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Another decision in favour of the US: A WTO Panel considers China's Tariff Rate Quotas for Certain Agricultural Products to be inconsistent with WTO rules

On 18 April 2019, the World Trade Organization (hereinafter, WTO) published the Panel report in the case China – Tariff Rate Quotas for Certain Agricultural Products (DS517). The case concerns China's administration of tariff rate quotas (hereinafter, TRQs) for wheat, short- and medium- grain rice, long grain rice, and corn. The complaint was part of a longer string of WTO disputes that the US has launched against China in recent years.

Essentially, TRQs are tariff-based trade policy tools aimed at protecting domestically-produced goods from competitive imports. TRQs actually link two policy instruments that were historically used to restrict imports: quotas and tariffs. In a TRQ, the quota works together with two separate tariff levels (the in-quota tariff and the over-quota tariff) to provide the desired degree of import protection. Imports entering within the TRQ are usually subject to a lower or zero tariff rate. Imports above the quota's quantitative threshold face a much higher, often prohibitive, tariff.

In December 2016, the US had requested consultations with China concerning China's administration of its TRQs for wheat, short- and medium- grain rice, long grain rice, and corn (see *Trade Perspectives*, Issue No. 2 of 27 January 2017). Slightly prior to the request for consultations in this case, on 13 September 2016, the US had already filed a closely related complaint in the field of agriculture. The case of *China – Domestic Support for Agricultural Producers* (DS511) concerns the same agricultural products, namely corn, certain types of rice and wheat. In 2016/2017, the USTR noted that China's domestic support measures and the administration of the TRQ regime "*worked together to distort global markets for wheat, corn and rice*". With regards to the TRQs, the US claimed that China's administration of these instruments was inconsistent with Paragraph 1.2 of Part I of the Protocol of Accession of the People's Republic of China (hereinafter, China's Accession Protocol) incorporating Paragraph 116 of the Report of the Working Party on the Accession of China, according to which "*China would ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ*". The US also asserted that China's administration of the TRQs appeared to be made in a manner inconsistent with Article X:3, XI:1 and XIII:3(b) of the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994, providing for uniformity, impartiality and reasonableness of

administration in trade rules, the general prohibition on quantitative restrictions and non-discriminatory administration of quantitative restrictions, respectively. The USTR estimated that an improved administration of the TRQs could have led to China importing as much as USD 3.5 billion worth of additional crops in 2015 alone. The US alleged that China's administration of the relevant TRQs was "*non-transparent*", "*opaque*" and "*unpredictable*". 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 US 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 (see *Trade Perspectives*, Issue No. 5 of 8 March 2019).

Aside from the multilateral agreements on trade in goods and services, Protocols of Accession of each new WTO Member form integral part of the WTO Agreement. Paragraph 1.2 of Part I of China's Accession Protocol provides that this "*Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement*". Consequently, WTO Members may initiate WTO dispute settlement proceedings on the basis of an alleged violation of China's Accession Protocol. Schedule CLII, Part I, Section I-B on Tariff Quotas included in China's Accession Protocol provides detailed information on its TRQs and their administration. It includes the specific amounts of the quota (*i.e.*, 9.636 million metric tonnes of wheat, 2.66 million metric tonnes of long-grain, as well as of short- and medium-grain rice, and 7.2 million metric tonnes of corn), the in-quota tariff rate (1% for most tariff lines), the staging of the amount, and the share of the tariff-quota reserved for importation through state-trading enterprises (50% for rice, 60% for corn and 90% for wheat).

Of key importance in this dispute is the controversy about the reallocation of unused amounts of the TRQs. The US noted that, while China does announce on an annual basis the opening of unused TRQs, the further process remains unclear. China's Accession Protocol provides for an annual reallocation process for unused TRQs. Any quota not used by 15 September of a given year can be reallocated. For that reason, China's Accession Protocol states that, if a quota-holder had not used the total quantity by 15 September, it must return the unused portion of the TRQ for reallocation to the competent Chinese authorities. Applications for reallocation are to be accepted by the competent Chinese authorities from 1 September to 15 September every year and new allocations must then be assigned by 1 October. Furthermore, China's Accession Protocol prescribes that specific conditions concerning the reallocation of the TRQs would be published in China's Official Journal one month in advance of each application period. All these requirements are typically intended to ensure the functioning of the TRQs and the steady and predictable supply of the market. According to the US, China's practices for these TRQs, however, indicated a malfunctioning of this process. For instance, while the management of the TRQs of private entities for wheat (only accounting for 10% of the share), appears to work well, the same may not be said of the 90% initially reserved for State-trading entities.

The US asserted that these practices suggest that China's administration of its TRQs was inconsistent with Paragraph 116 of China's Working Party Report. With regard to this claim, the Panel agreed with the US that China's Schedule CLII, which, in relevant part, refers to "*other relevant commercial criteria*", was too vague and an open-ended term that could cover a multitude of factors unknown to applicants and other interested parties. While recognising that China's authorities do benefit from a certain discretion regarding the allocation of TRQs, this could not, "*however, provide China's relevant authorities with unfettered discretion*". The Panel recalled that such discretion was still bound by the obligations set forth in Paragraph 116 of China's Working Party Report, which requires China to administer TRQs in a transparent and predictable manner. The Panel concluded that the inclusion of this vague notion ran counter to those obligations. Considering that this notion might potentially entail a wide range of factors that could not easily be understood or discerned by applicants and other

interested parties, the Panel considered the allocation principles in China's legal instruments to be non-transparent and unpredictable.

Furthermore, turning to the practice of China's administration of the TRQs, the Panel considered that "*the disparity between what is written in China's legal instruments and what China states in practice in allocating TRQ amounts does not represent administration in accordance with the applicable rules and standards*", constituting a violation of the obligation to administer TRQs on a fair basis. Similarly, with respect to the reallocation procedures, the Panel noted that they were "*not set out in plain or obvious detail, in violation of the obligation to administer TRQs using clearly specified administrative procedures*".

The US claimed that four of the basic eligibility criteria that TRQ applicants must meet, namely: 1) possessing "*a good financial condition*"; 2) "*a good integrity situation*"; 3) "*no record of violating regulations*"; and 4) "*having fulfilled social responsibilities associated with [their] operations*", were inconsistent with the obligations provided in Paragraph 116 of China's Working Party Report to administer TRQs on a transparent, predictable, and fair basis, and to use clearly specified requirements. The Panel agreed with the US that these terms were inherently vague and were not further or clearly enough defined in China's legal instruments. As a result, the Panel considered these criteria to be inconsistent with China's obligation to administer TRQs on a transparent, predictable basis and with its obligation to use clearly specified requirements. However, the Panel considered that the US had not made a *prima facie* case that the vagueness in the allocation principles laid down in China's legal instruments had led to a violation of China's obligation to administer its TRQs on a fair basis.

With respect to China's practice regarding the assessment of applicants' eligibility to receive TRQ allocations, the Panel refers to the absence of evidence submitted by China demonstrating that the applicants were made aware of the practice that the Chinese authorities had adopted with respect to the TRQs. Therefore, the Panel concluded that China's practice of administrating its TRQs is inconsistent with the requirements of predictability, transparency and clearness, but also with the requirement of fairness set out in Paragraph 116 of China's Working Party Report. Overall, the Panel concluded that China's legal instruments, in combination with its practice of administrating its TRQs, are inconsistent with China's obligation to administer TRQs on a transparent, predictable, uniform, fair and non-discriminatory basis, thereby violating Paragraph 116 of China's Working Party Report.

Finally, the US had asserted that China violated its obligation under Article X:3(a), XI:1 and XIII:3(b) of the GATT by failing to provide public notice of the quantities permitted to be imported under each TRQ and of the changes to such quantities. With respect to Article XIII:3(b) of the GATT, the US claimed that China had violated the obligation "*to give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period*" by not providing public notice of the TRQ amounts that are actually allocated at the initial allocation stage. The Panel rejected this interpretation by the US, explaining that this Article only required public notice of the total TRQ amounts that are available for allocation, but not the total TRQ amounts that are actually allocated. As for Articles X:3(a) and XI:1 of the GATT 1994, the Panel did not consider it necessary to make findings on these specific provisions as it considered its previous findings of inconsistency under Paragraph 116 of China's Working Party Report sufficient to reach a decision.

The two Panel decisions on China's domestic support, as well as on China's TRQ administration, both affirming the inconsistency of China's relevant rules with WTO requirements, add another layer of complexity to the ongoing trade war between the US and China and underline the continued relevance of the WTO dispute settlement mechanism. Indeed, USTR Robert Lighthizer commented on the recent decision, noting that this was the "*second important victory for the United States*" vis-à-vis China and that the US Administration would "*press China to promptly come into compliance with its WTO obligations*". China's Ministry of Commerce stated that it "*regretted*" the Panel's decision and that it would "*earnestly evaluate*" the Panel report. The parties to the dispute can now consider having recourse to the WTO Appellate Body and appealing the Panel decision. Within 60 days after the date of

circulation of a Panel report to the WTO Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal.

With respect to the Panel report on domestic support, China opted not to appeal the findings of the Panel and the Panel report was adopted on 26 April 2019. It remains to be seen if China will bring its laws and practices in conformity with the decision of the Panel on domestic support and if it will appeal the Panel report on the administration of the TRQs for wheat, short- and medium- grain rice, long grain rice, and corn.

A slowly changing approach: The regulation of medical cannabis in the EU

In April 2019, Uruguay announced that it would begin exporting medical cannabis to the EU, more specifically to Germany. On 13 February 2019, the European Parliament adopted the *European Parliament resolution of 13 February 2019 on use of cannabis for medicinal purposes (2018/2775(RSP))* (hereinafter, Resolution). In the Resolution, the European Parliament requested the European Commission (hereinafter, Commission) and the EU Member States to make a clear distinction between medical cannabis and other uses of cannabis and to allow more scientific research on the benefits of medical cannabis.

Over the past years, the production and marketing of products derived from the plant *Cannabis sativa* have increased from all over the world. In the EU, several EU Member States have legalised the medical use of some form of cannabis or cannabinoids or are considering changes to their domestic legislation. Products, derived from the hemp plant, in particular cannabidiol (hereinafter, CBD) oils, are also increasingly marketed in the EU and elsewhere. As legal uncertainties remain at the EU level, EU Member States are moving ahead with legalising medical cannabis or products derived from the cannabis plant, a piecemeal approach, which leads to an increasingly fragmented legal situation.

Cannabis is part of the *Cannabaceae* family of flowering plants. The best-known species is *Cannabis sativa*. Hemp and marijuana (a term of Mexican origin, '*marihuana*') are two popular names for the cannabis plant. *Cannabis sativa* contains at least 113 cannabinoids, which are the chemicals that give the cannabis plant its medical and recreational properties. Most notably, *Cannabis sativa* contains tetrahydrocannabinol (hereinafter, THC), which is a phytocannabinoid naturally occurring in the *Cannabis sativa* and the most abundant cannabinoid in the cannabis plant before cannabidiol (hereinafter, 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. Industrial hemp is a variety of the *Cannabis sativa L.* plant species, which is cultivated specifically for the industrial uses of its derived products. In industrial hemp, THC is only present in trace amounts, while CBD dominates the plant's chemical makeup. CBD does not appear to have any psychoactive effects, such as those caused by THC. To clarify, CBD hemp oil, for instance, is a natural botanical extract of the common hemp plant and is produced from high-CBD, low-THC hemp, while medical cannabis products are usually produced from plants with high concentrations of THC.

Internationally, cannabis is listed in Schedule IV, the most restrictive category, of the UN's Single Convention on Narcotic Drugs, providing detailed rules on the control of drug, such as cannabis plants and derived products. More specifically, the Single Convention on Narcotic Drugs makes a distinction between recreational, medical and scientific uses of drugs. Article 4 of the Convention provides that Parties to the Convention may allow the medical and scientific use of drugs, but prohibits any other uses.

In the EU, the regulation of cannabis and cannabinoids for medical purposes is a complex area. Currently, there is little harmonisation among EU Member States regarding the definition and penalisation of cannabis use or supply. While certain EU Member States treat cannabis like any other illicit substance, other EU Member States allow certain uses. At the EU level, the European Medicines Agency (EMA) is responsible for the scientific evaluation, supervision and safety monitoring of medicines, and works in cooperation with the EU Member States'

national authorities. In general, medicines are authorised with respect to a single EU Member State. However, there are three ways for medicines to receive cross-national authorisation across the EU (currently, 28 Member States), one of which grants EU-wide access (*i.e.*, authorisation in all EU Member States), while the other two may lead to authorisation in more than one EU Member State. Until now, there have been no EU-wide marketing authorisations for cannabinoid-containing medicines.

On 13 February 2019, the European Parliament adopted the *Resolution on use of cannabis for medical purposes*. The resolution is a non-binding document, which is however intended to open the debate on the issue at the EU level. The draft motion for the resolution regarding the use of cannabis for medicinal purposes was debated by the European Parliament's plenary on 12 February 2019, before it was adopted on the following day. In the Resolution, the European Parliament pointed out research gaps on medical cannabis and called "*on member states to seize the potential of cannabis-based medicines*". The Resolution provides 18 points regarding the use of cannabis for medicinal purposes and, *inter alia*, calls for the EU: 1) To provide for a legal definition of medical cannabis and to provide a clear distinction between the use of medical cannabis and other uses of cannabis (*e.g.*, recreational and industrial); 2) To review the financial and "*cultural barriers*" to fund more scientific research on the benefits, as well as possible effects in the human body, of medical cannabis and cannabis in general; 3) To set research programmes to properly address the possible use of THC, CBD and other cannabinoids for medical treatment; 4) To set the priority areas for research into cannabis for medicinal purposes in cooperation with the competent authorities; 5) To develop a comprehensive strategy to ensure the highest standards for independent research, development, authorisation, marketing and pharmacovigilance and to avoid the abuse of products derived from cannabis; 6) To emphasise the need for the standardisation and unification of products containing cannabis-based medicines; and 7) To allow doctors to use their "*professional judgement*" in prescribing cannabis-based medicines, which, when effective, should be covered by health insurance schemes in the same way, as other types of medicines.

Over the past years, EU Member States such as Germany, Portugal, the UK and France, have been working towards changes in their national legislation to grant access to medical cannabis. In March 2017, Germany legalised medical cannabis, and established a cannabis agency as part of the German Federal Institute for Drugs and Medical Devices (*i.e.*, *Bundesinstitut für Arzneimittel und Medizinprodukte, BfArM*). A tender to authorise licenses for the cultivation of cannabis was closed in April 2019 and the *BfArM* authorised 13 licenses. Imports of medical cannabis to German have also increased. In Portugal, the Parliament approved, in 2018, a bill to legalise cannabis-based medicines. Similarly, Italy and the UK also recently legalised medical cannabis. In France, medical cannabis is not yet legalised, but discussions on the matter have been ongoing since 2014. In September 2018, the French National Agency for Medicines and Health Products Safety (*i.e.*, *Agence Nationale de Sécurité du Médicament et des Produits de Santé, ANSM*) launched the '*Temporary Specialised Scientific Committee*' (*i.e.*, *Comité Scientifique Spécialisé Temporaire*, hereinafter, *CSST*). The objective of the *CSST* is to evaluate "*the relevance and the feasibility of the provision of therapeutic cannabis in France*". While France has not yet legalised the use of medical cannabis, a report and a stakeholder consultation by the *CSST* noted that the views on medical cannabis in France were changing in favour of legislative changes.

Developments regarding the deregulation of medical cannabis occur not only in the EU, but in countries all over the world. Most notably, Latin American countries have been passing reforms to regulate medical cannabis. In fact, Uruguay was the first country in the world to legalise cannabis not only for medical purposes, but also for recreational use, and is keen to become one of the world's major exporters of medical cannabis. In April 2019, Uruguay stated that it was ready to export its first significant cannabis harvest to the EU, Canada and Australia. As EU legislation regarding cannabis for medical purposes is not harmonised across the EU, its use and trade is regulated by each individual EU Member State. Therefore, medical cannabis imported from Uruguay will only be allowed to legally enter into the German market. Its

subsequent movement to other EU Member States will depend on the approval in each respective EU Member State.

Another relevant issue with respect to the EU regulation of products derived from *cannabis sativa* is the increase of CBD products marketed in the EU. CBD is extracted from the hemp plant and typically mixed with a carrier oil, such as hemp seed or coconut oil, in order to create CBD oil. The oil is also used, *inter alia*, in food supplements and for the production of margarine, salad dressings and cosmetic products. In recent months, hemp and CBD products, as well as shops selling such products, have increasingly appeared across the EU, but now face an important impediment. On 15 January 2019, the Commission modified the entries relating to '*Cannabis sativa*' and '*Cannabidiol (CBD)*' in the EU's '*Novel Food Catalogue*' and added an entry on '*Cannabinoids*' (see *Trade Perspectives*, Issue No. 6 of 22 March 2019). All extracts of hemp and derived products containing cannabinoids are now described as novel food and require an authorisation under *Regulation (EU) 2015/2283 of 25 November 2015 on novel foods*. In the previous version of the EU Novel Foods Catalogue, in the entry for cannabidiol, products with '*natural*' levels of CBD had been considered '*traditional*' foods and not novel ones. CBD products are often marketed as food supplements (*i.e.*, concentrated sources of nutrients) or as substances with a nutritional or physiological effect that are marketed in '*dose*' form (*e.g.*, pills, tablets, capsules, liquids in measured doses). In the EU, food supplements are regulated as food and are not considered medicinal products and, as such, cannot exert a pharmacological, immunological or metabolic action.

The legal issues surrounding cannabis and CBD oil are plentiful, in particular as legislation and regulation around the world, and notably across the EU, continues to evolve and as important regulatory differences persist or develop. The piecemeal approach across EU Member States will likely impede businesses to develop this growing market across the EU. The medical cannabis market is poised to develop quickly and will likely open up opportunities across EU Member States. Interested stakeholders should closely monitor the ongoing developments and the related ongoing discussions at the EU level and in individual EU Member States.

Towards a ban for '*meaty*' names like '*burger*' or '*sausage*' for plant-based food in the EU?

On 1 April 2019, in the context of the EU's post-2020 Common Agricultural Policy (CAP), Members of the European Parliament (hereinafter, MEPs) within the Committee on Agriculture and Rural Development (hereinafter, AGRI Committee) voted by 29 votes to 7 against and 1 abstention in favour of a *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products* (hereinafter, the Single CMO Regulation), with new EU rules for Common Market Organisations (hereinafter, CMOs) in agricultural products after 2020. The Committee adopted an amended draft of the proposal containing a provision that would ban the use of terms such as burger for vegetarian and vegan products.

Point 6 of the compromise amendment number 41 of the text adopted by the AGRI Committee addresses Annex VII on definitions, designations and sales description of products referred to in Article 78 of the Single CMO Regulation. According to compromise amendment number 41, a Part 1a on meat, meat products and meat preparations is supposed to be added to that Annex, stating, *inter alia*, that "*Names that fall under Article 17 of Regulation (EU) No 1169/2011* [on food information to consumers, hereinafter FIR] *and that are currently used for meat and meat cuts shall be reserved exclusively for edible parts of the animals. These designations include, for example: steak, sausage, escalope, burger and hamburger*".

In a press conference after the vote, European Parliament's *Rapporteur* of the new Single CMO regulation, MEP *Eric Andrieu*, stated that the name '*steak*' must be conserved for a steak of meat, and that "*new names must be created for all these new plant-based products, because people need to know what they are eating*". For MEP *Andrieu*, the measure would be an

opportunity for vegetarian brands to exhibit their creativity. However, reportedly, the approach has resulted in strong criticism by certain organisations, such as *Greenpeace*, and some MEPs actually suspect that the meat industry was behind the amendment. This was denied by MEP *Andrieu*, who noted that the ban was not the result of lobbying, but simply of "*common sense*" and that the Committee had been thinking exclusively of "*consumer interest*".

Suggestions for alternative '*meaty*' names for the plant-based food industry include terms like '*veggie discs*', '*roll*s' and '*tubes*', terms which, however, might not sound as appealing as, for example, the '*Impossible Burger*' - a soy-based burger, which bleeds like a '*real*' burger and which *Burger King* is going to market as a '*Veggie Whopper*'. According to press releases from both *McDonald's* and *Nestlé*, the '*Incredible Burger*', a vegan burger of *Nestlé*'s *Garden Gourmet* brand, would be launched in German *McDonald's* franchises as the '*Big Vegan TS*'. Not only small brands produce plant-based burgers and most of the names for plant-based products would be under threat by the proposed measure.

In the context of '*meaty*' names for plant-based products, reference has often been made to the judgement of 14 June 2017, in which the Court of Justice of the European Union (hereinafter, CJEU) in Case C-422/16 *Verband Sozialer Wettbewerb* v *TofuTown* (hereinafter, *TofuTown*) held that purely plant-based products, such as tofu or soya, cannot, in principle, be marketed with designations such as '*milk*', '*cream*', '*butter*', '*cheese*' or '*yoghurt*', which, under EU law, are reserved for animal products. The same applies even if those designations are accompanied by clarifying or descriptive terms indicating the plant origin of the product concerned and/or that the product at stake does not contain animal products. More specifically, the CJEU observed that, in principle, for the purposes of the marketing and advertising in question, the relevant legislation reserved the term '*milk*' only for milk of animal origin. In addition, except where expressly provided, such legislation reserves designations like '*cream*', '*butter*', '*cheese*' and '*yoghurt*' solely for products derived from milk. The CJEU interpreted the term '*milk*' and the respective terms for milk products very narrowly. In fact, Annex VII, Part III, point 1 of the Single CMO Regulation defines '*milk*' as "*exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom*". The following designations of milk products, listed in Annex VII, Part III, point 2, second subparagraph (a) of the Single CMO Regulation, may be used at all stages of marketing only for products derived from milk: whey, cream, butter, buttermilk, butteroil, caseins, anhydrous milk fat (AMF), cheese, yogurt, kephir, koumiss, viili/fil, smetana, fil; rjaženka, and rūgušpiens. A list of exceptions to the principle that the descriptions of milk and milk products may not be used for milk products other than those in said Annex is contained in *Commission Decision 2010/791/EU of 20 December 2010 listing the products referred to in the second subparagraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007* (the previous Single CMO Regulation). EU Member States were required to notify to the European Commission (hereinafter, Commission) the indicative lists of the products, which they deemed meeting, within their own territories, the criteria for the abovementioned exception.

The CJEU concluded in *TofuTown* that the designations used by the German company cannot be legally used to designate a purely plant-based product, unless that product is mentioned on the list of exceptions, which is not the case for soya or tofu. The CJEU observed, in particular, that the addition of descriptive or explanatory terms could not completely exclude the likelihood of confusion on the part of consumers. The CJEU found (interestingly in the current context of '*meaty*' names) that *TofuTown* could not assert that the producers of vegetarian or vegan substitutes for meat are not subject to restrictions comparable to those to which producers of vegetarian or vegan substitutes for milk or milk products are subject. The CJEU held that each sector of the CMOs for agricultural products, established by the Single CMO Regulation, embodies features specific to it and, as a result, a comparison could not constitute a valid basis for the purpose of proving discrimination between dissimilar products, which are subject to different rules. Therefore, there is an important difference between the protected terms for dairy products and the protected terms for meat products in the current Single CMO Regulation. In fact, for meat products, with a few exceptions, there are no legal names, similar to those for dairy products. Part 1 of Annex VII to the Single CMO Regulation

contains only general sales descriptions for meat of bovine animals (like '*veal*' in English), but currently no different language versions of meat products like burger, sausage or steak. The question is whether a list of examples in the European Parliament's compromise amendment 41 would be sufficient as protected terms for meat products.

However, it should also be determined if there actually is a need for such a list of reserved terms for meat products in the EU's different languages in the Single CMO Regulation, which would ban the use of terms like '*steak*' or '*burger*' for products that are not meat-based. In order to assess whether a denomination used for a food product is misleading, the FIR is relevant. In fact, Article 17 of the FIR requires that a food's name be its legal name (as in coffee, jam, honey). In the absence of such a name, the name of the food must be its customary name, or, if there is no customary name, or the customary name is not used, a descriptive name of the food must be provided (for an assessment of the German terms *Schnitzel* and *Wurst*, see *Trade Perspectives*, Issue No. 2 of 27 January 2017). *Wurst* (or sausage) could arguably be used for meat replacement products in the form of an elongated roll. However, whether or not a product name may be misleading, must be established on a case-by-case basis, taking into consideration all elements, including labelling, advertising and packaging.

Where the average consumer expects that a particular food is normally produced with certain ingredients, or that certain ingredients are naturally present in the food, the application of Article 7(1)(d) of the FIR would be triggered. This provision states that food information must not be misleading as to the characteristics of the food and, in particular, as to its nature, identity, properties and composition, or by suggesting, by means of the product's appearance, description or pictorial representations, the presence of a certain ingredient or food, when, in reality, a component being naturally present, or an ingredient normally used in that food, has been substituted with a different component or a different ingredient. The applicable provisions of the FIR appear to provide sufficient legal basis to protect consumers from being misled by the denominations of plant-based meat alternatives, if those are also denominated with term like '*plant-based*', '*vegan*' or '*vegetarian*'. EU Member States have the primary responsibility to enforce, monitor and verify that the relevant requirements of EU food law are complied with by food business operators at all stages of production, processing and distribution.

The issue of plant-based meat substitutes is closely related to the matter of defining vegetarian and vegan food. In Article 36(3)b), the FIR requires the Commission to adopt an implementing act on how to provide information on the suitability of foods for vegetarians or vegans, which is typically given on a voluntary basis, so as to ensure that this information is not misleading, ambiguous or confusing for the consumer. The FIR does not provide for a date by which the Commission must adopt such implementing act. In response to the inaction by the Commission, there have been efforts at the EU Member States' level. In Germany, the Consumer Protection Ministers of the 16 German Federal States recently adopted a decision on binding definitions of the terms '*vegan*' and '*vegetarian*' (see *Trade Perspectives*, Issue No. 13 of 1 July 2016). France also considered banning '*meaty*' names like '*steak*', '*filet*', '*bacon*' or '*sausage*' for plant-based foods and introducing a list of protected denominations for meat products in the context of a more general bill on agro-food issues (*i.e.*, Projet de loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine et durable, hereinafter the Bill). An amendment to the Bill introduced on 19 April 2018 by the National Assembly's Committee on Economic Affairs, provided the following insertion: "*Names associated with products of animal origin may not be used to market food products containing a significant proportion of plant-based material*" (see *Trade Perspectives*, Issue No. 9 of 4 May 2018). The Bill, including its Article 31 providing for the said ban, had been subject to much debate between the two chambers of the bicameral French Parliament. The Senate referred the Bill to France's Constitutional Court, which, on 25 October 2018, by Decision n° 2018-771 DC, quashed many articles of the Bill, including Article 31 on '*meaty*' names, which it considered unconstitutional on procedural grounds. The Bill has since then been passed into law in an amended version without the provision banning names associated with products of animal origin for vegetarian foods.

On 7 June 2017, the Commission's Regulatory Fitness and Performance programme (REFIT) Platform, bringing together the Commission, national authorities and other stakeholders in regular meetings to improve existing EU legislation, issued an opinion on the submission made by the *European Vegetarian Union* (*EVU*) on the need to define at EU level the terms '*vegan*' and '*vegetarian*'. In its opinion, the REFIT Platform recommends that the Commission rapidly fulfil its obligation to adopt an implementing act on the criteria for voluntary food information related to the suitability of a food for vegetarians or vegans, so as to avoid diverging national developments and a distortion of the EU market. For the sake of clarity, the terms '*vegan*' and '*vegetarian*' should be defined at the EU level, as urgently requested by the REFIT Platform.

According to the AGRI Committee, the text approved by the Committee would not reach the plenary stage in the current legislative term and would only happen after the May 2019 elections to the European Parliament. The Conference of Presidents of the next European Parliament (*i.e.*, the European Parliament's President and the leaders of the political groups) will have to decide whether to forward the AGRI Committee's draft report directly to the plenary or to resubmit it to the then newly constituted AGRI Committee, which would reopen the file. The next steps taken in the EU on the amended Single CMO Regulation, after the elections to the European Parliament, as well as in the EU and its Member States, on the naming and labelling of products as suitable for vegans and vegetarians (in particular, an eventual legislative proposal put forward by the Commission), should be monitored and all relevant stakeholders should be prepared to participate in shaping upcoming EU legislation by interacting with relevant EU Institutions, trade associations and other affected stakeholders. Where warranted, operators should also consider triggering domestic administrative procedures against anti-competitive, deceptive or misleading advertisements before the competent EU national authorities, or even challenging these practices before judicial authorities.

Recently Adopted EU Legislation

Customs Law

- *Commission Delegated Regulation (EU) 2019/673 of 27 February 2019 amending Regulation (EU) 2018/196 on additional customs duties on imports of certain products originating in the United States of America*

- *Commission Implementing Regulation (EU) 2019/675 of 29 April 2019 amending Regulation (EC) No 1067/2008 opening and providing for the administration of Community tariff quotas for common wheat of a quality other than high quality from third countries*

- *Commission Implementing Regulation (EU) 2019/653 of 24 April 2019 amending Regulation (EC) No 847/2006 as regards the Union tariff quotas for certain prepared or preserved fish*

- *Commission Implementing Regulation (EU) 2019/620 of 17 April 2019 granting Cape Verde a temporary derogation from the rules on preferential origin laid down in Delegated Regulation (EU) 2015/2446, in respect of prepared or preserved mackerel fillets and prepared or preserved frigate tuna or frigate mackerel fillets*

Food and Agricultural Law

- *Commission Regulation (EU) 2019/674 of 29 April 2019 amending Annex III to Regulation (EC) No 110/2008 of the European Parliament and of the Council on*

the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks

- *Commission Implementing Regulation (EU) 2019/660 of 24 April 2019 amending Regulation (EC) No 1484/95 as regards fixing representative prices in the poultrymeat and egg sectors and for egg albumin*

- *Commission Regulation (EU) 2019/649 of 24 April 2019 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards trans fat, other than trans fat naturally occurring in fat of animal origin*

- *Commission Regulation (EU) 2019/651 of 24 April 2019 refusing to authorise a health claim made on foods and referring to children's development and health*

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