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A WTO panel decides in favour of the US in a case against China concerning agricultural subsidies. Is the WTO itself the real winner?

On 28 February 2019, the World Trade Organization (hereinafter, WTO) circulated the panel report in the case *DS511: China – Domestic Support for Agricultural Producers* brought by the United States against China in relation to domestic support for local agricultural producers. The panel ruled in favour of the US, which had claimed that China's domestic support granted to local producers, namely to those producing wheat, Indica rice, Japonica rice, and corn, is inconsistent with China's WTO commitments. The panel determined that China provided farm subsidies in excess of its international trade commitments. In parallel, the US and China are currently conducting trade negotiations to overcome the '*tit-for-tat*' trade war that has led to the reciprocal introduction of additional tariffs for a wide range of products since early 2018.

In simple terms, the Chinese authorities, through market intervention, buy Indica rice, Japonica rice, and wheat from local farmers at a specific price. According to the US, through such elevated procurement prices, China provides domestic support in excess of its commitment level of "*nil*" (*i.e.*, zero), as specified in Section I of Part IV of its Schedule CLII of GATT Commitments, because China, *inter alia*, provides domestic support in excess of its product-specific *de minimis* level of 8.5% for wheat, Indica rice, Japonica rice, and corn. On 13 September 2016, the US had requested consultations with China regarding certain measures included in a number of legal instruments enumerated by the US.

With respect to domestic agricultural support, during the Uruguay Round of multilateral trade negotiations, all WTO Members committed to reduce their level of support, expressed as '*aggregate measurement of support*' (hereinafter, AMS) reduction commitments. On the one hand, pursuant to Article 6.3 of the WTO Agreement on Agriculture (hereinafter, AoA), WTO Members are required not to provide support in excess of their AMS reduction commitments, as set out in Part IV of their Schedules of Concessions on Goods. On the other hand, Article 3.2 of the AoA provides that a WTO Member "*shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule*". According to the US, the level of domestic support that China provided to its agricultural producers in the years 2012, 2013, 2014, and 2015 had exceeded the level set out in Section I of Part IV of China's Schedule of Concessions on Goods. Therefore, the US argued that China's measures were inconsistent with Articles 3.2, 6.3 and 7.2 of the AoA.

China, like nearly all WTO Members, provides a certain level of domestic support to its agricultural producers through a variety of subsidy programs and other measures. One of these

means of support is the so-called '*market price support*' (hereinafter, MPS), which China uses to support farmers' incomes and to increase production of basic agricultural products, including wheat, Indica rice, Japonica rice, and corn. According to Paragraph 8 of Annex 3 of the AoA, the MPS is to be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, are not to be included in the AMS.

Based on the WTO panel report, it appears that the central element of the dispute was the calculation of the value of China's MPS provided to producers of wheat, Indica rice, Japonica rice, and corn. Differing calculation methodologies, followed by the US and China, led to different results, exceeding or not the *de minimis* level (*i.e.*, minimal amounts of domestic support that are allowed even though they distort trade) and, subsequently, China's AMS. The panel also addressed the scope of its jurisdiction with respect to the measure relating to corn, which had already expired prior to the initiation of the dispute by the US. The panel determined that "*the measure relating to corn expired prior to the United States' request for the establishment of a panel and the United States' request for consultations"* and that "*In the absence of circumstances weighing in favour of making findings, past panels declined to address measures that had expired before the complainant requested the establishment of a panel*". Therefore, determining that there were no *considerations that could potentially weigh in favour of making findings with regard to the expired corn measure*, the panel considered that this measure fell outside its scope of jurisdiction.

In light of its decision not to rule on the corn measure, the panel followed on to only assess the measures still in force under Articles 6.3 and 3.2 of the AoA, namely the measures relating to Indica rice, Japonica rice, and wheat. The panel first reviewed the articles forming the legal basis of the dispute and observed that "*pursuant to Article 3.2 of the Agreement on Agriculture, Members can provide domestic support in favour of domestic producers as long as it is not in excess of the commitments undertaken by each Member (…)., as contained in Part IV of its Schedule. In turn, Article 6.3 sets out that in assessing a Member's compliance with its domestic support reduction commitments, it is necessary to compare the Current Total AMS and the corresponding domestic support commitment".* The panel then proceeded to compute China's Current total AMS in order to compare it to China's commitment of "*nil*".

In other words, in order for the panel to determine that China had respected its AMS obligation, the MPS provided to local farmers had to first be calculated. Under the AoA, the MPS is calculated using a mathematical formula composed of three factors set out in Annex 3 of the AoA: 1) The applied administered price (AAP); 2) The fixed external reference price (FERP); and 3) The quantity of production eligible to receive the AAP (QEP). To determine if China's subsidies were in compliance with its commitments, the panel had to verify that the resulting value of the MPS does not exceed 8.5% of China's *de minimis* commitment. On the basis of the various calculations and detailing the correct methodology to be followed, the panel concluded that "*China's level of support in favour of domestic producers is in excess of China's commitment level of "nil", set forth in Section I of Part IV of China's Schedule of Concessions on Goods. Therefore, China is not in compliance with its domestic support commitments pursuant to Articles 3.2 and 6.3 of the Agreement on Agriculture*". Consequently, China was considered to have acted inconsistently with its obligations under Articles 3.2 and 6.3 of the AoA and requested to bring its inconsistent measures into conformity with its obligations. Concerning the violation of Article 7.2 of the AoA, alternatively put forward by the US, and as the panel had already determined non-compliance based on the above-mentioned articles, it considered a further analysis of Article 7.2 of the AoA to be unnecessary.

The direct implications of the ruling, however, appear to be uncertain. In a first reaction, China regrets that the WTO panel did not support its method of calculating the subsidy levels in China's minimum procurement price policies for wheat and rice. In its submission to the panel, China had pointed out that it is common practice for Governments to support agriculture, safeguard grain security, and ensure the incomes of farmers, and that those practices are recognised and allowed under WTO rules. According to a Chinese Government official, China

would now evaluate the WTO panel report and "*handle the case*" following WTO dispute settlement procedures. China could have recourse to the WTO Appellate Body and appeal the panel decision. However, this China would need to act quickly, as such recourse might soon become only a theoretical possibility. Due to a number of concerns, the US Administration is currently blocking the appointment of new members of the WTO Appellate Body, which might soon render the Appellate Body incapable of hearing appeals (see *Trade Perspectives*, Issue No. 15 of 27 July 2018). According to the WTO Dispute Settlement Understanding (hereinafter, DSU), the Appellate Body is composed of seven members, but, due to the stalled appointment process, the Appellate Body currently only has three members. According to the second sentence of Article 17(1) of the DSU, the Appellate Body "*shall be composed of seven persons, three of whom shall serve on any one case*" and "*Persons serving on the Appellate Body shall serve in rotation*". The terms of two of the three Appellate Body members will end on 10 December 2019, which will lead to the Appellate Body being paralysed, as there would not be enough judges to hear any case.

Considering the potential forthcoming blockage of the usual WTO Dispute Settlement, it is worth considering, as argued by a number of Academics, whether Article 25 of the DSU, which provides for binding arbitration as an alternative means of dispute settlement, could serve as a '*temporary alternative*' to resolve disputes. Article 25(1) of the DSU provides that such "[e]*xpeditious arbitration within the WTO as an alternative means of dispute settlement, can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties*". The DSU does not provide many details on the procedure (*e.g.*, on the arbitrators, hearings, or required documents), leaving this entirely to the discretion of the parties. Importantly though, the second sentence of Article 25(3) of the DSU provides that parties to the proceeding shall agree to abide by the arbitration award. So far, the procedure under Article 25 of the DSU article has only been used once, namely in the case *US – Section 110(5) Copyright Act* in 2001. In that case, after the circulation of the panel report, the US and the EU as parties to the dispute decided to use arbitration "*to determine the level of nullification or impairment of benefits to the European Communities as result of Section 110(5)(B) of the US Copyright Act*". However, chances that WTO Members would rely on proceedings under Article 25 of the DSU appear to be slim, in particular as it stands outside of the established dispute settlement system and does not provide for any appeal mechanism.

Therefore, it might become necessary that the resolution of this dispute be part of the broader discussions that are currently ongoing between the US and China. In reaction to the panel decision, US Trade Representative (hereinafter, USTR) Robert Lighthizer stated that the US "*expected China to quickly come into compliance with its WTO obligations*". At the same time, USTR Lighthizer admitted that there was no guarantee that China would comply with the decision, but that the US was addressing this issue as part of the ongoing negotiations to end the trade war between the two countries. The US and China have been engaged in a '*tit-for-tat*' trade war since the Spring of 2018, when the US imposed additional tariffs on a wide range of products originating in China, arguing that China engages in unfair trade practices. Since 2018, additional US tariffs applied to China amount to around USD 250 billion, while additional tariffs applied by China on goods originating in the US amount to around USD 110 billion. From 21 to 24 February 2019, China and the US held trade negotiations in Washington, DC. During the negotiations, both parties agreed that the removal of tariffs was necessary for both countries. Reportedly, the US and China are close to concluding a trade agreement, which would be limited in scope and would aim at addressing only the additional tariffs, increased access to the Chinese market for US goods, as well as intellectual property rights issues. The details of the envisaged agreement remain unclear, notably whether the tariffs currently in force would be removed immediately or over a certain period of time. Reportedly, China offered the US to lower tariffs on US goods, *inter alia*, from the agricultural, chemical, and auto sectors. In response to the ongoing negotiations, the US delayed a planned additional increase from 10% to 25% of its import tariffs on Chinese goods that are already subject to additional tariffs since September 2018, and which were originally scheduled to take effect on 1 March 2019. A summit between US President Donald J. Trump and China's President Xi Jinping might take place at the end of March 2019, but has yet to be confirmed.

The WTO panel report over Chinese subsidies for certain agricultural products can be considered as a stage win for the US over China. However, considering the ongoing trade war and related ongoing negotiations between the two countries, the actual consequences remain to be seen. In a way, though, the fact that the US and China still referred the dispute to the WTO is encouraging and sign that the multilateral trading system still plays a role and is to be preferred to unilateral '*tit for tat*' actions. Hopefully, the impasse on the appointment of Appellate Body Members can soon be overcome and the WTO dispute settlement system regain its full role and authority in adjudicating disputes between parties.

As the path to '*Brexit*' remains unclear, the EU and the UK prepare their respective policies for tariff-rate quotas in case of a '*no deal*'-'*Brexit*'

On 5 March 2019, the most recent round of negotiations between the EU and the UK, regarding the terms for the impending '*Brexit*', ended without any announcement of progress, but negotiators assured that discussions would be taken up again "*soon*". These final negotiations focus on reaching agreement on legally binding assurances concerning the temporary nature of the so-called '*backstop*' for the Northern Ireland-Ireland border. These assurances are intended to allow the UK Prime Minister Theresa May secure a majority within the UK Parliament for the Withdrawal Agreement ahead of the 29th of March 2019, when the UK is scheduled to leave the EU. In the meanwhile, the EU and the UK continue to prepare for the two possible scenarios of an orderly '*Brexit*' on the basis of the Withdrawal Agreement or a so-called '*no deal*'-'*Brexit*'. More specifically, preparations concern the future use of tariff-rate quotas (hereinafter, TRQs), which are an important instrument to manage market access, particular with respect to agricultural trade.

On 29 March 2017, the UK Government had officially notified the EU of its intention to withdraw from the EU and, in its '*Brexit*' Bill, the UK formally committed to leave the EU at 23:00 GMT on 29 March 2019. '*Brexit*' negotiations have been taking place since June 2017, but the issue of the Irish border '*backstop*' (*i.e.*, a position of last resort, to maintain an open border on the island of Ireland whatever the outcome of the negotiations between the EU and the UK on their future relationship) has remained controversial. On 13 November 2018, the EU and the UK reached '*technical agreement*' on the withdrawal arrangement. On 25 November 2018, the Withdrawal Agreement and the Declaration on the Framework for the Future Relationship were endorsed by EU Member States' leaders. While the Withdrawal Agreement was approved by the UK Cabinet, it did not yet receive approval by the UK Parliament. UK Prime Minister May is now expected to report to the UK Parliament again on 12 March 2019.

Under the terms of the Withdrawal Agreement, a transition period would last from 29 March 2019 until 31 December 2020 (see *Trade Perspectives*, Issue No. 7 of 6 April 2018), during which EU law would continue to apply in and to the UK, but without UK participation in EU Institutions and governance structures. Most importantly, during that time, the UK would remain a member of the EU Single Market, as well as the EU Customs Union. This would provide the UK with ample time to define its own policies, including with respect to trade and customs issues. However, in case of a '*no deal*'-'*Brexit*', the UK would immediately need to apply its own customs and tariff policies and the EU and its trading partners would immediately need to take account of the fact that the UK is no longer an EU Member State, which affects the underlying assumptions of existing trade agreements and arrangements. A key issue in this regard is the allocation of the so-called TRQs to address specific market access concerns. TRQs determine the quantities of goods that may be imported duty-free or at reduced tariffs (in-quota rates). Once the quota is filled, the regular higher tariff applies (out-of-quota rate). TRQs are particularly important with respect to agricultural and fishery products. In view of the often wide gap existing between the in-quota and the out-of-quota tariff rates, the TRQ allocation is of key importance. With respect to '*Brexit*', both the EU and the UK will have to determine their future TRQ policies.

TRQs are a key trade instrument that the UK will be able to use post-'*Brexit*', after it has left the EU and the EU Customs Union. Currently, the UK, as part of the EU's Customs Union, does not maintain its own TRQs, but the EU-wide TRQs also apply to the UK. The UK's future customs and tariff policy, in case of a '*no deal*'-'*Brexit*', has not been announced yet and, while on 6 March 2019 the UK's Secretary of State for International Trade, Liam Fox, stated to UK Members of Parliament that basic agreement had been reached between senior members of the Government regarding the UK's future tariffs on EU goods, no details on any aspects of the UK's future tariff policy have been officially made public yet. Reportedly though, as part of its own customs and tariff policy, for the possibility of a '*no deal*-'*Brexit*' without any transition period, the UK Government is preparing the introduction of TRQs for certain agricultural products. More specifically, it appears that the UK intends to introduce TRQs for dairy and livestock products. This would allow the UK to manage the market access for such products, taking into account the demand and price level of such products, but also the protection of the domestic industry with respect to strong increases of imports. Importantly, these would be new and additional TRQs and do not concern the existing EU's TRQs for certain trading partners, which are currently under discussion at the WTO.

In the context of TRQs, a key question relates to the allocation method for the TRQs. Reportedly, the UK intends to apply these TRQs on an *erga omnes* basis, which means that they would apply to all trading partners. But more details are needed to determine the exact functioning of such TRQs. For instance, would they be allocated on a '*first come, first serve*' basis? Would they apply to specific time periods or seasonally on the basis of sub-quotas? In more general terms, the question of TRQs, and whether they are administered on a country-specific or most-favoured nation (MFN) basis, is one of the most important and often contentious issues associated with the opening and management of TRQs. Country-specific TRQs are not necessarily inconsistent with WTO rules, as Article XIII:2(d) of the General Agreement on Tariff and Trade (hereinafter, GATT) 1994 expressly allows quotas to be allocated among supplying countries, which in practice means the exclusion of certain WTO Members because not all Members can normally be considered as supplying countries. 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. If that were to prove not practical or possible, the unilateral decision of the importing country would suffice. In this latter case, however, the importing country is required to allocate the TRQs "*based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product*".

The special circumstances of '*Brexit*' will likely add some complexity to the process, as the UK might not be able to base its determinations exclusively on a '*previous representative period*', because during any such period, the UK would have been a member of the EU Customs Union and the EU Single Market. Should the EU seek to benefit from such TRQs, the EU could, arguably, put forth the argument that the UK's membership of the EU was a '*special factor*' that affected trade in the product and that the EU should be considered as the principal or substantial supplier to the UK for certain products. Third countries trading with the EU28 and with the UK should also decide how to engage in these negotiations and what strategy to pursue. While some countries will be able to swiftly negotiate preferential trade agreements (*e.g.*, FTAs, CEPAs, etc.) with the UK post-*Brexit*, others may not, but their TRQs should nevertheless be reaffirmed and protected. Considering these complexities and the limited time until the possible application of those TRQs, it is indeed likely that TRQs would, at first, be applied on an MFN basis *vis-à-vis* all trading partners.

In addition to the issue of the UK's future TRQs, another important aspect concerns the existing EU's TRQs, which have to be recalculated and reallocated due to '*Brexit*', and for which the EU is currently conducting negotiations with WTO Members. Already in October 2017, the EU

and the UK had sent a letter to all Permanent Representatives to the WTO and informed other WTO Members of how they would deal with the consequences of '*Brexit*' for the multilateral trading system of the WTO (see *Trade Perspectives*, Issue No. 18 of 5 October 2018). Most importantly, they noted that the EU's scheduled commitments for goods, services and public procurement would remain applicable to its territory, but that the EU's existing quantitative commitments in the area of goods, namely through TRQs, would require certain adjustments to reflect '*Brexit*'. With respect to the quantitative commitments in the form of TRQs, the future quotas are supposed to be established through an apportionment of the EU's existing commitments and based on current trade flows under each TRQ.

In view of the possibility of a '*no deal*'-'*Brexit*' with no transition period and despite the likelihood that not all negotiations with WTO trading partners be concluded by then, the EU already decided on the apportionment of TRQs included in the EU's WTO Schedule of the Union following '*Brexit*'. On 8 February 2019, the EU published in its Official Journal *Regulation (EU) 2019/216 of the European Parliament and of the Council of 30 January 2019 on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union, and amending Council Regulation (EC) No 32/2000* and its Annex provides the product-specific allocations. The relevant parts of the Regulation will only become effective when *Council Regulation (EC) No 32/2000 of 17 December 1999 opening and providing for the administration of Community tariff quotas bound in GATT and certain other Community tariff quotas and establishing detailed rules for adjusting the quotas* does not apply anymore to the UK (*i.e.*, when the UK has left the EU Customs Union). Recital 5 of the Regulation provides that the EU would, "*following completion of preliminary contacts, engage in negotiations with WTO Members having a principal or substantial supplying interest or holding an initial negotiating right in relation to each of these tariff rate quotas*".

On 26 June 2018, the Council of the EU authorised the Commission to open formal negotiations within the WTO on how to apportion the existing EU's TRQs between the EU27 and the UK. The Regulation goes on to state that "*given the time limits imposed on this process by the negotiations on the United Kingdom's withdrawal from the Union, it is possible that agreements might not be concluded with all WTO Members concerned in relation to all of the tariff rate quotas on the date the Union's WTO schedule of concessions and commitments on trade in goods ceases to apply to the United Kingdom*". Notably, the EU states that, due to "*the need to ensure legal certainty and the continuous smooth operation of imports under the tariff rate quotas to the Union and to the United Kingdom, it is necessary for the Union to be able to proceed unilaterally to the apportionment of the tariff rate quotas*". However, taking into account the ongoing negotiations with other WTO Members, the Regulation empowers the Commission to adopt delegated acts on the basis of Article 290 of the Treaty on the Functioning of the European Union (TFEU) "*to take account of any agreements concluded or of pertinent information that it might receive in the context of those negotiations which would indicate that specific factors that were not previously known require an adjustment to the apportionment of the tariff quotas*". Therefore, the TRQs provided in the Annex to *Regulation 2019/216* will likely only constitute '*transitional*' TRQs until the negotiations with all relevant WTO Members are concluded.

In fact, a certain number of WTO Members and important EU trading partners, already criticised the EU's approach to the reapportionment. It can, therefore, be expected that the negotiated TRQs will significantly differ from the allocations unilaterally determined by the EU. An important sector in this regard will be the meat sector, particularly with respect to beef and poultry, where important trade disputes were fought out in the past through a number of WTO dispute settlement proceedings (on poultry, see *Trade Perspectives*, Issue No. 18 of 5 October 2018, and, on beef, see Issue No. 17 of 21 September 2018).

With the date of '*Brexit*' fast approaching, the details for the trade and customs rules applicable post-'*Brexit*' are still largely unclear. It all depends on the UK's ability to achieve ratification of the Withdrawal Agreement by the UK Parliament. Stakeholders and exporters around the world

should carefully monitor the developments in the UK, as well as the ongoing negotiations at the WTO with regards to the future EU's and UK's TRQs.

Spanish advertising self-regulatory body *Autocontrol* declares the anti-palm oil advertising campaign of *Chocolates Trapa* misleading and denigrating

On 24 January 2019, the self-regulatory body of the Spanish advertising industry, *Autocontrol*, issued an opinion in case Nº 06/R/ *Fundación Española del Aceite de Palma Sostenible* (Spanish Sustainable Palm Oil Foundation) vs. *Europraliné, S.L.* "*Chocolates Trapa*" (hereinafter, Chocolates Trapa) with respect to the advertising campaign '*Commitment: Without palm oil*' (*i.e.*, '*Compromiso: Sin aceite de palma*'). The opinion condemns an advertising campaign that, by means of categorical statements, clearly conveyed two messages, namely that: 1) The cultivation of oil palms is the sole or main responsible for deforestation; and 2) The abolition of palm oil would help alleviate the problem; which *Autocontrol* considers to be statements that cannot be considered entirely true and, therefore, have to be deemed misleading and denigrating. *Autocontrol* also found that the allegations awarded by *Chocolates Trapa,* to the ingredients that replace palm oil in its chocolates, are not permissible. While not directly related to the controversial issue of '*palm oil-free*' claims on food products, the opinion clearly supports arguments on the illegality of such claims.

At the end of 2018, *Chocolates Trapa* launched an advertising campaign on its website and on the *YouTube website*, including a video that shows the alleged transformation suffered by the rainforests due to the cultivation of palm oil. The video includes trees felling, an orangutan sedated after being hit by a tranquiliser dart, controlled fires and testimonies from locals in Indonesia, the country with the highest amount of palm oil production, explaining the consequences that, in the long term, would derive from its consumption. Apart from the video, the following allegations are made by *Chocolates Trapa* on the same web page: "*Palm oil will be eliminated from all our products in 2019. The current problem is the conception of the forest as a large oil palm plantation. At Trapa, we have already eliminated palm oil from our new varieties, and in 2019 we will eliminate it from all our products*" and "*Now, with sunflower oil and cocoa butter, we substitute palm oil for the best quality raw materials, more responsible for the environment and the health of people*".

After the assessment of the request by the Spanish Sustainable Palm Oil Foundation, the opinion of *Autocontrol*'s Jury affirms that the message transmitted in *Chocolates Trapa*'s advertising campaign was incompatible with Rules 2, 14 and 21 of its Code of Advertising Conduct (*i.e.*, *Código de Conducta Publicitaria de Autocontrol*, hereinafter *Autocontrol* Code) and qualifies the advertising campaign by *Chocolates Trapa* as "*deceptive*", "*denigratory*" and "*incompatible with Rule 2 of the Autocontrol Code*", which includes the principle of legality and, by extension, the General Law of Advertising (*i.e.*, *Ley General de Publicidad*) and the Law of Unfair Competition (*i.e.*, *Ley de Competencia Desleal*).

In view of the factual background, the Jury analysed the advertising in light of Rule 14 of the *Autocontrol* Code, which provides that advertising should not be misleading. Advertising is understood as misleading when it concerns the main characteristics of a good or service (*e.g.*, availability, benefits, risks, composition, procedure and date of manufacture or supply, use, quantity, specifications and origin) and in any way induces its recipients to alter their economic behaviour. Likewise, advertising that omits necessary information and, for this reason can significantly distort the consumers' economic behaviour, is considered misleading. In this respect, the Jury considered that *Chocolates Trapa*'s advertising conveys a clear and unequivocal message, according to which palm oil plantations are responsible for deforestation.

The Jury also considered that such a generic advertising message, transmitted without any nuances, did not comply with the principle of veracity for two reasons: First, because sustainable palm oil exits, such as the one certified by the Roundtable on Sustainable Palm

Oil. Therefore, the advertising message is considered to be incompatible with the principle of truthfulness, because it broadly and categorically conveys a message that palm oil as such causes deforestation, omitting any mention or reference to the existence of other alternatives of palm oil cultivation with a lower environmental impact, and which focus on preventing deforestation and obtaining sustainable palm oil. Second, the advertising message is considered incompatible with Rule 14 of the *Autocontrol* Code, because the allegations contained therein were not entirely supported by a report quoted in the advertising. The conclusions of "*Oil palm and biodiversity. A situation analysis by International Union for Conservation of Nature*", are not as conclusive as they are shown in the advertising. In effect, the advertising presents palm oil as the main and almost exclusive responsible for deforestation, through categorical affirmations and without nuances. At the same time, the message is conveyed that the suppression of palm oil would contribute to mitigate the problem of deforestation: "*Oil palm plantations have a very negative impact on biodiversity. In tropical areas, the loss of habitats caused by deforestation and fire prior to palm cultivation can reach up to 50%. In addition, it impacts greenhouse gas emissions*" and "*now, with sunflower oil and cocoa butter, we replace palm oil with the best quality raw materials, more responsible for the environment and the health of people*". However, the quoted report also states that there are other types of crops with an equally negative effect on biodiversity, confirming that not only palm oil is to blame. According to the report, it is also unclear whether the elimination of palm oil would solve the problem of deforestation. In particular, the report notes that, if palm oil were to be prohibited or boycotted, it would *"most likely to be replaced by other vegetable oils that require more land (...)"*.

Next, the Jury analysed if the advertising campaign is to be considered as denigrating advertising. This refers to advertising that is apt to cause discredit or disparagement in the market of the product or products of a third party. Regulation 21 of the *Autocontrol* Code establishes that "*Advertising must not denigrate or belittle, implicitly or explicitly, other companies, activities, products or services. The statements contained in the advertising message that are accurate, true and relevant will not be considered denigration*". This prohibition coincides, in essence, with Article 9 of Spain's Law 3/1991 on Unfair Competition, according to which "*the realisation or dissemination of manifestations about the activity, the benefits, the establishment or the mercantile relations of a third party are considered unfair if that are apt to undermine their credit in the market, unless they are exact, true and pertinent*". After reviewing the advertising campaign, the Jury considers that it is apt to undermine or damage palm oil. The Jury considered it evident that the two messages conveyed by the campaign were apt to undermine the credit of palm oil, and, what is more important, that the two messages could not be considered as entirely true, since those messages were relying fundamentally on a report that also provides much different indications. Consequently, the Jury held that the advertising also violates Rule 21 of the *Autocontrol* Code.

Finally, the Jury determined that the advertising campaign violated Rule 2 of the *Autocontrol* Code, which refers to the principle of legality: "*Advertising must respect the current legislation and in a special way the values, rights and principles recognised in the Constitution*". The Jury puts this rule in relation to *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims on foods* (hereinafter, NHCR). The NHCR applies to nutrition and health claims in foods, the latter understood as "*any statement that affirms, suggests or implies that there is a relationship between a category of food, a food or a of its constituents and health*". The Jury held, that in view of the wording of the NHCR, there was no doubt that it is applicable to the advertising object of this Opinion, since it contained health claims in relation to sunflower oil and cocoa butter. The *Chocolates Trapa*'s campaign stated that "*We substitute palm oil for the best quality raw materials, more responsible for the environment and the health of people*". In relation to the aforementioned claim, the Jury points out that Article 10(3) of the NHCR refers to the conditions for the use of "*health claims*", which provides that a "*reference to general and non-specific benefits of the nutrient or food for general good health or health-related well-being may only be made if it is accompanied by a specific health claim included in the lists provided in Article 13 or 14*". Therefore, the claim included in the advertising campaign conveys to the public the idea that the substitutes for palm oil (in this case, sunflower oil and cocoa butter), have beneficial effects in relation to

general health. As this claim is not accompanied by a specific health claim authorised for these nutrients, the advertising campaign is considered incompatible with Rule 2 of the *Autocontrol* Code.

Since *Chocolates Trapa* is itself not a member company of *Autocontrol*, the opinion only constitutes a non-binding resolution on the ethical and deontological correctness of the advertising campaign, issued by experts in the field. In this regard, *Autocontrol* notes that, while the Advertising Jury is entrusted with the resolution of disputes that are presented by any natural or legal person with a legitimate interest, against advertisements of both associated companies and third parties, the opinions that settle such controversies only have binding force for the companies that have voluntarily declared their adherence to the *Autocontrol* Code. *Autocontrol* notes that it could not be ignored that most of the opinions issued by the Jury are fulfilled on a voluntary basis even by those companies that are not associated with the system. Probably this fact is explained by the recognised moral force that such opinions enjoy, deriving from the accredited and recognised prestige of the members of the Jury, and from the legal backing granted to the system of self-discipline or self-control, both at the EU level (see recital 18, and Articles 6 and 8 of *Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising*; and Articles 16 and 17 of *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on electronic commerce*) and at the national level. According to *Autocontrol*, this same moral force also explains the substantial overlap between the opinions and resolutions of the Jury and the decisions of judges and tribunals in those cases in which the same facts have been consecutively brought to them. Still, in response to *Autocontrol's* opinion, *Chocolates Trapa* reportedly stated that it had no intention of withdrawing its '*Commitment: Without palm oil*' campaign.

In the broader context, it must be recalled that '*palm oil-free*' or '*no palm oil*' claims and campaigns are to be considered as misleading under *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR). Most recently, in July 2018, Spanish *Idilia Foods*, the producer of *Nocilla*, the leading chocolate spread in Spain, launched a new recipe replacing, reportedly for nutritional reasons, palm oil with sunflower oil and cocoa butter. All *Nocilla* jars now carry a green '*palm oil-free*' ('*sin aceite de palma*' in Spanish) claim. Since 13 December 2014, the specific vegetable oil used in any food product must be specified in the list of ingredients. Therefore, '*palm oil-free*' or '*no palm oil*' claims, indicating that products do not contain palm oil, are now arguably obvious, '*self-evident*' and '*flagrantly misleading*' according to Article 7(1)(c) of the FIR, because such products are not '*special*' compared to similar ones that also do not contain palm oil, but which do not carry '*palm oil-free*' labels (see *Trade Perspectives*, Issue No. 4 of 20 February 2015). Furthermore, such allegations, when made in a nutritional and/or environmental context, like in the case of *Chocolates Trapa*'s advertisement, appear to be unsubstantiated misleading generalisations because palm oil consumption is not *per se* unhealthy and not all palm oil production is unsustainable. '*Palm oil-free*' campaigns appear to be, at best, deceptive or unsubstantiated generalisations and, at worst, fraudulent in nature and aimed at denigrating competing oils and/or promoting certain products by implying that whatever is used in them as an alternative ingredient is better, healthier or environmentally greener than what is not used (see *Trade Perspectives*, Issue No. 10 of 16 May 2014 and Issue No. 23 of 12 December 2014).

The matter of *Chocolates Trapa*'s '*Commitment: Without palm oil*' advertising campaign and the related '*palm oil-free*' claims that many operators affix to their products are just two occasions showing a lack of enforcement of existing food information law. However, no new EU level rules would be needed if EU Member States' actually enforced the existing rules. Perhaps the call of European Commissioner for Health and Food Safety, Vytenis Andriukaitis, in summer 2018, that "*misleading labelling practices would merit further attention in your national control activities*" is finally being heard. Still, the European Commission could perhaps better assist EU Member States in their tasks by issuing some authoritative guidance with examples from the CJEU, national courts and even advertising self-control bodies on what is considered to be misleading food information under the FIR and what is not. Such guidance

would also help food business operators to know the limits between correct and misleading advertising.

Recently Adopted EU Legislation

Customs Law

- *Commission Implementing Regulation (EU) 2019/368 of 4 March 2019 repealing Implementing Regulation (EU) No 444/2013 concerning the classification of certain goods in the Combined Nomenclature*

- *Commission Implementing Regulation (EU) 2019/321 of 18 February 2019 concerning the classification of certain goods in the Combined Nomenclature and repealing Implementing Regulation (EU) 2017/1232*

Trade Remedies

- *Commission Implementing Regulation (EU) 2019/297 of 20 February 2019 imposing a definitive anti-dumping duty on imports of chamois leather originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2019/366 of 5 March 2019 amending Annex I to Regulation (EU) No 605/2010 as regards the list of third countries or parts thereof from which the introduction into the European Union of consignments of raw milk, dairy products, colostrum and colostrum-based products is authorised*

- *Commission Regulation (EU) 2019/343 of 28 February 2019 providing derogations from Article 1(3) of Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on food for the use of certain generic descriptors*

- *Commission Regulation (EU) 2019/335 of 27 February 2019 amending Annex III to Regulation (EC) No 110/2008 of the European Parliament and of the Council as regards the registration of the spirit drink 'Tequila' as a geographical indication*

- *Commission Implementing Regulation (EU) 2019/337 of 27 February 2019 approving the active substance mefentrifluconazole in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011*

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