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When trade becomes political: The European Commission is considering revoking trade preferences for Cambodia and Myanmar because of human rights violations

On 5 October 2018, European Commissioner for Trade Cecilia Malmström announced that she had notified Cambodia that, due to human rights violations, the EU would launch the procedure for the withdrawal of trade preferences under the EU's *Everything But Arms* (hereinafter, EBA) preferential trading scheme, part of the EU's Generalised Scheme of Preferences (hereinafter, GSP). Similarly, Commissioner Malmström announced that the European Commission (hereinafter, Commission) would assess the human rights situation in Myanmar, which also currently benefits from EBA preferences. The EU's GSP links trade with development policy objectives pursuing a '*value-based*' trade policy. This also means that trade policy can, at times, become a delicate political issue.

The EU's GSP scheme is a system of unilateral trade concessions that reduces or eliminates tariffs on a wide range of exports from developing and least-developed countries. With the GSP, the EU intends to increase export revenues in developing countries in order to reduce poverty and promote sustainable development and good governance. The GSP focuses solely on granting tariff preferences for trade in goods and does not apply to services or other areas of trade. The EU's GSP has been in place since 1971, although it has been periodically subject to reviews of varying depth and extent. On 31 October 2012, the EU adopted its most recent iteration of the GSP scheme through *Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences* (hereinafter, GSP Regulation) (see *Trade Perspectives*, Issue No. 21 of 16 November 2012), which applies since 1 January 2014. The architecture of the scheme has undergone significant changes over time. In its current form, the EU's GSP foresees three types of preferential arrangements: Standard GSP (for developing countries matching certain eligibility criteria), and two special arrangements: 1) A special incentive arrangement for sustainable development and good governance or '*GSP+*'; and 2) A special arrangement for least-developed countries, known as the *Everything But Arms* (EBA) arrangement because it grants full duty free and quota free access to the EU Single Market for all products (except arms and armaments).

A country is granted EBA status if it is listed as a Least Developed Country (hereinafter, LDC) by the UN Committee for Development Policy. There are currently 47 countries on the list of LDCs, which is reviewed every three years. Cambodia has been listed as an LDC since 1991, Myanmar since 1987. Countries do not need to apply to benefit from the EBA scheme, rather they are added to or removed from the relevant list through a delegated regulation on the

initiative of the Commission. Importantly, under Article 19 of the GSP Regulation, EBA preferences may be withdrawn in case of exceptional circumstances enumerated in Article 19(1) of the Regulation. This concerns, under Article 19(1)(a) of the GSP Regulation, serious and systematic violations of principles laid down in fundamental human rights and labour rights conventions listed in Part A of Annex VIII to the GSP Regulation, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights and thirteen other international human and labour rights conventions.

Article 19 of the GSP Regulation details the legal procedure that is to be followed in view of withdrawing the trade preferences. When the Commission considers that there are "*sufficient grounds*" justifying the temporary withdrawal of the tariff preferences provided under any of the preferential arrangements under the GSP Regulation, on the basis of the reasons referred to in Article 19(1) of the GSP Regulation, the Commission is first required to adopt an implementing act initiating the procedure for temporary withdrawal in accordance with the advisory procedure referred to in Article 39(2) of the GSP Regulation. The Commission is also required to inform the European Parliament and the Council of the EU of that implementing act. A notice on the initiation of the temporary withdrawal procedure must be published in the EU's Official Journal, and the Commission is required to notify the beneficiary country concerned thereof. That notice must: 1) Provide sufficient grounds to initiate the temporary withdrawal procedure; and 2) State that the Commission would monitor and evaluate the situation in the beneficiary country concerned for six months from the date of publication of the notice. During that period, the Commission must provide the country with every opportunity to cooperate and is required to seek and assess all information it considers necessary. Within three months from the expiry of the six-month period, the Commission is required to submit a report on its findings and conclusions to the country. Then, during a period of at most one month, the beneficiary country has the right to submit comments on the report. Within six months from the expiry of the six-month period, the Commission is required to decide to either: 1) Terminate the temporary withdrawal procedure; or 2) Temporarily withdraw the tariff preferences provided under the respective preferential arrangement. When the Commission considers that the findings do not justify a temporary withdrawal, it is required to adopt an implementing act on the termination of the temporary withdrawal procedure. When the Commission considers that the findings do justify a temporary withdrawal, it is empowered to adopt a delegated act to amend the relevant Annex of the GSP Regulation that lists the concerned country, in order to temporarily withdraw the tariff preferences provided under the respective preferential arrangement. The delegated act must be based, *inter alia*, on evidence received, and, when the Commission decides in favour of temporary withdrawal, such delegated act only takes effect six months after its adoption. Finally, the GSP Regulation provides that, where the reasons justifying temporary withdrawal no longer apply before the delegated act takes effect, the Commission is empowered to repeal the act in accordance with the urgency procedure pursuant to Article 37 of the GSP Regulation.

In recent months, the Commission increased its efforts to assess the human rights situation in Cambodia. This was already noted in the EU's biennial GSP report of January 2018, and, in July of this year, a delegation of the Commission and the European External Action Service (hereinafter, EEAS) visited Cambodia to evaluate the situation on the ground, following reports on "*worrying human rights and labour rights developments in the country*". After the mission, the Commission noted that it would "*analyse as a matter of priority the information gathered during the mission to consider further steps*" and that the analysis would "*also take into account further written submissions from the Cambodian authorities, reports of the International Labour Organisation (ILO) and other bodies responsible for monitoring the implementation by Cambodia of the international conventions"* referred to in the GSP Regulation. According to Commissioner Malmström, the assessment largely focussed "*on the serious decline in the area of political and electoral rights, as well as a curbing of civil society activities*" and on alleged "*deficiencies when it comes to land dispute resolution mechanisms, and serious threats to freedom of association and collective bargaining rights*". After assessing the information, the Commission initiated, on 5 October 2018, the process under Article 19(1) of the GSP Regulation for the withdrawal of Cambodia's EBA preferences. The next step is a six-months

period, during which the Commission further monitors and evaluates the situation in Cambodia, while providing Cambodia ample opportunity to cooperate.

With respect to Myanmar, the Commission is only beginning a more thorough assessment. In parallel to the decision on Cambodia, Commissioner Malmström announced that the Commission and the EEAS would notify Myanmar authorities of the EU's intention to send an emergency, high-level EU mission to the country to assess the situation on the ground. The mission took place from 28 to 30 October 2018 and Commissioner Malmström noted that this high-level mission was sent within the framework of a potential withdrawal of Myanmar from the EBA arrangement list. The focus for Myanmar is on the situation for the Rohingya minority. In October, the Commission referred to a recent report from a United Nations fact-finding mission, which called for the prosecution of Myanmar military leaders for genocide and crimes against humanity. Myanmar has denied most of the allegations noted in the report.

The impact of the potential withdrawal of EBA preferences for Cambodia and Myanmar, respectively, would be economically and commercially devastating. In 2016, EU Member States accounted for around 40% of Cambodia's exports, with the majority of exports being textile products originating from a sector that employs around 700,000 people. Between 2011 and 2016, exports from Cambodia to the EU increased by 227% and, in 2017, Cambodia's total exports to the EU amounted to EUR 5 billion, compared to minute levels before the EU granted Cambodia EBA status. Despite the recent developments, Cambodia's main garment factory group appears to remain optimistic, noting that it hoped that the EU and Cambodia would reach an amicable solution. The EBA scheme also provides significant benefits to Myanmar, as exports to the EU increased from EUR 535 million in 2015 to EUR 1.3 billion in 2017. 95% of Myanmar's EBA-eligible exports were made under EBA preferences to the EU. In 2017, around 72% of Myanmar's exports to the EU could be attributed to textile products, leading to particularly strong job creation and growth in this sector. The EU is the third largest export market of Myanmar, accounting for around 8.8% of Myanmar's total exports in 2017.

As detailed above, the EU's GSP framework links trade preferences with the compliance and the upholding of certain fundamental human rights and labour rights conventions. Inevitably, this contributes to trade policy becoming even more '*political*' and delicate than usual. The clear procedures and the continuous involvement of the beneficiary country are the main elements to achieving a balanced and objective process. Additionally, if the EU does indeed pride itself in pursuing a value-based trade policy, as the Council of the EU and the Commission regularly underline, it must be ensured that the EU apply the rules under the GSP Regulation, but also of its trade policy in more general terms, in a consistent and non-discriminatory manner, applying the same moral standards to all trading partners. While the GSP Regulation provides for structured procedures applicable to the respective beneficiary countries, no such procedures exist for countries that do not fall within the scope of application of the GSP Regulation, but where, nonetheless, similar situations may arise.

The GSP Regulation provides for clear, comprehensive and binding procedures before any set of trade preferences may be withdrawn. In particular, it provides for the involvement of the beneficiary country and for lengthy monitoring and evaluation periods. In view of the need for balanced and non-discriminatory decisions, the EU should ensure that all perspectives be taken into account and that the same standards be applied to all trading partners. Interested stakeholders in affected industry sectors and within the affected countries should carefully assess the potential consequences of the possible withdrawal of preferences and engage with the relevant EU officials and their respective Governments.

As the popularity of CBD-based products grows rapidly in the EU, Italy proposes maximum levels of tetrahydrocannabinol (THC) in food

On 30 October 2018, the Government of Italy, namely the Ministry of Health, notified the European Commission (hereinafter, Commission) of a Draft Decree setting maximum levels of

tetrahydrocannabinol (hereinafter, THC) in food (in Italian: *Decreto: Regolamento recante limiti di tetraidrocannabinolo (THC) negli alimenti*, hereinafter, Draft Decree). Products, derived from the hemp plant, in particular cannabidiol (hereinafter, CBD) oils, are increasingly marketed in the EU and elsewhere. Hemp seeds are reportedly a good source of protein and have proved useful in human nutrition with the seed's oil richness in omega-3 and omega-6 fatty acids. The seed can be used to produce protein powder, as well as bread and cereals. Likewise, the oil is used in food supplements and for margarine, salad dressing and cosmetics, *inter alia*.

THC is a phytocannabinoid naturally occurring in the hemp plant (*i.e.*, *Cannabis sativa L.*). Hemp and marijuana are two popular names for the cannabis plant. THC, as well as CBD, are some of at least 113 cannabinoids identified in the cannabis plant. Cannabinoids are the chemicals that give the cannabis plant its medical and recreational properties. THC is the most abundant cannabinoid in marijuana before CBD. CBD, which accounts for up to 40% of the plant's extract, does not appear to have any psychoactive effects such as those caused by THC. Hemp, or industrial hemp, is a variety of the *Cannabis sativa L.* plant species, which is cultivated specifically for the industrial uses of its derived products. CBD hemp oil is a natural botanical extract of the common hemp plant and is produced from high-CBD, low-THC hemp, unlike medical marijuana products, which are usually produced from plants with high concentrations of THC. Because hemp contains only trace amounts of THC, these hemp oil products are non-psychoactive. In hemp, THC is only present in trace amounts, while CBD dominates the plant's chemical makeup. CBD is considered a safer and less controversial alternative to THC, while still offering significant health benefits, such as a downregulating impact on disordered thinking and anxiety. Potential uses of CBD are still the subject of ongoing research. While CBD use is considered to be safe, a 2017 review recommended larger and longer human trials before a definitive conclusion could be reached. CBD oils are almost always produced from industrial hemp. Depending on how products derived from the hemp plant are manufactured, in particular, hemp oils and CBD oils, they may need authorisation under *Regulation (EU) 2015/2283 on novel foods*, before they may be placed on the EU market. Essentially, hemp oil obtained by cold-pressing the seeds or other parts of the hemp plant does not require pre-market authorisation as a novel food. If, however, the natural CBD content of hemp oil is selectively increased using certain forms of extraction or purification techniques, then a novel food authorisation might be required.

The Draft Decree is based on Article 5 of *Law No 242 on Provisions for the promotion of hemp cultivation and the related agro-industrial sector* of 2 December 2016 (Legge n.242 "*Disposizioni per la promozione della coltivazione e della filiera agroindustriale della canapa*"), which contains rules for the support and promotion of the cultivation and supply chain of hemp (*Cannabis sativa L.*), as a crop able to contribute to the reduction of the environmental impact in agriculture, to the reduction of the consumption of soils and desertification and the loss of biodiversity, as well as a culture to be used as a possible substitute for surplus crops and as a rotational crop. Article 5 of *Law No 242* sets out that, by decree of the Minister of Health, maximum levels of THC residues allowed in food "*shall be adopted*". The Italian text, in fact, refers to the concept of "*residues*", noting that "*A Decree of the Ministry of Health defines the maximum levels of THC residues allowed in food*" (*i.e.*, "*Con decreto del Ministro della salute sono definiti i livelli massimi di residui di THC ammessi negli alimenti*").

The Draft Decree notes that Article 32(6) of *Regulation (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy,* allows the cultivation in the EU of varieties of *Cannabis sativa L.,* provided that they are included in the common catalogue of varieties of agricultural plant species and have a THC content not exceeding 0.2%. Furthermore, the Draft Decree states that hemp seeds and hemp seed derivatives intended for food use have a long history as a foodstuff before 1997 and as such should not be considered to be novel foods pursuant to *Regulation (EU) No 2015/2283 on novel foods*. The Draft Decree defines, in its Annex II, maximum levels of THC specifically in certain foodstuffs derived from hemp (*i.e.*, seeds, flour obtained from seeds, oil obtained from seeds) and for food supplements containing foodstuffs derived from hemp. For hemp seeds, flour obtained from hemp seeds and food supplements containing foodstuffs derived from hemp, a total maximum THC limit of 2.0 mg/kg is proposed. For oil

obtained from hemp seeds, a total maximum THC limit of 5.0 mg/kg is proposed. "*Total tetrahydrocannabinol (THC)*" is defined in the Draft Decree as "*concentration resulting from the sum of concentrations of the substance 'Δ^9-THC ((-)-trans- Δ^9-THC)*' *and the inactive acid precursor 'Δ^9-THCA-A (delta-9-tetrahydrocannabinolic acid A)*'". The notification of the Draft Decree to the Commission states that the limits proposed are defined in accordance with the precautionary principle, since the sum of the active substance (*'Δ^9-THC ((-)-trans- Δ^9-THC*) and the inactive acid precursor (*'Δ^9-THCA-A (delta-9-tetrahydrocannabinolic acid A)'*) could, in specific situations, lead to the formation of the active substance.

Before establishing the maximum limits, the Ministry of Health obtained the opinion of the Italian National Institute of Health (*i.e.*, *Istituto Superiore di Sanità*, ISS) of 18 May 2017 on the maximum levels of THC in foodstuffs, as a measure intended to manage exposure risks, as well as the opinion of the Council of the Federal Board of Health (*i.e.*, *Consiglio Superiore di Sanità*, CSS) expressed on 9 October 2018. The Draft Decree states that the maximum limits provided for in Annex II would apply until adoption of EU provisions pursuant to Article 2(3) of *Regulation (EEC) No 315/1993 laying down Community procedures for contaminants in food*. The Draft Decree also provides instructions for operators in the food sector and the competent authorities on the application of regulations on food hygiene and official inspections. In particular, Article 6(1) and Annex III concern sampling and analysis. In order to obtain a representative uniform laboratory sample, food sampling must be carried out in accordance with the basic rules set out in *Commission Regulation (EC) No. 401/2006 laying down the methods of sampling and analysis for the official control of the levels of mycotoxins in foodstuffs*. The method of analysis must refer to the provisions of *Commission Recommendation (EU) No 2016/2115 of 1 December 2016 on the monitoring of the presence of Δ^9-tetrahydrocannabinol, its precursors and other cannabinoids in food*.

The Draft Decree reads that cannabinoids (like THC) are not currently considered to be undesirable substances pursuant to *Commission Regulation (EC) No 1881/2006 setting maximum levels for certain contaminants in foodstuffs*, and that Article 5 of *Council Regulation (EEC) No 315/1993* permits EU Member States to set maximum limits for specific contaminants in foodstuffs where no EU provisions have been adopted. Specific harmonised maximum contaminants have so far been established under *Regulation (EC) No 1881/2006* for nitrate, mycotoxins, heavy metals, dioxin and PCB, Polycyclic aromatic hydrocarbons (PAH), melamine and inherent plant toxins (*i.e.*, erucic acid and to tropane alkaloids), but not for THC.

Procedurally, Italy notified the Commission of the Draft Decree under *Council Regulation (EC) No 315/93 on contaminants*. *Regulation (EC) No 315/93* establishes a procedure under which an EU Member State is required to communicate to the Commission and the other EU Member States the measures envisaged, should it deem it necessary to adopt new legislation, in instances where EU provisions concerning the maximum tolerances for specific contaminants have not been adopted. The notifying EU Member State is required to provide the reasons justifying the measures. The Commission is required to consult the other EU Member States within the Standing Committee on Plants, Animals, Food and Feed (hereinafter, SCPAFF), which is composed of representatives the EU Member States and chaired by the Commission, if it considers such consultation to be useful or if an EU Member State so requests. EU Member States may take such envisaged measures only three months after such communication and provided that the Commission's opinion is not negative.

Within three months from Italy's notification of the draft decree, the Commission will have to consult the SCPAFF on the matter. The question may arise as to whether legislation on food contaminants is the appropriate legal basis for establishing maximum limits of THC, a chemical naturally occurring in the hemp plant, in food. Article 1(1) of *Regulation (EC) No 315/93* defines '*contaminant*' as "*any substance not intentionally added to food which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry and veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food, or as a result of environmental contamination. Extraneous matter, such as, for example, insect fragments, animal hair, etc, is*

not covered by this definition". Considering that THC is a chemical that is naturally occurring in the hemp plant, it appears questionable that the THC present in food is a result of the production, including operations carried out in crop husbandry.

EU legislation on restricted substances may be another possible legal basis for the restriction of THC in foods. The Commission is currently proposing a draft *Commission Regulation amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods as regards trans fat in foods intended for the final consumer, other than trans fat naturally occurring in animal fat*. Trans fat is considered a substance, other than vitamins and minerals, for which harmful effects on health have been identified. The Commission proposes to place the substance in Part B of Annex III (restricted substances) to the Regulation and its use in the manufacture of foods should only be allowed under the conditions that the content of trans fat in food, which is intended for the final consumer, shall not exceed 2 grams per 100 grams of fat (see *Trade Perspectives*, Issue No. 19 of 19 October 2018).

Finally, there are other ways of addressing THC content in food. On 18 June 2018, the Danish Veterinary and Food Administration (*i.e.*, *Fødevarestyrelsen*, hereinafter, DVFA) established guidance levels for THC content in foodstuffs from industrial hemp. The indicative guidance levels are established on the basis of the Danish National Food Institute's (NFI) assessment of the risks related to hemp-based food. The values are defined in such a way that the general adult population is protected from excessive intakes of THC. Indicative guidance level means that the placing on the market of a food containing THC at the specified level would be possible without the company having to demonstrate that it is safe for the consumer. If a business wishes to place a food on the market with quantities higher than those specified, the company must be able to provide evidence of the safety of the food. The following indicative guidance levels for THC content (THC/Total THC) have been established: hemp seeds and flour (2.0/5.0 mg/kg); hemp oil (4.0/10.0 mg/kg); and beer, tea as well as bread and other foods (0.25/0.5 mg/kg). The recommended daily dose of a food supplement may contain a maximum of 80µg THC and not more than 200µg of total THC. On 30 October 2018, DVFA adopted further guidelines, including rules for the marketing in Denmark of food, such as food supplements, containing the active substance CBD from *Cannabis sativa L.*

The procedural '*standstill*' period, within which other EU Member States may give an opinion on the Draft Italian Decree, will end on 31 January 2019. Food business stakeholders with an interest in the matter should work with their legal advisors to have their views and interests duly considered. The matter of levels for THC in food should be carefully monitored by interested stakeholders, as further national legislation may be adopted by other EU Member States.

COOL potatoes? Poland plans to introduce mandatory country of origin labelling for fresh potatoes

On 14 November 2018, Poland's Ministry for Agriculture and Rural Development notified the European Commission (hereinafter, Commission) of its intention to introduce mandatory country of origin labelling (hereinafter, COOL) for potatoes on the basis of a *Draft Regulation of the Minister for Agriculture and Rural Development amending the Regulation on the labelling of certain foodstuffs* (hereinafter, Draft Regulation). Poland's notification is the most recent example of the continuously increasing number of EU Member States' measures on COOL for foodstuffs. While the EU already provides COOL requirements for fruits and vegetables in *Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors* (hereinafter, Regulation (EU) No 543/2011), they do not apply to fresh potatoes.

Potato is one of the most important crops in the EU, growing even under high temperatures and in a wide variety of soils. Potatoes are, therefore, grown in all EU Member States. Over time, different varieties of potatoes have been created to satisfy the needs of the food chain. A number of broad categories of potatoes can be identified: early potatoes, main crop potatoes, seed potatoes and starch potatoes. Potatoes for human consumption (*i.e.*, early and main crop potatoes) can be used as table potatoes, when they are supplied fresh to the consumer, or as raw material for the food processing industry. Potatoes for human consumption are one of the few agricultural products that are not covered by the EU's Common Market Organisation (hereinafter, CMO) in the context of the EU's Common Agricultural Policy (hereinafter, CAP). *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* (hereinafter, CMO Regulation), provides for internal market measures and a trade regime with third countries for a range of products. While EU potato producers may benefit from the Common Agricultural Policy (CAP) promotion and quality schemes, the Commission put forward proposals for a CMO for potatoes in 1992 and 1995, but no agreement was reached.

The general rules for food labelling in the EU are set by *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR). Article 26 of the FIR already provides for general rules and requirements with respect to the indication of the country of origin or place of provenance of food. Article 26(2)(a) of the FIR requires the indication of the country of origin or place of provenance where its omission could mislead the consumer as to the true country of origin or place of provenance of the final food in question, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance. Furthermore, Article 39(2) of the FIR provides that "*By means of paragraph 1, Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods only where there is a proven link between certain qualities of the food and its origin or provenance. When notifying such measures to the Commission, Member States shall provide evidence that the majority of consumers attach significant value to the provision of that information*".

The Draft Regulation submitted by Poland's Ministry for Agriculture and Rural Development proposes to introduce an obligation to provide information on the country of origin of potatoes at the place where they are sold or on the packaging. It would apply to fresh potatoes sold loose or packed, but not to processed potatoes. According to the regulatory impact assessment provided with the notification, the objective of the Draft Regulation "*is to provide consumers with information on the country of origin of potatoes available in retail trade*". In addition, the impact assessment states that the introduction of the obligation would contribute to aligning the requirements concerning the identification of the country of origin of potatoes with the COOL requirement for fresh fruits and vegetables covered by specific marketing standards at EU level by *Regulation (EU) No 543/2011*.

Pursuant to Article 76(1) of the CMO Regulation, fruit and vegetables that are intended to be sold fresh to the consumer, "*may only be marketed if they are sound, fair and of marketable quality and if the country of origin is indicated*". To harmonise the implementation of this provision, detailed rules are provided in the CMO Regulation and a general marketing standard is provided for most fresh fruit and vegetables. *Regulation (EU) No 543/2011* then establishes specific marketing standards for ten food product groups (*i.e.*, apples, citrus fruit, kiwifruit, peaches and nectarines, pears, strawberries, sweet peppers, table grapes and tomatoes as well as lettuces, curled-leaved and broad-leaved endives). For fruits and vegetables figuring on the list of specific marketing standards, *Regulation (EU) No 543/2011* provides detailed rules on the indication of the country of origin. Furthermore, the indication of the region, local place or district where the fruit or vegetable was grown may be indicated as well. Optionally, the district where the fruit or vegetable was grown, or national, regional or local place names, may also be indicated. Potatoes are neither covered by the specific standards, nor by the general marketing standard. According to a 2009 report by the Commission's Directorate General (hereinafter, DG) for Agriculture, potatoes are only covered in the CMO with respect to State aid rules, because the potato sector opposed the enforcement of a European quality standard for early and ware potatoes, as the potato production and the markets (*e.g.*,

presentation and packaging) were largely differentiated in all EU Member States and the retail sector was defining different quality classes according to the wishes of the consumers.

Beyond EU legislation, the United Nations Economic Commission for Europe (hereinafter, UNECE), has developed more than 50 specific marketing standards for fresh fruit and vegetables (including the ten types covered by the specific EU marketing standards). This includes standards for potatoes that require specifying the country of origin and, optionally, the district where the potatoes were grown, or national, regional or local place names. However, these standards only cover early and ware potatoes for human consumption (*i.e.*, potatoes harvested before they are completely mature, marketed immediately after their harvesting, and whose skin can be easily removed without peeling). The abovementioned DG Agriculture report notes that, in the potato sector, a sector without public EU standards, international UNECE quality standards for early and ware potatoes are used as a guideline for minimal standards for early and ware potatoes by the potato trade. Arguably, another reason for the lack of harmonised rules is the use of the EU system for Protected Designation of Origin (PDO) and Protected Geographical Indication (PGI) that apply to a number of EU potatoes. In order to inform and offer guarantees to consumers about the quality of the product, potato producers in Europe may apply for these quality schemes. Some examples of potatoes benefiting from this scheme are '*Patata Kato Nevrokopiu*' (PGI-Greece), '*Pomme de terre de Merville*' (PGI-France), and '*Pomme de terre de l'Île de Ré*' (PDO-France). Poland has registered PGIs and PDOs for some fruits and vegetables (*e.g.*, '*Truskawka kaszubska*' strawberries and '*Wiśnia nadwiślanka*' cherries). However, no GIs for potatoes have been registered yet.

Poland's Draft Regulation reportedly responds to concerns expressed by Polish potato farmers regarding the necessity to ensure easier identification of the country of origin of potatoes at "*every stage of the marketing*". Earlier this year, the Polish Vegetable and Potato Union (*i.e.*, *Unia Warzywno Ziemniaczana*) had complained about the inability to sell Polish products on both domestic and foreign markets and that Polish stores were mainly supplied with foreign products. In addition, according to the notification submitted by Poland to the Commission, consumers were "*confused*" by current EU labelling provisions, which require obligatory origin labelling for certain fruits and vegetables, but not for potatoes. The Draft Regulation intends to introduce the following measures to fresh potatoes, either sold loose or packed: 1) The indication of the country of origin, together with a representation of that country's flag, with the exception of products also labelled "*with a* '*Polish product*' *graphic mark*"; 2) In retail areas, information concerning the country of origin and the representation of the flag thereof must be placed on a display placed in a visible position, directly accompanying the potatoes' presentation. The designation of the potatoes' country of origin must be presented in a font of a height not smaller than that used to present the designation of potatoes and the height of the representation of the flag of the country of origin of potatoes must not be lower than the height of the wording of the designation thereof; and 3) In the case of packed potatoes, COOL is required directly on the packaging. The Draft Regulation also indicates that the obligation would not apply to packed potatoes imported from any other EU Member State, Turkey, or marketed in a Member State of the European Free Trade Agreement (EFTA).

The Draft Regulation notes that it aimed at providing better information to consumers regarding the quality of the potatoes. The Draft Regulation cites the results of a study conducted by the Plant Breeding and Acclimatisation Institute of the Polish National Research Institute, which found that Poland possesses several specific conditions that had an impact on the quality characteristics of potatoes, making Polish potatoes distinguishable from ware potatoes produced in other EU Member States. Under Article 39(2) of the FIR, EU Member States may introduce additional measures concerning mandatory COOL only where there is a proven link between certain qualities of the food and its origin or provenance. EU Member States must notify such measures and provide credible evidence to the Commission that the majority of consumers attaches significant value to the provision of that information. Apart from the claimed wish of the consumer to know the origin or provenance of a product, a link must be established between the respective EU Member State of origin and a particular quality attribute. Such link must be established and corroborated by the respective EU Member State. The labelling of potatoes with '*Origin: Poland*' and marked with a Polish flag, or any voluntary

label with a '*Polish product*' graphic used as a synonym of '*quality*', could, arguably, also be misleading to consumers, and violate EU Internal Market rules. In this regard, the French Council of State (*i.e.*, the *Conseil d'État*), in a still pending preliminary question to the Court of Justice of the EU relating to mandatory COOL for milk and milk used as ingredient of food, raised the question if the assessment of the conditions set out in Article 39 of the FIR presupposes that the qualities of a food are considered to be unique because of their origin or provenance or that the qualities are being guaranteed on the basis of the origin or provenance. (see *Trade Perspectives*, Issue No. 14 of 13 July 2018).

Although the mandatory COOL would not apply to products lawfully produced or marketed in another EU Member State, Turkey or any EFTA Member State, it might still have a detrimental effect on the EU Internal Market. Unlike other national COOL measures, the Draft Regulation does not foresee that potatoes may also be labelled as '*origin: EU*' or '*origin: outside EU*'. Packaged potatoes produced in Germany and imported to Poland would also not require a label stating '*Origin: Germany*' and a graphic of the German flag. However, with or without the indication, it could be easily identified as a foreign product because it does not state '*Origin: Poland*' and a graphic of the Polish flag, which could in turn lead to *de facto* discrimination as retailers and Polish consumers might prefer to buy only Polish origin products, perhaps independently of the quality of the product. National COOL measures appear to encourage local sourcing without regard to the detrimental impact that they may have on established supply chains that often transcend borders (see *Trade Perspectives*, Issue No. 15 of 28 July 2018) and might, thereby, already restrict the free movement of goods, possibly violating Article 34 of the Treaty of the Functioning of the EU. The effect of mandatory origin labelling on all operators that are subject to the COOL requirements is an added cost for processors, which has consequences at all levels of the supply chain, from farmers to consumers. The piecemeal approach of national COOL measures does not do justice to the EU Internal Market.

The Draft Regulation states that the legislation would enter into force 30 days after its publication. Transitional rules would apply to packed potatoes that have been marked and placed on the market in line with the current provisions and may remain on the market until stocks run out, but no later than 31 December 2019. As the consultation is still ongoing, a spokesperson for the Commission stated that the Commission could not comment or express its views on the Draft Regulation. All interested stakeholders should monitor the developments related to Poland's Draft Regulation on mandatory COOL for fresh potatoes.

Recently Adopted EU Legislation

Customs Law

- *Commission Implementing Regulation (EU) 2018/1872 of 23 November 2018 derogating from Regulations (EC) Nos 2305/2003, 969/2006 and 1067/2008 and from Implementing Regulations (EU) 2015/2081 and (EU) No 2017/2200, Regulation (EC) No 1964/2006 and Implementing Regulation (EU) No 480/2012 and Regulation (EC) No 1918/2006 as regards the dates for lodging import licence applications and issuing import licences in 2019 under tariff quotas for cereals, rice and olive oil, and derogating from Regulation (EU) 2016/2080 as regards the period for examination of offers for the sale by tender of powdered skimmed milk under public intervention in 2019*

- *Commission Implementing Regulation (EU) 2018/1800 of 21 November 2018 fixing the trigger volumes for the years 2019 and 2020 for the purposes of possible application of additional import duties on certain fruit and vegetables*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2018/1865 of 28 November 2018 concerning the non-renewal of approval of the active substance propiconazole, 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 Commission Implementing Regulation (EU) No 540/2011*

- *Commission Delegated Regulation (EU) 2018/1784 of 9 July 2018 amending Delegated Regulation (EU) No 639/2014 as regards certain provisions on the greening practices established by Regulation (EU) No 1307/2013 of the European Parliament and of the Council*

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