

**Issue No. 20 of 2 November 2018**

- **Slow progress in EU-US trade negotiations, contentious exchanges at the WTO, and the return of threats to impose additional tariffs on cars**
- **Denmark discusses climate labels for food products to address their ‘climate impact’**
- **The Court of Justice of the EU ruled that ‘chewing tobacco’ is just to be chewed and not sucked**
- **Recently Adopted EU Legislation**

**Slow progress in EU-US trade negotiations, contentious exchanges at the WTO, and the return of threats to impose additional tariffs on cars**

During the week of 22 October 2018, the EU-US ‘Executive Working Group’ on trade issues reportedly held meetings in Washington, DC. Earlier, on 16 October 2018, US Secretary of Commerce, Wilbur Ross, held a meeting with European Commissioner for Trade, Cecilia Malmström, during which they discussed the status of the ongoing trade negotiations. It appears that both sides have very different perspectives on the negotiating approach, with the US reiterating the possibility to impose additional tariffs on car imports, should the trade talks not lead to results in the near future. Since the summer of this year, the EU and the US have been engaging in trade negotiations on a number of specific trade issues and further meetings are scheduled for November. However, in view of the recent rhetoric, it remains uncertain if both sides will be able to agree on a WTO-compliant package any time soon.

On 8 March 2018, US President Donald Trump exercised his authority under Section 232 of the Trade Expansion Act of 1962 and imposed a 25% tariff on steel imports and a 10% tariff on aluminium imports, allegedly in order to protect US national security (see *Trade Perspectives*, Issue No. 5 of 9 March 2018). The US granted temporary exemptions, *inter alia*, to the EU, but, on 31 May 2018, the US Administration decided not to extend such exemption and, on 1 June 2018, imposed tariffs on steel and aluminium imports also from the EU. On 20 June 2018, the European Commission (hereinafter, Commission) adopted the EU’s ‘rebalancing measures’ in response to the US tariffs, targeting a list of US products worth EUR 2.8 billion.

In view of threats by the US Administration to similarly impose additional tariffs on car imports from the EU, US President Trump and the President of the Commission Jean-Claude Juncker, on 25 July 2018, held a meeting on trade-related issues in Washington, DC. Both leaders agreed to a number of initiatives: 1) To work together toward zero tariffs, zero non-tariff barriers, and zero subsidies on non-auto industrial goods; and to work to reduce barriers and increase trade in services, chemicals, pharmaceuticals, medical products, as well as soybeans; 2) To strengthen EU-US strategic cooperation with respect to energy. Notably, the EU agreed to import more liquefied natural gas (LNG) from the US to diversify its energy supply; 3) To launch a close dialogue on standards in order to ease trade, reduce bureaucratic obstacles, and reduce costs; and 4) To join forces to better protect US and EU companies from unfair global trade practices by working closely together with like-minded partners to reform the WTO and to address unfair trading practices, including intellectual property theft, forced

technology transfer, industrial subsidies, distortions created by state owned enterprises, and overcapacity.

The EU and the US decided to set up an '*Executive Working Group*' to take this agenda forward, which is also tasked with identifying short-term measures to facilitate commercial exchanges and assess existing tariff measures. Both sides agreed that, while the work of the '*Executive Working Group*' was ongoing, they would not go against the spirit of the agreement reached, unless either party were to terminate the negotiations.

On 10 September 2018, Commissioner Malmström held a meeting with US Trade Representative (hereinafter, USTR) Robert Lighthizer in Brussels. USTR Lighthizer issued a statement noting that the meeting was productive and that all points mentioned in the Joint Statement issued by Presidents Trump and Juncker had been discussed. The USTR noted that the focus of the talks had been in the area of technical barriers to trade (hereinafter, TBT) and that the US and the EU hoped for an "*early harvest*" in that area of negotiations. Additionally, USTR Lighthizer stated that he would "*begin consultations with Congress pursuant to trade promotion authority to facilitate negotiations on longer-term outcomes*". In fact, on 16 October 2018, at the direction of the President, he notified Congress that the US Administration intended to negotiate three separate trade agreements with the EU, Japan, and the United Kingdom.

In officially notifying Congress, the USTR is following the procedures set out in the *Bipartisan Congressional Trade Priorities and Accountability Act of 2015*, often referred to as Trade Promotion Authority (TPA), which requires ongoing consultations with Congress during the negotiations. The notifications to Congress on Japan and the EU, refer to "*chronic US trade imbalances*" and underline that US exporters had long been challenged by tariffs and non-tariff barriers in the EU and in Japan. In accordance with the relevant procedures, the Office of the USTR noted that it would publish its objectives for the negotiations at least 30 days before formal trade negotiations were to begin. However, at this time, the US does not appear to have agreed with any of these three trading partners to begin actual trade negotiations. In fact, the UK is not allowed to negotiate its own trade agreements before it leaves the EU on 29 March 2019 (see *Trade Perspectives, Issue No. 7 of 6 April 2018*). In its notifications, the USTR noted that negotiations with the EU and Japan should be initiated "*as soon as practicable, but no earlier than 90 days from this notice*". Negotiations with the UK should be initiated "*as soon as it is ready after its exit from the European Union*".

On 3 September 2018, also as a part of the initiative to reduce trade tensions between the US and the EU, the Commission announced that it had recommended to the Council of the EU to agree to open negotiations with the US on the longstanding WTO dispute on US beef exports to the EU. The Commission's proposal to the Council suggests allocating to the US a part of the existing tariff-rate quota (hereinafter, TRQ) that is available to exporters from other countries (see *Trade Perspectives, Issue No. 17 of 21 September 2018*). On 19 October 2018, the [Council of the EU authorised](#) the Commission to open negotiations on an agreement with the US on imports of high-quality beef from animals not treated with certain growth promoting hormones. The Council notes that the aim of the negotiations is to find a mutually satisfactory solution in line with WTO rules.

Importantly, the Commission is not authorised to negotiate an increase of the existing TRQ, but may discuss a country-specific allocation of the overall quota. However, the process will likely not be as easy as the Commission made it appear, since negotiations with other beef-supplying countries may be needed to ensure that any agreed country-specific allocation to the US respects their existing rights in the context of WTO commitments. Article XIII:2(d) of the GATT 1994 expressly allows quotas to be allocated among supplying countries, which in practice means the exclusion of other WTO Members. However, in accordance with Article XIII:2 of the GATT 1994, the core requirement with respect to the allocation of TRQs is to "*aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions*". The preferred way of allocating TRQs under Article XIII of the GATT 1994 is to do so on the

basis of agreement among all WTO Members that have a substantial interest in supplying the product. Should that not be viable, the unilateral decision of the importing country may suffice, taking into account the supply proportions of WTO Members. The EU will likely face difficult negotiations and possible WTO dispute settlement vis-à-vis beef-supplying third countries. Indeed, during an earlier public consultation organised by the EU in March and April 2018, the Australian and Uruguayan Governments already requested to participate in the negotiations in accordance with WTO law.

On 16 October 2018, US Secretary of Commerce Wilbur Ross and Commissioner Malmström held a meeting in Brussels and, reportedly, blamed each other for the limited progress in the ongoing trade negotiations. Members of the US delegation then referred to the still existing possibility of the imposition of additional tariffs on cars imported from the EU. Indeed, the US Ambassador to the EU, Gordon Sondland, stated that negotiations were “*not moving forward, not moving at all*” and that tariffs on EU cars were a remedy still available to the US Administration. According to Commissioner Malmström, the Commission had stated repeatedly that it was “*prepared to start the scoping exercise on a limited agreement focused on industrial goods, on tariffs*”. At the same time, US Secretary Ross stated that the US put special emphasis on the harmonisation of standards in certain sectors (e.g., cars or agriculture), where diverging approaches are considered as a “*far more serious trade barrier than the tariffs*”.

What has not yet been publicly addressed by EU and US negotiators is the legal framework that would apply to any future agreement between the EU and the US. Any such trade agreement would have to be compatible with the rules of the World Trade Organization (WTO). Typically, bilateral trade agreements are concluded on the basis of, in particular, Article XXIV of the General Agreement on Trade and Tariffs (GATT) and Article V of the General Agreement on Trade in Services (GATS), requiring free trade areas to liberalise “*substantially all the trade*”. While the definition of the term “*substantially all the trade*” remains controversial, sectoral agreements, for example an agreement limited to reducing tariffs on “*non-auto industrial goods*” would likely not satisfy the WTO requirements. Such agreements would only be compatible with WTO rules if they were also made available on a most-favoured nation’s (MFN) basis to all other WTO Members, which would hardly be the bilateral objective of the EU and the US.

Another possible, and likely legally less problematic option, could be a mere focus on regulatory cooperation, for instance addressing technical barriers to trade. Mutual recognition agreements and structured cooperation on elaborating and aligning technical regulations and standards can be agreed outside of preferential trade agreements, but may result in important trade facilitation advantages, thereby significantly enhancing bilateral trade. This is indeed favoured by the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement). For instance, Article 2.7 of the WTO TBT Agreement calls on WTO Members to embrace the concept of ‘equivalence’, noting that WTO Members “*shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations*”.

With respect to the broader ‘*global trade war*’, tensions continue to escalate. By the end of October, disputes over US tariffs and retaliatory moves by other WTO Members had led to twelve requests for consultations filed with the WTO’s Dispute Settlement Body (hereinafter, DSB). Canada, China, the EU, Mexico, Norway, Russia and Turkey requested consultations with the US on the legality of steel and aluminium tariffs imposed by the US in March. In return, the US requested consultations on the retaliatory tariffs imposed by Canada, China, the EU, and Mexico. Additionally, the US requested consultations in another case against China, related to the alleged Chinese failure to protect US intellectual property rights. All twelve requests figured on the agenda of the WTO’s Dispute Settlement Body for its meeting on 29 October 2018 and the DSB agreed to revert to the matter at a following meeting. The exchange at the meeting on 29 October 2018 highlighted the significant differences between the US and its trading partners. In particular, the US noted that it was deeply disappointed with the EU’s

request for a panel and that the EU was “*undermining the system by asking the WTO to do what it was never intended to do*”, “*to review a sovereign nation’s judgment of its essential security interests*”. Finally, the US noted that, “*if the WTO were to undertake to review an invocation of Article XXI, this would undermine the legitimacy of the WTO’s dispute settlement system and even the viability of the WTO itself*”. It appears likely that the DSB will agree to establish one or several panels on the matter at its next meeting on 21 November 2018, but as proceedings of these disputes could last for years, considering the current dynamics, they might soon be overtaken by future developments before any report is issued.

Further meetings and negotiations between the EU and the US are scheduled, and it appears that the US is keen on achieving some results. A high-level meeting between Commissioner Malmström and USTR Lighthizer remains on the agenda for the end of November. Considering the heated rhetoric earlier this year, and the renewed threat of tariffs on cars, ongoing negotiations can still be considered as some progress. However, in view of the different views on the approach and progress, it currently appears unlikely that any meaningful agreement be reached by the end of November. Still, stakeholders and trading partners around the world should diligently follow EU-US negotiations and assess any agreement in relation to its compatibility with WTO rules.

### **Denmark discusses climate labels for food products to address their ‘*climate impact*’**

On 9 October 2018, the Danish Ministry of Energy, Utilities and Climate announced that Denmark aimed at remaining a world leader of environmental policy, ensuring that Danes continue enjoying access to clean air and a stable climate, while steering development towards green solutions. These aims shall be achieved through the Danish Ministry of Energy, Utilities and Climate’s proposal bearing the title “*Together for a greener future*”, which includes initiatives aimed at putting Denmark on course for reaching its climate goals by 2030. These initiatives also push towards the ambitious goal of a climate-neutral Denmark by 2050, absorbing at least as much greenhouse gas as it emits. Among the tabled initiatives, figures a proposal to oblige food manufacturers and supermarkets to put labels on their products that would rate their impact on the environment and the climate.

The climate and air proposal “*Together for a greener future*” calls on all Danes to “*come together and embrace a shared responsibility for the planet*”. The proposal by the Ministry of Energy, Utilities and Climate includes 38 concrete initiatives to ensure cleaner transport in cities and the countryside, efficient and modern agriculture, more environmentally-friendly shipping, and a green transition in housing and industry. Key initiatives in the climate and air proposal include: 1) A phase-out of the sale of new petrol and diesel cars by 2030; 2) Zero carbon emissions and zero air pollution from busses in Denmark’s cities by 2030; 3) A climate- and environmentally-efficient agricultural sector, with a strong focus on research; 4) Clean air in big cities through stricter environmental zones; 5) Lower emissions from industry and housing; 6) A behavioural campaign and a mandatory climate labelling for food products; and 7) Research efforts to develop carbon capture and storage technologies for use in Denmark’s fields and forests. The proposal requiring food manufacturers and supermarkets to put labels on their products, that would rate their impact on the environment and climate, figures among the main proposals, but remains rather vague. The Danish Government’s initiative No. 31 ‘*Behaviour campaign with climate labelling*’ reads as follows: “*The government will launch a campaign to make it easier to choose the climate, even on a busy day. Based on a climate label, the campaign will make it easier for Danes to take green choices. The efforts will be facilitated with advice from a panel of behavioural and consumer experts and in dialogue with the business community*”.

Currently, in the EU, there is the *EU Ecolabel*, a voluntary scheme that forms part of the EU policy to encourage more sustainable consumption and production. However, to date, criteria for the *EU Ecolabel* scheme have been developed for products in the non-food sector only.

Several years ago, the European Commission (hereinafter, Commission) had undertaken a study on the feasibility of developing Ecolabel criteria for food and feed products, as mandated under *Article 6(5) of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel*. The [final report of the feasibility study](#) of 20 October 2011, and the corresponding [Opinion of the EU Ecolabelling Board](#), found that relevant expertise and significant resources were needed before launching an ecolabel for food, feed and drink products in the EU. It was also found that potential consumer confusion with the *EU Organic* label would call for awareness building campaigns, requiring additional financial resources. The Commission, therefore, is currently not developing ecolabel criteria for food and feed products. The Commission stated, however, that it could revisit this question at some point in the future, considering the possible role of the *EU Ecolabel* within the framework of the development of any wider EU food strategy, in particular in light of developments in methodologies, and other tools, for measuring the environmental impact (including by, for example, environmental footprinting) of products.

The proposed Danish food climate label would aim at showing consumers how what they eat and drink affects climate change. The assessment of the environmental impact of food is obviously a complex matter to fit onto a single label. In particular, there is a need to take production methods and agricultural practices (*inter alia*, what kind of pesticides are used and how much water is needed) into account when comparing the carbon footprint of different products. Since the climate impacts of food must also include how far it has travelled from farm to table, issues such as air miles, transportation and logistics are relevant as well. It may also be necessary to compare the climate effect of a product with how nutritious it is. For example, a soda might only have a small impact on the climate, but it may not be nutritionally balanced and additional nutritious food might need to be consumed, leading to an extra climate impact. In particular, plant-based products should be assessed against meat products. According to a study from *Copenhagen Economics*, commissioned by the *Danish Council on Climate Change*, almost 90% of Greenhouse Gas (GHG) emissions from Danish agriculture is '*ultimately*' the result of cattle and swine breeding. The livestock sector plays an important role in climate change, representing 14.5% of all human-induced emissions of carbon dioxide, according to the UN's Food and Agriculture Organization (FAO). Morten Høyer, director of the *Danish Agriculture and Food Council*, representing the farming and food industry of Denmark, including companies, trade and farmers' associations, stated as a first reaction: "*Our goal is to develop an accurate label. We must include every piece of information so products like plant-based substitutes for ground meat have information on the climate impact of the soy in the product, which is produced in South America. Things like these are difficult to calculate, so we have a worthy challenge ahead of us before we can say with certainty that we have the right solution for a climate label*".

According to Article 38(2) of *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR), EU Member States may adopt national measures concerning matters not specifically harmonised by the FIR, provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with the FIR. Harmonised mandatory food information under the FIR concerns, under Article 4(1) thereof, information that falls, in particular, into one of the following categories: 1) Information on the identity and composition, properties or other characteristics of the food; 2) Information on the protection of consumers' health and the safe use of a food, particularly information on: a) Compositional attributes that may be harmful to the health of certain groups of consumers; b) Durability, storage and safe use; and c) The health impact, including the risks and consequences related to harmful and hazardous consumption of a food; and 3) Information on nutritional characteristics so as to enable consumers, including those with special dietary requirements, to make informed choices. Arguably, the mandatory labelling of the climate and environmental impact does not fall within those categories. Provided that that the labelling scheme does not prohibit, impede or restrict the free movement of goods that are in conformity with the FIR, Denmark may adopt a measure on a mandatory climate label.

Labelling products with respect to their environmental effects is not a new idea. The Ecolabel Index, a global directory of ecolabels, currently lists 463 voluntary environmentally-related

ecolabels in 199 countries and 25 industry sectors. In the food sector, the Ecolabel Index lists, for example, *Milieukeur* (a Dutch label covering goods, including food, and services), *Rainforest Alliance Certified*, *UTZ Certified*, and *Roundtable on Sustainable Palm Oil* (RSPO) certification for sustainable palm oil. Such voluntary labels might arguably have little impact compared to mandatory labels, which would encourage more people to think about their choices by exposing them to the facts each time they are in the shops. Mandatory ecolabels could also provide better information about the whole food system, which might also lead to better use of subsidies and taxes to 'penalise' environmental harm and incentivise sustainable, circular practices. An ecolabel for food products with transparent requirements is obviously also better compared to certain 'rogue' industry-driven labels, like the often used 'palm oil-free' or 'no palm oil' labels, which might imply that whatever vegetable oil is used instead of palm oil is more environmentally friendly.

Sectors other than food have seen a success of mandatory labels at the EU level. Household appliances like washing machines, fridges or televisions are supplied with a label rating them from A to G based on their energy consumption. *Regulation (EU) 2017/1369 setting a framework for energy labelling* recently repealed *Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products* to update the energy labelling framework so as to improve its effectiveness. The first rules on labelling the energy efficiency were, however, already established in 1992 by *Directive 92/75/EEC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances*.

Mandatory energy labelling, according to the harmonised EU rules, enables customers to make informed choices based on the energy consumption of energy-related products. Information on efficient and sustainable energy-related products makes a significant contribution to energy savings and to reducing energy bills, while at the same time promoting innovation and investments into the production of more energy efficient products. Improving the efficiency of energy-related products through informed customer choice and harmonising related requirements at EU level benefits also manufacturers, industry and the EU economy overall. The classification using letters from A to G has been shown to be cost effective for customers. It is intended that its uniform application across product groups raises transparency and understanding among customers. However, the consumption of energy and other resources by energy-related products is something much easier to measure than the various factors to look at with respect to food products and their production.

Article 2 of *Regulation (EU) 2017/1369* defines 'energy-related product' as a good or system with an impact on energy consumption during use, which is placed on the market or put into service. 'Label' is defined as "a graphic diagram, either in printed or electronic form, including a closed scale using only letters from A to G, each letter representing a class and each class corresponding to energy savings, in seven different colours from dark green to red, in order to inform customers about energy efficiency and energy consumption". The energy labelling rules for household appliances had a huge impact. Initially, 75% of fridges and freezers were rated G to D (low efficiency), but today 98% are classed A++ or A+++ (better than A on the scale). Worldwide, the energy efficiency of labelled appliances has increased three times faster than for appliances without labels. Introducing an equivalent system for food could have an even bigger impact, although it would be much more complex and, arguably, very controversial.

The *Danish Agriculture and Food Council* welcomed the proposal for a climate label as an opportunity to promote best practices when it comes to mitigating the effects of food production, and particularly of farming, on climate change. It would also enable Danish products to highlight their environmental credentials. Responding to queries over the impact that the introduction of climate labelling would have on businesses, and SMEs in particular, a spokesperson for the Danish Ministry of Energy, Utilities and Climate reportedly said that detailed plans would be drawn up through a consultation process: "The government will launch a campaign to make it easier to make climate-friendly choices, including a climate mark. Efforts must be made with relevant experts and business. Therefore, the [detailed] content of the climate label is not defined". The Danish Government's initiative on climate labels comes

shortly after the International Panel on Climate Change (IPCC), the UN body for assessing the science related to climate change, published its report on global warming on 8 October 2018, stating that important measures would be required within the next few years if the increase in global temperatures is to be kept below 1.5°C. The Danish Minister of Energy, Utilities and Climate Christian Lilleholt stated that “*We want consumers to get a tool when they stand in the supermarket, which can help them assess how much climate impact the product has*”.

Environmental initiatives that originated in Denmark often served as a model for future EU developments. By setting new climate and environmental standards, Denmark aims at inspiring others to take action and help shape developments in the EU and around the world. Stakeholders, not just from Denmark, should monitor and actively participate in eventual consultations on and the shaping of a climate label for food to ensure that measures take into account their interests and are compliant with the applicable legal frameworks, particularly those of the EU and WTO.

### **The Court of Justice of the EU ruled that ‘*chewing tobacco*’ is just to be chewed and not sucked**

On 17 October 2018, the Court of Justice of the European Union (hereinafter, CJEU) published its judgment in the case *C-425/17 Günter Hartmann Tabakvertrieb GmbH & Co. KG v Stadt Kempten*. Chewing tobacco is, according to the CJEU, only tobacco whose ingredients can be released exclusively by chewing. In particular, the CJEU ruled that it is not enough if the consumer could merely suck the tobacco to release the ingredients. In the EU, the marketing of ‘*oral tobacco*’ is prohibited unless it is inhaled or chewed. The only existing legal exception applies to Sweden, where the sale of ‘*snus*’ is also authorised.

On 11 July 2017, the Higher Administrative Court of Bavaria, Germany (*i.e.*, *Bayerischer Verwaltungsgerichtshof*) requested a preliminary ruling under Article 267 of the TFEU, concerning the interpretation of Article 2(6) and (8) of *Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products* (hereinafter, Directive 2014/40/EU). The request was made in proceedings between tobacco distributing company *Günter Hartmann Tabakvertrieb GmbH & Co. KG*, and the municipality of Kempten, Germany, regarding the prohibition of placing certain imported smokeless tobacco products on the German market. *Günter Hartmann Tabakvertrieb GmbH & Co. KG* is a German company that imports various tobacco products into Germany, which are then distributed on the German market. Particularly, it imports ‘*Thunder Chewing Tobacco*’ and ‘*Thunder Frosted Chewing bags*’, which are produced by *V2 Tobacco A/S*, a Danish manufacturer of ‘*snus*’ (loose and portion ‘*snus*’), nasal snuff and chewing tobacco. In a previous judgment of 14 December 2004, in case *C-434/02 Arnold André GmbH & Co. KG v Landrat des Kreises Herford*, the CJEU provided a definition of ‘*snus*’ products, noting that “*snus is finely ground or cut tobacco sold loose or in small sachet portions and intended to be consumed by placing between the gum and the lip*”.

On 18 September 2014, the Bavarian Health and Food Safety Administration (*i.e.*, *Bayerisches Landesamt für Gesundheit und Lebensmittelsicherheit*) in Germany stated in an opinion that, after analysing the product ‘*Thunder Frosted Chewing bags*’, it had concluded that “*owing to its structure, consistency and manner of use, it constituted a prohibited tobacco product, given that it was intended for oral use other than smoking or chewing*”. Similarly, on 19 and 26 November 2014, the Bavarian Health and Food Safety Administration considered that the same applied to the products ‘*Thunder Wintergreen Chewing Tobacco*’ and ‘*Thunder Original Chewing Tobacco*’, respectively. Subsequently, in decisions of 13 October 2014 and 15 January 2015, adopted by the municipality of Kempten and pursuant to the German Law on Tobacco Products (*i.e.*, *Tabakerzeugnisgesetz*) of 4 April 2016, which transposed *Directive 2014/40/EU*, *Günter Hartmann Tabakvertrieb GmbH & Co. KG* was banned from placing the products ‘*Thunder Chewing Tobacco*’ and ‘*Thunder Frosted Chewing Bags*’ on the market.

The German company appealed the two decisions before the Bavarian Administrative Court (*i.e.*, Bayerisches Verwaltungsgericht) of Augsburg, Germany (hereinafter, the Court). The Court examined the tobacco products subject of the appeal, as well as chewing tobacco products in the traditional sense and the products of the 'snus' type. The Court stated, during a hearing on 28 July 2015, that the mere fact that the 'Thunder Chewing Tobacco' was a new product, and differed from the chewing tobacco in the traditional sense, "did not justify a prohibition on placing on the market". However, the Court went on to state that, "even after having placed the product in a glass of water until the end of the hearing, there remained a piece in one block of consistent mass, which was resistant to pressure and did not disintegrate. By contrast, loose 'snus' rapidly dissolved in the water and remained at the bottom of the glass". Therefore, the Court concluded that the product 'Thunder Chewing Tobacco' thus "resists a mechanical action of the teeth and to some extent needs such an action in order to release the tobacco components" and annulled the decision of the municipality of Kempten. However, regarding the 'Thunder Frosted Chewing bags', the Court dismissed the appeal stating that the product did not resist a mechanical action of the teeth and did not need such an action to release its components. Therefore, it was not intended solely to be chewed. *Günter Hartmann Tabakvertrieb GmbH & Co. KG* and the municipality of Kempten appealed the judgements by the Bavarian Administrative Court to the Higher Administrative Court of Bavaria. The Higher Administrative Court of Bavaria observed that *Directive 2014/40/EU* "does not mention the circumstance in which a tobacco product is intended to be chewed" and that "several variants of interpretation have been put forward in the main proceedings, but that none can claim to prevail clearly". Therefore, the Higher Administrative Court of Bavaria submitted a request for a preliminary ruling to the CJEU.

On 17 October 2018, the CJEU published its decision on the interpretation of the concept of 'tobacco products intended to be chewed' within the meaning of Article 2(8) of *Directive 2014/40/EU*, read in conjunction with Article 2(6) of that Directive, in order to assess whether smokeless tobacco products, such as those at issue in the main proceedings, fall under the prohibition on placing tobacco for oral use on the market, laid down in Article 17 of that Directive. The CJEU stated that "only products which can be consumed in the proper sense only by chewing", meaning that the product only releases its essential ingredients in the mouth by chewing, can be classified as 'tobacco products intended to be chewed' within the meaning of Article 2(8) of *Directive 2014/40/EU*. By contrast, "a tobacco product which, whilst also being able to be chewed, is essentially intended to be sucked", meaning that "a product which it is sufficient to hold in the mouth for its essential ingredients to be released, cannot be classified as" [tobacco products intended to be chewed]. Therefore, the CJEU concluded that "only tobacco products which can be consumed in the proper sense only by chewing constitute tobacco products intended to be chewed within the meaning of those provisions, which it is for the national court to determine on the basis of all the relevant objective characteristics of the products concerned, such as their composition, their consistency, their method of dispensation and, where appropriate, their actual use by consumers".

The prohibition of tobacco for oral use was originally introduced by *Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622*. According to its recitals, the prohibition was motivated, particularly, by the actual risk of newer tobacco products for oral use that are particularly attractive to young people, such as 'snus'. However, Article 151 and Annex XV of the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, and the adjustments to the Treaties on which the European Union is founded, grant the Kingdom of Sweden a derogation from the prohibition of placing on the market tobacco products for oral use, with the exception of the prohibition to place this product on the market in a form resembling a food product. However, Sweden is not allowed to export such products to other EU Member States. Since 1971, chewing tobacco and 'snus' are included in the Swedish food legislation, the rationale being that these tobacco products are consumed in the mouth and are partly ingested. The prohibition has been subsequently confirmed and referred to by the relevant EU legislation, which succeeded *Council Directive 92/41/EEC*, lastly by *Directive 2014/40/EU*. 'Tobacco for oral use' is defined in *Directive 2014/40/EU* as "all products for oral use, except those intended

*to be inhaled or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets*". Additionally, Article 17 of Directive 2014/40/EU states that EU Member States "are to prohibit the placing on the market of tobacco for oral use, without prejudice to Article 151 of the Act of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden". The EU has taken the view that it was appropriate to differentiate other smokeless tobacco products, which can be classified as 'traditional' tobacco products, such as 'chewing tobacco', from other tobacco products for oral use. This view was taken in view of the lack of novelty and attractiveness for young people with respect to this kind of traditional products of chewing tobacco, contrary to the attractiveness that newer tobacco products for oral use, such as 'snus' type products, might possess for younger people.

Regardless of the fact that the prohibition of tobacco for oral use was introduced due to the emergence on the market of newer tobacco products, particularly those of the 'snus' type, the CJEU states in its judgement that it could not be inferred that the novelty or, the 'classical' or 'traditional' nature of a product was "decisive for the purpose of classifying a product as a tobacco product intended for oral use, within the meaning of Article 17 of Directive 2014/40, read in conjunction with Article 2(8) of that Directive". Therefore, the CJEU, in its judgement C-425/17 *Günter Hartmann Tabakvertrieb*, considers that the concept of 'tobacco products intended to be chewed' must be strictly interpreted in that way and cannot include sucking tobacco products, such as those of the 'snus' type. Additionally, the CJEU noted that Directive 2014/40/EU had added the adverb 'exclusively' to the definition of the concept of 'chewing tobacco' in order "to limit the possibilities of circumventing the prohibition of tobacco for oral use faced with repeated attempts to market tobacco of the 'snus' type under the title of chewing tobacco".

The judgment of the CJEU essentially confirms the ban in the EU, with the exception of Sweden, of oral tobacco of the 'snus' type. It is now the responsibility of the referring German Court to decide on the specific products on the basis of all their relevant objective characteristics, such as their composition, their consistency, their method of dispensation and, where appropriate, their actual use by consumers. It appears that trying to circumvent the ban of 'snus'-type tobacco products through products that are denominated (also) as 'chewing' tobacco and where the characteristics and intended use are not always clear is becoming increasingly difficult, as the CJEU held that "only tobacco products which can be consumed in the proper sense only by chewing constitute tobacco products intended to be chewed" within the meaning of Directive 2014/40/EU. Interested stakeholders and trading partners should diligently assess the ruling and the forthcoming decision by the referring Court in Bavaria, Germany.

## Recently Adopted EU Legislation

### Customs Law

- [Commission Implementing Regulation \(EU\) 2018/1607 of 24 October 2018 amending Council Regulation \(EC\) No 992/95 as regards Union tariff quotas for certain agricultural, processed agricultural and fishery products originating in Norway](#)

### Trade Remedies

- [Commission Implementing Regulation \(EU\) 2018/1579 of 18 October 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in](#)

*the People's Republic of China and repealing Implementing Regulation (EU) 2018/163*

## Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2018/1633 of 30 October 2018 authorising the placing on the market of refined shrimp peptide concentrate as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470*
- *Commission Implementing Regulation (EU) 2018/1632 of 30 October 2018 authorising the placing on the market of bovine milk basic whey protein isolate as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470*
- *Commission Implementing Regulation (EU) 2018/1631 of 30 October 2018 authorising the placing on the market of cranberry extract powder as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470*
- *Commission Implementing Regulation (EU) 2018/1584 of 22 October 2018 amending Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control*

## Other

- *Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore*

*Ignacio Carreño, Tobias Dolle, Lourdes Medina Perez and Paolo R. Vergano contributed to this issue.*

*Follow us on twitter @FratiniVergano*

To subscribe to or unsubscribe from *Trade Perspectives*<sup>®</sup>, please click [here](#).

FRATINI VERGANO specialises in European and international law, notably WTO and EU trade law, EU agricultural and food law, EU competition and internal market law, EU regulation and public affairs. For more information, please contact us at:

FRATINI VERGANO – EUROPEAN LAWYERS

Boulevard Brand Whitlock 144, 1200 Brussels, Belgium. Telephone: +32 2 648 21 61, Fax: +32 2 646 02 70. [www.fratinivergano.eu](http://www.fratinivergano.eu)

*Trade Perspectives*<sup>®</sup> is issued with the purpose of informing on new developments in international trade and stimulating reflections on the legal and commercial issues involved. *Trade Perspectives*<sup>®</sup> does not constitute legal advice and is not, therefore, intended to be relied on or create any client/lawyer relationship.

To stop receiving *Trade Perspectives*<sup>®</sup> or for new recipients to be added to our mailing list, please contact us at [TradePerspectives@fratinivergano.eu](mailto:TradePerspectives@fratinivergano.eu)

Our privacy policy and data protection notice is available at <http://www.fratinivergano.eu/en/data-protection/>