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Season's Greetings

2019 is drawing to a close and all of us in the International Trade and Food Law practice of FratiniVergano would like to wish you, your colleagues and families all the best for a peaceful holiday season and for a successful and healthy 2020. We hope that you have enjoyed *Trade Perspectives*© throughout this year and that you have always found it stimulating and timely.

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

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

For the year to come, we will continue with our editorial efforts, beginning with the publication of the next issue of *Trade Perspectives*© on 17 January 2020. *Trade Perspectives*© is circulated to thousands of recipients worldwide and not a single week goes by without new readers asking to be added to our circulation list. This fills us with pride, but also with a deep sense of commitment and discipline towards our readers' expectations.

Thank you for your interest in *Trade Perspectives*© and for helping us to make it a better and more useful tool of discussion. We look forward to continue hearing from you regularly and to another year of international trade and food law developments. Stay tuned, as we are also working on a new format and mode of circulation to celebrate *Trade Perspectives*© 10-year anniversary!

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The European Parliament gives its consent to amending the tariff-rate quota for '*Poultry meat and poultry meat preparations*' of the EU-Ukraine Association Agreement, closing a '*loophole*' for certain poultry cuts

On 26 November 2019, the European Parliament adopted the *European Parliament legislative resolution of 26 November 2019 on the draft Council decision on conclusion, on behalf of the Union, of the Agreement in the form of an exchange of letters between the European Union*

and Ukraine amending the trade preferences for poultry meat and poultry meat preparations provided for by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (hereinafter, Resolution) and thereby gave its consent to the agreement. The agreement amending the EU-Ukraine Association Agreement (hereinafter, EUUAA) concerns two tariff lines for poultry, relating to: 1) fresh or chilled; and 2) frozen '*other cuts*' of poultry breast, respectively. The amendment addresses the fact that large quantities of special chicken breast cuts from Ukraine were entering the EU at a 0% tariff rate and, following a minor modification, were sold in the EU market as a chicken breasts, which are subject to a limited tariff rate quota (hereinafter, TRQ) in order to legitimately protect EU industry.

Negotiations of the EUUAA were concluded in 2011. The trade part of the EUUAA, the Deep and Comprehensive Free Trade Agreement (hereinafter, DCFTA), falling under exclusive EU competence, was provisionally applied from 1 January 2016, with the full EUUAA having entered into force on 1 January 2017. The EU-Ukraine DCFTA provides enhanced market access for the EU and Ukraine via the progressive removal of customs tariffs and quotas. The DCFTA also creates conditions for aligning key sectors of the Ukrainian economy to EU standards on the basis of the harmonisation of laws, norms and regulations in various trade-related sectors. The EUUAA is the first of a new generation of Association Agreements with the EU's Eastern Partnership countries (*i.e.*, Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine) and intends to support political and socio-economic reforms in the partner countries. The EU is Ukraine's largest trading partner. In 2018, EU-Ukraine trade in goods amounted to EUR 40 billion, with exports from Ukraine to the EU accounting for EUR 18 billion and exports from the EU to Ukraine amounting to EUR 22.1 billion.

The EU-Ukraine DCFTA liberalises most tariff lines. The remaining tariff lines for certain sensitive products, such as sugar, ethanol, certain dairy, as well as meat products, are subject to TRQs. A multitude of tariff lines falling under '*Poultry meat and poultry meat preparations*' are considered as sensitive products and are exempt from full liberalisation, but rather subject to a limited duty-free TRQ, while the out-of-quota trade is subject to the EU's Most-Favoured-Nation tariffs. For the products falling under '*Poultry meat and poultry meat preparations*', the EU-Ukraine DCFTA provides for the following TRQ: "*16,000 tons/year expressed in net weight with linear increase in 5 years to 20,000 tons/year expressed in net weight + 20,000 tons/year expressed in net weight (for the CN code 0207 12 (10-90))*". Net weight refers to the actual, computed, or estimated weight of a good without its container and/or packaging. Importantly, a number of tariff lines related to poultry, namely imports of fresh or frozen "*other*" cuts under tariff lines 02071370 and 02071470, as well certain other poultry products, such as livers under tariff line 02071391 and 02071491 or '*Backs, necks, backs with necks attached, rumps and wing-tips*' under tariff lines 02071440, are not subject to a TRQ, but are currently allowed to enter the EU market at a 0% tariff rate.

Following the application of the EU-Ukraine DCFTA, imports into the EU under tariff lines 02071370 and 02071470 started to increase in 2016, namely from 3,700 metric tonnes in 2016 to more than 55,000 metric tonnes in 2018. The specific chicken cut imported into the EU from Ukraine, under tariff lines 02071370 and 02071470, consisted of a traditional chicken breast cap with the *humerus* bones of the wings still attached, the latter only being a very small part of the total weight of the cut. In simple terms, the cut was the chicken breast with some remaining bones of the wing, but not the entire wing. This particular chicken cut had not been traded before and neither falls under the tariff line relating to '*Halves or quarters*' (0207132000) nor the tariff line for '*Breasts and cuts thereof*' (0207135000), which are subject to the TRQ. After the importation of those chicken cuts into the EU, the *humerus* bones were removed from the chicken breast and the chicken cut was sold in the EU as chicken breast, which is considered a highly sensitive product subject to the limited TRQ and the higher degree of protection. Immediately after the agreement started to be provisionally applied, imports into the EU under the two tariff lines 02071370 and 02071470 significantly increased and, in 2016 and 2017 combined, the import value amounted to EUR 43.9 million. This represented 1.1% of total EU poultry meat imports from all third countries in those two years. The European Commission (hereinafter, Commission) recognised that the imports of chicken breast caps with

humerus bones were legally entering the EU market at a 0% tariff rate. However, the creation of this new cut and the '*abuse*' of the two tariff lines or '*circumvention*' of the agreed protection were considered to go against the spirit of the agreement.

Therefore, on 20 December 2018, the Council authorised the Commission to start negotiations with Ukraine in order to address this issue and remove the risk of distorting the EU market through the significant increase of poultry duty-free imports from Ukraine, with a view to reach a solution by amending the trade preferences for poultry meat and poultry meat preparations in the EU-Ukraine DCFTA. Negotiations took place from 29 January to 22 February 2019 and were concluded on 19 March 2019. On 30 July 2019, the EU and Ukraine signed an agreement in Kyiv, Ukraine, in order to amend the relevant provisions in the EUAA relating to the trade preferences for poultry meat and poultry meat preparations. On 26 August 2019, the Council submitted the signed agreement to the European Parliament for its consent. On 26 November 2019, the European Parliament adopted the legislative Resolution by 444 votes in favour, 128 against and 74 abstentions, thereby giving its consent.

The agreement between the EU and Ukraine will integrate the two relevant tariff lines for "*other*", fresh or chilled, or frozen, poultry cuts, namely 02071370 and 02071470, into the existing TRQ for '*Poultry meat and poultry meat preparations*' under the EU-Ukraine DCFTA. On that basis, the novel chicken breast cuts or any other type of chicken breast cut will be subject to a TRQ and any out-of-quota imports will be subject to the EU's Most Favoured Nation tariff rate of EUR 100,80 per 100kg net weight. Importantly, in order to accommodate Ukraine's export interests, the TRQ for '*Poultry meat and poultry meat preparations*' will be significantly increased. According to the agreement signed by the EU and Ukraine, '*Poultry meat and poultry meat preparations*' will be subject to the following duty-free TRQ: "*50,000 metric tons/year expressed in net weight, +18,400 metric tonnes/year expressed in net weight with an incremental increase of 800 metric tonnes/year expressed in net weight in year 2020 and in year 2021, +20,000 metric tonnes/year expressed in net weight (for CN code 020712 (10-90))*".

Despite the agreement reached between the two parties, reactions in the industry from both parties have been mixed. In September 2019, the *Association of Poultry Processors and Poultry Trade* in the EU countries (hereinafter, AVEC) stated that it regretted that Ukrainian companies that had "*circumvented the provisions of the DCFTA and used a mechanism going against the spirit of this agreement will be rewarded with significant extra quantities*". AVEC pointed out that it did "*understand the legal and geopolitical complexity of these negotiations*", but also noted that the sector would "*act responsibly in order to make sure that a solution to close that loophole will be found as soon as possible*". At the same time, Ukraine's *Poultry Industry Union* stated that the agreement was a major achievement, but that a higher quota would have been better. The Deputy Prime Minister for European and Euro-Atlantic Integration of Ukraine, Mr. *Dmytro Kuleba*, welcomed the consent by the European Parliament and stated that the agreement to amend the EU-Ukraine Association Agreement was "*an important example of the revision of the existing agreements, which helps improve trade and create new opportunities for Ukrainian exporters*".

The issue of using and '*abusing*' customs classifications for economic advantages, in particular in the poultry sector, is not new. In 2002, Brazil and Thailand had brought a case against the EU before the World Trade Organization (hereinafter, WTO) with respect to a new description of frozen boneless chicken cuts under the EU's CN code 02071410 (DS269 EC — Chicken Cuts). The new description of frozen boneless chicken cuts included a salt content of the product that was not existing before. This change in the description was automatically classifying products that were previously classified under code 0210 "*salted meat*", under code 0207 "*frozen meat*". The tariff rate applicable to code 0207 was much higher than that applicable to code CN 0210. The WTO panel and the WTO Appellate Body considered the EU's new tariff classification to be inconsistent with relevant WTO disciplines. While the bilateral dynamics in the EUUAA played in favour of a negotiated solution and gave the EU a stronger position, it is likely that the same occurrence would have most probably worked its

way to and through the WTO dispute settlement mechanism and arguably resulted in the EU losing the case along the lines of what happened in DS269 EC — Chicken Cuts.

In October 2019, the Cabinet of Ministers of Ukraine approved a motion for ratification by Ukraine's Parliament (*i.e.*, *Verkhovna Rada*) relating to the amendments of the EUUAA. With the European Parliament having given its consent, the agreement to modify the TRQ for '*Poultry meat and poultry meat preparations*' in the EUUAA will enter into force after the Council's approval. The recent issue of Ukraine's poultry producers' creative application of the disciplines under the EUAA show the relevance of diligent assessments of tariff lines and TRQs negotiated under trade agreements, as even slight differences, intended or unintended, may have significant implications for trade. The EU's poultry industry and Members of the European Parliament urged the Commission to see the situation with Ukraine as a lesson to avoid this kind of issue in other trade agreements and in other sectors, such as pork and beef. The need for this amendment underlines the importance for businesses to closely follow ongoing trade agreements and carefully assess the disciplines negotiated and agreed.

The European Commission calls for the support of European industries involved in the development of sustainable seaweed aquaculture

The European Commission (hereinafter, Commission) noted in October 2019 that the domestication of the oceans was widely regarded as a possible solution to increase food and could be one of the next most important developments in human history. The Commission added that, by 2050, the edible bioresource biomass (*i.e.*, the total quantity or weight of organisms in a given area or volume, essentially '*food*') would have to satisfy the 9 billion people predicted to live on the planet at that time. According to the Commission, seaweed aquaculture could help to address global challenges related to nutrition, health, and a sustainable circular economy. Today, there is a growing need for the development, improvement and diversification of seaweed aquaculture practices. Seaweeds are a promising bioresource for the future and the demand for high-value seaweed-derived compounds is increasing in Europe. This article reviews the publication of the *PHYCOMORPH* network's *European Guidelines for a Sustainable Aquaculture of Seaweeds* (hereinafter, PEGASUS) report on 9 May 2019 and looks at recent developments in the sector, involving major players in the food industry.

Seaweeds are plant-like organisms that play a key ecological role in coastal ecosystems: seaweed support the marine food web, protect coasts from erosion, remove nitrogen or phosphate and possible pollutants, and sequestrate CO_2. The European continent is characterised by its large coastal territory and large range of climates. Seaweeds are also called *macro-algae* (*i.e.*, a collective term used for seaweeds and other marine *algae* attached to the marine bottom). This distinguishes them from *micro-algae* (*Cyanophyceae*), which are microscopic in size, often unicellular, and are best known by the blue-green *algae* that sometimes bloom and contaminate rivers and streams.

Earlier this year, the PEGASUS report was published by the Commission's Joint Research Centre (hereinafter, JRC), which is the Commission's science and knowledge service that provides independent scientific advice and support to EU policy, as well as a team of experts of the international academic *PHYCOMORPH* network, which comprises research teams dedicated to the identification of the biological events governing the development of *macro-algae*. The authors of the PEGASUS report analysed the current EU policy framework for seaweed aquaculture, identifying challenges, including regulatory hurdles, and how they can be solved to make the most of this resource in a sustainable way.

The PEGASUS report notes that, although the European marine *flora* has one of the highest diversity of species in the world, the commercial production of seaweeds is still at the beginning, with only 1% of the world's production. At the same time, interest in seaweed-based industrial applications (*e.g.*, food supplements, cosmetics like skincare, as well as herbal

remedies) is on the rise. According to the PEGASUS report, the estimated value of the global seaweed production industry currently amounts to more than EUR 8 billion (for 30 million metric tonnes) and will continue to increase. However, the report notes that European production lags behind Asian countries, where seaweeds have been used for centuries in order to draw benefits from their nutritional properties. In Western countries, *macro-algae* have not been a significant food source over the past centuries, while industrial applications have long been limited to the extraction of *phycocolloids* (*i.e.*, algal colloids, *e.g.*, alginate, agar and carrageenan, used as gelling agents, thickeners or stabilising and emulsifying agents) for the food industry. However, northeast Atlantic countries show historical records of seaweed consumption, with the red *alga Palmaria palmata* being an important source of minerals and vitamins in ancient times. The tradition has survived only in Iceland and Ireland, where this red seaweed is still consumed, dried as a snack or mixed into salads, bread dough, and curds.

The PEGASUS report provides scientific guidance to help meet growing global demand for seaweeds, while also protecting resources and the environment, calling for the development, improvement and diversification of seaweed aquaculture practices in Europe. Currently, the production of seaweeds in Europe is largely based on the harvesting of wild stocks. However, climate change and disturbance from human activity is putting pressure on these populations, with commercially important species and essential coastal habitats significantly decreasing in certain areas of Europe. For example, in the southerly areas of Europe, where they normally grow, several species of kelp, used for food, animal feed and fertilisers, are starting to disappear. To protect these wild seaweed resources and to satisfy the market demand for seaweed biomass, the report states that aquaculture production (*i.e.*, farming) is becoming increasingly common. This also has potential environmental and ecological impacts, including the change to ecosystem dynamics caused by introducing non-native species or modifying the interaction between species. The report notes that developing the sector also depends on overcoming technological, market and regulatory constraints, such as upscaling production and simplifying legal procedures. As this is an emerging sector in the EU, there is currently no framework to guide the development of seaweed aquaculture in Europe and to factor-in all these aspects. With this in mind, the PEGASUS report recommends: 1) Harmonising EU regulation and simplifying procedures across EU Member States; 2) Adopting a risk assessment approach to the cultivation of non-native species; 3) Improving standardisation and traceability frameworks; 4) Adapting food security monitoring programmes for seaweeds; and 5) Dedicated research to support market claims.

The report describes the national regulatory framework and the current status of development of the seaweed-aquaculture sector for seven European countries (*i.e.*, Denmark, France, Ireland, Norway, Portugal, Scotland/UK, and Spain) and identifies the main challenges that such countries need to overcome towards the sustainable development of the seaweed-aquaculture industry at the national level. These challenges include, *inter alia*, access to information about the regulatory framework (or the lack thereof), simplification of licensing procedures, availability of marine space for cultivation, and social acceptability.

Under harmonised EU legislation, certain seaweed species are considered to be novel foods (such as the brown seaweed species *Cladosiphon okamuranus* or *Mosuku* and *Durvillaea antarctica* or *Cochayuyo*) and need to be authorised under *Regulation (EU) 2015/2283 of the European Parliament and of the Council on novel foods* (hereinafter the NFR), while other seaweed species were consumed as food (or food supplements) to a significant degree within the EU before 15 May 1997 and therefore do not require pre-market authorisation (like the brown seaweed *Alaria esculenta* or *Winged Kelp*, as well as the red seaweed *Chondrus crispus* or *Irish moss*). However, the report notes that there is no updated and complete list of seaweed species authorised as food in the EU. It must be noted that the seaweed species mentioned above as novel foods appear to be currently imported into the EU and could therefore benefit from the simpler novel food approval procedure under *Regulation (EU) 2015/2283* for traditional foods from third countries (see *Trade Perspectives*, Issue No. 1 of 12 January 2018).

The French company *Algaia*, for example, focusses on producing specialised seaweed ingredients. According to the company, seaweed is uniquely placed as a sustainable ingredient source and has a long list of the benefits, noting that "*brown seaweed is renewable, natural, does not require fertilisers, pesticide or anything external to grow, as well as there are no GM issues of any kind and no water irrigation issues*". Seaweed also compares favourably to conventional production of land-based crops, according to *Algaia*, which also notes that seaweed consumes five times more CO_2 than a terrestrial plant when growing and requires no terrestrial areas normally used to grow plant-based proteins. *Algaia* has reportedly developed plastic alternatives through seaweed-based products, which may be a better solution than other plant-based plastic alternatives.

The Swiss food manufacturer *Nestlé* and the Dutch ingredients supplier *Corbion* have reportedly entered into a strategic partnership to develop what they describe as the '*next generation*' of *micro-algae*-based ingredients for plant-based applications, combining *Corbion*'s *micro-algae* and fermentation capabilities with *Nestlé*'s expertise in the development of plant-based products. The companies reportedly stated that they "*aim to leverage micro-algae to deliver 'sustainable, tasty and nutritious plant-based products*".

Currently, *micro-algae* still appear to be a relatively under-exploited resource. According to a 2017 scientific study by scientists of the *Department of Environmental Biology* (*Centro de Investigaciones Biologicas*, CIB) of the Spanish *Consejo Superior de Investigaciones Científicas* (CSIC) on ingredients derived from *algae*, global *spirulina* production (*i.e.*, biomass of *cyanobacteria* (the blue-green *alga*)) currently stands at around 12,000 tonnes per year, followed by *chlorella* (*i.e.*, a genus of the single-celled green *alga* belonging to the division *chlorophyta*) at 5,000 tonnes per year, followed by *dunaliella salina* (*i.e.,* a type of halophile green *micro-alga* especially found in sea salt fields) with about 3,000 tons for the production of *carotene*. Compared to terrestrial crops, however, these production levels are still very low.

Importantly, the EU novel foods catalogue notes that *spirulina* was on the EU market as a food or food ingredient and consumed to a significant degree before 15 May 1997. Thus, its access to the market is not subject to the NFR and related pre-marketing authorisation. However, according to the catalogue, other specific legislation may still restrict the placing on the market of this product as a food or food ingredient in some EU Member States. Therefore, it is recommended to consult with the relevant national competent authorities or seek expert legal advice. For c*hlorella luteoviridis*, c*hlorella pyrenoidosa*, and c*hlorella vulgaris*, the novel food catalogue notes that these *algae* are grown in Japan, China and Taiwan, since 1955. Their composition is quite similar to the other *macro-algae*. They are nutrient-dense unicellular fresh water green *algae* and were on the market as a food or food ingredient, and consumed to a significant degree, before 15 May 1997. *Dunaliella salina* is currently not listed in the EU's novel foods catalogue, a non-exhaustive list that serves as orientation on whether a product would need an authorisation under the NFR. As EU Member States' submit new information, the Commission amends the catalogue. Businesses submit information to the national authorities of the respective EU Member State for verification, for example, of the history of significant consumption of a food or food ingredient prior to 15 May 1997 in the EU.

In addition to the issue of novel foods, there are further issues that companies intending to market *macro-algae* in the EU should be aware of, such as the issue of heavy metals and contaminants in seaweed, the issue of seaweed and nutrition, and the discussion on nutrition and health claims in the marketing of seaweeds and seaweed products, including food supplements (see *Trade Perspectives*, Issue No. 12 of 14 June 2019).

In October 2019, the Commission concluded that European industries involved in the development of sustainable seaweed aquaculture needed to be supported. The PEGASUS report provides the first European guidelines for the sustainable aquaculture of seaweeds, making a number of recommendations, including the adoption of a risk assessment approach to the cultivation of non-native species, improving standardisation and traceability frameworks, and adapting food security monitoring programmes for seaweeds. Adequate legal advice, *inter alia*, on health claims and the authorisation of novel foods (including traditional foods from third

countries), should be sought so as to ensure that compliance with legal requirements is achieved and that the legitimate interests are properly voiced and represented within all relevant *fora*.

The CJEU rules that the protection of the name '*Aceto Balsamico di Modena*' does not extend to the use of the individual non-geographical terms of that name

On 4 December 2019, the Court of Justice of the European Union (hereinafter, CJEU) delivered the judgment in the Case C 432/18 *Consorzio Tutela Aceto Balsamico di Modena* (hereinafter, *Consorzio*) v *Balema GmbH* (hereinafter, *Balema*), responding to a request for a preliminary ruling from the German Federal Court of Justice (*Bundesgerichtshof*, hereinafter, BGH), lodged on 12 April 2018. In its question, the BGH had asked, in essence, whether Article 1 of *Commission Regulation (EC) No 583/2009 of 3 July 2009 entering a name in the register of protected designations of origin and protected geographical indications [Aceto Balsamico di Modena (PGI)]* must be interpreted as meaning that the protection of the name '*Aceto Balsamico di Modena*' extends to the use of the individual non-geographical terms of that name, which the CJEU essentially denied. In light of the controversies over protected geographical indications (hereinafter, PGIs), this case provides additional clarity for producers.

The request has been made in the context of proceedings in Germany between the *Consorzio*, a *consortium* of producers of products designated by the name '*Aceto Balsamico di Modena (PGI)*', and *Balema* concerning the use by the latter of the terms '*balsamico*' and '*Deutscher balsamico*' (*i.e.*, German *balsamico*) on the labels of vinegar-based products that do not meet the specifications set for that PGI. *Balema* produces and markets vinegar-based products made from wines from the Baden region in Germany, which it has been selling for at least 25 years. The *Consorzio*, considering that the use of the term '*Balsamico*' infringes the PGI '*Aceto Balsamico di Modena*', sent *Balema* a letter of formal notice. In response, *Balema* brought an action in the German courts seeking a negative declaration of its obligation to refrain from using that term for vinegar-based products produced in Germany. Given that its action was dismissed at first instance, *Balema* lodged an appeal, which was upheld on the grounds, in relevant part, that the use did not infringe point b) of the first subparagraph of Article 13(1) of *Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs* (on protection against any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as '*style*', '*type*', '*method*', '*as produced in'*, '*imitation*', or similar), as the protection granted to that PGI by *Regulation No 583/2009* was conferred only on the entire name '*Aceto Balsamico di Modena*'.

The *Consorzio* appealed that decision to the BGH, which considered that the success of that action depended on whether the use of the term '*Balsamico*' or the phrase '*Deutscher balsamico*' infringes point a) (on the protection against any direct or indirect commercial use of a registered name in respect of products not covered by the registration, in so far as those products are comparable to the products registered under that name or in so far as using the name exploits the reputation of the protected name) or point b) of the first subparagraph of Article 13(1) of *Regulation No 1151/2012*. This entailed determining, first of all, whether the protection granted for the name '*Aceto Balsamico di Modena*' by Article 1 of *Regulation No 583/2009* covers only that entire name or also extends to the use of the individual non-geographical terms thereof.

The request for a preliminary ruling concerned the interpretation of Article 1 of *Regulation (EC) No 583/2009*, which protects '*Aceto Balsamico di Modena*'. *Regulation No 583/2009* was adopted on the basis of *Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs* (in the meantime largely repealed and replaced with effect from 3 January 2013 by *Regulation (EU) No 1151/2012)*, in particular the third and fourth subparagraphs of Article 7(5) thereof. Article 7 of *Regulation No 510/2006*, on the '*Objection/decision on registration*',

provided in paragraph 1 and in the first, third and fourth subparagraphs of paragraph 5 thereof, that any EU Member State or third country may object to the registration proposed, by lodging a duly substantiated statement with the European Commission (hereinafter, Commission). If such an objection is admissible, the Commission must invite the interested parties to engage in appropriate consultations. If no agreement is reached, the Commission must take a decision, having regard to fair and traditional usage and the actual likelihood of confusion. Germany, Greece and France submitted objections to the registration under Article 7(1) of *Regulation No 510/2006*. Germany's objection referred in particular to the concern that the registration of '*Aceto Balsamico di Modena*' as a PGI would adversely affect other products that have been placed lawfully on the market for at least five years and sold as *Balsamessig/Aceto balsamico*, as well as to the alleged generic character of these terms. Greece stressed the importance of balsamic vinegar production in Greece, which is marketed under names such as '*balsamico*' or '*balsamon*' and the negative impact that the registration of the name '*Aceto Balsamico di Modena*' would have on these products, which have been placed lawfully on the market for at least five years. Greece also maintained that the terms '*aceto balsamico*' and '*balsamic*' are generic. Given that no agreement was reached between France, Germany, Greece, and Italy within the designated timeframe, the Commission adopted a decision after requesting the opinion of the Scientific Committee for Designations of Origin, Geographical Indications and Certificates of Specific Character as to whether the conditions for registration were met. The Committee stated, in its unanimous opinion submitted on 6 March 2006, that the name '*Aceto Balsamico di Modena*' has an undeniable reputation on the national and international markets.

The Commission, therefore, entered the name '*Aceto Balsamico di Modena*' in the register of protected designations of origin and protected geographical indications, but referred to the objection and noted in recital 10 of *Regulation (EC) No 583/2009* that "*It appears that Germany and Greece did not refer to the entire name, i.e. "Aceto Balsamico di Modena" in their objections regarding the generic nature of the name proposed for registration, but only to some elements of it, namely the words "aceto", "balsamico" and "aceto balsamico", or to translations thereof. However, protection is granted to the term "Aceto Balsamico di Modena" as a whole. Individual non-geographical components of that term may be used, even jointly and also in translation, throughout the [European Union], provided the principles and rules applicable in the [European Union]'s legal order are respected*."

In its judgment, the CJEU held that, in accordance with Article 1 of *Regulation No 583/2009*, read in conjunction with recital 11 of and Annex I to that Regulation, the name '*Aceto Balsamico di Modena (PGI)*' is registered and entered in the register of protected designations of origin and protected geographical indications. Therefore, according to the wording of that Article 1, it is the name '*Aceto Balsamico di Modena*' as a whole that is registered and, consequently, protected. In that regard, the CJEU has already held (in the judgement of 26 February 2008 in the Case C-132/05, *Commission* v *Germany*) that, under the system of protection created by *Regulation No 2081/92*, which was reproduced in *Regulation No 510/2006* and is now provided for in *Regulation No 1151/2012*, questions concerning the protection to be accorded to the various constituent parts of a registered name are matters for determination by national courts on the basis of a detailed analysis of the facts presented before it by the parties concerned.

However, the CJEU has also held (in the judgment of 9 June 1998, in the cases C-129/97 and C-130/97 *Chiciak* and *Fol*) that, as regards a '*compound*' name registered in accordance with *Regulation No 2081/92*, the fact that, for that name, there is no footnote in the regulation registering that name, specifying that registration is not sought for one of the parts of that name does not necessarily mean that each of its parts is protected. The Court pointed out that, even if it may prove to be the case that it follows from Article 13 of *Regulation No 2081/92* that, in the absence of specific circumstances pointing to the contrary, the protection afforded by that provision covers not only the compound name as a whole, but also each of its constituent parts, that will be the case only if that constituent part is not a generic or a common term.

In the judgment relating to '*Aceto Balsamico di Modena*', the CJEU held that "*it is apparent from the specific circumstances of the registration, by Regulation No 583/2009, of the name 'Aceto Balsamico di Modena' that the protection conferred on that name cannot extend to the*

individual non-geographical terms of that name". In that regard, the CJEU pointed out that the operative part of an act is indissociably linked to the statement of the reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption. In the present case, the CJEU held that it is apparent from recital 8 of *Regulation No 583/2009* that it is the name '*Aceto Balsamico di Modena*' that has an undeniable reputation on the national and international markets and that it is, therefore, that compound name as a whole, which meets the inherent condition for the product having a specific reputation linked to that name.

Most importantly, the CJEU stated that, as regards the objections to the registration of that name submitted by Germany and Greece, it is stated in recital 10 of that regulation that those Member States did not refer to the entire name, (*i.e.*, '*Aceto Balsamico di Modena*'), but only to some elements of it, namely the words '*aceto*', '*balsamico*' and '*aceto balsamico*, or to translations thereof), that protection is granted to the term '*Aceto Balsamico di Modena*' as a whole, and that "*individual non-geographical components of that term may be used, even jointly and also in translation, throughout the [European Union], provided the principles and rules applicable in the [European Union]'s legal order are respected*". The CJEU followed unequivocally from the recitals of *Regulation No 583/2009* that the non-geographical terms of the PGI at issue, namely '*aceto*' and '*balsamico*', and their use in combination and in translation, cannot benefit from the protection for the PGI '*Aceto Balsamico di Modena*'.

Moreover, the CJEU established that the term '*aceto*' is a common term, as previously held by the CJEU (in the judgment of 9 December 1981 in the Case 193/80, *Commission* v *Italy*) and that the term '*balsamico*' is the Italian translation of the adjective '*balsamic*', which has no geographical connotation and which, in the case of vinegar, is commonly used to refer to a type of vinegar with a bitter-sweet flavour. Lastly, the CJEU referred to the Advocate General's opinion, which had pointed out, in essence, that interpretation of the scope of the protection conferred on the PGI at issue is appropriate in the light of the registrations of the PDOs '*Aceto balsamico tradizionale di Modena*' and '*Aceto balsamico tradizionale di Reggio Emilia*' which were also taken into account by the Commission when *Regulation (EC) No 583/2009* was adopted. The CJEU held that the use in the text of those PDOs of the terms '*aceto*' and '*balsamico*' and their use in combination and in translation cannot be considered likely to infringe the protection conferred on the PGI at issue. In the light of all the foregoing considerations, the CJEU ruled that Article 1 of *Regulation No 583/2009* must be interpreted as meaning that the protection of the name '*Aceto Balsamico di Modena*' does not extend to the use of the individual non-geographical terms of that name.

The association *Kulinaria*, representing German producers of culinary products, including of balsamic vinegar, stated that the ruling brings long-sought legal certainty after years of legal disputes and that the decision means that use of the words '*balsamico*' or '*aceto balsamico*' is now allowed. *Kulinaria* went on to state that "*the German producers of balsamic vinegar are proud of their products of at least equal quality and will make sure in the presentation that they are not confused with Italian products*".

The *Consorzio* considered the ruling unjust, "*starting from the assumption that the word 'balsamic' indicates what is not: 'balsamic' candies and syrups, as well as the adjective 'balsamic' for wine do not indicate absolutely a bittersweet taste, recalling instead strong and mentholated notes, which balsamic vinegar certainly does not possess*". The *Consorzio* went on to say that "*many European countries have partly wanted to appropriate the worldwide success achieved by the aceto balsamico di Modena, the only vinegar to be bittersweet and to use the word 'balsamic' only because it was attributed to it many centuries ago by the Este Dukes (Duchi Estensi), who thought it was medicinal*". The *Consorzio* also noted with regret how the CJEU "*deliberately avoided treating the issue of evocation and in no way referred to the recent jurisprudential precedents relating to Scotch Whisky and Queso Manchego in which the concept of evocation has been related to the use of common terms and signs and the principle of 'conceptual similarity'*".

The CJEU did not analyse the question of whether the use of the terms '*aceto*' and '*balsamico*' evoke the PGI '*Aceto Balsamico di Modena*', it merely looked at the literal meaning of the terms on the basis of the question referred to it. The CJEU has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 7 June 2018, in Case C-44/17, *Scotch Whisky Association*). In May 2019, the CJEU ruled in favour of Spanish makers of Queso Manchego in a dispute over the way competitors labelled or named their product to look like Manchego cheese. On 2 May 2019, the CJEU delivered the judgment in Case C-614/17 *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego*, responding to a request for a preliminary ruling from the Spanish Tribunal Supremo. The CJEU held that the wording itself of Article 13(1)(b) of *Regulation (EU) No 1151/2012* does not limit the scope of that provision solely to the names of the products covered by those names. On the contrary, according to the CJEU, that provision requires protection against '*any*' evocation, even if the protected name is accompanied by an expression such as '*style*', '*type*', '*method*', '*as produced in*' or '*imitation*', on the packaging of the product concerned. The CJEU concluded in the Queso Manchego case that it is for the referring court to assess whether there is sufficiently clear and direct conceptual proximity between the figurative signs and names at issue in the main proceedings and the PDO '*queso manchego*', evoking the image of a registered name in the mind of the consumers of the respective EU Member State.

After the CJEU's preliminary ruling, the BGH will have to decide on the revision lodged by the *Consorzio*, assessing whether both the figurative and word elements relating to the '*Balsamico*' and '*German Balsamico*' products at issue in the main proceedings, evoke the image of the registered PGI '*Aceto Balsamico di Modena*' in the mind of the German consumers.

Recently Adopted EU Legislation

Customs Law

- *COUNCIL DECISION (EU) 2019/2073 of 5 December 2019 on the conclusion of the Agreement between the United States of America and the European Union on the Allocation to the United States of a Share in the Tariff Rate Quota for High Quality Beef referred to in the Revised Memorandum of Understanding Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union (2014)*

- *Agreement between the United States of America and the European Union on the Allocation to the United States of a Share in the Tariff Rate Quota for High Quality Beef referred to in the Revised Memorandum of Understanding Regarding the Importation of Beef from Animals Not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Union (2014)*

- *Commission Implementing Regulation (EU) 2019/2027 of 28 November 2019 derogating from Regulations (EC) Nos 2305/2003, 969/2006 and 1067/2008 and from Implementing Regulations (EU) 2015/2081 and (EU) 2017/2200, Regulation (EC) No 1964/2006 and Implementing Regulation (EU) No 480/2012 and Regulation (EC) No 1918/2006 as regards the dates for lodging import licence applications and issuing import licences in 2020 under the tariff quotas for cereals, rice and olive oil*

Trade Remedies

- *Commission Implementing Regulation (EU) 2019/2131 of 28 November 2019 amending Implementing Regulation (EU) 2019/1198 imposing a definitive anti-dumping duty on imports of ceramic tableware and kitchenware 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) 2019/2118 of 10 December 2019 amending Implementing Regulation (EU) 2019/1693 imposing a provisional anti-dumping duty on imports of steel road wheels originating in the People's Republic of China*

- *Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia*

- *Commission Implementing Regulation (EU) 2019/1996 of 28 November 2019 imposing a definitive anti-dumping duty on imports of certain prepared or preserved sweetcorn in kernels originating in the Kingdom of Thailand following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036*

Food and Agricultural Law

- *Commission Implementing Regulation (EU) 2019/2093 of 29 November 2019 amending Regulation (EC) No 333/2007 as regards the analysis of 3-monochloropropane-1,2-diol (3-MCPD) fatty acid esters, glycidyl fatty acid esters, perchlorate and acrylamide*

- *Commission Implementing Regulation (EU) 2019/2095 of 29 November 2019 operating deduction from the Atlantic salmon fishing quota available to Poland in 2019 on account of overfishing in 2018*

Other

- *Commission Delegated Regulation (EU) 2019/2125 of 10 October 2019 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council as regards rules concerning the performance of specific official controls of wood packaging material, notification of certain consignments and measures to be taken in cases of non-compliance*

- *Commission Regulation (EU) 2019/2117 of 29 November 2019 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein*

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