FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 9 of 4 May 2018

Entering the second phase to avoid a global '*trade war*'? Trading partners negotiate bilateral exemptions or request WTO consultations concerning US tariffs on aluminium and steel

On 30 April 2018, three hours before the expiry of the deadline, US President Donald Trump extended the temporary exemptions from the recently-introduced import tariffs on steel and aluminium granted to Canada, Mexico and the EU until 1 June 2018, postponing their application for 30 days. At the same time, Members of the World Trade Organization (hereinafter, WTO) are elevating the issue to the multilateral level. On 5 April 2018, China filed a request for WTO dispute settlement consultations on the matter. On 16 and 17 April 2018, respectively, the EU and India requested consultations with the US within the Committee on Safeguards under Article 12.3 of the Safeguards Agreement. Additionally, the EU indicated that it would continue negotiating a definitive exemption to the steel and aluminium import tariffs with the US but is also ready to take '*retaliatory*' measures should the US decide to impose the tariffs.

On 23 March 2018, the US introduced import tariffs of 25% and 10%, respectively, on certain steel and aluminium products, from all countries except Argentina, Australia, Brazil, Canada, the EU, Mexico and South Korea. On 30 April 2018, US President Donald Trump announced that the US had reached an '*agreement in principle*' with Argentina, Australia and Brazil and those countries would be permanently exempted from the tariffs. The details of these agreements would be finalised by 1 June 2018. The specific terms and conditions of these agreements were not made public. While Argentina announced that it had agreed to a quota limiting its steel and aluminium exports to 180,000 metric tonnes per year, Brazil and Australia did not reveal any details of their agreements with the US. Canada, Mexico and the EU were originally granted a temporary exemption until 1 May 2018. Mexico, Canada and the US are in the process of renegotiating the North American Free Trade Agreement (hereinafter, NAFTA) and the US suggested that both Canada and Mexico could be granted a permanent exemption if a new and '*fair*' NAFTA were to be agreed. Mexico, Canada and the US aim at finishing NAFTA negotiations by the end of May. However, Mexico and Canada already indicated that imposing a quota would undermine fair trade. Additionally, Canada pointed out that any discussion on the import tariffs on steel and

aluminium should be separated from the NAFTA renegotiations. On the basis of the recently renegotiated Korea-US Free Trade Agreement, South Korea is now exempt from the tariffs. In the agreement, Korea agreed on a quota that limits its steel exports to the US to about 2.7 million metric tonnes per year. This agreement could be considered as a so-called voluntary export restraint (hereinafter, VER), a trade measure that is prohibited by Article 11 of the WTO Agreement on Safeguards and under Article XI of the General Agreement on Tariffs and Trade (hereinafter, GATT). Trading partners could challenge this restriction under WTO law.

The GATT provides WTO Members with rules that allow them to take emergency actions to restrict imports, so-called '*safeguard measures*', to prevent injury to domestic industry from a '*sudden*' surge of imports. However, bilateral VERs are considered '*grey area*' measures and are prohibited under WTO law. Although Article XIX of the GATT 1947 (the so-called '*escape clause*') was the remedy provided for industries facing injurious import competition, it did not clearly specify the conditions under which '*safeguards measures*' may be imposed. As a consequence, VERs were commonly used by trading partners as a protectionist measure. The nature of the VERs was described in a 1984GATT report. In this report, the Safeguard Committee pointed out that countries that accepted VERs did so because, "*they felt they had little choice and that the alternative was, or would have been, unilateral actions, countervailing actions, etc., involving greater harm to their exports in terms of both quantity and price*". Additionally, the report concluded that the affected exporting countries did not seek a remedy under GATT dispute settlement procedures "*because these were considered cumbersome and time-consuming and there was fear that the industries involved could suffer serious, and perhaps irreparable, damage in the meantime*". The WTO Uruguay Round made reforms to the GATT and introduced the Agreement on Safeguards. The new rules on safeguards prohibit '*grey-area*' measures, and set a time limit (so-called '*sunset clause*') on all safeguard actions. Article 11 of the Agreement on Safeguards states that "*a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members*". In 1984, the WTO Director-General stated that '*voluntary*' export restraints were contrary to the rules of the GATT and that they were "*only '*outside the General Agreement*' in the sense that governments have not brought them formally to the GATT for examination*". As a consequence, VERs were completely phased out by the end of 1999 and the EU was the last WTO Member to phase out its voluntary restrictions on car imports from Japan. Arguably, the recent decisions by Korea and Argentina to '*voluntarily*' restrict their exports on steel and aluminium to the US, are contrary to, and therefore, illegal under WTO rules. The US leaves little choice to trading partners when it states that countries could only choose between quotas or tariffs to maintain trade.

At the end of March, the EU successfully negotiated a temporary exemption. Since then, the EU has been engaged in further negotiations with the US and has recently stated its intention to continue its efforts to negotiate a definitive exemption. Recently, French President Emmanuel Macron and German Chancellor Angela Merkel held meetings with US President Trump, discussing, *inter alia*, a permanent exemption from the tariffs. The US Administration did not make any concessions or provide any guarantee. In a press release of 1 May 2018, the EU underlined that the US decision prolonged market uncertainty and was already affecting business decisions. The Commission also indicated that the EU would not negotiate under "*threats*". On 27

April 2018, US Commerce Secretary Wilbur Ross stated that countries subject to the import tariffs, including trading partners subject to temporary exemptions, would be able to choose between quotas or the tariffs. On 26 April 2018, the EU started to implement a monitoring system allowing the tracking of aluminium imports, and is also monitoring steel imports. The Commission believes that there was a risk that imports of steel and aluminium into the EU would increase due to the US import tariffs. If such import surges were to be determined, the EU could decide to restrict imports of aluminium or steel through safeguard measures. Furthermore, the EU already agreed on a list of US products, which could be subject to increased tariffs if the US decided to permanently impose the import tariffs on steel and aluminium on the EU.

The US based the new tariffs on steel and aluminium on an investigation conducted under Section 232 of the US Trade Expansion Act 1962. Under this Section, investigations are focused on the effect of imports on national security. This approach follows recommendations by the US Department of Commerce (hereinafter, DOC) after an investigation initiated in January 2017 and concluded in January 2018 (for more detailed information on the background of the measure, see *Trade Perspectives,* Issue No. 5 of 9 March 2018). While Section 232 does not define '*national security*', the DOC recognised two main elements in its interpretation: 1) '*National defence*' (*i.e*., defence of the US directly and of its ability to project military capabilities globally); and 2) '*Critical industries*' (*i.e*., the general security and welfare of certain industries, beyond those necessary to satisfy national defence requirements, that are critical to the minimum operations of the economy and government). The DOC had determined that steel was essential for '*national defence*' and for critical US infrastructural needs, with unfair competition and increased imports putting them at risk. Similarly, the DOC had stated that an increase of aluminium imports was putting "*the domestic aluminium industry at risk of becoming unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production*".

On 5 April 2018, China requested WTO dispute settlement consultations with the US "*on certain measures on steel and aluminium products*" concerning the recently introduced tariffs. China argues that the import tariffs on steel and aluminium, imposed by the US, constitute *"safeguard measures in substance*". China considers that the US violated the WTO Agreement on Safeguards, arguing that the US had "*failed to make proper determination and to provide reasoned and adequate explanation"* of the following terms, provided under the Agreement on Safeguards: 1) "*unforeseen developments*"; 2) imports "*in such increased quantities*" and "*under such conditions*"; and 3) "*cause or threaten to cause serious injury to domestic producers*". China also claims that the US violated Article II:1(a) and (b) of the General Agreement on Tariffs and Trades 1994 (hereinafter, GATT) concerning its Schedules *of Concessions*, and Article I:1 of the GATT, the so-called Most Favoured Nation (hereinafter, MFN) clause, due to the "*the selective application by the* [US] *of the additional import duties on certain steel and aluminium products originating in different Members, including providing exemption or applying alternative means*". On 13 April 2018, the US responded to China's request for consultations, accepting the request, but specifying that its decision was "*without prejudice to the US view that the tariffs imposed pursuant to Section 232 are issues of national security not susceptible to review or capable of resolution by WTO dispute settlement, and that the consultations provision in the Agreement on Safeguards is not applicable*". The US argues that its decision to impose import tariffs on steel and aluminium was necessary to adjust such imports, which threatened to impair US national security,

and which, as a political matter, was not susceptible to review or capable of resolution by WTO dispute settlement. On 18 April 2018, Thailand and Russia requested to join the consultations. Both countries are currently subject to the US import tariffs on steel and aluminium.

The EU and India have submitted, separately, requests for consultations under Article 12.3 of the WTO Agreement on Safeguards. A WTO Member intending to apply safeguard measures must provide "*adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned*". The EU argues that US import tariffs measures were "*in essence safeguard measures*" and that the US had failed to notify them to the WTO Committee on Safeguards and to consult the EU on the measures. Therefore, the EU "*suggests holding the consultations as soon as possible*". Similarly, India seeks to exercise its right to hold consultations on the specifics of the measures and its right to determine the appropriate trade compensation with the US. On 18 April 2018, the US submitted its communications in response to the requests by the EU and India and expressed that the US was available to discuss the matter. However, "*any discussions regarding the Proclamations would not be under the Agreement on Safeguards and would be without prejudice to* [the US] *view that the Proclamations are not safeguard measures*".

The US import tariffs on steel and aluminium continue to cause uncertainty and appear to be already distorting trade. While affected countries are taking the issue to the WTO and continue their negotiations with the US, these approaches are unlikely to deliver any straightforward and speedy solution. WTO dispute settlement proceedings would likely span over several years, thereby not providing any immediate relief for steel and aluminium exporters around the world. Additionally, there is also a clear risk that WTO dispute settlement proceedings might not be able to move forward once they reach the appeal stage, as the US has been blocking the procedure of appointing new judges to the WTO Appellate Body, or extending the term of the current judges, respectively. That being said, it is critical that WTO Members continue to resort to the rules and procedures of the WTO and preserve the centrality of the multilateral trading system. The very idea that some countries, including the EU, could prefer or suggest that the issue be addressed bilaterally and through the negotiation with the US of dubious solutions such as VERs, tariff rate quotas and/or waivers that would get them '*off the hook*', but result in blatant trade discriminations and further undermine the WTO system, is in itself disturbing. Understandable commercially, perhaps, but highly worrying and extremely short-sighted. Let us hope that rational approaches will prevail.

The EU and Mexico reached an '*agreement in principle*' to update their existing trade agreement

On 21 April 2018, the EU and Mexico reached an '*agreement in principle*' on the terms to update and modernise the trade part of their Economic Partnership, Political Coordination and Cooperation Agreement (hereinafter, Global Agreement), which has been disciplining trade between the two Parties since 2000. Reportedly, the '*agreement in principle*' provides that almost all trade in goods between the EU and Mexico will be tariff-free, including in the agricultural sector, which had been mostly excluded from the agreement currently in force. Additionally, both Parties agreed to simplify customs procedures in sectors such as pharmaceuticals, machinery and transport equipment, significantly facilitating trade in those sectors. While reactions

are generally positive, a number of sectors remain concerned by certain aspects of the future agreement.

In 1997, Mexico was the first country in Latin America to sign such a comprehensive agreement with the EU, which entered into force in 2000. In view of the continuous slow pace of negotiations within the World Trade Organization (hereinafter, WTO), the EU has continued to negotiate and conclude increasingly comprehensive agreements with its trading partners. Considering the broader scope of more recent EU agreements, such as, most recently, the EU-Japan Economic Partnership Agreement (hereinafter, EPA) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU has been engaging in updating its existing trade agreements that are limited scope. This concerns, in particular, the Global Agreement with Mexico from 2000, as well as the trade part of the EU-Chile Association Agreement, which entered into force on 1 March 2005. The Global Agreement already eliminated and reduced tariffs in the automobile sector and eliminated 62% of tariffs on total agricultural trade. However, with respect to agriculture, the Global Agreement includes a list of sensitive products (*i.e.*, cereals, sugar, meat products and dairy), that was not considered for the elimination of tariffs. While the current Global Agreement provided that both Parties would liberalise trade in these products no later than three years after the agreement entered into force, since 2003 no further liberalisation was agreed. Instead, the EU and Mexico agreed on additional preferential tariff-rate quotas (hereinafter, TRQs), which favour trade of these products only in a limited way.

In May 2016, the EU and Mexico began negotiations to update the current agreement. Negotiations progressed well and both Parties intended to reach political agreement by December 2017. However, reaching agreement on sensitive areas, such as market access for meat and dairy, rules of origin (hereinafter, RoOs), as well as the issue of geographical indications (hereinafter, GIs), needed more time and negotiating efforts. Therefore, negotiations were extended into 2018 (see *Trade Perspectives*, Issue No. 3 of 9 February 2018). On 23 April 2018, the EU published the *EU-Mexico 'agreement in principle'* on trade and investment. The '*agreement in* principle' summarises the negotiating results of the trade part of the modernised future EU-Mexico Global Agreement, in particular related to: 1) Agriculture; 2) Rules of origin; 3) Sanitary and phytosanitary (hereinafter, SPS) issues; 4) Technical barriers to trade (hereinafter, TBT); 5) Energy and raw materials; 6) Services and investment liberalisation; 7) Public procurement; 8) Sectoral annexes; and 9) A number of novelty chapters.

One of the most important, but at the same time also most sensitive, parts of the new agreement is agriculture. It is recalled that, although 62% of tariffs on total agriculture trade were already reduced or eliminated, many sensitive products remained subject to tariffs or only benefitted from very limited TRQs. Under the new agreement, more than 85% of tariff lines of agricultural products will be fully liberalised, including sectors which had previously been exempt from liberalisation (*i.e.*, dairy, meat and food and processed agricultural products). The exclusion of entire sectors will be limited to the sugar sector, which will only benefit from TRQs. In this regard, the EU will provide Mexico with duty-free market access for 25,000 metric tonnes of ethanol, phased-in over five years, and 30,000 metric tonnes of raw sugar for refining, at a reduced rate of EUR 49,00 per metric tonne, phased-in over three years.

One of the most sensitive products during the negotiations has been cheese, because of the protection of cheese names originating in the EU through GIs. The

‘*agreement in principle*’ notes the recognition and protection of 340 distinctive European food and drink products, including several cheese names by and in Mexico. In 2017, the EU had proposed to protect 57 cheese names originating in the EU, names that Mexican producers also use for the marketing of certain cheeses. Although EU and Mexican negotiators reached an agreement at the end of 2017 on allowing, *inter alia*, sales of Mexican *brie*, *camembert*, *gouda*, and *mozzarella*, discussions regarding the name of the Spanish ‘*manchego*’ cheese turned particularly difficult. The name is protected as a GI in the EU, but not included on the list of 340 GIs. On the basis of the future agreement, Mexico would be allowed to use the name, but it is required to clearly indicate that the cheese has no relation with protected EU ‘*manchego*’ cheese. Indeed, Mexican ‘*manchego*’ is a very popular cheese in Mexico and in the US, representing almost 15% of the total cheese sales in Mexico. Mexican ‘*manchego*’ is produced from cow milk, while ‘*manchego*’ cheese from Spain’s La Mancha region is produced from sheep milk. According to Spanish cheese producers, confusion over the name ‘*manchego*’ and its origin has already led to significant monetary loss for Spanish producers, particularly in the US market, where Mexican ‘*manchego*’ is sold at a much lower price than Spanish ‘*manchego*’.

Other sensitive products that will benefit from duty-free market access or from preferential TRQs are dairy products, pork, poultry and beef. Market access for poultry and pork will be fully liberalised with only a few exceptions. Noteworthy is that all TRQs obtained by the EU are duty-free, while EU’s TRQs granted to Mexico often only provide for partial liberalisation. Other products originating in Mexico that will benefit from preferential market access include, *inter alia*, fruits (*e.g.*, apples and bananas) and honey. With respect to food and processed agricultural products, the agreement will provide the “*liberalisation of all processed agriculture products with rapid or immediate tariff dismantling for key products such as pasta, chocolates, confectionery and chocolates, biscuits, lactose and lactose syrup*”. Finally, Mexico obtained increased market access with partial liberalisation and TRQs for beef and beef offal (10,000 metric tonnes each with a 7.5% duty phased-in over five years). Concessions for Mexican beef have been a key point of disagreement and an important concern for EU producers. *Interbev*, the French National Interprofessional Association of Livestock and Meat, underlined its concerns regarding the concessions offered to Mexican beef to access the EU market. In particular, *Interbev* claimed that Mexican beef is not produced under the same sanitary standards as EU beef, allowing Mexican producers to sell their products at lower prices and leading to unfair competition. On the other side, the EU European farmers and agri-cooperatives associations *Copa-Cogeca* welcomed the agreement between the EU and Mexico, stating that it was a good and balanced trade agreement. However, Copa-Cogeca regrets the increased access offered to Mexican beef to enter the EU market, noting that “*an import quota of 10,000 tonnes of beef is 10,000 tonnes too much*”.

Agriculture was not the only sector that delayed the ‘*agreement in principle*’. Further contentious negotiating areas concerned RoOs, public procurement, as well as services. The EU and Mexico agreed to include a new chapter on RoOs, based on the respective chapter in the EU-Japan EPA. This chapter is particularly relevant for the motor vehicles industry. According to the ‘*agreement in principle*’, the future agreement will provide for product-specific RoOs for cars and other vehicles, stating that they may contain 45% non-originating materials. Public procurement was another sector subject to complex negotiations and, reportedly, it is one of the areas where remaining issues still need to be agreed. Mexico agreed to open up public procurement opportunities to EU companies, such as the opportunity to bid for goods

and services purchased by the international airport of Mexico City. The EU offered reciprocal access for Mexican suppliers to the European procurement market, including the utilities market. However, Mexico has so far been unable to provide the EU with access to public procurement in Mexican States, only committing "*to enter into negotiations with the Mexican States to offer access for EU bidders to procurement of some Mexican States by the signature of the agreement*". With respect to services, the '*agreement in principle*' provides that both Parties committed to open up international maritime services and that the future agreement would contain new chapters on telecommunications, financial services, temporary movement of company personnel (including spouses and children), and digital trade.

In addition to market access issues, the future agreement will include a number of additional chapters, compared to the current Global Agreement: 1) A chapter on '*animal welfare and antimicrobial resistance*', focusing on cooperation and exchange of information; 2) A chapter on '*anti-corruption*'; and 3) A chapter on '*trade and sustainable development*', which has become a standard feature in EU trade agreements. The chapter on animal welfare will provide many specific commitments for enhanced cooperation. Most notably, the future agreement will be the first EU trade agreement to contain anti-corruption provisions, focusing on committing to the implementation of international conventions, such as the United Nations Convention against corruption (UNCAC). Regarding investment protection, Mexico agreed to include the EU's new Investment Court System and committed to work towards the establishment of a Multilateral Investment Court.

Overall, it appears that the future agreement will allow important trade diversification, that will also benefit consumers through better market access for a number of products and potentially lower prices. Initial reactions by Mexican industries and civil society have been rather limited, mainly due to the ongoing Presidential campaign season, as well as the focus on NAFTA renegotiations. Officials from both Parties welcomed the agreement.

The '*agreement in principle*' only summarises the main elements of the future agreement and does not mean an imminent end of the negotiating process. A number of chapters and sectorial annexes still require clarification and additional negotiations. Such technical negotiations will continue in parallel to ongoing formal negotiations on the other elements of the future modernised Global Agreement (*i.e.,* the political component and the cooperation agreement). As the current Global Agreement had been concluded as a '*mixed*' agreement, meaning that it concerns EU and EU Member States' competences and was ratified by the EU and all EU Member States, the modernised agreement will again require ratification by the EU and all its EU Member States. Considering that negotiations between the EU and Mexico will continue at the technical level to resolve the remaining issues requiring further clarifications, final changes to the agreement are still possible. As both Parties aim at reaching agreement on the full text by the end of 2018, all interested stakeholders should get involved now and engage with their respective interlocutors in the EU and Mexico before negotiations come to a final close.

Tofu steaks? Developments on the naming and marketing of plant-based foods

France is considering banning '*meaty*' names like steak, filet, bacon or sausage for plant-based foods and introducing a list of protected denominations for meat products. The draft Rural and Marine Fishing Code (*i.e.*, *Code Rural et de la Pêche*

Maritime) has been examined since 17 April 2018 by the Committee on Economic Affairs of France's National Assembly. During these discussions, an unexpected amendment was adopted by the deputies on 19 April 2018. The text of the amendment aims at regulating the naming of plant-based food products and concerns in particular foods for vegetarians and vegans. At the same time, EU dairy industry associations are urging the EU to continue to ensure that dairy products are protected against misleading sales descriptions of plant-based foods in EU legislation and the future Common Agricultural Policy (CAP).

The amendment to the French Rural and Marine Fishing Code, introduced on 19 April 2018 by the National Assembly's Committee on Economic Affairs, provides the following insertion: "*I - Names associated with products of animal origin may not be used to market food products containing a significant proportion of plant-based material. II - Any breach of the prohibition mentioned in I is punishable by the penalties provided for in Articles L. 132-1 to L. 132 9 of the Consumer Code. III - An order of the Minister in charge of agriculture lays down the list of names and the significant part of vegetable origin mentioned in I of this article*". The exposé of the amendment states that its purpose is to prohibit certain marketing practices that mislead consumers associating terms such as steak, filet, bacon or sausage with products that are not solely, or not at all, composed of meat. More generally, the amendment's exposé states that it addresses denominations referring to products of animal origin, in particular milk, cream or cheese. Therefore, a preparation based on meat and on vegetable matter, such as soy, which is very profitable for the producer compared to a pure beef steak, could be the subject of a '*marketing presentation*', which alludes to a meat product. Similarly, some vegetarian or vegan products use, quite paradoxically, according to the exposé, meat vocabulary to highlight their products: '*bacon taste*', '*merguez vegan*' or '*substitute sausage*'. The draft amendment of the French draft Rural and Marine Fishing code will be put to a vote during a public session in May. Arguably, the existing provisions of the *Regulation (EU) No. 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) provide sufficient legal basis to protect consumers from being misled by denominations for plant-based meat alternatives, if those are also denominated '*vegan*' or '*vegetarian*'. EU Member States have the primary responsibility to enforce, monitor and verify that the relevant requirements of food law are fulfilled by food business operators at all stages of production, processing and distribution. However, for the sake of clarity, the terms '*vegan*' and '*vegetarian*' should be defined at the EU level.

Finally, the exposé recalls the judgement of the Court of Justice of the European Union (hereinafter, CJEU) in Case C-422/16 *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH* (hereinafter, *TofuTown*), which the amendment intends to be consistent with. On 14 June 2017, the CJEU delivered its judgment in *TofuTown*. The Court asserted that the legislation in force (*i.e.*, Article 78(2) of and Annex VII, Part III, to *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products*) must be interpreted as precluding the term '*milk*' and the designations reserved by *Regulation (EU) No. 1308/2013* exclusively for milk products from being used to designate a purely plant-based product in marketing or advertising, even if those terms are expanded upon by clarifying or descriptive terms indicating the plant origin of the product at issue. There is a long-lasting controversy regarding designations such as '*soy milk*', '*veggie milk*', '*vegan steak*' or '*veggie sausage*', used for food products that are not or not entirely based on animal products. Article 78 of *Regulation (EU) No. 1308/2013* sets out that the definitions, designations or sales

descriptions provided for in Annex VII for the following sectors or products (*i.e.*, 1) Beef and veal; 2) Wine; 3) Milk and milk products intended for human consumption; 4) Poultry meat; 5) Eggs; 6) Spreadable fats intended for human consumption; and 7) Olive oil and table olives) may be used in the EU only for the marketing of products of the respective sectors. As regards meat products, Part I of Annex VII of *Regulation (EU) No 1308/2013* contains only general sales descriptions, in all official languages of the EU, for meat of bovine animals (like '*veal*' in English), but currently no different language versions of terms for meat products like *sausage*, *prosciutto* or *steak*. Part III of Annex VII reserves a large number of names exclusively for milk products, namely whey, cream, butter, buttermilk, butteroil, caseins, anhydrous milk fat (AMF), cheese, yogurt, kephir, koumiss, viili/fil, smetana, fil; rjaženka, rūgušpiens.

To assess whether a denomination used for a product is misleading, the FIR is relevant. In fact, Article 17 of the FIR requires that a food's name be its legal name (as in coffee, jam, honey). In the absence of such a name, the name of the food must be its customary name, or, if there is no customary name, or the customary name is not used, a descriptive name of the food must be provided (for an assessment of the German names Schnitzel and Wurst, see *Trade Perspectives*, Issue No. 2 of 27 January 2017). *Wurst* (or sausage) could arguably be used for meat replacement products in the form of an elongated roll. However, whether a product name may be misleading must be established on a case-by-case basis, taking into consideration all elements, including labelling, advertising and packaging. If animals are depicted on a plant-based (*i.e.*, vegetarian) sausage's product label, or if such product is sold in transparent packaging in order to create the impression of meat products, there may be misleading elements at play.

Where the average consumer expects that a particular food is normally produced with certain ingredients, or that certain ingredients are naturally present in the food, the application of Article 7(1)(d) of the FIR would be triggered. This provision states that food information must not be misleading as to the characteristics of the food and, in particular, as to its nature, identity, properties and composition, or by suggesting, by means of the product's appearance, description or pictorial representations, the presence of a certain ingredient or food, when, in reality, a component being naturally present, or an ingredient normally used in that food, has been substituted with a different component or a different ingredient. In addition, under Annex VI, Part A, Point 4 of the FIR, where a substitution ingredient is used in a product, the name of the product should be followed in close proximity by the name of the substitution ingredient(s). Arguably, a product denominated '*steak*' containing plant-based ingredients instead of meat could be a '*substitution*' product, which might mislead consumers. The document with the *Questions and Answers on the application of the Regulation (EU) No 1169/2011 on the provision of food information to consumers (Part II)*, published by the Commission provides the following examples for such '*substitution foods*': 1) A food in which an ingredient normally used in that food has been substituted with a different component or a different ingredient (*e.g.*, a pizza for which the presence of cheese is expected, while cheese has been substituted with another product), named otherwise, made from raw materials used for the purpose of replacing, in whole or in part, any milk constituent; and 2) A food in which a component naturally present in that food has been substituted with a different component or a different ingredient (*e.g.*, a product that looks like cheese, where fat of milk origin has been replaced by fat of vegetable origin). As regards the labelling of foods, where a substitution ingredient is used in a product, the name of the product must be followed in close proximity by the name of the substitution ingredient, printed on the package or on the label in such a way as to ensure clear legibility and using a

font size that has an x-height of a least 75% of the x-height of the name of the product and which is not smaller than 1,2 mm. It is up to the food business operator to find an appropriate denomination for this '*substitution food*', in accordance with the rules concerning the name of the food. In addition, the provisions of the product-specific legislation in place, where appropriate, shall also be respected. For example, it is forbidden to use the name '*imitation cheese*', because the name '*cheese*' is reserved exclusively for milk products by Part III of Annex VII of *Regulation (EU) No 1308/2013*. '*Milk*' means exclusively the normal mammary secretion obtained from milking.

Part I of Annex VII contains only general sales descriptions, in all official languages of the EU, for meat of bovine animals (like '*veal*' in English), but currently no different language versions of meat products like sausage or steak. Therefore, arguably, a meat product denominated '*veggie veal*' could be considered as misleading under the FIR. Such a list of reserved terms for meat products in the EU's different languages could be drafted as an amendment to *Regulation (EU) No. 1308/2013* and the use of terms like sausage or steak could be banned for products that are not meat-based. However, there are no signs that the Commission is inclined to introduce such reserved terms for meat products.

In the cases of plant-based *steak, prosciutto or bresaola*, there are certain parallelisms to the so-called '*imitation foods*', such as the so-called '*analogue cheese*', which must be made clear in the labelling. Such plant-based '*cheese*' products may no longer be denominated as cheese. However, there is an important difference: in shops, '*analogue cheese*' was not named, for example, as '*vegan cheese*', but simply as '*cheese*'. Perhaps nobody would have complained if it had been named '*plant-based cheese without milk*'. A *steak* without meat is, however, usually denominated '*vegetarian steak*'. Traditional meat terms, such as *prosciutto*, are used to guide consumers to the products they want. Certain vegetarian alternatives are developed and produced in order to match the '*original*' as closely as possible in terms of shape, texture, taste, how to prepare it, etc., which is why traditional terms are useful. The vegetarian '*character*' of the product is, in most cases, unmistakably clear and clarified by using words such as '*vegetarian*' or '*vegan*' in the product's name. In addition, the plant ingredient is normally indicated in close proximity to the product name. It is up to the food business operator to find an appropriate name for this '*substitution food*' in accordance with the rules concerning the name of the food.

The topic of plant-based meat substitutes is closely related to the matter of defining vegetarian and vegan food. The FIR expressly requires the Commission to adopt an implementing act on how to provide information on the suitability of foods to vegetarians or vegans, which is typically given on a voluntary basis, so as to ensure that this information is not misleading, ambiguous or confusing for the consumer. The FIR does not provide for a date by which the Commission may adopt such implementing act and the Commission has not yet done so. In response to the inaction by the Commission, there have been efforts at the EU Member States' level. In Germany, the Ministers responsible for consumer protection of the 16 German Federal States adopted, in 2016, a decision on binding definitions of the terms '*vegan*' and '*vegetarian*' (see *Trade Perspectives*, Issue No. 13 of 1 July 2016).

In a joint statement of 27 April 2018, the European Dairy Association (*EDA*), the Association of Dairy Trade (*Eucolait*) and the EU trade association *Copa-Cogeca*, representing EU farmers and their cooperatives, urged the EU to continue to ensure

that dairy products were protected against misleading sales descriptions in EU legislation and in the future Common Agricultural Policy (CAP). Recalling the *TofuTown* judgment, the associations stress that the aim of EU legislation on labelling was to provide consumers with information about their food and to make sales descriptions more transparent so as to avoid misleading practices. *Copa-Cogeca*'s Secretary-General Pekka Pesonen stated that the issue is not about having plant-based, innovative products on the market, but it is about ensuring that consumers are not misled or confused vis-à-vis the nutritional characteristics of livestock produce and plant-based products. The *EDA*, *Eucolait*, *Copa-Cogeca* urged the EU to ensure that dairy terms and marketing standards remain protected under EU legislation and be respected by all supply chain partners. These organisations argued that it is also vital that they continued to be protected under the future CAP and used exclusively for milk and dairy products. *Eucolait's* Secretary-General Jukka Likitalo concluded by pointing out that marketing standards set out basic product specifications that must be respected by all supply chain actors in the interest of ensuring high-quality products and fair competition.

The next steps taken in the EU and its Member States on the labelling of products as suitable for vegans and vegetarians should be monitored and stakeholders should be prepared to participate in shaping the upcoming EU legislation by interacting with relevant EU Institutions, trade associations and other affected stakeholders. Establishing a list of reserved terms for meat products in the EU's different languages for meat products would require amending *Regulation (EU) No. 1308/2013*, which appears challenging. A French national list of protected meat names does not do the EU Single Market justice. Where warranted, operators should also consider triggering domestic administrative procedures against anti-competitive, deceptive or misleading advertisements before competent national authorities, or even challenging these practices before judicial authorities.

Recently Adopted EU Legislation

Market Access

- *Commission Implementing Regulation (EU) 2018/679 of 3 May 2018 renewing the approval of the active substance forchlorfenuron in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011*

Food and Agricultural Law

- *Commission Regulation (EU) 2018/676 of 3 May 2018 correcting Commission Regulation (EU) No 546/2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards uniform principles for evaluation and authorisation of plant protection products*

- *Commission Regulation (EU) 2018/669 of 16 April 2018 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures*

- *Publication of an application pursuant to Article 50(2)(a) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs*

- *Commission Regulation (EU) 2018/677 of 3 May 2018 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council as regards the use of Thaumatin (E 957) as a flavour enhancer in certain food categories*

- *Commission Regulation (EU) 2018/678 of 3 May 2018 amending and correcting Annex I to Regulation (EC) No 1334/2008 of the European Parliament and of the Council as regards certain flavouring substances*

Trade Remedies

- *Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India*

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