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As impatience in Australia grows, the European Parliament calls on the Council of the EU to authorise the start of negotiations with Australia and New Zealand

On 26 October 2017, the European Parliament's plenary adopted the *European Parliament resolution of 26 October 2017 containing the Parliament's recommendation to the Council on the proposed negotiating mandate for trade negotiations with Australia* (hereinafter, the Resolution). In parallel, the EU is also pursuing the opening of negotiations for a free trade agreement (hereinafter, FTA) with New Zealand and the European Parliament adopted a similar resolution on the same day. While Australia and New Zealand are awaiting the completion of the EU's internal preparations, the key issues of the negotiations are shaping up.

In the 2015 EU trade and investment strategy document '*Trade for all*', the EU has noted that the Asia-Pacific region is crucial to European economic interests and that it would "*request authorisation to negotiate FTAs with Australia and New Zealand, taking into account EU agricultural sensitivities*". The EU had further stated that those FTAs would provide a solid platform for deeper integration with wider Asia-Pacific value chains. On 6 April 2017, the European Commissioner for Trade Cecilia Malmström and the Australian Minister for Trade Steven Ciobo announced the conclusion of discussions on the scope of the future EU-Australia Free Trade Agreement (see *Trade Perspectives*, Issue No. 8 of 21 April 2017). After the publication of the draft negotiating directives by the Commission in September 2017 (see *Trade Perspectives*, Issue No. 17 of 22 September 2017), and the recent recommendations by the European Parliament, the Council of the EU is now tasked with agreeing on the Council Decision authorising the opening of negotiations for an FTA with Australia. While this decision might still be adopted before the end of the year, formal negotiations are unlikely to begin before early 2018.

Currently, the trade relationship between Australia and the EU is governed by the '*EU-Australia Partnership Framework*' of October 2008, which aims at facilitating trade in industrial products between Australia and the EU by reducing technical barriers, including conformity assessment procedures. In March 2015, the EU and Australia concluded a legally binding political framework agreement, which also includes some provisions on trade, but no specific (preferential) market access provisions. Additionally, there is a number of bilateral sectoral agreements covering non-tariff measures for industrial products (*i.e.*, Mutual Recognition Agreements, or MRAs) and trade in wine. However, in terms of tariffs, the trade relationship has not been updated since the Uruguay Round of multilateral trade negotiations within the framework of the General Agreement on Tariffs and Trade (GATT), which lasted

from 1986 to 1994 and that lead to the establishment of the World Trade Organization (hereinafter, WTO) in 1995. Thereby, as the European Parliament's Resolution notes, Australia is among a group of only six WTO Members without preferential market access to the EU or negotiations in progress to that end.

Already in its recitals, the European Parliament's Resolution notes that "*the European agricultural sector and certain agricultural products, such as beef, lamb dairy products, cereals and sugar – including special sugars – are particularly sensitive issues in these negotiations*". With respect to beef and sugar, Australia is the world's third largest exporter. In light of such sensitivities, Recommendation 19(k) of the Resolution provides that measures could include "*potentially excluding from the scope of the negotiations the most sensitive sectors*" and "*the inclusion of a usable, effective, suitable and quick bilateral safeguard clause enabling the temporary suspension of preferences, if, as a result of the entry into force of the trade agreement, a rise in imports causes or threatens to cause serious injuries to sensitive sectors*". EU trade policy concerning EU market access for certain agricultural products has been criticised by trading partners and certain trade associations as overly protectionist in nature. At the same time, while EU producers of the relevant agricultural products are strongly lobbying the EU to maintain a certain level of protection, certain businesses, and ultimately consumers, would also benefit from enhanced market access for Australian agricultural products. A political solution will likely be necessary to bridge the gap of diverging interests in this sector.

Interestingly, one of the most detailed recommendations concerns the issue of trade and sustainable development. This is particularly noteworthy because the recitals of the European Parliament's resolution note that Australia is already quite advanced with respect to social and environmental sustainability issues. With respect to environmental sustainability, Recital J of the Resolution notes that "*Australia made significant commitments in TPP [*i.e.*, the Trans-Pacific Partnership Agreement] to promote the long-term conservation of certain species and to tackle illegal wildlife trafficking through enhanced conservation measures, and whereas it also laid down requirements for the effective enforcement of environmental protection and to engage in enhanced regional cooperation*". With respect to social and labour issues, Recital L of the Resolution notes that "*Australia has ratified and implemented the main international covenants on human, social and labour rights and on environmental protection and fully respects the rule of law*". Still, in Recommendation 19(g) of its Resolution, the European Parliament notes that "*a robust and ambitious sustainable development chapter is an indispensable part of any potential agreement*" and should include "*provisions for effective tools for dialogue, monitoring and cooperation, including binding and enforceable provisions which are subject to suitable and effective dispute settlement mechanisms, and consider, among various enforcement methods, a sanctions-based mechanism*". This recommendation appears to be in line with the European Parliament's current sanctions-based approach on such chapters, while the Commission still appears to be readjusting its own approach (see *Trade Perspectives*, Issue No. 15 of 28 July 2017). FTAs offer the parties the opportunity to grant preferential access to sustainable products, something that is likely to be considered to be non-compliant with WTO rules if attempted outside the scope of an FTA and when subjected to WTO disciplines in the context of WTO dispute settlement (particularly in relation to the discrimination between '*like products*' or based on production and processing methods).

Another critical area of the negotiations will likely be the services sector and related issues. Services have become an important aspect of EU-Australia trade. Trade in services makes up 38% of trade from the EU to Australia, while accounting for almost 50% of trade from Australia to the EU. This is significantly higher than the share of services in overall global trade flows, which stands at around 20%. Considering that Australia and the EU are both engaged in the plurilateral negotiations on trade in services towards the Trade in Services Agreement (TiSA), both sides will reportedly aim at going beyond those offers in their FTA negotiations. On 25 October 2017, the Australian Embassy in Brussels hosted the presentation of a study entitled "*Australia, the European Union and the New Trade Agenda*",

published by the Australian National University's Centre for European Studies. The book aims at informing public debate on the issues at stake and, apart from discussing matters relating to trade in agricultural products, has a clear focus on trade in services. The chapter on services in the book describes an ambitious outcome with respect to services as providing, *inter alia:* 1) Pre-establishment access for investment capital in all sectors without restriction, and post-establishment investment protection; 2) Opening-up access to public procurement tenders and contracts issued by sub-federal and regional governments and by removing all equity caps in inwards investment; 3) Strong regulatory cooperation powers and the pursuit of greater regulatory coherence through mutual recognition, and the recognition of differing certification requirements of equivalent intent in relation to services; 4) Mutual Recognition Agreements (MRAs) on professional qualifications; 5) A negative list approach (*i.e.*, all services sectors are to be liberalised except those on an '*exceptions*' list); 6) Liberalisation commitments on all the modes through which international services are traded internationally (*i.e.*, cross-border trade in services, commercial presence abroad through foreign direct investment (FDI), and the movement of natural persons).

The European Parliament's Resolution also provides a number of recommendations related to services. Most notably, the European Parliament calls for "*promoting cross-border data flows*" and for "*ambitious rules for cross-border data transfers*". Due to the importance of data flows for the provision of services, the issue of the digital ecosystem and cross-border data flows looks poised to become a key issue in the context of the services negotiations. So far, however, the EU has been rather reluctant to embrace ambitious provisions in this are due to to data protection and privacy concerns. This sentiment is also reflected in the European Parliament's Resolution, noting that "*data protection and privacy are not a trade barrier but fundamental rights, enshrined in Article 39 TEU and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union*".

Another key issue still remains unclear, namely the approach to investment and investment protection provisions. The proposed negotiating directives by the Commission note, in the section on the nature and scope of the agreement, that the "*Agreement should exclusively contain provisions on trade and foreign direct investment related areas applicable between the parties*" (see *Trade Perspectives*, Issue No. 17 of 22 September 2017). No indication is provided with respect to the fate of other kinds of investment and investment protection. The European Parliament's Resolution now expressly calls on the Commission to "*put forward a proposal as soon as possible about the general future architecture of trade agreements taking into account CJEU Opinion 2/15 on the EU-Singapore FTA, and to clearly distinguish between a trade and liberalisation of foreign direct investment (FDI) agreement, containing only issues that fall within the EU's exclusive competence, and a potential second agreement which covers subjects whose competences are shared with Member States*". At the launch of the "*Australia, the EU and the New Trade Agenda*" publication, the Australian Chief Negotiator for the for FTA with the EU reportedly stated that Australia did not yet have the impression that the Commission had decided on its new approach on investment and investment protection provisions. The issue should be addressed with urgency, as important EU trading partners should not be left wondering as to the EU's intentions.

In its Resolution, the European Parliament instructs its President to forward the resolution to the Council and, for information, to the Commission and to the governments and parliaments of the EU Member States. The Commission has, reportedly, also sent information about the upcoming FTA negotiations to EU Member States' Parliaments. A vote in the Council of the EU on the opening of negotiations does not appear to have been scheduled yet, but will likely be on the agenda between November and December 2017. Formal negotiations are then unlikely to begin before 2018.

An ambitious negotiating schedule can be expected, since, in the context of the G20 Summit during the summer of 2017, the President of the Commission Jean-Claude Juncker and the President of the Council of the EU Donald Tusk have reportedly agreed with Australia's Prime Minister Malcolm Turnbull to aim at a conclusion of negotiations by March 2019.

Around the same time, the two-year period of '*Brexit*' negotiations between the EU and the UK will also come to an end. Taking into account the significant share of the UK in the EU trade with Australia, the implications of '*Brexit*' will certainly have to be factored-in during the negotiations. Considering the elaborate preparation of negotiations and the ambitious schedule, all interested stakeholders should already carefully analyse opportunities and risks, get involved within the relevant *fora*, and engage with their respective interlocutors in the EU and in Australia.

The Court of Justice of the EU ruled that an international agreement on Geographical Indications (GIs) falls under the EU's exclusive trade competence

On 25 October 2017, the Court of Justice of the European Union (hereinafter, CJEU) published its ruling in case C-389/15 on the action for annulment of the '*Council decision authorizing the opening of negotiations on a revised Lisbon Agreement on Appellation of Origin and Geographical Indications*' of 30 March 2015. The CJEU determined that the negotiations to revise the so-called Lisbon Agreement fall under the EU's exclusive competences, as part of the EU's common commercial policy. The CJEU based its ruling on the assumption that the revised Lisbon Agreement for the protection of Appellation of Origin and Geographical Indications (hereinafter, Revised Agreement) has direct and immediate effect on international trade and is essentially intended to facilitate and govern trade between the EU and third States. In its judgement, the CJEU confirms the reasoning of its opinion, issued on 16 May 2017, on the division of competences between the EU and its Member States, with respect to the EU-Singapore Free Trade Agreement (hereinafter, EUSFTA).

The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (hereinafter, Lisbon Agreement) was signed on 31 October 1958. The Lisbon Agreement constitutes a special agreement within the meaning of Article 19 of the Paris Convention for the Protection of Industrial Property (hereinafter, Paris Convention). The Paris Convention was one of the first intellectual property treaties. It provides rules for the protection of all industrial property (*i.e.,* patents, utility models, industrial designs, trademarks, service marks, trade names and indications of source or appellations of origin) and the repression of unfair competition. Furthermore, it covers not only industry and commerce as such, but also agriculture, extractive industries and all manufactured or natural products. Article 19 of the Paris Convention provides the parties with the right to enter into separate special agreements among themselves, aiming at the protection of industrial property. The Lisbon Agreement has the objective to protect the appellation of origin (*i.e.*, "*the geographical denomination of a country, region, or locality which serves to designate a product originating therein the quality or characteristics of which are due exclusively or essentially to the geographical environment*") of products of the other Parties of the Lisbon Agreement on their respective territories. The Lisbon Agreement ensures that appellations of origin receive protection in all Parties' jurisdictions insomuch as they are protected in their country of origin. It contains provisions related to the qualification as an appellation of origin and to their protection. Moreover, it established an International Register of Appellations of Origin, managed by the World Intellectual Property Organization (WIPO).

In September 2008, the Parties to the Lisbon Agreement formed a working group to prepare a draft of a Revised Agreement of the Lisbon Agreement. The draft Revised Agreement preserves the institutional, procedural and substantive provisions of the Lisbon Agreement, but introduced some additions and clarifications. One of the main additions and clarifications concerns the extension of the scope of protection to geographical indications (hereinafter, GIs). GIs are distinctive signs used to identify a product as originating in the territory of a country, region or locality where its quality, reputation or any other characteristic are linked to its geographical origin. GIs are relevant property rights because they have the potential to add value and promote rural socio-economic development. Any change with respect to the protection of GIs could have an impact on businesses that depend on the use of GIs as a distinctive advantage of their business. Other additions and clarifications to the Lisbon

Agreement include the procedural means for implementing the protection provided by the agreement, and the possibility for intergovernmental organisations, such as the EU, of acceding to the agreement.

The draft Revised Agreement was agreed by the working group in October 2014 and a diplomatic conference was scheduled for May 2015 to consider and adopt the draft Revised Agreement. Invitations to attend were extended to the 28 Parties to the Lisbon Agreement and also to two '*special*' delegations, including a delegation from the EU, and a number of '*observer*' delegations. Therefore, on 30 March 2015, the European Commission (hereinafter, Commission) submitted a draft for a decision by the Council of the EU (hereinafter, Council) authorising the opening of negotiations for a Revised Agreement. In the recommendation, the Commission's proposed decision was twofold: Firstly, it proposed to the Council to base its decision on Article 207 of the Treaty of the Functioning of the EU (hereinafter, TFEU), on the common commercial policy, and on Article 218(3) and (4) of the TFEU, concerning agreements with one or more third countries or international organisations. The Commission based this recommendation on the exclusive competence conferred on the EU in the field of the common commercial policy through Article 3(1) of the TFEU and the aim and the content of the Lisbon Agreement. Secondly, the Commission proposed to the Council to authorise the Commission to conduct the negotiations on behalf of the EU. On 7 May 2015, the Council adopted its decision. However, it based this decision on Article 114 of the TFEU on the approximation of national laws. In the contested decision, the Council stated that "*The [draft] revised agreement establishes a system of protection for appellations of origin and geographical indications within the contracting parties through a single registration. This subject matter is harmonised by internal EU legislation as regards agricultural appellations and indications and falls therefore within the shared competence of the Union (as regards agricultural appellations and indications) and of its Member States (as regards non-agricultural appellations and indications, and fees)*". On 20 May 2015, the diplomatic conference in Geneva, attended by the EU delegation, adopted the revising act of the Lisbon Agreement. It was then opened for signatures the day after its adoption.

Shortly thereafter, on 17 July 2015, the Commission initiated proceedings to contest the Council Decision of 7 May 2015. It submitted two petitions to the CJEU and requested: 1) The annulment of the Council's Decision; and 2) To maintain the effects of the contested decision until the entry into force of a new decision by the Council pursuant to Article 218(3), (4) and (8) of the TFEU. In its arguments submitted to the CJEU, the Commission stated that the commercial aspects of intellectual property were included in the field of the common commercial policy in accordance to Article 207(1) of the TFEU. Therefore, the EU had exclusive competence to negotiate and conclude international agreements concerning intellectual property, where it was established that a specific link with international trade existed. For the Commission, supported by the European Parliament, the Revised Agreement, as well as the Lisbon Agreement, had a specific link with international trade.

In its findings, the CJEU focused its reasoning on whether the draft Revised Agreement fell within the field of the common commercial policy. First, the CJEU clarified the framework of the common commercial policy. It stated that such policy is "*to be based on uniform principles*", particularly regarding the commercial aspects of intellectual property. Furthermore, it is "*to be conducted in the context of the principles and objectives of the [EU's] external action*". Therefore, and based on the prior jurisprudence of the CJEU (Judgement C-414/11 of 18 July 2013 *Daiichi Sankyo and Sanofi-Aventis Deutschland* and Opinion 2/15 of 16 May 2017 *Free Trade Agreement with Singapore*), the common commercial policy related to trade with third countries, rather than trade within the internal market. Secondly, the CJEU stated that international agreements that are related to the protection and safeguarding of intellectual property rights on the territory of the Parties to the Lisbon Agreement can fall within the common commercial policy, provided that such agreements meet two conditions: 1) The agreement is essentially intended to promote, facilitate or govern trade between the EU and third countries; and 2) The agreement has direct and immediate effect on trade.

Regarding the first condition (*i.e.*, that the agreement is essentially intended to promote, facilitate or govern trade between the EU and third countries), the CJEU, due to the lack of an express statement in the draft Revised Agreement, analysed the aim of the draft Revised Agreement in light of the international agreement forming its context. The CJEU noted that the Revised Agreement provided amendments to the Lisbon Agreement, which is in itself an agreement based on Article 19 of the Paris Convention. In its preamble, the Paris Convention states its aim "*to protect industry and trade and to contribute to ensuring the fairness of commercial transactions between the States which are party to it*". Therefore, the CJEU determined that the Paris Convention provided an equivalent and homogenous protection of industrial property rights and was designed to enable holders of intellectual property to participate in international trade on an equal footing. The CJEU concluded that, since the main objective of the draft Revised Agreement was to strengthen the system established by the Lisbon Agreement and to extend the specific protection provided to GIs, thereby supplementing the protection that the Paris Convention provides to the various forms of industrial property, the draft Revised Agreement must fall within the framework of the aim of the Paris Convention. Therefore, the CJEU considered that the Lisbon Agreement must be regarded as "*being intended to facilitate and govern trade between the [EU] and the third States party to the Lisbon Agreement*".

Regarding the second condition (*i.e.*, that the agreement has direct and immediate effect on trade), the CJEU analysed three provisions, which form the bases of the system of reciprocal protection of appellation of origin and of GIs envisaged by the draft Revised Agreement. First, each contracting party must establish a body of rules preventing the appellations of origin and GIs, that are already protected in the parties' territories, from being used in ways that are likely to damage the interests of their holders, or in ways detrimental to the reputation of the product. Second, each contracting party must establish rules of procedural law that allow any interested natural or legal person to secure observance of the protection and to bring legal proceedings against persons alleged to have infringed the protection of the appellation of origin or GI. Third, the Revised Agreement would allow the holders of the appellations of origin or GIs to invoke protection as a result of the single registration mechanism, which is valid in all Parties to the Agreement. In its conclusion, the CJEU focused on the first two provisions. It determined that those provisions would have immediate effects on trade between the EU and the third State concerned, by providing all necessary tools to secure effective protection, "*under homogeneous substantive and procedural conditions*," if appellations of origin or GIs were used in an unfair and harmful manner.

The assessment of the effects of the draft Revised Agreement is supported by the analysis conducted by the CJEU in its Opinion 2/15, with respect to the competences for negotiating and concluding the EUSFTA (see *Trade Perspectives*, Issue No. 10 of 19 May 2017). In its Opinion 2/15, the Court had stated that "*in the light of the key role that the protection of intellectual property rights plays in trade in goods and services in general, and in combatting unlawful trade in particular, are such as to have direct and immediate effects on trade (...)*". In the case at stake, in light of the approach taken in the EUSFTA Opinion, the CJEU stated that "*a draft international agreement providing for the establishment of a registration mechanism for [GIs] of the contracting parties and of a system of reciprocal protection of those indications against acts of unfair competition, was such as to have direct and immediate effects on international trade*". In its conclusion, the CJEU determined that the draft Revised Agreement is essentially intended to facilitate and govern trade between the EU and third countries and that it is such as to have direct and immediate effects on such trade. Therefore, the negotiations of the Revised Agreement fall under the EU's exclusive competence conferred to the EU in the field of the common commercial policy. Consequently, the CJEU annulled the decision and decided to maintain the effects of the contested decision until the entry into force (within a reasonable period) of a new decision of the Council based on Articles 207 and 218 of the TFEU.

The Council now has two months to appeal the judgement. The ruling by the CJEU brings clarity for international agreements related to industrial property and the protection of GIs. GIs in any international agreement will fall under the EU's exclusive competence, insomuch as those agreements can essentially be deemed to intend to promote, facilitate or govern trade, and to the extent that they have a direct and immediate effect on trade, including the protection of GIs in free trade agreements. In light of the numerous trade agreements currently under negotiation, which include provisions on the protection of GIs, this judgement reinforces the Court's jurisprudence on the EU's exclusive trade competences. The practical relevance becomes apparent at the moment of ratification and should ensure swifter entry into force once negotiations are completed. All interested stakeholders should carefully analyse the judgment and its potential consequences in view of other ongoing trade negotiations.

A growing number of Front-of-Pack (FoP) nutrition labelling schemes underlines the need for global consistency

At the 44th Session of the *Codex* Committee on Food Labelling (hereinafter, CCFL) in Asunción, Paraguay, on 16 to 20 October 2017, at the invitation of the Government of the Republic of Paraguay and the Government of Canada, delegates discussed a *Discussion Paper on Front-of-Pack Labelling* (document number CX/FL 17/44/7). In the conclusions of the session, the CCFL agreed to start new work to develop draft guidelines on Front-of-Pack Nutrition Labelling (hereinafter, FOPL) systems for approval by the *Codex Alimentarius* Commission. FOPL is a topic that has become increasingly relevant for regulators and industry alike. Within the EU, the European Commission (hereinafter, Commission) is required to submit a report on the effects of FOPL schemes to the Council of the EU and the European Parliament by mid-December 2017. In the meantime, a number of multinational companies in the food sector have launched a new "*Evolved Nutrition Label Initiative*" (ENLI) earlier this year.

The *Codex Alimentarius* Commission is a joint body of the World Health Organisation (hereinafter, WHO) and the Food and Agriculture Organisation of the United Nations (hereinafter, FAO). The main objective of Codex Alimentarius is to protect consumers and facilitate global trading in foods. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), recognises the *Codex Alimentarius* Commission as the competent international body in terms of standardisation of foods, both for purposes of guaranteeing safety and for ensuring that fair practices apply to their trade. The WTO Agreement on Technical Barriers to Trade (TBT Agreement) acknowledges international standardisation. Additionally, the coordination of all work on food standards undertaken by governmental and non-governmental international organisations is promoted by the *Codex Alimentarius* Commission and its specific Committees, such as the CCFL. Many countries are looking to Codex for clear and unambiguous guidance on areas such as nutrition labelling.

At the previous, the 43rd session of the CCFL, the lack of global consistency and guidance on FOPL was identified as an issue that Codex may need to consider. It was noted that the proliferation of different FOPL systems could create problems for export and trade and that some global consistency in approach should be sought through the CCFL. An electronic working group (EWG), chaired by Costa Rica, was established, with the mandate focussing on three broad aspects: 1) Stock-taking on the existing FOPL systems; 2) The need for development of principles for FOPL; and 3) Preparation of a discussion paper on FOPL. This discussion paper, which was discussed at the most recent CCFL meeting, reports that a significant increase in the provision of simplified nutrition information on food labels has been observed in recent years. For the purposes of improved consumer understanding to support healthier food choices, food labelling (including simplified nutrition labelling) has been identified as an important tool to help reduce the increasing incidence of obesity and the chronic non-communicable diseases that are occurring worldwide. The WHO is currently also

developing guidance for countries considering front-of-pack labelling systems. It is essential that there be coherence in the work of WHO and Codex. The discussion paper highlights that it was not the intention of the work on FOPL to establish a specific global FOPL scheme.

In Paraguay, the 44th session of the CCFL expressed broad support for developing guidance on the use of simplified FOPL and noted the following aspects: 1) Currently, there are no international guidelines on best practices for FOPL and a multiplicity of FOPL systems can lead to technical barriers to trade. New work on FOPL systems would provide clear and transparent scientific guidance to governments wishing to implement this type of labelling and would help in harmonisation of FOPL systems and thus facilitate international trade; 2) The new work should include a definition for FOPL and fundamental principles for monitoring and assessing the effectiveness of such systems; 3) The FOPL systems should be: scientifically substantiated; voluntary; and apply exclusively to processed foods, possibly with a number of exceptions; 4) FOPL should provide consumers with accurate and transparent nutrition information, and in a format that helps them to easily understand the essential nutrition information in order to make informed decisions; 5) There was limited published evidence on FOPL and some countries were in the process of publishing such information. However, there was increasing evidence that FOPL schemes had positively impacted consumer behavioural change, and industry had also positively changed its food formulations; and 6) Complementary consumer awareness, communication, education, and monitoring and evaluation strategies were essential factors in assuring the success of any FOPL system.

The following terms of reference were agreed for the development of specific guidelines that may or may not be included within the *Guidelines for Nutrition Labelling* (CAC / GL 2-1985): 1) Undertake a review of the *Guidelines on Nutrition Labelling* and any other relevant *Codex* guidelines, based on four key aspects (*i.e.*, purpose and scope; definition of FOPL; general principles; and steps to consider/other aspects in the development of FOPL systems); 2) Prepare proposed draft guidelines to be circulated for comments and for consideration at the next session of the CCFL (*i.e.*, the 45th session); and 3) Make recommendations on the placement of the guidelines.

The current (to be '*developed*') *Guidelines on Nutrition Labelling* only state, in section 4 thereof on '*Supplementary Nutrition Information',* that such information "[*i]s intended to increase the consumer's understanding of the nutritional value of their food and to assist in interpreting the nutrient declaration. There are a number of ways of presenting such information that may be suitable for use on food labels*". Furthermore, "[*t]he use of supplementary nutrition information on food labels should be optional and should only be given in addition to, and not in place of, the nutrient declaration, except for target populations who have a high illiteracy rate and/or comparatively little knowledge of nutrition. For these, food group symbols or other pictorial or colour presentations may be used without the nutrient declaration*". Finally, "*[s]upplementary nutrition information on labels should be accompanied by consumer education programmes to increase consumer understanding and use of the information*".

A number of countries have adopted or are planning to adopt FOPL systems, either on a voluntary or mandatory basis. In the EU, the UK has developed a voluntary '*traffic light*' scheme and, in France, several voluntary colour-coded schemes were tested. On 31 October 2017, one scheme, the so-called NutriScore, was finally recommended by the French Government (see *Trade Perspectives*, Issue No. 21 of 20 November 2015, Issue No. 6 of 24 March 2016 and Issue No. 9 of 5 May 2017). In South America, since 2015, Chile requires mandatory warning messages in the shape of a black octagon in the form of a STOP sign to be placed on the front-of-pack, with the text '*High in…*' when food products exceed certain levels of energy, sodium, sugars or saturated fats. Peru has recently adopted similar measures, which it notified to the WTO TBT Committee in September 2017 (*i.e.*, *Manual on health warnings, prepared pursuant to the Regulations implementing Law No. 30021 on the promotion of healthy eating among children and adolescents*). Furthermore, Uruguay notified

a draft Decree on labelling for packaged foods (*i.e.*, *Proyecto de decreto relativo a Rotulado de Alimentos Envasados*) to the WTO TBT Committee on 15 June 2017. The draft measure requires any prepacked foods, available for consumption in Uruguay, to bear an octagonal warning label on the front-of-pack with the writing '*exceso de*' (in English: '*excess of*') whenever the final food's content in sodium, sugars, fats or saturated fats, which have been added during processing, or which have been added to one of its ingredients, exceeds certain values established in the draft decree. This is in addition to the '*stop sign*' feature of the symbol that appears to imply that there is a danger in consuming the product. Both descriptions appear to intend convincing consumers not to buy a certain product at all, rather than just inciting a conscious and informed choice. Similar to red traffic lights symbols, they could cause fear among consumers.

The manner through which Chile (see *Trade Perspectives*, Issue No. 16 of 15 September 2015), Peru and Uruguay pursue their legitimate public heath objective appears to be incompatible with the list of prohibited claims under section 3 of the *Codex General Guidelines on Claims* (CAC/GL 1-1979). For instance, Section 3.5 of these guidelines prohibits "*claims which could give rise to doubt about the safety of similar food or which could arouse or exploit fear in the consumer*". '*High in*' warnings, such as those in the Chilean and Peruvian legislation, or even '*excess of*', as in Uruguay's draft measure, should arguably be avoided, as they are not foreseen by the applicable *Codex Guidelines on Nutrition Labelling*, and they risk demonising some foods, whose moderate consumption can be part of a healthy diet. In a hypothetical comparison to EU law, such warning measures would be classified as '*non-beneficial*' nutrition claims. It must be noted that nutrition claims are, by nature, '*beneficial*' claims, since the operator that places them on its products intends to highlight something nutritionally '*positive*'. This is the reason why '*non-beneficial*' nutrition claims (like '*rich in fat*') are not covered by the scope of *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods* (hereinafter the Nutrition and Health Claims Regulation, NHCR).

Another argument is that the *Codex Guidelines on Nutrition Labelling* establish the principle that the information contained in the nutrient declaration "*should not lead consumers to believe that there is exact quantitative knowledge of what individuals should eat in order to maintain health, but rather to convey an understanding of the quantity of nutrients contained in the product*". According to the *Codex Guidelines on Nutrition Labelling*, the overall purpose of nutrition labelling should be to provide the consumer "*with information about the nutrient content of a food so that a wise choice of food can be made*". In any case, "*nutrition labelling cannot describe a product or present information about it which is in any way false, misleading, deceptive or insignificant in any manner*". As for "*supplementary nutrition information*", Section 4.2 of the *Codex Guidelines on Nutrition Labelling* states that this should be intended "*to increase the consumer's understanding of the nutritional value of their food and to assist in interpreting the nutrient declaration*". STOP signs arguably go beyond the information on nutrient content of food and try to convince consumer not to buy it.

Although relatively novel in the food sector, Chile, Peru and Uruguay's measures are part of a trend of public policies aimed at tackling lifestyle risks by conveying certain information to the public. While warning messages that reduce the visual appeal of the packaging of products are ubiquitous in the tobacco sector, these types of messages are now also gradually being extended to the alcoholic beverages and food sectors.

The objective of the new work at *Codex* level must be to develop general guidelines that provide clear and transparent scientific guidance on the implementation of FOPL. In the development of such guidelines, it must be noted that the existing guidelines and principles of the *Codex Guidelines on Nutrition Labelling* and *Codex General Guidelines on Claims* must be respected, in particular, the prohibition of claims "*which could arouse or exploit fear in the consumer*". In terms of scope, there should be a reference that supplementary FOPL must be optional (*i.e.*, voluntary in nature) and only given in addition to, rather than in place of, the nutrition declaration.

In the EU, according to Article 35(2) of *Regulation (EU) 1169/2011 on the provision of food information to consumers* (hereinafter, FIR), EU Member States may recommend to food business operators the use of one or more additional (voluntary) forms of expression or presentation of the nutrition declaration that they consider as best fulfilling a number of requirements, including that they be based either on the harmonised reference intakes, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients. There are, for example, doubts that the recommended French NutriScore FOPL scheme is in line with this requirement (see *Trade Perspectives*, Issue No. 9 of 5 May 2017).

The FIR requires the Commission to adopt, by the end of 2017, a report on the use of those additional forms of expression and presentation of the nutrition declaration, on their effect on the internal market, and on the advisability of further harmonisation. The Commission announced in October 2017 that it is still in the process of preparing this report and, therefore, that no indication of the subsequent steps that may be considered in the future can yet be given. Earlier this year, in March 2017, multinational companies in the food sector, including the Coca-Cola Company, Mars, Mondelez International, Nestlé, PepsiCo and Unilever, launched the "*Evolved Nutrition Label Initiative*" (hereinafter, ENLI) in order to introduce a traffic light labelling scheme, similar to that in operation in the UK (but with reference values including portions), throughout Europe. However, the European food sector appears to be divided over the benefits of introducing a European traffic light labelling scheme. The European Dairy Association (EDA), for instance, reportedly criticised the ENLI scheme, claiming that it focusses on negative qualities, fails to acknowledge the positive nutritional benefits of products, and does not recognise the importance of nutrient-dense foods as recommended in dietary recommendations, nor does it help consumers to compose a balanced and varied diet with nutritious foods.

With a growing number of systems globally, it becomes increasingly important that some consistency is maintained (or achieved) at a global level. This should ensure that the impediments to trade, which may arise from different approaches, be minimised. Stakeholders in the food sector are advised to monitor developments on FOPL and to take action to ensure that their legitimate interests are voiced and represented within all relevant *fora*. These include the *Codex*, the WTO TBT Committee and all other instances where opportunities are given to comment on the new *Codex* work on FOPL and on the eventual amendment of the *Codex Guidelines on Nutrition Labelling*, as well as the forthcoming report by the Commission.

Recently Adopted EU Legislation

Customs Law

- *Commission Delegated Regulation (EU) 2017/1965 of 17 August 2017 amending Delegated Regulation (EU) 2016/1237 as regards the nature and type of information to be notified for licences in the rice sector*

- *Commission Implementing Regulation (EU) 2017/1964 of 17 August 2017 amending Implementing Regulation (EU) 2016/1239 as regards certain rules on time limits and notifications of the quantities covered by licences in the rice sector*

- *Commission Implementing Regulation (EU) 2017/1958 of 26 October 2017 on the issue of licences for importing rice under the tariff quotas opened for the October 2017 subperiod by Implementing Regulation (EU) No 1273/2011*

Trade Remedies

- *Commission Implementing Regulation (EU) 2017/1982 of 31 October 2017 re-imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam and produced by Dongguan Luzhou Shoes Co. Ltd, Dongguan Shingtak Shoes Co. Ltd, Guangzhou Dragon Shoes Co. Ltd, Guangzhou Evervan Footwear Co. Ltd, Guangzhou Guangda Shoes Co. Ltd, Long Son Joint Stock Company and Zhaoqing Li Da Shoes Co., Ltd, implementing the judgment of the Court of Justice in Joined Cases C-659/13 and C-34/14*

Food and Agriculture Law

- *Commission Regulation (EU) 2017/1981 of 31 October 2017 amending Annex III to Regulation (EC) No 853/2004 of the European Parliament and of the Council as regards temperature conditions during transport of meat*

- *Commission Implementing Regulation (EU) 2017/1963 of 9 August 2017 amending Implementing Regulation (EU) No 615/2014 laying down detailed rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council and Regulation (EU) No 1308/2013 of the European Parliament and of the Council in respect of work programmes to support the olive oil and table olives sectors*

- *Commission Delegated Regulation (EU) 2017/1962 of 9 August 2017 amending Delegated Regulation (EU) No 611/2014 supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council as regards the support programmes for the olive-oil and table-olives sector*

- *Commission Delegated Regulation (EU) 2017/1961 of 2 August 2017 amending Regulation (EC) No 606/2009 as regards certain oenological practices*

Other

- *Council Decision (EU) 2017/1960 of 23 October 2017 on the signing, on behalf of the Union, and provisional application of the Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Mauritius*

- Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Mauritius

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