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Season's Greetings

2018 is drawing to a close and all of us in the International Trade and Food Law practice of *FratiniVergano* would like to wish you, your colleagues and families all the best for a peaceful holiday season and for a successful and healthy 2019. We hope that you have enjoyed *Trade Perspectives*© throughout this year and that you have always found it stimulating and timely.

As usual, we have published a total of 23 issues and invested a great deal of time and energy in this undertaking. We have done it with the usual passion and drive, only reinforced by the determination to play a small but constant role in protecting the multilateral trading system from the current attacks and surges of unilateralism.

You can now also follow us on *twitter* *@FratiniVergano* and find all previous issues of *Trade Perspectives*© on our website: http://www.fratinivergano.eu/en/trade-perspectives/.

For the year to come, we will continue with our editorial efforts, beginning with the publication of the next issue of *Trade Perspectives*© on 11 January 2019. *Trade Perspectives*© is circulated to thousands of recipients worldwide and not a single week goes by without new readers asking to be added to our circulation list. This fills us with pride, but also with a deep sense of commitment and discipline towards our readers' expectations.

Thank you for your interest in *Trade Perspectives*© and for helping us to make it a better and more useful tool of discussion. We look forward to continue hearing from you regularly and to another year of international trade and food law developments, despite the current state of affairs for international economic cooperation and the multilateral trading system.

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The next round on WTO reform: The EU and other WTO Members make proposals to reform the Appellate Body, but the US is not convinced

On 26 November 2018, the EU, together with Australia, China, Canada, Iceland, India, the Republic of Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, submitted specific proposals to the General Council of the World Trade Organization (hereinafter, WTO) aimed at reforming certain aspects of the WTO's Appellate Body and, on that basis, restoring its functioning. On 12 December 2018, the proposals were discussed at the most recent meeting of the WTO General Council. Alleging a number of deficiencies, the US has been

blocking the filling of vacancies of its Members, which are beginning to paralyse the Appellate Body. This debate takes place in the context of a broader debate on WTO reform, most recently discussed at the G20 Summit in Argentina, and expected to gain *momentum* going into 2019.

It is a time of increased tension within the global trading system, mainly due to the ongoing '*trade war*' initiated by the additional tariffs imposed by the US. The WTO's negotiating function has been largely blocked. Since the WTO Ministerial Conference in Doha in 2001, WTO Members have been negotiating under the Doha Development Agenda (hereinafter, DDA). However, negotiations stalled in 2008 and made little progress ever since. This lack of progress is largely attributed to the traditional WTO negotiating principle of the '*single undertaking*', referring to the approach that virtually every item of the negotiations is part of a whole and indivisible package and cannot be agreed separately. Certain WTO Members tried numerous times to change course, negotiate beyond the Doha Round issues and advance certain topics, not with all WTO Members, but in smaller groups, leading to plurilateral agreements. However, agreement on a new overall approach to negotiations has not been reached. Considering these serious concerns, WTO Members are now intensifying debate on how to reform the WTO on a broad range of issues, from changes to working procedures within the WTO permanent committees to changes to the overall rulemaking.

A key and increasingly urgent area of reform, or at least of agreed common understanding, concerns the WTO Dispute Settlement Body, more specifically the WTO's Appellate Body. While there have been discussions on improving its functioning for years, the issue has become pressing since the US started blocking the selection process of new members of the Appellate Body to replace those whose terms have ended (see *Trade Perspectives*, Issue No. 15 of 27 July 2018). In the US President's Trade Policy Agenda, the US Administration detailed five US concerns with respect to the WTO dispute settlement mechanism, relating to: 1) Delays in the issuance of appeal decisions; 2) Continued service by members of the Appellate Body whose terms have ended; 3) Decisions going beyond the issues necessary to decide the appeal; 4) The Appellate Body's approach to reviewing facts; and 5) The Appellate Body's claim that its reports be treated as precedents. As a consequence of the alleged shortcomings, the US is blocking the filling of Appellate Body vacancies. Technically, the Appellate Body is composed of seven members, but, since October 2018, it only has three members. According to Article 8(5) of the WTO Dispute Settlement Understanding (DSU), Appellate Body panels shall be composed of three members and, according to Article 8(3) of the DSU, "*Citizens of Members whose governments are parties to the dispute or third parties […] shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise*". Considering that the three remaining judges are of Chinese, Indian and US nationality, and that the majority of cases typically involve one of those three countries, the Appellate Body can no longer hear the vast majority of cases. In December 2019, the terms of two additional members will end, then paralysing the Appellate Body for cases between any WTO Members. As the successful functioning of the WTO's dispute settlement system has been one of the cornerstones of the global trading system, this is clearly the most pressing issue and one that should be addressed with great urgency.

The communication from the EU, as well as Australia, China, Canada, Iceland, India, the Republic of Korea, Mexico, New Zealand, Norway, Singapore, and Switzerland, aims at taking the discussions on the Appellate Body a step further. These WTO Members note that they "*call on all Members to fill the vacancies on the Appellate Body and to amend certain provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes*". The communication picks up exactly the five issues put forth by the US trade policy agenda earlier this year and which were then discussed in concept papers elaborated by the EU and Canada earlier this year (see *Trade Perspectives*, Issue No. 15 of 27 July 2018 and Issue No. 18 of 5 October 2018).

The first proposed amendment relates to "*transitional rules for outgoing Appellate Body members*". Here, the WTO Members propose that "*a transitional rule for outgoing Appellate Body members is adopted by the WTO Membership itself through an amendment of the DSU. The DSU would provide that an outgoing Appellate Body member shall complete the*

disposition of a pending appeal in which a hearing has already taken place during that member's term". This appears reasonable in order to avoid that proceedings have to be interrupted or restarted in view of an ongoing appeal case when a term ends.

The second amendment regards the concerns that had been expressed with the timelines for appellate proceedings and with the absence of consultation of the parties when the 90-day timeframe provided for in Article 17.5 of the DSU is exceeded. For this situation, the communication proposed to amend the 90-days rule in Article 17.5 of the DSU and to establish an enhanced consultation and transparency obligation for the Appellate Body. More specifically, Article 17.5 of the DSU could provide for the possibility that the parties agree to exceeding the 90-day timeframe, if they estimate that the report could be circulated only after the 90-day limit. In case no agreement is reached, there could be a mechanism pursuant to which the procedure or working arrangements for the particular appeal be adapted to ensure the meeting of the 90-day timeframe (*e.g.*, focusing the scope of the appeal, setting an indicative page limit on the parties' submissions, or taking appropriate measures to reduce the length of the report).

Thirdly, the communication provides a proposal for the Appellate Body's review of panel findings as to the meaning of domestic legislation, noting that it could be clarified that, while issues of law covered in the panel report and legal interpretations developed by the panel include the legal characterisation of the measures at issue under WTO rules, and the panel's objective assessment according to Article 11 of the DSU, they do not include the meaning itself of the domestic measures.

The fourth proposed amendment concerns the accusation levied against the Appellate Body that it tends to make findings on issues that are not necessary in order to resolve a dispute. The proposal is made to amend Article 17.12 of the DSU, requiring the Appellate Body to only address "*the issues raised on appeal by the parties to the dispute to the extent this is necessary for the resolution of the dispute*".

Finally, the fifth proposal relates to the issue of legal precedent. The US had criticised that "*[w]ithout basis in the DSU, the Appellate Body has asserted its reports effectively serve as precedent and that panels are to follow prior Appellate Body reports absent "cogent reasons"*". The proposal provides that annual meetings could be held between the Appellate Body and WTO Members where WTO Members could express their views in a manner unrelated to the adoption of particular reports (as already provided in Article 17.14 of the DSU). The idea is that this would provide an additional "*channel of communication*" where concerns with regard to some Appellate Body approaches, systemic issues or trends in the jurisprudence could be voiced. It is noted that "*adequate transparency and ground rules for such meetings*" should be established, in order to avoid undue pressure on the members of the Appellate Body. The proposals do not expressly note that Appellate Body decisions should not be treated as precedents. Indeed, it is the consistent and somewhat predictable jurisprudence of the Appellate Body that has significantly contributed to the success of WTO dispute settlement, as well as to the overall confidence in the rules-based multilateral trading system, by providing legal certainty.

Importantly, the proposals are accompanied by drafts of the various amendments to the DSU. However, while it may be necessary to amend certain provisions of the DSU in order to achieve these diverse objectives, actually amending the DSU is a complex undertaking. Article X.8 of the Agreement establishing the World Trade Organization provides that any WTO Member may initiate a proposal to amend the provisions of the DSU by submitting a proposal to the Ministerial Conference. The decision to approve amendments to the DSU are made by consensus and take effect for all WTO Members upon approval by the Ministerial Conference. Indeed, the communication already provides, in a footnote, that "*If the amendment of the DSU proves to be impracticable to achieve this objective swiftly, we will consider other legal instruments appropriate for that purpose*". One option could be to implement the changes through amendments of the *Working Procedures for Appellate Review* (hereinafter, Working Procedures). The Working Procedures are established by the Appellate Body in consultation

with the Director-General of the WTO and the Chairman of the Dispute Settlement Body (DSB). The Working Procedures have been amended six times since 1995. Additionally, the Appellate Body has adopted two sets of guidelines relevant to appellate proceedings. Considering the rather insurmountable challenge of amending the DSU by consensus, other options will likely need to be considered.

In fact, the initial reception of the communication already indicates that this would not be the final round of reform discussions concerning the Appellate Body. At the WTO General Council, on 12 December 2018, the Deputy United States Trade Representative (USTR) and Chief of Mission in Geneva, Dennis Shea, reportedly said that the reform proposal by the EU and other WTO Members acknowledged the complaints elaborated by the US to a certain extent, but that they fell short by seeking only to amend some rules. Deputy USTR Shea underlined that the proposals were mere "*revisions to the text (…) to permit what is now prohibited*", and that the US considered it necessary for WTO Members "*to engage in a deeper discussion of the concerns raised, to consider why the Appellate Body has felt free to depart from what WTO members agreed, and to discuss how best to ensure that the system adheres to WTO rules as written*". While raising specific concerns earlier this year, the US now appears to be reluctant to discuss with a view to resolving those very concerns, citing the need for a broader dialogue. This puts into question if the US is at all willing to advance the reform process or if the continued obstruction is an objective in itself.

The proposed amendments clearly aim at specifically addressing the issues raised by the US earlier this year in order to restore the functioning of the Appellate Body. While understandable, they neglect other aspects of potential reform. Already back in 1997, negotiations were initiated to clarify and improve the DSU, but they did not lead to any reform. Limiting the DSU reform to addressing the US concerns may be politically necessary and urgent, but clearly falls short of taking into account the years of previous negotiation.

The leaders convened at the G20 Summit in Argentina, in November 2018, noted that the multilateral trading system was currently falling short of its objectives and that there was room for improvement. They agreed that they would "*assess progress*" at their next summit, scheduled to take place at the end of June 2019. This includes the reform of the Appellate Body, but also the broader reform agenda (see *Trade Perspectives*, Issue No. 18 of 5 October 2018). WTO Director General Azevêdo welcomed the G20 communiqué, but also called on the leaders to act urgently in order to address the blockage of the WTO dispute settlement system. The ongoing debates on restoring the functioning of the Appellate Body and the broader debate on WTO reform are poised to become even more pressing in 2019. While it remains uncertain if the political will to find a solution is strong enough and genuine, the impending paralysation of the Appellate Body might force WTO Member to '*reveal their cards*'. Interested stakeholders around the world should carefully assess the proposals and contribute to the debate. We all have to lose from a crippled WTO.

Striving for more coherent implementation, the European Parliament, the Council of the EU and the European Commission reached agreement on a horizontal safeguard regulation

On 28 November 2018, the European Parliament, the Council of the EU (hereinafter, Council) and the European Commission (hereinafter, Commission) reached a political agreement on the Commission's *Proposal for a Regulation of the European Parliament and of the Council implementing the safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain agreements concluded between the European Union and certain third countries* (hereinafter, horizontal safeguard regulation). On 5 December 2018, the European Parliament's Committee on International Trade (hereinafter, INTA Committee) published the *Provisional Agreement Resulting from Interinstitutional Negotiations* on the horizontal safeguard regulation. The horizontal safeguard regulation will lay down standard

rules for the implementation of bilateral safeguard clauses to all future trade agreements and will significantly facilitate their implementation.

In general terms, safeguard measures allow countries to temporarily restrict the importation of a product with the purpose of protecting a specific domestic industry from an import surge that is causing or threatening to cause serious injury to the respective industry. The broader objective of implementing a safeguard measure is to provide the affected industry with some time to take necessary actions to restructure itself. Safeguard measures are regulated at the multilateral level within the agreements of the World Trade Organization (hereinafter, WTO), as well as in bilateral and regional trade agreements. At the multilateral level, rules on safeguards are provided by Article XIX of the General Agreement on Tariffs and Trade (GATT) on '*Emergency Action on Imports of Particular Products*', in the WTO Agreement on Safeguards, and under Article 5 of the WTO Agreement on Agriculture on '*Special Safeguard Provisions*'. The WTO Agreement on Safeguards provides specific guidelines and strict procedural obligations to which WTO Members must adhere. Regional and bilateral trade agreements also typically provide for safeguard clauses. They often share the same or similar grounds for the invocation of trade-restrictive measures as under the multilateral rules, or even make direct reference to the procedure and obligations contained in the WTO agreements. However, these clauses are naturally limited to the effects of certain bilateral or regional free trade agreements and are only applicable between the contracting parties of such preferential trade agreements. Safeguard clauses are a key element in trade agreements, as they provide a '*built-in insurance policy*' or a '*safety net*' that allows countries to make greater commitments and agree to significant tariff liberalisation, while at the same time disposing of a mechanism to adopt protective measures if a domestic industry is threatened by the sudden increase of imports of a specific product. Safeguards also play a '*psychological role*' in trade policy, as it appears that countries are actually more willing to reduce tariffs when a safeguard clause is also put in place.

The majority of trade agreements negotiated and concluded by the EU include a bilateral safeguard clause. Such a clause provides for the possibility of suspending the further tariff liberalisation or of re-instating the Most Favoured Nation (hereinafter, MFN) customs duty rate when, as a result of trade liberalisation, imports take place in such increased quantities and under such conditions, that they cause or threaten to cause serious injury to the domestic producers producing the like or directly competitive product. Additionally, a number of EU trade agreements include other mechanisms that also confer the possibility to reintroduce the MFN customs duty rate. In order to implement these trade agreements and the provisions contained therein, it is necessary to lay down the internal EU procedures in order to guarantee the effective application of the safeguard clauses. Certain agreements also include other mechanisms for temporary withdrawal of tariffs or of other preferential treatment, which also need to be taken into account, and the procedures for their application need to be established.

Currently, in conjunction with each separate recent trade agreement, the Commission proposes an implementing regulation to lay down the details for the safeguard clause and the special mechanisms, if any. In view of this repetitive and complex legislative process, it was considered that the whole process could be streamlined by establishing a horizontal bilateral safeguard regulation, which could be used for all future trade agreements concluded by the EU. Therefore, the Commission had proposed, on 18 April 2018, a horizontal safeguard regulation, which would apply to all safeguard clauses in future trade agreements. The objective of the horizontal regulation is to lay down standard rules for the implementation of bilateral safeguard clauses, providing a more efficient and coherent implementation process, as the same rules would apply under all future EU trade agreements.

The proposal for a horizontal safeguard regulation by the Commission lays down detailed provisions for the implementation of the bilateral safeguard clauses and other mechanisms on the temporary withdrawal of tariff preferences or other preferential treatment contained in the trade agreements concluded between the EU and a third country, which would be referred to in the Annex to the Regulation. More specifically, the horizontal safeguard regulation would specify the procedural details and technical aspects common to any bilateral safeguard

instrument, such as the initiation and conduct of investigations, the procedures for the provisional adoption and definitive measures, the duration and review of safeguard measures, the adoption of prior surveillance measures on imports from a country concerned, and further aspects. A separate chapter would establish the procedural rules concerning the special mechanisms, and an Annex would reflect the applicability of the regulation for a specific trading partner in question, as well as any specificities of the respective trade agreement.

Overall, the Commission's proposal was well received by the Council and the European Parliament. On 24 October 2018, the Council adopted its position, and, on 11 October 2018, the European Parliament's INTA Committee adopted its report. The Council and the European Parliament's INTA Committee agreed with the Commission on the importance to lay down rules for the implementation of bilateral safeguard clauses in a horizontal line to all future trade agreements, but emphasised the specific nature of some sensitive products and of areas that are particularly vulnerable to the effects of imports, such as the EU's outermost regions. In its report, the INTA Committee had requested the Commission to include in the horizontal safeguard regulation not only a monitoring system for imports of sensitive products, but also for the observance by third countries of the social and environmental standards laid down in the chapters of sustainable development. The INTA Committee decided to open inter-institutional negotiations on the basis of the report adopted by the Committee. *Trilogue* negotiations then led to the compromise agreement of 28 November 2018, which was made public on 5 December 2018.

The outcome of the inter-institutional negotiations is a provisional agreement that takes into account many of the requests from the European Parliament. As requested by both the Council and the European Parliament, Recital 1 of the revised proposal provides that the specificity of some products subject to the Agreements, as well as the vulnerable situation of the EU outermost regions, may require *ad-hoc* provisions. Article 4 of the revised proposal on *'Monitoring*' states that the Commission would monitor imports of sensitive products more closely and stringently than in the past. The revised proposal also includes a new paragraph under Article 5 on the '*Initiation of an investigation*', which provides that a request for initiating an investigation on whether safeguard measures should be applied may also be submitted jointly "*by the Union industry, or by any natural or legal person or any association not having legal personality acting on behalf thereof, and trade unions, or be supported by trade unions*". Furthermore, the revised proposal also includes, in its Article 6 on '*Conduct of investigation*', a requirement for the Commission to facilitate access to safeguard investigations for diverse and fragmented industry sectors through a dedicated Help Desk for small and medium-sized enterprises. The revised proposal also provides for the establishment of a Hearing Officer, who would be responsible to safeguard the effective exercise of the procedural rights of the interested parties. While the request by the European Parliament to extend the monitoring to the observance of social and environmental standards in trade agreements was not included in the revised proposal, the Commission will be required to report on these matters as part of its annual reporting obligations. Article 13 of the revised proposal provides that the "*Commission shall submit an annual report to the European Parliament and to the Council on the application, implementation and fulfilment of obligations of the Agreement concluded with each country concerned, including with regard to the Trade and Sustainable Development chapter, where the Agreement contains such chapter and of this Regulation*".

The inclusion of this reporting requirement underlines the continued importance that the European Parliament, and civil society, accords to the issue of trade and sustainable development. Another recent example is the threat by certain Members of the European Parliament to block the adoption of the EU-Japan Economic Partnership Agreement because of labour standards and the fact that Japan had not signed two core conventions of the International Labour Organization (ILO) on discrimination and on the abolition of forced labour. The increased focus on trade and sustainable development, now also in the context of the horizontal safeguard regulation, demonstrates the increasing relevance of this issue. At the same time, it clearly connects the economic benefits accorded by trade agreements to the commitments under the chapters on trade and sustainable development. The discussion on the further development of these chapters and their implementation has been ongoing (see

Trade Perspectives, Issue No. 4 of 23 February 2018) and will remain relevant in the context of the ongoing EU trade negotiations.

The vote on the revised proposal for the horizontal safeguard regulation by the European Parliament's plenary is scheduled on 15 January 2019. The first agreement that would then be covered by the horizontal safeguard regulation is the EU-Japan Economic Partnership Agreement, which was ratified by the European Parliament on 12 December 2018 and is scheduled to enter into force on 1 February 2019. The EU's horizontal safeguard regulation will allow the EU to implement safeguard clauses in a more efficient and coherent manner and it should make EU action more predictable for trading partners. Businesses in the EU and beyond, as well as EU trading partners, should assess the forthcoming horizontal safeguard regulation, in particular in view of the enhanced reporting requirements.

Front-of-Pack (FoP) nutrition labelling: As the European Commission intends to release its report in 2019, can consensus be reached on a harmonised EU system?

Nutrition labelling is often presented as an important tool in the fight against obesity and other non-communicable disease (hereinafter, NCDs). The nutrition information presented in a panel on the back side of food packaging is, however, complex. Additional, simplified front-of-pack (hereinafter, FoP) labels on food products, therefore, aim at empowering consumers to make informed and healthier choices about their diets. While the European Commission (hereinafter, Commission) intends to release a report on the topic in 2019, food manufacturers and retailers have developed their own simplified FoP nutrition labels and a number of EU Member States issued recommendations regarding specific schemes.

According to Article 35 of *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, FIR), in addition to the harmonised panel with '*nutrition information*' on the side or back of the food packaging referred to in the FIR, the energy value and the amount of nutrients may be given by other forms of expression and/or may be presented using graphical forms or symbols in addition to words or numbers, provided that a number of requirements are met. According to Article 35(2) of the FIR, EU Member States may recommend to food business operators (hereinafter, FBOs), providing the Commission with the details, the use of one or more additional forms of expression or presentation of the nutrition declaration that they consider as best fulfilling the following requirements: "*1) They are based on sound and scientifically valid consumer research and do not mislead the consumer; 2) Their development is the result of consultation with a wide range of stakeholder groups; 3) They aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet; 4) They are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer; 5) In the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII of the FIR, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; 6) They are objective and non-discriminatory; and 7) Their application does not create obstacles to the free movement of goods*".

Article 35(5) of the FIR requires the Commission to adopt, in the light of the experience gained, a report to the European Parliament and the Council of the EU on the use of the additional forms of expression and presentation of the nutrition declaration, on their effect on the internal market, and on the advisability of further harmonisation. The Commission may accompany this report with proposals to modify the relevant EU provisions. For this purpose, EU Member States are required to provide the Commission with information concerning the use of such additional forms of expression or presentation on the market in their territory. The Commission announced in October 2017 that it was still in the process of preparing this report, originally foreseen by 13 December 2017, and that, therefore, no indication of the subsequent steps that

may be considered in the future could yet be given. The report is now scheduled to be released in 2019.

The Commission is currently engaged in a process to facilitate a dialog at the EU level on the topic between stakeholders and EU Member States. This dialog takes place within the EU Platform for Action on Diet, Physical Activity and Health, a *forum* for European-level organisations, including FBOs (*i.e.*, manufacturers, retailers, caterers, fast food restaurants); consumer organisations; public health NGOs; and scientific and professional associations, as well as within the High Level Group on Nutrition and Physical Activity. Discussions address technical aspects of existing FoP nutrition labelling schemes and those under development, an ongoing Joint Research Center (JRC) study providing an overview of EU and international FoP schemes, as well as details of FoP schemes developed by EU Member States, such as the Nordic '*Keyhole*' scheme, the UK's FoP '*traffic light*' labelling scheme, and the French '*Nutri-Score*' scheme, and by private operators, such as the Reference Intakes (hereinafter, RIs) Label, the Evolved Nutrition Label, and the Healthy Choice logo. Most recently, on 22 October 2018, a joint meeting on FoP nutrition labelling was held between the FIR Working Group of the Standing Committee on Plants, Animals, Food and Feed, as well as the Advisory Group on the Food Chain, Animal and Plant Health. At the meeting, potential elements to consider for the development of FoP schemes were discussed in light of the criteria set out in Article 35(2) of the FIR.

The development and recommendations by EU Member States of FoP nutrition labelling is an ongoing process and has made the Commission's task to release a report on the topic more complex. In 2012, the UK was the first EU country to introduce a nationwide FoP nutritional label, the voluntary '*traffic lights*' labelling scheme. The colour-coded system rates the healthiness of a product by assessing the content of key nutrients: salt, fat, saturated fat, sugar, and total calorie count. Unlike traffic light labels, which highlight key individual nutrients, the French *Nutri-Score* system provides a single score for the entire product, giving consumers an overall assessment of the product at a glance. *Nutri-Score* gives a rating to any food (except single-ingredient foods and water) ranging from a dark green A (best) to a red E (worst), by weighing the prevalence of '*good*' and '*bad*' nutrients. In August 2018, Belgium announced the intention to follow the French model (see *Trade Perspectives*, Issue No. 16 of 7 September 2018) and, on 13 November 2018, also the Spanish Government's Agency for Consumer Affairs, Food Security and Nutrition announced a number of measures aimed at tackling obesity, including the use of the *Nutri-Score* FoP nutrition labelling scheme. Scandinavian EU Member States developed the '*keyhole*' label and model, where foods labelled with the keyhole symbol contain less sugars and salt, more fibre and wholegrain, and are considered healthier or less fat than comparable food products. Similarly, criteria of the '*Healthy Choices Programme*', set by independent scientists, indicate the healthiest option in each food-group.

There are also developments at industry level. In March 2017, multinational companies in the food sector, including the *Coca-Cola Company*, *Mars*, *Mondelez International*, *Nestlé*, *PepsiCo* and *Unilever*, launched the '*Evolved Nutrition Label Initiative*' (hereinafter, ENLI) in order to introduce a traffic light labelling scheme, similar to that in operation in the UK (but with reference values including portions), throughout Europe. The ENLI drew strong criticism from public health campaigners and other stakeholders for providing nutrition information per portion rather than per 100g, leaving the door open to potentially misleading colour codes. In March 2018, *Mars* withdrew from the initiative, noting that it lacked "*credibility and consensus*". In November 2018, *Nestlé* also withdrew, while the remaining companies put trials on '*hold*'. *PepsiCo* reportedly decided to opt for UK-style '*traffic light*' labels rather than the '*Nutri-Score*' system. *Kellogg,* which is not part of the ENLI, announced, at the end of November 2018, that, from January 2019 it would put traffic light labels on its cereal boxes in the UK.

Not all EU Member States appear to be in favour of any FoP colour coding system. The current Italian Government appears to maintain the position of previous Governments against the adoption at EU level of a simplified nutrition label that uses the colours of the traffic light, as in the UK, or with colours associated with letters, as in France. Italy argued, *inter alia*, that '*Nutri-Score*' was discriminatory, especially in relation to these products recognised at the EU level

as a "*national heritage (PDO, PGI, TSG), which are required by law to maintain certain levels of nutrients provided for in the production specifications for the protection of traditions and consumers*". On 22 June 2018, Italy presented its own proposal, consisting of a battery icon, like that of smartphones, displaying the amount of calories, fat, saturated fat, sugars and salt in each portion. The charged part of the battery graphically represents the percentage of energy or nutrients contained in the single portion, allowing it to be visually quantified. For a balanced daily diet, the sum of what is consumed during the day should not exceed 100% of the recommended daily amount.

A recent decision (PS11063 - '*Auchan - La vita in blu*', *Provvedimento* n. 27379) of the Italian Antitrust Authority (*i.e.*, *Autorità Garante della Concorrenza e del Mercato*, hereinafter, AGCM), published on 29 October 2018, addressed FoP nutrition labels introduced by a retailer. During the course of 2018, the Italian branch of the French retailer *Auchan* was investigated for introducing its own FoP nutrition label '*La vita in blu*'. The initiative, part of *Auchan*'s '*wellness project*' (*i.e.*, '*progetto benessere*'), consisted of placing blue heart stickers on food products deemed healthier, with the aim of helping consumers to '*eat better*' (*i.e.*, '*mangiare meglio*'). Availing itself of the advice of its own board of experts ('*avvalendosi della consulenza di un proprio collegio di esperti*'), blue heart labelled products were considered to have "*the best nutritional balance between nutrients that must be present in the diet (proteins) and nutrients whose intake should be kept under control (sugars, saturated fats and salt)*". The AGCM found that this initiative constituted an "*unfair commercial practice*" that "*altered the capacity*" for consumers to make informed purchasing decisions, as it was neither methodologically correct nor transparent. In the decision, *Auchan* committed to use the *'La vita in blu*' claim only as a commercial tool based on criteria individually and subjectively chosen by the retailer, underlining that the products are '*chosen by us*' (*i.e.*, '*Scelti da noi*').

There is currently no agreement on which nutrients the FoP schemes should focus. Recently, scientists pointed out that, throughout Europe, the average recommended daily intake of fibre of at least 30g was often not reached. To reach the recommended doses for fibre, FoP labels may help, but the importance of fibre has been overlapped by fat and sugar on which most people concentrate. It has been said that it would be easier for consumers to follow recommendations if fibre quantities were included on the FoP along with sugar, fat, calories and salt. Indeed, additional forms of expression and presentation, according to Article 35 of the FIR, may also be supplemented with an indication of the amounts of one or more of the following: mono-unsaturates, polyunsaturates, polyols, starch, fibre, and certain vitamins or minerals.

There are also a number of legal questions that must be taken into account. For example, on the '*Nutri-Score*' logo itself, there is no reference at all to RIs. In comparison, the UK's '*traffic light*' scheme is a '*hybrid*' FoP scheme that includes RIs (formerly known as '*guideline daily amounts*', or GDAs) and colour coding in the logo. The '*Nutri-Score'* logo and its colour codes appear to simply categorise foods from '*good*' foods to '*bad*' foods, without taking into account of how much energy and nutrients are consumed per day. Regarding the requirement of Article 35 of the FIR, that these additional forms of expression be objective and non-discriminatory, it appears that only saturated fats and '*simple*' sugars are relevant for the negative component of the calculation of the nutritional score. This appears to be a discrimination towards products containing saturated fats (which are not *per se* unhealthy) and presumably added sugars, which can also form part of a healthy diet, if consumed in moderation. Various other questions remain unanswered. First, whether such schemes are actually '*voluntary*' in nature or whether they implicitly force competing FBOs to apply the same labels, once one operator has started doing so. Second, whether certain elements of these schemes can be classified as '*non-beneficial*' nutrition claims. Finally, the proliferation of different schemes may become an obstacle to the free movement of goods within the EU and be contrary to EU law (see *Trade Perspectives*, Issue No. 21 of 20 November 2015 and Issue No. 6 of 24 March 2016).

Regarding the French '*Nutri-Score*' scheme, the pan-European industry group *FoodDrinkEurope* (hereinafter, FDE) issued a statement calling for discussions on a coordinated approach to FoP labelling to take place at EU level in close consultation and

agreement with all stakeholders. The approach should also be consistent with the RIs approach (*i.e.*, taking into account the average daily dietary intake of energy) that the European food and drink sector had pioneered and which aims at ensuring meaningful, science-based and non-discriminatory information to consumers. In its statement, FDE regrets that the '*Nutri-Score*' scheme added yet another potential layer of complexity to what should be a harmonised EU approach to FoP labelling. Any proliferation of national schemes should be avoided, as this might affect the free movement of goods within the EU's Single Market. There are also related developments at the international level to be taken into account. In the 41st Session of the *Codex Alimentarius* Commission, in July 2018, the *Codex Alimentarius* Commission agreed to undertake new work to develop guidance on providing simplified FoP nutrition information to consumers to enable them to identify healthier food choices, while avoiding creating unnecessary obstacles to the food trade.

With the report on additional FoP nutrition labelling schemes, the Commission has a complex task. Stakeholders in the agri-food sector should monitor developments on FoP nutrition labelling and take action to ensure that their legitimate interests are voiced and represented within all relevant *fora*. In addition, given the unique situation of the EU Single Market, uniform legislation regarding FoP nutrition labelling should be adopted at the EU level, as piecemeal legislation across EU Member States would almost certainly have a negative impact on the free movement of goods. The release of the Commission's report in 2019 will hopefully shed some light on this complex topic.

Recently Adopted EU Legislation

Customs Law

- *Council Regulation (EU) 2018/1977 of 11 December 2018 opening and providing for the management of autonomous Union tariff quotas for certain fishery products for the period 2019–2020*

- *Commission Implementing Regulation (EU) 2018/1968 of 12 December 2018 opening a tariff quota for the year 2019 for the import into the Union of certain goods originating in Norway resulting from the processing of agricultural products covered by Regulation (EU) No 510/2014 of the European Parliament and of the Council*

- *Commission Implementing Decision (EU) 2018/1888 of 3 December 2018 determining that a temporary suspension of the preferential customs duty pursuant to Article 15 of Regulation (EU) No 19/2013 of the European Parliament and of the Council and pursuant to Article 15 of Regulation (EU) No 20/2013 of the European Parliament and of the Council is not appropriate for imports of bananas originating in Guatemala and Peru*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2018/1980 of 13 December 2018 amending Implementing Regulation (EU) 2017/2325 as regards the terms of authorisation of preparations of lecithins liquid, lecithins hydrolysed and lecithins de-oiled as feed additives for all animal species*

- *Commission Implementing Decision (EU) 2018/1986 of 13 December 2018 establishing specific control and inspection programmes for certain fisheries and repealing Implementing Decisions 2012/807/EU, 2013/328/EU, 2013/305/EU and 2014/156/EU*

- *Commission Implementing Regulation (EU) 2018/1969 of 12 December 2018 operating deductions from fishing quotas available for certain stocks in 2018 on account of overfishing in the previous years*

Other

- *Commission Implementing Regulation (EU) 2018/1883 of 3 December 2018 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing*

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

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