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## Increasing tensions in EU-US trade relations – Controversial provisions of the Helms-Burton Act are no longer suspended

On 2 May 2019, for the first time since 1996, the US Administration let the suspension of Title III of the '*Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*', also known as the Helms-Burton Act, expire. On the same day, the High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, Federica Mogherini, expressed her regrets regarding the US Administration's decision and stated that the US action violated the EU-US agreements reached in 1997 and 1998. The EU considers certain provisions of the Helms-Burton Act to be contrary to international law and violating WTO disciplines. This development is adding additional tensions to the already strained EU-US trade relationship and might considerably affect businesses in the EU and beyond.

The 1996 Helms-Burton Act, named for its original sponsors, US Senator Jesse Helms and Congressman Dan Burton, is a US federal law in the context of the US embargo against Cuba. The Helms-Burton Act notes that it seeks *"international sanctions against the Castro government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes*". Most importantly, Title III of the Helms-Burton Act on the '*Protection of Property Rights of United States Nationals*' allows US citizens, including Cubans that became naturalised US citizens, to file lawsuits against persons that may be "*trafficking"* in that property, notably affecting businesses linked to properties nationalised after the Cuban Revolution in 1959. Section 4(13) of the Helms-Burton Act on '*Definitions*' defines '*traffic*' as any action that: 1) "*Sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property*"; 2) "*Engages in a commercial activity using or otherwise benefiting from confiscated property*"; or 3) "*Causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person*". Importantly, this broad definition of the term "*trafficking"* allows cases to be lodged against businesses that only have very indirect links to a nationalised Cuban property.

Title IV of the Helms-Burton Act on the '*Exclusion of certain aliens*' prohibits the entry of certain people onto US territory. Section 401, within Title IV of the Helms-Burton Act, concerns the "*Exclusion from the United States of aliens who have confiscated property of United States Nationals or who traffic in such property*". More specifically, the US Secretary of State is to

deny the issuance of visas to, and the Attorney General to exclude from the US, any alien that: 1) Has confiscated, or has directed the confiscation of property, that is subject to a claim owned by a US national; 2) Traffics in such property; 3) Is a corporate officer, principal, or shareholder with a controlling interest in an entity that has been involved in the confiscation or trafficking of such property; or 4) Is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3). Since the implementation of the Helms-Burton Act, citizens from countries such as Canada, Israel, Italy, Mexico, and the United Kingdom have been denied entrance to the US.

Section 306(b)(1) of the Helms-Burton Act provides the US President with the authority to suspend the application of Title III of the Helms-Burton Act for periods of up to six months, if the suspension is necessary to the national interests of the US and if it would expedite a transition to democracy in Cuba. Successive US Presidents exercised this authority, most recently in June 2018. These suspensions stemmed from a non-binding agreement of April 1997 with the EU. In fact, following the EU's request for a WTO dispute settlement panel concerning the Helms-Burton Act, dated 13 May 1996, the EU and the US engaged in negotiations to reach a solution agreeable to both sides. In April 1997, agreement was reached, and the US committed to soften Titles III and IV of the Helms-Burton Act, while the EU would withdraw its request at the WTO. On 18 May 1998, the EU and the US announced agreement on the *Understanding with Respect to Disciplines for the Strengthening of Investment Protection*, which would freeze the application of the controversial Helms-Burton Act, as well as the similarly controversial D'Amato Act, in reference to investment in Cuba, Iran, and Libya.

On 2 May 2019, the US Administration let the suspension of the application of Title III of the Helms-Burton Act expire. Earlier this year, on 4 March 2019, US Department of State had issued a briefing stating that, despite the fact that every previous US Administration had fully suspended the application of Title III, the current administration continued "*to see the Cuban state's repression of its own people, which has, in our view, persisted and even worsened*". According to the briefing, the current US Administration had undertaken a serious and thorough review of Title III and had examined: 1) The conditions on the ground in Cuba; and 2) Whether a waiver was both in the US national interest and suitable to expedite Cuba's transition to democracy, which are the conditions for suspension provided in Section 306(b)(1) of the Helms-Burton Act. The suspension was then only extended for 30 days, from 19 March to 17 April 2019. On 17 April 2019, the US Administration announced that it would no longer suspend the application of Title III of the Helms-Burton Act.

As noted above, Title III of the Helms-Burton Act allows US citizens to bring a claim against those who "*traffic*" in property that was expropriated by the Cuban Government after the Cuban Revolution in 1959. Due to the continued suspension of Title III, this is the first time that the US would allow such kind of claims. It is still unclear how many of these claims would be lodged and how the US Federal Courts would deal with such cases, particularly if they were to amount to a multitude of cases against foreign people and businesses. An indication of the number of potential cases could be the claims registered under the first Cuban Claims Program implemented by the US Administration between 1965 and 1972. Through this programme, US citizen were able to register claims regarding property expropriated after the Cuban Revolution. The Cuban Claims Program is administered by the US Foreign Claims Settlement Commission (hereinafter, FCSC), an entity within the US Department of Justice, which adjudicates claims of US citizens against foreign governments, either under specific jurisdiction conferred by the US Congress or pursuant to international claims settlement agreements.

Section 303(a)(1) under Title III of the Helms-Burton Act states that US Courts are to "*accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest that has been made by the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949*". The FCSC certified 5,911 claims to the US Department of State as valid claims. Additionally, claims not certified by the FCSC are also admissible, but, in those cases, the claimant must establish a proof of ownership. The US Administration estimates that the number of unregistered claims could reach up to 200,000.

Finally, Title III of the Helms-Burton Act provides that "*an action may be brought under this section by a United States national only where the amount in controversy exceeds the sum or value of $50,000, exclusive of interest, costs, and attorneys' fees*". Already on the day that the suspension expired, the first claim under Title III of the Helms-Burton Act was filed in a US Federal Court in Miami. Cuba-born US citizen Javier Garcia Bengochea, and the Havana Docks Corp., respectively, filed complaints against the US-British company Carnival Cruise Lines. The complainants allege that the Miami-based cruise company had been using ports in Cuba that belonged to Mr. Bengochea's family without providing any compensation.

The judicial proceedings on the basis of the Helms-Burton Act could potentially have massive implications for businesses in the US and around the world and the EU swiftly argued that the US decision violates international laws, notably WTO disciplines. The EU's reaction comes as no surprise, as it is one of the most important foreign investors in Cuba, alongside Canada, China, Japan, and Russia. Of the 28 EU Member States, Spain is the country with the most investment in Cuba, particularly in the tourist sector. EU High Representative Mogherini underlined that the US decision regarding the Helms-Burton Act would "*create unnecessary friction and weaken the confidence and predictability of the transatlantic partnership*". Together with other countries noting their concerns regarding the Helms-Burton Act, such as Canada and Mexico, the EU is already trying to determine the appropriate reaction should EU businesses be affected by claims under Title III of the Helms-Burton Act.

One of the options for EU citizens and businesses is the recourse to the rules contained in *Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom*, the EU's so-called *Blocking Statute.* The purpose of the EU's Blocking Statute is to protect EU operators from the extra-territorial application of third country laws listed in the Annex of the Regulation, including the Helms-Burton Act. More specifically, the EU's Blocking Statute protects EU operators by: 1) Nullifying the effect in the EU of any foreign court ruling based on the foreign laws listed in its Annex; and 2) Allowing EU operators to recover in court damages caused by the extra-territorial application of the specified foreign laws. Canada and Mexico stated that they were considering similar actions. In 1996, Mexico had adopted a so-called "*antidote*" law against the application of Title III of the Helms-Burton Act. Like the EU's *Blocking Statute*, Mexico's "*antidote*" law prohibits the enforcement of US Court judgements.

Already in April 2019, when the US announced that it would not extend the suspension of Title III of the Helms-Burton Act, the EU noted that it would "*consider all options at its disposal to protect its legitimate interests, including in relation to its WTO rights*". In 1996, the EU had initiated case *DS38 United States – The Cuban Liberty and Democratic Solidarity Act*. A WTO dispute settlement panel was established on 20 November 1996, but, in view of efforts by the EU and the US to find a bilateral agreement, at the request of the EU, dated 21 April 1997, the Panel had suspended its work. In its 1996 request for consultations, the EU had noted that certain provisions of the Helms-Burton Act had "*the intent and effect to restrain the liberty of the EC to export to Cuba or to trade in Cuban origin goods, as well as to restrict the freedom of EC registered vessels and their cargo to transit through US ports*". Additionally, the EU stated that there were "*measures which may lead to the refusal of visas and the exclusion of non-US nationals from US territory in a way which may contravene US commitments under GATS*". With respect to the 1996 case, the US had indicated that it would likely base its defence of the controversial provisions of the Helms-Burton Act on the delicate Article XXI of the General Agreement on Tariffs and Trade (hereinafter, GATT) 1994 on '*Security Exceptions*', which has been subject to recent debate in the context of the additional tariffs introduced by the US Administration (see *Trade Perspectives*, Issue No. 8 of 19 April 2019).

Letting the suspension of Title III of the Helms-Burton Act expire adds another layer of complexity to the already strained EU-US trade relations. What has worked in the past, namely finding a bilateral solution with the US that has been respected for more than twenty years, may not be an option considering the current political climate. Still, the various issues affecting EU-US trade relations should be addressed before they increasingly affect businesses in the

EU, in the US, and beyond. Businesses in the EU and beyond with business activities in Cuba should carefully assess their contractual relations and seek legal advice in order to consider all relevant legal elements and avenues.

## The EU revises its regulation on the mutual recognition of goods to strengthen the EU Single Market

On 19 March 2019, the European Parliament and the Council of the EU adopted *Regulation (EU) 2019/515 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008* (hereinafter, the Mutual Recognition Regulation) in order to strengthen the functioning of the EU's internal market. The Mutual Recognition Regulation replaces *Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC.* The rules contained in these regulations are supposed to facilitate the application of the principle of mutual recognition by establishing procedures to minimise the possibility of creating obstacles to the free movement of goods marketed in EU Member States. The Mutual Recognition Regulation provides a number of important innovations, which have been welcomed by business stakeholders.

An internal market, such as the EU's Single Market, is defined as an area without internal borders in which the free movement of goods, services, capital, and people is assured, and in which citizens are free to circulate and provide services. Still, national technical regulations and varying standards between EU Member States represent a remaining barrier to trade. To implement the functioning of the EU Single Market, three complementary approaches have been pursued: 1) Liberalisation; 2) Harmonisation; and 3) Mutual recognition. Liberalisation means the prohibition for EU Member States to apply quantitative restrictions in direct or indirect ways, as provided for under Article 34 of the Treaty on the Functioning of the European Union (hereinafter, TFEU). More specifically, Article 34 of the TFEU states that quantitative restrictions on imports and all measures having equivalent effect (hereinafter, MEQR) are prohibited among EU Member States. In the 1974 *Dassonville* case, the Court of Justice of the European Union (hereinafter, CJEU) interpreted the term '*measures having an equivalent effect*', as "*all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"*. Harmonisation consists of bringing various national technical regulations and standards to such a level of approximation that goods may freely be traded within the EU. While these two approaches are treaty-based, the application of the principle of mutual recognition has been construed by the CJEU. Following the *Dassonville* case, in the landmark 1979 case of *Cassis de Dijon,* the CJEU held that even a measure that is indistinctly applicable to all market actors (*i.e.*, technically non-discriminatory in nature) could constitute an MEQR. In that case, the CJEU affirmed the underlying fundamental assumption of the EU Single Market that, when a good is lawfully marketed in one EU Member State, it must be accepted into any other EU Member State. In simple terms, an EU Member State may not deny market access to a good from another EU Member State on the basis that it does not fully comply with its technical regulations and/or standards.

Still, even after the *Cassis de Dijon* case, EU Member States were facing difficulties regarding the removal of such barriers to trade. In order to improve mutual recognition, the EU adopted *Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community*. This decision was modest in its objectives, merely requiring national authorities to notify the Commission of national measures derogating from the principle of the free movement of goods. *Regulation (EC) No 764/2008* then repealed this decision and provided for a more elaborate scheme to properly implement the mutual recognition principle. *Regulation (EC) No 764/2008* provides rules and procedures to be followed by EU Member States when they take a decision that could hinder the free movement of goods. Importantly, *Regulation (EC) No 764/2008* assigned

the burden of proof that products, which are lawfully marketed in another EU Member State, may not be marketed, to the national authorities of the EU Member State prohibiting their placing on the market. The Regulation also established national *Product Contact Points* tasked with the provision of information on the technical rules applicable in the respective EU Member States, the contact details of the competent authorities, and the remedies available in case of disputes.

In 2016, the Commission published a Communication entitled '*Upgrading the single market*', in which it reported a number of shortcomings of *Regulation (EC) No 764/2008*. Primarily, the Commission noted that EU Member States often still required specific proof of lawful marketing, at times simply refused access to their national market, or sometimes required operators to carry out additional tests for their products. These practices were either illegal or very burdensome for economic operators, who had to bear the increased costs. As a result, economic operators were discouraged from expanding the marketing of their products to other EU Member States' markets. Furthermore, as recalled in Recital 7 of the Mutual Recognition Regulation, the evaluation carried out by the Commission between 2014 and 2016 showed that *Regulation (EC) No 764/2008* only had limited effects on facilitating mutual recognition. For instance, the *Product Contact Points* network established under the previous regulation was barely known or used by economic operators and, within that network, national authorities did not sufficiently cooperate. Additionally, the requirement to notify administrative decisions restricting or denying market access was rarely complied with.

The Mutual Recognition Regulation now intends to remedy these shortcomings and to improve the overall application of the existing tools. Overall, the Mutual Recognition Regulation takes over the key provisions already laid down in *Regulation (EC) No 764/2008*, but reinforces certain key elements. One of the most important novelties of the Mutual Recognition Regulation is the voluntary *Mutual Recognition Declaration* provided for in its Article 4. Pursuant to this provision, the producer of goods, or of goods of a given type, "*that are being made or are to be made available on the market in the Member State of destination"* may draw up a voluntary declaration to demonstrate that its products are legally marketed elsewhere in the EU and, therefore, entitled to benefit from the mutual recognition principle. For the sake of simplification, the Annex to the Mutual Recognition Regulation provides a mandatory structure for such declaration. Pursuant to Article 5 of the Mutual Recognition Regulation on '*Assessment procedures*', if an EU Member State intends to assess the goods subject to the *Mutual Recognition Declaration,* to ensure that they are indeed "*lawfully marketed in another Member State, and, if so, whether the legitimate public interests covered by the applicable national technical rule of the Member State of destination are adequately protected"*, the EU Member State is requested to contact the economic operator without delay. In the meantime, the economic operator is already "*allowed to make the goods available on the market in the EU Member State of destination*" and may continue to do so unless "*the goods pose a serious risk to safety or health of persons or to the environment*" or if it is established that the making available of the goods on the market of the EU Member State is prohibited on grounds of public morality or public security. In such cases, the national authority must issue an administrative decision denying or restricting market access for those goods. Under the new Mutual Recognition Regulation, in case a *Mutual Recognition Declaration* has been supplied to an EU Member State and an assessment procedure has been conducted, the *Mutual Recognition Declaration*, together with the relevant supporting evidence, is to be accepted by the competent authority as sufficient to demonstrate that the goods are lawfully marketed in another EU Member State.

Pursuant to Article 9 of the Mutual Recognition Regulation, EU Member States are still required to establish *Product Contact Points* within their territory and to ensure that such contact points be entrusted with sufficient powers for the proper performance of their tasks. Notably, Article 10(1) of the Mutual Recognition Regulation now provides that the Commission is to ensure efficient cooperation among EU Member States by: 1) Facilitating and coordinating the exchange and collection of information and best practices; 2) Supporting the functioning of the Product Contact Points and enhancing their cross-border cooperation; 3) Facilitating and

coordinating the exchange of officials' among the EU Member States and; 4) The organisation of common training and awareness raising programmes for authorities and businesses.

Finally, Article 8 of the Mutual Recognition Regulation provides for an enhanced '*Problem-solving procedure*' that builds on the EU's general non-judicial problem-solving procedure, the Internal Market Problem Solving Network (*i.e.*, SOLVIT), a service provided by national administrations of the EU Member States, as well as Iceland, Liechtenstein and Norway, which largely takes place online and aims at finding a solution within ten weeks. Pursuant to Article 8, where a SOLVIT procedure is initiated, the respective SOLVIT centre may now request an opinion from the Commission in order to assist in the proceedings. The Commission is then to assess whether the administrative decision taken by the EU Member State is compatible with the principle of mutual recognition and the relevant provisions of the Mutual Recognition Regulation. From the day of receipt of the request, the Commission has 45 working days to issue a final opinion on the issue, excluding the time necessary for the Commission to receive additional information requested for the purpose of the assessment. The opinion by the Commission will be notified to all EU Member States.

The elements of novelty of the Mutual Recognition Regulation have already been welcomed by certain stakeholders. *Peter Loosen*, the Chair of the Board of *Food Supplements Europe* greeted the new elements contained in the revised Regulation, in particular those on the new *Mutual Recognition Declaration* and the new problem-solving mechanism. Mr. Loosen affirmed that it was important to re-establish trust in the mutual recognition principle, noting that food businesses had tended to adapt their products and recipes to other markets in order to avoid facing long and costly legal procedures. *Horst Hetiz*, Secretary-General of *SME Connect*, a recently founded platform representing the interests of 10 million small and medium-sized enterprises (hereinafter, SMEs) in Europe, noted that the revised Regulation was "*a huge step forward in the right direction*". According to Mr. *Hetiz*, the simplified procedures would foster competition among SMEs, which would be in the interest of EU consumers.

The elimination of quantitative restrictions and the alignment of diverse national technical regulations are key elements for global trade facilitation and are prominently reflected in international trade disciplines, notably the WTO agreements. Both the WTO Agreement on Technical Barriers to Trade (hereinafter, TBT Agreement) and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter, SPS Agreement) encourage WTO Members to pursue mutual recognition. Most notably, Article 6.3 of the TBT Agreement encourages WTO Members to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Similarly, Article 4.1 of the SPS Agreement requires WTO Members to recognise different SPS measures as equivalent if the exporting WTO Member successfully demonstrates that its own SPS measures achieve an appropriate level of protection.

The Mutual Recognition Regulation entered into force on 18 April 2019, but will only apply as of 19 April 2020, and is supposed to facilitate and increase trade among and between EU Member States. Importantly, from April 2020, EU businesses will be able to benefit from the new Mutual Recognition Declaration, as well as from the enhanced problem-solving mechanism based on SOLVIT. It remains to be seen if the new tools will deliver an increased degree of trade facilitation among EU Member States, but businesses should prepare to take advantage of these new tools.

## Developments on front-of-pack nutritional labelling in Germany: Court prohibits use of *Nutri-Score* label by *iglo*

On 16 April 2019, the Hamburg Regional Court (*i.e.*, *Landgericht Hamburg*) issued a preliminary injunction in case 411 HKO 9/19 against the frozen food brand *iglo GmbH,* ordering *iglo* to refrain from placing the *Nutri-Score* front-of-pack (hereinafter, FoP) nutrition label on its products. The introduction of the *Nutri-Score* label on *iglo* products is thus temporarily stopped.

The injunction had been requested by the Munich-based trade association *Schutzverband gegen Unwesen in der Wirtschaft e.V.* (*i.e.*, Association against Nuisances in the Economy), which aims at promoting compliance with competition law. The Court found that the *Nutri-Score* label violates EU food labelling regulations and is, therefore, illegal in commercial transactions.

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 or side panel of food packaging is detailed and complex. Therefore, the additional, simplified FoP labels on food products aim at empowering consumers to make informed and healthier choices about their diets. While the European Commission (hereinafter, Commission) still 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. In 2012, the UK was the first EU Member State to recommend a nationwide FoP nutritional label, the voluntary '*traffic light*' 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 *Nutri-Score* system, which was first introduced in France in 2017, provides a single score for the entire product, giving consumers an overall assessment of the product. *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. Certain retailers already market products with the Nutri-Score label in other EU Members States, such as Luxembourg, while other EU Members States are still considering their options. Similarly, Scandinavian EU Member States have 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.

Since January 2019, *iglo*, a unit of the UK-based frozen food manufacturer *Nomad Foods*, has provided *Nutri-Score* information via its website on around 140 products and planned to start labelling products with it. *iglo* did so voluntarily, without the guidance of any recommendation by the German Government. Most importantly, the Hamburg Regional Court argued that this labelling allows for a classification of the nutrient profile. Under *Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods* (hereinafter, NHCR), nutrient profiles are generally intended to determine whether foods are, based on their nutrient composition, eligible to bear claims. According to the Court, *Nutri-Score* was, as far as the colour grades highlighted positive properties of the food, a nutrition claim in the sense of NHCR. The NHCR makes certain specifications for such claims, which *Nutri-Score*, according to the Court, does not meet. According to the Court, the *Nutri-Score* label also infringes Article 35 of *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR), which sets out certain requirements for the presentation of the calorific value of a food. *iglo* did not sufficiently prove to the Court that the nutrient value classifications are based on sound and scientifically tenable findings of consumer research, announced the Court's spokesperson. Consequently, the Court ordered *iglo* to refrain from using this label in the future, since the label at stake is not permissible in Germany under competition law. In the absence of a recommended national scheme in Germany, a number of further food companies including *bofrost*, *Danone, Mestemacher* and *McCain*, have voluntarily introduced *Nutri-Score* in Germany. For instance, by the end of 2019, 90% of all Danone's dairy products on sale in Germany will reportedly carry the *Nutri-Score* label. Those products and brands are not affected by the decision taken against *iglo*.

Indeed, according to Article 35 of the FIR, in addition to the harmonised panel with '*nutrition information*', the energy value and the amount of nutrients may be indicated 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 (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*".

There are several legal questions that must be taken into account. For example, on the *Nutri-Score* logo itself, there is no indication of the reference intakes. In comparison, the UK's '*traffic light*' scheme is a '*hybrid*' FoP scheme that includes reference intakes (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 how much energy and nutrients are consumed per day. Indeed, due to the calculation of an overall '*score*', the *Nutri-Score* label does not provide consumers with information on the individual nutrients. 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 major 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 across EU Member States may become an obstacle to the free movement of goods within the EU and be contrary to EU law (see on these questions *Trade Perspectives*, Issue No. 21 of 20 November 2015 and Issue No. 6 of 24 March 2016).

The German food industry association Federation for Food Law and Food Science (*i.e.*, *Bund für Lebensmittelrecht und Lebensmittelkunde, BLL*) has launched its own FoP nutritional value labelling model in April 2019, which it argues provides a visual representation of the nutrients and the calories contained in packaged and processed foods. When developing the new system, the BLL stated that it needed to provide added value to the already mandatory (back of pack) nutrition table by delivering information on how a product relates to GDAs. The reference levels indicate the amount of nutrients that an adult should consume on average daily and have been standardised throughout Europe with the FIR. The reference value will be given per 100 grams or millilitres, but a portion reference should also be possible for single-use portion packs with a capacity of less than 100g/ml, the BLL suggested. Most importantly, the BLL, which changed its name on 9 Mai 2019 to German Food Association (*i.e.*, *Lebensmittelverband Deutschland*) concluded that the model should not rate the food in a way similar to *traffic light* or *Nutri-Score* labels.

The German Non-communicable Diseases Alliance (*i.e.*, *Deutsche Allianz Nichtübertragbare Krankheiten, DANK*), an association of 22 medical scientific societies, associations and research institutes working to prevent diseases such as obesity, diabetes, cancer and cardiovascular diseases, reacted with incomprehension to the Court's decision. The Alliance blames the German Federal Minister of Food and Agriculture *Julia Klöckner* for the *Nutri-Score* '*ban*', as she had not yet paved the way for legislation to introduce a FoP nutrition labelling system. The decision shows, according to DANK's spokeswoman *Barbara Bitzer*, that the German policy had missed the development in the food market: "*Consumers and manufacturers wanted clearer nutrition labelling, as guaranteed by the scientifically sound*

*Nutri-Score*". The German Federal Minister of Food and Agriculture *Julia Klöckner*, who backs the introduction of a pan-European FoP nutrition label, said this month that Germany would introduce a national system after the Commission postponed its report on nutritional labelling systems in Europe. The reasoning of her Ministry is that none of the existing FoP nutrition labelling systems on the market in the EU were completely satisfactory, neither the classic nutrient *traffic light* in the UK, nor the *Nutri-Score* used in several countries, nor the *Keyhole* model in Scandinavia.

Regarding the *Nutri-Score* scheme, the pan-European industry association *FoodDrinkEurope* (hereinafter, FDE) issued, in 2017, a statement calling for discussions on a coordinated approach to FoP labelling at EU level and in close consultation and agreement with all stakeholders. The approach should also be consistent with the approach on reference intakes (*i.e.*, taking into account the average daily dietary intake of energy) that the European food and drink sector had pioneered, 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 nutrition labelling. Any proliferation of national schemes should be avoided, as a multitude of labels might negatively affect the free movement of goods within the EU's Single Market, requiring food businesses to label food differently for the various EU Member States.

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 food trade. Shortly before the *Codex Alimentarius* Committee on Food Labelling, which took place from 13 to 17 May 2019, the Permanent Mission of Italy to the International Organizations in Geneva, on 6 May 2019, had published a press release on the draft document "*WHO guiding principles and framework manual for front-of-pack labelling for promoting healthy diets*". The press release expresses concerns regarding the draft, noting that "*the whole exercise is based on the concept of "nutrient profiles", which is an entirely political concept with no scientific foundation*", and which, *inter alia*, discouraged the consumption of Italian products like olive oil.

*iglo* immediately announced that it would file an appeal against the Court's decision at the Hamburg Higher Regional Court (OLG Hamburg). 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, harmonised legislation regarding FoP nutrition labelling should arguably 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. On the basis of *Commission Decision (EU) 2019/718 of 30 April 2019*, the Commission registered the proposed citizens' initiative entitled '*Pro Nutri-Score*', which is asking the Commission to "*impose simplified 'Nutri-Score' labelling on food products, to guarantee that consumers are provided with quality nutritional information and to protect their health*". The initiative has until 8 May 2020 to receive at least one million statements of support from a minimum of seven EU Member States, before the Commission is required to react.

## Recently Adopted EU Legislation

### Trade Remedies

- *Commission Implementing Regulation (EU) 2019/765 of 14 May 2019 repealing the anti-dumping duty on imports of bioethanol originating in the United States of America and terminating the proceedings in respect of such imports, following an*

*expiry review pursuant to Article 11(2) of the Regulation (EU) 2016/1036 of the European Parliament and of the Council*

- *Commission Implementing Regulation (EU) 2019/687 of 2 May 2019 imposing a definitive anti-dumping duty on imports of certain organic coated steel products 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*

- *Commission Implementing Regulation (EU) 2019/688 of 2 May 2019 imposing a definitive countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council*

## Food and Agricultural Law

- *Commission Recommendation (EU) 2019/794 of 15 May 2019 on a coordinated control plan with a view to establishing the prevalence of certain substances migrating from materials and articles intended to come into contact with food*

- *Commission Implementing Regulation (EU) 2019/764 of 14 May 2019 concerning the authorisation of a preparation of Lactobacillus hilgardii CNCM I-4785 and Lactobacillus buchneri CNCM I-4323/NCIMB 40788 as a feed additive for all animal species*

- *Commission Regulation (EU) 2019/759 of 13 May 2019 laying down transitional measures for the application of public health requirements of imports of food containing both products of plant origin and processed products of animal origin*

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