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As a new Commissioner for Trade will soon take over, the EU looks forward to a busy Autumn of trade negotiations

On 31 October 2019, the mandate of the current European Commission (hereinafter, Commission) will come to an end and, on 1 November 2019, the new European Commission will take office. The current European Commissioner for Agriculture and Rural Development, Mr. Phil Hogan, has been nominated as Commissioner for Trade. In the past five years, the EU has made significant progress with its trade policy agenda and is on the way to conclude further trade negotiations in the coming months. Still, even with like-minded partner countries, sensitive issues remain, such as the question of the protection of geographical indications (hereinafter, GIs), for instance in the context of the free trade agreement (hereinafter, FTA) under negotiation between the EU and Australia and the EU and New Zealand, respectively.

Over the past twenty years, the global focus of trade negotiations has increasingly shifted from the multilateral level within the WTO to regional, bilateral, and region-to-region trade agreements. Perhaps somewhat reluctantly at first, given its traditional preference for the multilateral approach at the WTO, the EU then fully embraced this trend. In its 2015 '*Trade for all – Towards a more responsible trade and investment policy*' strategy, the Commission had laid out its detailed trade policy objectives with respect to its key trading partners.

With respect to Latin America, the strategy prioritised trade negotiations with Chile, Mexico and Mercosur. Negotiations for an update to the EU-Mexico trade agreement were concluded and the text is currently undergoing '*legal scrubbing*'. The signing of the agreement will, however, only take place once Mexico has fulfilled its commitment to liberalise public procurement at the federal and sub-federal level, for which the Government of Mexico is still engaging in internal consultations with the various Mexican States. The Commission is hoping to submit the final text of the FTA to the European Parliament before the end of this year. Negotiations with Chile on an FTA continue to progress, but at a very slow pace, reportedly due to sensitive issues that are preventing the negotiations from moving at a faster pace, notably the rules on the settlement of investment disputes, as well as on GIs. During the 5th round of negotiations in July 2019, however, negotiators reportedly achieved very good progress in a significant number of chapters. The 6th round of negotiations is scheduled to take place in November 2019. In June, the EU and Mercosur (*i.e.*, Argentina, Brazil, Paraguay, and Uruguay) reached an '*Agreement in Principle*' on the trade part of the EU-Mercosur Association Agreement (hereinafter, EU-Mercosur FTA), which now needs to be ratified by both parties. In the EU, consent and ratification is required by the EU and all EU Member States. The process is already experiencing setbacks, as France and Ireland declared their opposition towards the

Agreement without stronger Mercosur commitments towards climate change mitigation and, on 18 September 2019, the responsible committee in Austria's Parliament rejected the Agreement, requiring the Government of Austria to vote against it in the Council of the EU (hereinafter, Council). Opposition is mainly attributed to the fires affecting Brazil's Amazon region, but might also be due to concerns regarding agricultural market access granted to Mercosur.

With respect to the Asia-Pacific region, the Commission's 2015 strategy noted that the "*region is crucial to European economic interests*" and that the conclusion of negotiations with Singapore and Viet Nam had "*set a second benchmark for engaging with other partners*", such as Indonesia, Malaysia, the Philippines, and Thailand. Negotiations with Indonesia are progressing slowly and the 9th round of negotiations is scheduled to take place during the week of 30 September 2019 in Brussels. On 30 June 2019, the outgoing European Commissioner for Trade, Cecilia Malmström, and Viet Nam's Minister of Industry and Trade, Tran Tuan Anh, signed the EU-Viet Nam FTA and an Investment Protection Agreement. According to the Commission, the agreements reinforce the EU's engagement with Southeast Asia, and contribute to the strengthening of cooperation between the Association of Southeast Asian Nations (hereinafter, ASEAN) and the EU, aiming at closer trade and investment relations between the two regions. The EU-Viet Nam FTA is the second agreement concluded between the EU and an ASEAN Member State. The first such agreement was the EU-Singapore FTA and both agreements are nearing entry into force. The EU-Singapore FTA has reached the ratification stage and, on 13 February 2019, has received the European Parliament's consent. The European Parliament also agreed to an Investment Protection Agreement providing a court system with independent judges to settle disputes. While the investment protection agreement still needs to be ratified by all EU Member States, the EU-Singapore FTA will enter into force once the Council has adopted the decision to conclude the agreement and the ratification process in Singapore has been finalised. With respect to the EU-Viet Nam FTA, the European Parliament still needs to give its consent and the agreement is expected to be discussed by the European Parliament's Committee on International Trade (hereinafter, INTA) before the end of the year, so that the European Parliament's plenary could proceed to a vote in early 2020.

Finally, on 25 July 2019, Thailand's new Deputy Prime Minister, Somkid Jatusripitak, and the country's Minister of Commerce, Jurin Laksanavisit, announced that Thailand intended to relaunch FTA negotiations with the EU shortly. Negotiations for an FTA between the EU and Thailand had been launched 2013 and four rounds of negotiation were held until April 2014. Negotiations were suspended due to the political situation, but a general election took place in 2019 and a new Government took office in the Spring, paving the way for the possible relaunch of negotiations with the EU. The Director General of the Department of Trade Negotiations, Khun Auramon Supthaweethum, stated that the Department would inform relevant stakeholders including EU representatives, the private sector, as well as civil society groups about Thailand's intention to re-start negotiations. In September 2019, the EU's Ambassador to Thailand, H.E. Pirkka Tapiola, confirmed the intentions of the Government of Thailand and noted that he was confident that negotiations could restart soon. The EU is Thailand's and ASEAN's third largest trading partner.

Strengthening trade relations with Australia and New Zealand was also determined as a priority in the EU's 2015 strategy, noting that agreements should take "*into account EU agricultural sensitivities*". On 18 and 21 June 2018, respectively, the EU officially launched negotiations for comprehensive trade agreements with Australia and New Zealand (see *Trade Perspectives*, Issue No. 11 of 1 June 2018) and negotiations with both countries have been progressing during the first half of 2019. Negotiations with New Zealand have progressed particularly swiftly with the aim of concluding negotiations already by the end of this year. The 5th round of EU-New Zealand trade negotiations was held from 8 to 12 July 2019 in Brussels and, according to the Commission's report, the discussions "*covered most areas of the future agreement and have moved some of them close to reaching a provisional conclusion*". With respect to Australia, negotiations progress at a slower pace than those with New Zealand. The 4th round of negotiations was held from 1 to 5 July 2019 and, according to the Commission's

report, negotiators discussed "*the textual proposals that had been submitted for the different chapters, and their respective comments*" and "*started to agree in principle on text parts that were agreeable to both sides*". The 5th round of negotiations is scheduled to take place in November 2019, but in view of the overall status of the negotiations and remaining issues to be resolved, it appears unlikely that negotiations could be concluded by the end of the year.

In the negotiations with Australia, the issue of GIs has remained a key controversy. GIs are distinctive signs used to identify a product as originating in the territory of a country, region, or locality where its quality, reputation or any other characteristic are linked to its geographical origin. The subject of GIs has become an important, and often controversial, element for the EU in trade negotiations and has been a sensitive issue in many recent trade negotiations, such as those with Chile, Mercosur, and Mexico, respectively. On 13 August 2019, Australia's Ministry of Trade published a list of 408 products (*i.e.*, 172 food products and 236 spirits) that the EU was requesting to be protected as GIs under the EU-Australia FTA. In a statement of 13 August 2019, Australia's Minister of Trade Simon Birmingham launched a public consultation, open until 13 November 2019, on GIs to ensure that the opinion of the different industries were reflected in Australia's forthcoming position. In his statement, Minister Birmingham noted that there were "*enormous opportunities for Australian farmers and businesses if we can improve their access to markets across the EU*", catering to the "*more than 500 million consumers*" in the EU. Minister Birmingham pointed out that Australia would only commit to an FTA if it were in Australia's overall interest.

One of the most vocal industries, after the publication of the list of GIs requested by the EU for the FTA with Australia, appears to be the Australian dairy sector. Of the 172 food products, over 50 products are cheeses, such as *Feta*, *Gruyère*, *Roquefort*, and *Gorgonzola*. *Australian Dairy Farmers*, the national advocacy body representing dairy farmers across Australia's six dairying States, stated that if Australia were to agree to the protection of the listed GIs, as requested by the EU, the industry could face significant economic losses. The President of *Australian Dairy Farmers* also noted that the EU was pursuing the extension of the scope of labelling restrictions to include colours, flags, and symbols that might evoke EU Member States. The list has also caused reactions on the EU side, as some sectors have seen their specialities omitted from the list. For instance, Italian authorities and winemakers are requesting to include *Prosecco*, a wine entirely or mainly produced from the grape variety of the same name, on the list of GIs protected under the EU-Australia FTA. *Prosecco* from a specific region in Northern Italy is protected as a GI in the EU, but is not included as a GI in any existing FTA concluded by the EU. The EU's Ambassador to Australia confirmed that the EU would continue to seek the protection for prosecco, even though it does not figure on the current list. Australia noted that the EU and Australia had already concluded an agreement on trade in wine in 2008 and that negotiations should not be reopened. That agreement does not include the protection of *Prosecco* due to successful opposition by the *Winemakers' Federation of Australia*.

The EU is continuing its efforts to negotiate and conclude comprehensive trade agreements with its key trading partners. In the mission letter addressed to Commissioner-designate Phil Hogan, the President-elect of the European Commission Ursula von der Leyen points out that Mr. Hogan's mission as the future Commissioner for Trade would be, *inter alia*, to conclude ongoing negotiations, notably with Australia and New Zealand. Additionally, the letter notes that, where conditions are met, the Commissioner is supposed to "*propose to open negotiations on new bilateral or multilateral agreements*". In view of the various agreements now concluded, an important focus will be the implementation and enforcement of those agreements. In this regard, President-elect von der Leyen notes that the College of Commissioners would appoint a *Chief Trade Enforcement Officer* to work under the direct guidance of the Commissioner for Trade in order to monitor and improve the compliance with the EU's trade agreements. The new College of Commissioners is still subject to approval by the European Parliament, prior to which all Commissioners-designate will attend hearings by the Parliament's Committee(s) dealing with the respective portfolio(s). Commissioner-designate Hogan will be subject to a hearing within the European Parliament's Committee on International Trade (INTA Committee).

Businesses with commercial interests within the EU or its trading partners should carefully assess the relevant rules and issues being negotiated. The INTA Committee's hearing of the EU's future Commissioner for Trade will take place in the coming weeks and will likely already provide a clearer picture of EU trade policy in the years to come. Given the progress in trade negotiations and the overall developments in trade policy, an update to the EU's trade strategy can be expected for next year.

Vegan leather? The need for better leather labelling rules

The European leather industry has raised the issue of the use of arguably false and misleading product descriptions regarding leather and leather products in the EU. The sector is evolving rapidly, with the arrival on the market of new products, denominated as apple, pineapple, or vegan '*leather*'. Given that leather is generally understood as being of animal origin, the use of the term '*leather*' for non-animal or even totally synthetic products would seem to be misleading in a way, which is detrimental to consumers. One way to avoid such implications would be the review and update of labelling rules in order to better inform EU consumers.

The designation of leather and leather products is not fully regulated at EU level. The term '*leather*' is clearly defined only for footwear in point 2 of Annex I to *Directive 94/11/EC of the European Parliament and of the Council of 23 March 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to labelling of the materials used in the main components of footwear for sale to the consumer* as "*a general term for hide or skin with its original fibrous structure more or less intact, tanned to be rot-proof. The hair or wool may or may not have been removed. Leather is also made from a hide or skin which has been split into layers or segmented either before or after tanning*". In addition, *Directive 94/11/EC* established a corresponding pictogram for leather. There is no mandatory definition of '*leather*' for other leather products, such as garment, furniture, and automotive leather goods.

Textile products including up to 20% leather fall under *Regulation (EU) No 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products*, which requires all textile products to be labelled or marked whenever they are placed on the market for production or commercial purposes. *Regulation 1007/2011* covers all raw, semi-worked, worked, semi-manufactured, semi-made, made-up products with more than 80% textile weight content. In the context of leather labelling, the most important provision of *Regulation 1007/2011* is Article 12, which sets out a labelling requirement for textile products containing '*non-textile parts of animal origin*'. This term is to be clearly stated on the label if a piece of garment contains any non-textile animal-derived parts. It is important to note that products only fall within the scope of *Regulation 1007/2011* if they consist of at least of 80% textile fibres. Products consisting of more than 20% leather (in combination with any other non-textile material) fall outside of the scope of *Regulation 1007/2011*. As there is still no EU directive or regulation specifically covering leather goods, such products are not subject to the requirements of Article 12 of *Regulation 1007/2011* or any other labelling requirements.

'*Vegan*' or '*faux*' leather products can be produced from materials as varied as apple waste, cork, bark cloth, glazed cotton, waxed cotton, paper, polyvinyl chloride (PVC), and polyurethane. It was reported in the press that, on an successful initiative of the animal rights organisation *PETA* Germany, the publisher of the German *Duden* (a dictionary and the predominant language resource of the German language), has added in the entry to leather the phrases '*vegan leather*' and '*synthetic leather*'. It must be noted, however, that the meaning of leather has not been changed on the German *Duden* as "*material derived from animal skin by tanning, usually tough, very tear-resistant*". Under '*expressions*', '*vegan leather*' has been included as "*name for imitation leather made from vegetable natural materials or from plastics*", and '*Kunstleder*' (*i.e.*, artificial leather) as "*name for synthetic leather*".

A majority of EU Member States does not have specific rules on leather, while some introduced such rules, but with divergent scopes and mechanisms, underlining the need for harmonised rules at the EU level. In France, Article 1 of *Decree No 2010-29 of 8 January 2010 applying Article L.214-1 of the Consumer Code to certain leather goods and like-kind products* (*Décret n° 2010-29 du 8 janvier 2010 portant application de l'article L. 214-1 du code de la consommation à certains produits en cuir et à certains produits similaires*) defines '*leather*' as "*the product made from animal hide by means of tanning, or by impregnation preserving the natural structure of the hide, and that has kept all or part of its grain*". According to its Article 2(1), it is prohibited to use the term '*leather*', either as a noun, as the root word, or as an adjective, regardless of the language, to identify any other material than the one made from animal skin by means of tanning, or by impregnation preserving the natural shape of the skin fibres.

In Italy, *Law No. 8 of 14 January 2013 on new provisions concerning the use of the terms leather, pelt and fur and their derivatives and synonyms* and repealing Law No. 1112 of 16 December 1966 (*Legge 14 gennaio 2013, n. 8. Nuove disposizioni nell'utilizzo dei termini cuoio, pelle e pelliccia, di quelli da essi derivanti o loro sinonimi*) defines '*leather*' in Article 1 as follows: "*1. The terms 'leather' and 'pelt' and their derivatives and synonyms, including when translated into a foreign language, are reserved exclusively for products, with or without hair, obtained from the processing of animal spoils, which are subject to tanning or impregnation in order preserve the natural structure of their fibres intact, as well as for all articles created with them with covering layers made from other material with a thickness of 0.15 mm or smaller. (…) 3. The provisions of points 1 and 2 above also apply where such terms are used as adjectives, nouns or as prefixes or suffixes in other words*". Article 3 sets out that "*it is prohibited to sell or place on the market items not exclusively obtained from animal spoils processed specifically for the purpose of conserving their natural characteristics, or any products other than those described in article 1, under the terms 'leather', 'pelt', 'fur' and their derivatives and synonyms, as adjectives or nouns or inserted as prefixes or suffixes of other words, or under the generic descriptions 'hides', 'leatherwear' or 'furs', including when translated into a foreign language*". Therefore, similar as in France, the term '*leather*' is reserved for certain animal products and it is prohibited to use the term for other than the defined terms.

Some other EU Member States, notably Austria, Belgium, Lithuania, and Spain, appear to have introduced similar definitions and labelling systems for leather and leather products, albeit with divergent scopes and rules. In addition to mandatory national rules, there is also a range of standards and labelling rules that apply in certain EU Member States. In Germany, the Standard RAL 060 A2 (Issue March 2012) of the German Institute for Quality Assurance and Certification (*RAL Deutsches Institut für Gütesicherung und Kennzeichnung e. V.*) defines '*leather*' and the demarcation of the term from other materials, similar to the DIN Standard DIN EN 15987 (Issue July 2015) on the denomination of the leather trade for leather, leather types and leather terms. Under both standards, a material may only be described as leather, genuine leather, or with an expression, which according to the trade view refers to leather, or a type of leather (box calf, nappa, nubuck, morocco, etc.), which has been manufactured from the unsplit or split animal skin or pelt through tanning and retaining the fibres in their natural condition. Word connections with the term leather or with phrases that, according to commercial interpretation, point to leather or a type of leather, are inappropriate for materials similar to leather, which are not manufactured from animal skins or pelts.

Given that leather is generally understood as being of animal origin, the use of the term '*leather*' for non-animal or even totally synthetic products appears to be misleading. An important aspect of *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* (*i.e.*, the *'Unfair Commercial Practices Directive')* concerns misleading actions in commercial practices. A commercial action is considered misleading if it contains false information and is therefore untruthful, or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is correct. This also includes omissions of information. A trader must provide the material information that the average consumer needs to make an informed decision. According to the Directive, it is misleading to: 1) Omit material

information that the average consumer needs, according to the context, to make an informed transactional decision; 2) Hide or provide material information in an unclear, unintelligible, ambiguous or untimely manner; and 3) Fail to identify the commercial intent of the commercial practice if not already apparent from the context. These are the elements that need to be assessed to determine whether terms like '*vegan leather*' or '*apple leather*' in the marketing of a given product in specific commercial instances are misleading.

Following the concerns expressed by the European leather industry about the use of arguably false and misleading product descriptions regarding leather and leather products in the EU, the European Commission (hereinafter, Commission) carried out a feasibility study in 2013 to assess the need, at EU level, for a leather definition and related labelling of leather products, including a public consultation on "*Authenticity leather labelling system at EU level*" between October 2013 and January 2014. Preliminary results of the public consultation included that the EU should propose a mandatory label at EU level and that the EU should provide guidance on how to address unsubstantiated claims. The overall conclusion was, however, that the available data did not allow for the determination of the extent of damages caused to the EU leather industry by the misleading use of denominations related to leather. According to a reply to a parliamentary question in 2018, the Commission, therefore, requested the EU's leather industry to provide all available information and data at their disposal. This was intended to allow the continuation of the ongoing assessment regarding leather product descriptions, including the assessment of the economic and financial impact of counterfeiting and of misleading consumers through fraudulent designations. Depending on the outcome of the assessment, the Commission intends to analyse different policy options. As the process of data collection is still ongoing, the Commission does not yet appear to be in a position to move forward with the regulation of leather authenticity in the EU's Single Market.

Industry stakeholders like the *Confederation of National Associations of Tanners and Dressers of the European Community* (COTANCE), the representative body of the European leather industry, deal quite often with problems related to products that appear to be fraudulently labelled as leather or that are counterfeit. Misleading and fraudulent labelling are not only detrimental to businesses, but also to consumers, who are not correctly informed. In this context, the *German Leather Industry Federation* (*Verband der deutschen Lederindustrie*, or VDL) has recently issued a '*cease and desist*' letter to the German company *NUUWAI*, which markets handbags made out of an innovative apple leather material. VDL claims that the terms '*apple leather*' and '*vegan leather*', as used on NUUWAI's website, are misleading and anti-competitive. Such a dissuasion warning typically calls on an operator to refrain from using the labelling or advertising in question and can then be enforced in Court unless a declaration of discontinuance is signed by the operator within a certain period of time. Reportedly, on 20 August 2019, a court hearing was held at the Hanover Regional Court in the proceedings initiated by VDL against NUUWAI.

The VDL sees its main task in the preservation of the quality features and the reputation of the natural material '*leather*'. As such, the VDL stated that supply or sale may only refer to a material made from the unsplit or split animal skin or coat by tanning, while maintaining the grown fibre in its natural entanglements. In addition, '*real leather*' as well as '*nappa*', '*nubuck*', '*beef box*', etc., are expressions that consumers recognise as leather and are allowed. Deliberately misleading uses, especially for imitation leather from non-animal origin, are mainly found in the trade in furniture and leather goods, according to the VDL. Offenders are warned and '*cease and desist*' letters are often sent to the persons or companies that the VDL considers to be acting unlawfully. According to the VDL, in the past three years, it had obtained almost 300 '*cease and desist*' commitments and more than 30 *interim* injunctions, it enforced more than 30 penalties or instituted regulatory proceedings, the costs of which have been imposed on the unlawful actors.

The Commission is yet to pronounce itself on a '*Leather Authenticity label*' or any other option to address the concerns expressed by the European leather industry about the use of arguably false and misleading product descriptions with regard to leather and leather products in the

EU. In the meantime, developments like the judgement expected by the Hanover Regional Court on '*vegan leather*' should be monitored and analysed.

The CJEU holds that mushrooms cultivated in the Netherlands and harvested in Germany must be labelled with '*country of origin: Germany*'

On 4 September 2019, the Court of Justice of the European Union (hereinafter, CJEU) delivered the judgment in the case C-686/17, *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v Prime Champ Deutschland Pilzkulturen GmbH*, responding to a request for a preliminary ruling from the German Federal Court of Justice (*Bundesgerichtshof, BGH*) lodged on 7 December 2017. The case initiated by a German Centre for Protection against Unfair Competition (*i.e.*, *Wettbewerbszentrale*) addresses the question of whether the labelling of freshly packaged mushrooms with '*country of origin: Germany*' is permitted if the mushrooms are cultivated in the Netherlands and brought to Germany for harvesting only. In light of the controversies over country of origin labelling (COOL), this case provides additional clarity for producers of fruits and vegetables.

The mushroom breeder *Prime Champ* sells mushrooms in Germany with the indication '*country of origin: Germany*'. The cultivation of the mushrooms takes place in the Netherlands, but, a few days before the harvest, they are brought to Germany and harvested there. The mushrooms grow in boxes on compost, which is processed in the Netherlands and in Belgium, and consists of horse manure and straw sourced in different European countries. The *Wettbewerbszentrale* had filed an injunction against *Prime Champ*, as it considered the indication '*country of origin: Germany*' to be misleading if it did not provide any additional information on its origin. The *Wettbewerbszentrale* considered this to be misleading because the target public would assume that the mushrooms were actually produced and cultivated in Germany and not only brought from the Netherlands to Germany for the harvest. The Stuttgart Higher Regional Court (*Oberlandesgericht*, OLG, Stuttgart) had decided in a judgment of 10 March 2016 that the indication '*origin: Germany*' is also permissible if the mushrooms were brought only for the harvest to Germany, after having been cultivated in the Netherlands. The Court considered that there is no legal basis for additional labelling indicating the cultivation in the Netherlands, even though the Court itself admitted that consumers were somehow misled. In the next instance, the German Federal Court of Justice stayed the proceedings and submitted four questions to the CJEU for a preliminary ruling.

In the first two questions, the CJEU was asked to clarify whether the determination of the country of origin could also depend on the harvesting process, if substantial production steps take place in other EU Member States. The BGH asked: 1) For the purposes of the definition of the term '*country of origin*' in Article 113a(1) of *Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)* and Article 76(1) of *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products*, are the definitions in Article 23 et seq. of *Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code* and *Article 60 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code* pertinent?; and 2) Do cultivated mushrooms, which are harvested in a national territory, have their origin in that territory pursuant to Article 23 of *Regulation (EEC) No 2913/92* and Article 60(1) of *Regulation (EU) No 952/2013* even if substantial production steps take place in other EU Member States and the cultivated mushrooms have been transported to the relevant national territory only three days or fewer prior to the first harvest? In the proceedings, the *Wettbewerbszentrale* argued that the EU legislator did not consider that, within the framework of future cultivation methods, the place of harvesting could be different to the place of cultivation. The provision is therefore based on the premise that cultivation and harvesting take place only in one place and only within the borders of an EU Member State. The

Wettbewerbszentrale argued that it was, therefore, not possible to only focus on the harvesting process.

Article 113a(1) of *Regulation (EC) No 1234/2007* provides that "*The products of the fruit and vegetables sector which are intended to be sold fresh to the consumer, may only be marketed if they are sound, fair and of marketable quality and if the country of origin is indicated*". However, as *Regulations No 1234/2007* and *1308/2013* do not provide for a definition of '*country of origin*', the answer to the first two questions lies in EU customs law, which expressly refers to these agricultural provisions. Article 23(2)(b) of *Regulation (EEC) 2913/92* (the so-called Customs Code, now superseded by *Regulation (EU) No 952/2013 laying down the Union Customs Code*) provided that the expression '*goods wholly obtained in a country*' means '*vegetable products harvested therein*'. Additionally, Article 59(c) of *Regulation (EU) No 952/2013*, provides that Articles 60 and 61 of *Regulation (EU) No 952/2013* lay down rules for the determination of the non-preferential origin of goods for the purposes of applying other EU measures relating to the origin of goods.

In his Opinion, delivered on 4 April 2019, Advocate General Saugmandsgaard Øe at the CJEU stated that the wording of Article 23(2)(b) of *Regulation (EEC) 2913/92* solely referred to the place of harvest and that previous production steps are irrelevant. This interpretation does not change with the fact that, at the hearing before the CJEU, the Commission reportedly stated that, when the regulations were drawn up, it had not taken into account the '*cross-border*' production of vegetables. In its judgement, the CJEU followed the Advocate General's opinion and held that the customs rules must be interpreted as meaning that the country of origin of cultivated mushrooms is their country of harvest, irrespective of whether substantial production steps have taken place in other EU Member States. The CJEU also considered the wording of the customs rules to be compelling and stressed that it does not matter whether the vegetables were brought to the harvesting area in Germany three, two, or only one day before the first harvest. As long as the harvest takes place in Germany, Germany qualifies as '*country of origin*'.

In the third question to the CJEU, the BGH sought to clarify the relationship between the prohibitions of misleading food information in EU food law, and the product-specific labelling rules of EU agricultural law. More specifically, the CJEU had to determine whether the prohibition on the making of misleading statements under Article 2(1)(a)(i) of *Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs* and Article 7(1)(a) of *Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers* (hereinafter, the EU Food Information Regulation, FIR) also applied to the indication of origin required under Article 113a(1) of *Regulation (EC) No 1234/2007* and Article 76(1) of *Regulation (EU) No 1308/2013*.

Article 7(1)(a) of the FIR on '*Fair information practices*' provides that "*Food information shall not be misleading, particularly as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production*". Most importantly, according to Article 2(3) of the FIR, the "*country of origin of a food shall refer to the origin of a food as determined in accordance with Articles 23 to 26 of Regulation (EEC) No 2913/92*". The Advocate General concluded that the agricultural regulations, which require a specific indication of origin, are more specific provisions than the provisions prohibiting misleading food information in Article 7 of the FIR. It follows that the words '*country of origin: Germany*' in the present case cannot be considered as misleading consumers in the sense of the FIR. Whether consumers are actually deceived is, in the opinion of the Advocate General, irrelevant. According to his opinion, the precedence of product-specific regulations of EU agricultural law exclude any factual misleading. The CJEU followed the Advocate General noting that an indication of origin that is admissible and correct under EU agricultural law cannot be considered as misleading under the FIR.

In the fourth question, the BGH asked the CJEU whether it is permitted to add additional, explanatory elements to the indication of origin prescribed under Article 113a(1) of *Regulation (EC) No 1234/2007* and Article 76(1) of *Regulation (EU) No 1308/2013* in order to counteract a misleading statement prohibited under Article 2(1)(a)(i) of *Directive 2000/13/EC* and Article 7(1)(a) of *Regulation (EC) No 1169/2011*. More specifically, the question concerned the possibility of imposing such an obligation on producers on the basis of the rules on unfair commercial practices in case the indication of the country of origin were to be considered misleading. In this regard, the CJEU recalled that the FIR refers to Articles 23 to 26 of *Regulation (EEC) 2913/92*, which links the country of origin to the country in which the produce was harvested. The CJEU concluded that a manufacturer may not be required to provide any clarifying information.

As regards the indication of origin, the judgment provides further clarity and legal certainty to all food business operators that are marketing fruit or vegetables, in particular to those with cross-border value chains. After the CJEU's preliminary ruling, it can be expected that the BGH will reject the revision lodged by the *Wettbewerbszentrale*. In practice, this means that the packaging of fruit and vegetables must state the EU Member State in which the product was harvested, even if all the preceding cultivation and production steps were carried out in another country. In the case at hand, it would even be legally wrong to label the mushrooms with '*country of origin: The Netherlands*', as they were harvested in Germany. A possible scenario would therefore be that, in the future, fruit or vegetable varieties could be cultivated, as far as technically possible, in one EU Member State and then harvested and marketed in other EU Member States as '*local*' products. Whether such a practice is acceptable from the point of view of consumer protection is an issue that must be addressed by EU and EU Member States' regulators.

Recently Adopted EU Legislation

Customs Law

- *Commission Implementing Regulation (EU) 2019/1394 of 10 September 2019 amending and correcting Implementing Regulation (EU) 2015/2447 as regards certain rules on surveillance for release for free circulation and exit from the customs territory of the Union*

Food and Agricultural Law

- *Commission Regulation (EU) 2019/1561 of 17 September 2019 amending Annexes II and III to Regulation (EC) No 396/2005 of the European Parliament and of the Council as regards maximum residue levels for chlormequat in cultivated fungi*

- *Commission Implementing Regulation (EU) 2019/1395 of 10 September 2019 amending Annex I to Regulation (EC) No 798/2008 as regards the entries for Bosnia and Herzegovina and Israel and the name of the Republic of North Macedonia in the list of third countries, territories, zones or compartments from which certain poultry commodities may be imported into and transit through the Union and amending the model veterinary certificate for egg products*

Other

- *Council Decision (EU) 2019/1569 of 16 September 2019 on the position to be taken, on behalf of the European Union, within the Joint Committee on Agriculture set up by the Agreement between the European Community and the Swiss*

Confederation on trade in agricultural products, as regards the amendment of Annexes 1 and 2 to the Agreement

- *Notice concerning the entry into force of the Voluntary Partnership Agreement between the European Union and the Socialist Republic of Viet Nam on forest law enforcement, governance and trade*

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

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