decision that he/she would not have taken otherwise.

Trademark law may also be relevant since the issue of '*dual quality*' food products is inseparably linked to branded products (*i.e.,* fish fingers of a certain brand, not fish fingers in general). Marketing law literature emphasises the way a brand allows product differentiation, impacts consumer preferences, and enables cross-cultural marketing. Brands have been described as a promise and a relationship between company and consumer. Therefore, brands are far more than trademarks. Trademark law is governed in the EU by *Council Directive 89/104 to approximate the laws of the Member States relating to trademarks* (hereinafter, Trademark Directive) and *Council Regulation 40/94 on the Community trademark* (hereinafter, Trademark Regulation). While the Trademark Regulation establishes and regulates Community trademarks (CTM), which offer uniform protection throughout the EU, the Trademark Directive harmonises national trademark laws of the EU Member States, which retain the right to regulate the procedural aspects and the protection of trademarks acquired through use. Trademarks and brands historically provide a guarantee of origin and quality (and beyond that, for the purposes of marketing, also emotions, identity, self-worth, lifestyle, etc.), and enable companies to be identified by consumers, who are then able to associate a product made by a producer with a consistent level of quality. However, while trademark law protects the right of a company to use a mark, it does arguably not provide consumers with a legal guarantee of a certain level of quality and a legally enforceable guarantee. However, trademark scholars argue that brands allow businesses to reach consumers directly with messages regarding emotion, identity, and self-worth, such that consumers are no longer buying a product but buying a brand. There is evidence that consumers are ready to pay a substantial premium for goods of their preferred brand, even if they are the same as non-branded products. Here, it would need to be analysed in more depth whether branding (and the resulting consumer loyalty to brands) provides consumers under trademark law (and eventually competition law) with specific rights or whether companies marketing somehow inferior branded products commit an infringement.

In a joint statement, FoodDrinkEurope and the European Brand Association, AIM, on 13 September 2017 agreed with Commission President Juncker that inferior food for consumers in certain markets cannot be accepted. They stated that practices, which are not in line with existing EU legislation, if any, should be clearly addressed and, therefore, welcomed the Commission's commitment to improve and harmonise testing methodologies and look forward to the establishment of a multi-stakeholder dialogue to assess and address the perceptions that exist in some EU Member States.

In conclusion, EU legislation does not consider, in principle, the practice of '*dual quality*' branded foods to be misleading, as long as the products are safe, properly labelled and not falsely advertised as being identical to those sold in another EU Member State. Trademark law and competition law questions may also be relevant. The Commission announced, on 13 September 2017, that it will present in the coming weeks guidance on '*dual quality*' of products to "*help national consumer authorities make better use of existing EU consumer law to identify and address unjustified differences*". Affected stakeholders should monitor developments on this matter and participate actively in the debate on '*dual quality*' branded food products and interact with relevant EU institutions, trade associations and other affected stakeholders.

Recently Adopted EU Legislation

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/1589 of 19 September 2017 withdrawing the acceptance of the undertaking for one exporting producer under Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures*

- *Commission Implementing Regulation (EU) 2017/1578 of 18 September 2017 amending Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia*

- *Commission Implementing Regulation (EU) 2017/1570 of 15 September 2017 amending Implementing Regulation (EU) 2017/366 and Implementing Regulation (EU) 2017/367 imposing definitive countervailing and anti-dumping duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China and repealing Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures*

Customs Law

- *Commission Implementing Regulation (EU) 2017/1590 of 20 September 2017 determining the quantities to be added to the quantity fixed for the subperiod 1 January to 31 March 2018 under the tariff quotas opened by Regulation (EC) No 442/2009 in the pigmeat sector*

- *Commission Implementing Regulation (EU) 2017/1585 of 19 September 2017 opening and providing for the administration of Union tariff quotas for fresh and frozen beef and veal and pigmeat originating in Canada and amending Regulation (EC) No 442/2009 and Implementing Regulations (EU) No 481/2012 and (EU) No 593/2013*

- *Commission Implementing Regulation (EU) 2017/1586 of 19 September 2017 amending Regulation (EC) No 1067/2008 opening and providing for the administration of Community tariff quotas for common wheat of a quality other than high quality from third countries and derogating from Council Regulation (EC) No 1234/2007*

- *Commission Implementing Regulation (EU) 2017/1588 of 19 September 2017 amending Regulation (EC) No 2535/2001 as regards the concessions on dairy products originating in Canada*

- *Commission Implementing Regulation (EU) 2017/1582 of 18 September 2017 determining the quantities to be added to the quantity fixed for the subperiod from 1 January to 31 March 2018 under the tariff quota opened by Regulation (EC) No 536/2007 for poultrymeat originating in the United States of America*

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