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As the WTO Appellate Body remains paralysed, certain WTO Members agree to develop a multiparty *interim* appeal arbitration arrangement

On 11 February 2020, the Office of the US Trade Representative (hereinafter, USTR) published its *Report on the Appellate Body of the World Trade Organization*, which details the US Administration's fundamental concerns regarding the role and jurisprudence of the World Trade Organization's (hereinafter, WTO) Appellate Body (hereinafter, AB). Since 10 December 2019, when the terms of two of the three remaining AB members ended, the AB has been effectively impaired and is no longer functioning. For several years and due to certain systemic concerns, the US has been blocking the appointment of new members to the AB. In parallel, on 24 January 2020, the EU and Ministers from 16 further WTO Members announced their agreement to develop a multi-party *interim* appeal arrangement to operate during the AB's impairment.

WTO dispute settlement has been the most widely used international dispute settlement mechanism in the world, having received nearly 600 complaints since its establishment in 1995 and having issued 350 decisions. Settling disputes is the responsibility of the Dispute Settlement Body (hereinafter, DSB), in which all WTO Members are represented. WTO disputes begin with a request for consultations by a WTO Member. After the consultations, the complainant may request the establishment of a panel. The DSB has the authority to establish the panel of experts to consider the case, which is composed of three or five panellists and, to assist in the selection of panellists, the WTO Secretariat maintains an indicative list of governmental and non-governmental individuals with specified qualifications. The panel's findings are contained in the *interim* report, which is also submitted to the parties for comments (additional hearings may be held), before the panel then submits its final report to the parties. Within 60 days after the panel's publication of the final report, the final report is adopted by the DSB, unless the DSB rejects it by consensus. The Dispute Settlement Understanding (hereinafter, DSU) provides the parties to the dispute with the possibility to appeal a panel report. According to the second sentence of Article 17(1) of the DSU, the AB is to *"be composed of seven persons, three of whom shall serve on any one case"* and *"persons serving on the Appellate Body shall serve in rotation"*. For the AB, Article 17(2) of the DSU states that *"the DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once"*.

For several years now, the US has been blocking the appointment process to replace those members of the AB whose terms have ended. The terms of two of the three remaining AB members ended on 10 December 2019, leading to the AB being effectively paralysed, as there

are not enough judges to hear any new appeals. In 2018, the US Administration's Trade Policy Agenda detailed five US concerns with respect to the WTO dispute settlement mechanism, relating to delays in the issuance of appeal decisions, continued service by members of the AB whose terms have ended, decisions going beyond the issues necessary to decide the appeal, and its approach to reviewing facts, as well as the AB's claim that its reports be treated as precedents (see *Trade Perspectives*, Issue No. 18 of 5 October 2018). Now that the AB has become fully impaired, due to the US Administration's posture, the USTR has published a detailed report of its concerns regarding the WTO dispute settlement system. In its two main parts, the USTR's report focuses both on the alleged violation by the AB of binding WTO rules regarding the dispute settlement procedure, as well as on alleged errors in the interpretation of WTO agreements.

More specifically, with respect to the violation of procedural rules, the USTR report raises concerns relating to: 1) Delays in the issuance of appeal decisions; 2) The continued service by members of the AB whose terms have ended; 3) Decisions going beyond the issues necessary to decide the appeal; 4) The AB's approach to reviewing facts; 5) The claim that AB reports are treated as precedents; 6) The alleged failure of the AB to make recommendations regarding how a Member should address breaches of WTO Agreements as established by the AB; 7) The claim that the AB overstepped its authority by opining on matters within the authority of other WTO bodies; and 8) The allegation that the AB has deemed its decisions to be authoritative interpretations of WTO agreements, while this is the competence of the WTO Ministerial Council or the WTO General Council. While the first five of these allegations had already been raised in 2018, the others are new and likely to create even more need for debate.

With respect to the alleged errors in the interpretation of WTO agreements, the report focuses on the allegation that erroneous findings by the AB had "*favored non-market economies at the expense of market economies*", namely by: 1) Misinterpreting the term "*public body*" as not including State owned enterprises (hereinafter, SOEs), thereby allegedly disabling WTO Members to counteract trade-distorting subsidies provided through SOEs; 2) Converting the non-discrimination obligation among WTO Members into a "*detrimental impact*" test, thereby limiting policy space of WTO Members; 3) Using a calculation method that "*artificially*" reduces the "*margin of dumping*", thereby diminishing the ability for antidumping measures; 4) Applying a distorted benchmarking system for the calculation of subsidies; 5) Limiting WTO Members' right to impose safeguard measures against import surges; 6) Misinterpreting the WTO Agreement on Subsidies and Countervailing Measures so as to forbid "*double remedies*" (*i.e.*, concurrently applying both countervailing duties and antidumping duties against products which are both subsidised and dumped).

While some of the claims appear to follow the current US Administration's *America first* policy approach and are put forth in an irreconcilable manner, other elements of critique are not new and have been voiced by various US Administrations over the past decades. It must be hoped that this report constitutes the beginning of a more constructive approach by the US Administration to resolve the crisis at the WTO. So far, the US Administration has published its allegations and continued its policy of blocking the appointment of new AB members, but has not yet contributed to a solution in earnest. WTO Members regularly discuss the matter at meetings of the WTO General Council. At the meeting of 9 and 10 December 2019, New Zealand's Ambassador presented WTO Members with a draft decision intended to resolve differences on the functioning of the AB, which included concessions regarding some of the issues raised by the US Administration. However, while many WTO Members expressed their support for the draft decision, there was no consensus to approve it.

As for the way forward, the USTR report merely states that "*Honest and candid dialogue about how and why the WTO arrived at the current situation is necessary if any reform is to be meaningful and long lasting*" and that this would "*require WTO Members to engage in a deeper discussion of why the Appellate Body has felt free to depart from what Members agreed to*". While repeatedly underlining the need for discussion, the proposal expressly forgoes any specific proposals regarding a potential solution. In recognition of the systemic challenges faced by the multilateral trading system, WTO Director-General *Roberto Azevêdo* noted, on 4

February 2020, at the Washington International Trade Association Conference, that many WTO Members "*were dissatisfied with different aspects of how the Appellate Body was operating"* and that it was his hope that WTO Members would *"use the current crisis to produce an improved two-step appeals process*". Director-General *Azevêdo* further noted that "*some of the unconventional policies and bilateral arrangements we see today might never have arisen had we done more to update the system*". It remains to be seen whether discussions within the WTO, including those to be held at the 12th WTO Ministerial Conference scheduled for June 2020 in Kazakhstan, can lead to a resolution of the current impasse.

Given that, currently, no quick fix appears to be in sight, it is likely that the "*unconventional policies and bilateral arrangements*" referred to by Director-General *Azevêdo* will remain relevant for a while to come. In 2019, the EU already agreed to a bilateral *interim* appeal arbitration mechanism with Canada and with Norway, respectively (see *Trade Perspectives*, Issue No.20 of 1 November 2020). Following this initial bilateral approach, in December 2019, shortly after the AB became impaired, the EU and other WTO Members launched an initiative for a multi-party *interim* appeal arrangement. This marks an important step in the efforts to maintain an independent and impartial appeal stage for WTO trade disputes during the impairment of the AB.

On 24 January 2020, the EU, as well as Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, the Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay, announced that they had "*agreed to develop a multi-party interim appeal arrangement that will allow the participating WTO members to preserve a functioning and two-step dispute settlement system at the WTO in disputes among them*". European Commissioner for Trade *Phil Hogan* stated that the multiparty appeal arbitration arrangement would *"guarantee that the participating WTO members continue to have access to a binding, impartial and high-quality dispute settlement system among them*". In view of ongoing WTO disputes, the participation of WTO Members such as Brazil, Canada, China, the EU, and Korea is particularly noteworthy.

The objective of the *interim* appeal arbitration arrangement is to replicate as closely as possible the substantive rules and procedures of the WTO dispute settlement system. Commissioner *Hogan* recalled that the *interim* appeal arbitration arrangement remained "*a contingency measure needed because of the paralysis of the WTO Appellate Body*". Importantly, the *interim* appeal arbitration does not affect the panel stage of the WTO dispute settlement and only intends to substitute the WTO appeal stage until the AB would resume its work. Finally, its *interim* nature is underlined by the fact that "*it will only apply until the WTO Appellate Body becomes operational again*". The WTO Members involved underlined that the arrangement would be open to any WTO Member willing to join.

While the text of the multi-party agreement on *interim* arbitration is not yet available, the EU's existing *interim* appeal arbitration arrangements with Canada and Norway already provide some insight into the likely design. The *interim* appeal arbitration arrangement will be based on Article 25 of the DSU on '*Arbitration*', whose paragraph 1 provides that "*[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties*". Under the *interim* appeal arbitration, the parties would agree to pursue arbitration under Article 25 of the DSU regarding the appeal of any final panel report that might result from a current or future WTO dispute. While the *interim* appeal arbitration arrangement will be open for all WTO Members to join, WTO Members that do not do so might not be able to join disputes as third parties. While for regular WTO dispute settlement proceedings, Article 10 of the DSU provides other WTO Members with a right to participate when they have a substantial interest in a matter, Article 25(3) of the DSU merely states that "*other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration*". It also remains to be seen and determined how future '*jurisprudence*' of the *interim* appeal arbitration arrangements would be treated and how cases being dealt with by arbitrators under the *interim* appeal arbitration arrangements could be handed back to the AB once it resumes its functions.

As no solution is in sight to resolve the blockage of new appointments to the WTO AB, the multi-party *interim* appeal arrangement, which gathers a number of prominent WTO Members, is a first step to maintain and safeguard the rules-based trading system, but obviously does not address the concerns put forth by the US. The USTR report on the AB might also mean that the US is finally prepared to begin negotiations on the matter, as WTO Members engage ahead of the Ministerial Conference in June.

Italy notifies the '*NutrInform Battery*' to the Commission, clearly opposing the French '*Nutri-Score*' scheme

On 27 January 2020, Italy notified to the European Commission (hereinafter, Commission) a draft Decree on the '*NutrInform Battery*' front-of-pack (hereinafter, FoP) nutrition labelling scheme. Italy recommends to food business operators (hereinafter, FBOs) the use of a form of expression complementary to the nutrition declaration, giving them the freedom to decide whether or not to voluntarily apply the recommended '*NutrInform Battery*' logo. The Italian model appears to challenge the growing support for the colour-coded '*Nutri-Score*' scheme, first notified by France and then also recommended by several other EU Member States. The Italian alternative to '*Nutri-Score*' has been characterised as "*counter intuitive*" and "*confusing*" and will certainly add another layer to the already complex debate.

Nutrition labelling is often presented as an important tool in the fight against obesity and other non-communicable diseases. The harmonised mandatory nutrition information presented in a panel on the back or side of food packaging is, however, complex. Additional, simplified, and voluntary FoP labels on food products, therefore, aim at empowering consumers to make informed and healthier choices about their food. Some FBOs, including manufacturers and retailers, have developed their own simplified FoP nutrition labels and a number of EU Member States issued recommendations regarding specific schemes.

According to Article 35 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, FIR), in addition to the harmonised mandatory panel with '*nutrition information*', the energy value and the amount of nutrients may be given 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 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) Be based on scientifically valid consumer research and not be misleading; 2) Stakeholders groups have been consulted; 3) Aim at facilitating consumer understanding of the importance of the food to the energy and nutrient content of a diet; 4) Be supported by scientific evidence of understanding of such forms of expression by consumers; 5) In the case of other forms of expression, be based either on the harmonised reference intakes, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients; 6) Be objective and non-discriminatory; and 7) Their application does not create obstacles to the free movement of goods.

The development and recommendations by EU Member States of FoP nutrition labelling is an ongoing process. In 2012, the UK had been the first (now former) EU Member State to introduce a nationwide FoP nutritional label, the voluntary '*traffic lights*' 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 provides a single score for the entire product, giving consumers an overall assessment of the product at a glance. *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. Belgium also recommends using the '*Nutri-Score*' scheme (see *Trade Perspectives*, Issue No. 16 of 7

September 2018) and other EU Member States, such as Austria, Germany, the Netherlands, and Spain, are considering doing so. Scandinavian EU Member States 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. Finland indicates the best nutritional choice with a heart symbol.

Italy's draft Decree has been adopted in accordance with Article 35 of the FIR and sets out the general principles that FBOs should respect regarding labels. In its notification to the Commission, Italy emphasises that EU Member States are allowed to "*adopt forms of expression on labels to facilitate understanding of the nutritional characteristics of a food*". Italy notes that Recital 34 of the FIR confirms that the "*nutrition information acts as a support and does not substitute specific dietary actions in the context of public health policies*", and indicates that the "*additional forms of expression do not, therefore, replace the nutrition declaration, but they help to better understand its information*". Italy argues that the aim of the additional forms of nutrition labelling is, therefore, to "*simplify information related to the intake levels of these nutrients and not to compile a classification of foods based on the different composition of the latter*".

Italy claims that its proposed system consistently supports the guidelines suggested by the *European Commission High Level Group on Nutrition and Physical Activity* and notes that "*among the various voluntary systems present at international level, the only one that appears to meet these criteria is that of the Reference Intakes(RI) icons, which have been developed by the European industry since 2005 (the 'GDA icons,* indicating the '*guideline daily amounts') with a non-directive or discriminatory approach, informing without prescribing and stimulating the cultural growth of the consumer through a simple graphic form*". By using the RIs as a scientific base, Italy proposes a kind of evolution of the current icons through the development of a graphic form that is easier to understand for consumers, therefore "*allowing them to immediately understand the extent to which the portion of food to be consumed contributes to their energy needs and other nutrients to which particular attention must be paid (fats, saturated fats, sugars and salt)*".

Italy's '*NutrInform Battery*' system uses columns or batteries (with no colour coding) to display the percentage of energy, fats, saturated fats, sugars and salt contained in the portion of product (self-defined by manufacturers and not based on 100g/ml) in relation to the reference daily intake. The recommended daily intakes for average adults are, as foreseen in the FIR, 8400 KJ/2000 Kcal energy; 70g fat; 20g saturated fat; 90g sugar; and 6g salt. The charged part of the battery, therefore, graphically represents the percentage of energy or nutrients contained in the single portion, allowing it to be visually quantified. For a balanced daily diet, the sum of what is consumed during the day should not exceed 100% of the recommended daily amount. According to Article 1(6) of the draft Decree, the scope of application of the nutrition logo excludes: 1) Foods packed in packages or in containers whose largest surface is less than 25 cm^2; and 2) Products benefitting from protected designations of origin (PDO), protected geographical indications (PGI), and traditional specialities guaranteed (TSG) referred to in *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,* due to the risk that additional logos may prevent the consumer from recognising the quality mark that certifies the distinctiveness and uniqueness of these products.

The Italian approach is based on different consumer surveys. In 2018, a test was conducted with 1,500 consumers surveyed online and during 2019 another investigation was carried out in accordance with a methodological protocol developed by the *Council for Agricultural Research and Analysis of the Agricultural Economy* (*Consiglio per la ricerca in agricoltura e l'analisi dell'economia agraria*, CREA, in its Italian acronym) and the *Higher Institute of Health* (*Istituto Superiore di Sanità*, ISS, in its Italian acronym) in a panel of 300 consumers divided into three groups, with the compilation of a nutrition knowledge questionnaire. The results of this further testing activity showed that consumers have an interest in a labelling system that informs and educates. A comparison between two systems, Italian and French, "*made it possible to detect that the battery system increases the nutritional knowledge of the study*

sample". The results confirmed that a label that '*informs*' is more accepted by the consumer who, therefore, would make decisions that take into account the actual characteristics of each consumer, by adapting the diet.

Opponents of the '*Nutri-Score*' scheme note that a system that uses algorithms to calculate the '*Nutri-Score*' is too simplistic, and that it discriminates against presumably '*healthy foods*' with a high saturated fat content. For instance, under *'Nutri-Score*', olive oil reportedly receives a '*C*' as a good fat, compared to an '*E*' for butter or saturates-rich vegetable oils, such as palm oil. Some even suggest that the system is susceptible to abuse by FBOs, who may seek to mask potentially unhealthy ingredients in products or engineer a way around the criteria by adding, for example, fibre to obtain a better score. In a press release, the Italian Minister of Agriculture *Teresa Bellanova* stated that "*NutrInform is our alternative to Nutri-Score, but it is far better. It is not penalising, it does not give good or bad grades*" and asks the Commission "*to monitor carefully why some large retail chains demand labelling with Nutri-Score by threatening or implementing commercial retaliation. It is unacceptable*". She also asks other EU Member States, "*in particular France, to take action to put an end to the repetition of this unfair practice*". Finally, the Minister claimed that "*Nutri-score does not guarantee transparency*".

There appears to be some merit behind the Italian argument that nutrition information should better educate consumers to take the best decision, instead of imposing, in a not very transparent way, the best choice. In the US, according to *Del Monte Foods*' *2020 State of Healthy Eating in America Study*, over one-third of *Generation Z* (mid- to late-1990s as starting birth years) and *millennials* believe they were never taught how to find healthy food options. Around 40% of *Generation Z*, compared to 31% of *millennials*, 24% of *Generation X* (birth years around 1965 to 1980), and 17% of *Boomers* (born between 1946 and 1964) do not feel that they have sufficient knowledge about nutrition to maintain a healthy diet.

There are also a number of legal questions that must be taken into account. On the '*Nutri-Score*' logo itself, there is no reference at all to RIs. In comparison, the UK's '*traffic light*' scheme is a '*hybrid*' FoP scheme that includes RIs 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. 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, for example whether such schemes are actually '*voluntary*' in nature or whether they implicitly force competing FBOs to apply the same labels, once one operator has started doing so.

Certain elements of a colour-coded nutrition labelling scheme could also be classified as '*non-beneficial*' nutrition claims. It must be noted that nutrition claims are, by nature, '*beneficial claims*' since the FBO, who places them on its products, intends to highlight something nutritionally '*positive*'. This is the reason why '*non-beneficial*' nutrition claims (like '*rich in fat*') do not fall under the scope of *Regulation (EC) No. 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods* (hereinafter, NHCR), which states in recital 6 that "*[n]on-beneficial nutrition claims are not covered by the scope of this Regulation; Member States intending to introduce national schemes relating to non-beneficial nutrition claims should notify such schemes to the Commission and to other Member States* (...)". Finally, the proliferation of different FoP schemes may become an obstacle to the free movement of goods within the EU and be contrary to EU law (see *Trade Perspectives*, Issue No. 21 of 20 November 2015 and Issue No. 6 of 24 March 2016).

Consumer associations claim that the Italian alternative to *Nutri-Score* is "*counter-intuitive*" and "*confusing*". Italian consumer association *Altroconsumo* stated that it favours '*Nutri-Score*', underlining that "*A nutritional label should be based on uniform reference amounts (such as*

per 100g/100ml) and should use a colour-coding to help consumers to compare the nutritional value of foods across a range of products. This is the Nutri-Score". According to *Altroconsumo*, the *'NuntrInform*' battery system is too complicated for consumers, as it "*doesn't use a colour-coding and it gives information per portion, not allowing consumers to compare products effectively. In addition, to suppose consumers can identify a risk/alert 'of an excessive charge (intake)' on the battery symbol makes no logical sense: consumers normally associate the low level charge signal as a need to fully recharge the battery (not enough intake/charge) which should not be exactly the case*".

Following the notification, it is for the Commission and for other EU Member States to assess whether the Italian recommendation complies with EU rules, particularly with the FIR. The European Parliament Resolution of 15 January 2020 on the European Green Deal calls on the Commission "*to consider improved food labelling for instance in terms of nutrition labelling, country-of-origin labelling of certain foods and environment and animal welfare labelling, with the objective of avoiding fragmentation of the single market and providing objective, transparent and consumer-friendly information*".

Article 35(5) of the FIR requires the Commission to adopt, in light of the experience gained, a report to the European Parliament and the Council of the EU on the use of the additional forms of expression and presentation of the nutrition declaration, on their effect on the internal market, and on the advisability of further harmonisation. The Commission may accompany this report with proposals to modify the relevant EU provisions. For this purpose, EU Member States are required to provide the Commission with information concerning the use of such additional forms of expression or presentation on the market in their territory. The implementation of the national schemes has made the Commission's task to release a report on the topic more complex. The Commission is still in the process of preparing this report, originally foreseen by 13 December 2017, and the report is now scheduled to be released before the summer of 2020.

With the forthcoming report on additional FoP nutrition labelling schemes, the Commission has a complex task. 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, uniform legislation regarding FoP nutrition labelling should 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 2020 will hopefully shed some light on this complex topic.

The Italian Authority for Competition and Market Regulation issues a controversial decision on the country of origin labelling (COOL) of durum wheat on pasta products

On 20 December 2019, the Italian Authority for Competition and Market Regulation (*Autorità Garante per la Concorrenza e il Mercato*, hereinafter, AGCM) issued a decision imposing a EUR 1 million fine to the retailer *LIDL Italia s.r.l*., as a result of an investigation assessing the compliance of the country of origin labelling (hereinafter, COOL) with the relevant legal rules. The ruling confirms a trend in Italy aimed at supporting its domestic agricultural sector and creating a demand for locally sourced and produced foodstuffs. COOL requirements have been introduced in a number of other EU Member States, notably in France, but have important negative implications for the EU Single Market, creating a preference for sourcing products in the respective EU Member States and, therefore, resulting in changes to the supply chains.

On 26 July 2017, the Government of Italy had issued an Inter-ministerial Decree requiring mandatory country of origin labelling (COOL) for durum wheat in pasta made from durum wheat flour (*Decreto Interministeriale del 26 luglio 2017 - Indicazione dell'origine, in etichetta, del grano duro per paste di semola di grano duro*, hereinafter, the Decree) (see *Trade*

Perspectives, Issue No. 16 of 8 September 2017). Article 2 of the Decree establishes that the following information must be displayed on the packaging of pasta: "*a) 'country of cultivation of the wheat': the name of the country where the durum wheat was grown; and b) the 'country of milling': the name of the country where the semola of durum wheat was obtained"*. Additionally, Article 3 of the Decree addresses the indications to be affixed on the pasta labels in the case of durum wheat or durum semolina obtained in more than one country: where cultivation or milling occurs in the territories of more than one EU Member State or outside the EU, the following entries may be used to indicate where the single operation has been carried out, even in the absence of mixtures: '*EU*', '*non-EU*', or '*EU and non-EU*'. Where the durum wheat used has been cultivated for at least 50% in a single country, the '*name of the country*' in which at least 50% of durum wheat and other countries were cultivated *'and other countries: 'EU', 'non-EU', 'EU and non-EU'* may be used, depending on the origin. Therefore, with regard to durum wheat, if at least 50% of the durum wheat used in a product is grown in one country (such as Italy), the label '*Italy and other EU and/or non-EU countries*' should be used. Article 4(2) of the Decree provides detailed rules on the style and format of the COOL labelling, requiring, in relevant part, that the "*indications on the origin referred to in Articles 2 and 3 are affixed on the label in an evident point and in the same visual field so as to be easily visible, clearly legible and indelible. They are in no way to be hidden, obscured, limited or separated from other written or graphic indications or from others elements likely to interfere*".

In April 2019, the AGCM initiated investigations into the practices of the Italian food business operators and retailers *F.lli De Cecco di Filippo - Fara San Martino S.p.A.*, *Pastificio Artigiano Cav. Giuseppe Cocco S.r.l.*, *Margherita Distribuzione S.p.A., Divella S.p.A.*, and *Lidl Italia s.r.l.*. The AGCM is an independent authority with the power, *inter alia*, to take action against misleading advertising carried out by any means, including on product packaging. The AGCM is competent to initiate an inquiry acting on its own authority or following a complaint from a third party having an interest in the matter. According to Article 27 of Italy's Consumer Code (*i.e.*, *Codice del Consumo*), the AGCM has the authority "*to prohibit the continuation of any unfair commercial practice and eliminate their effects"* and may require the business operator "*to end the infringement and to cease its dissemination, or to modify such that the unlawful parts are removed"*.

The object of the investigation was the fact that certain pasta products placed on the market by the investigated brands are manufactured using durum wheat flour produced from durum wheat of non-Italian origin, which has to be indicated on the product packaging in line with the Decree.

With respect to *Lidl Italia s.r.l.*, the AGCM stated in its decision that *Lidl* had misled consumers with respect to the characteristics of the pasta products sold under its '*Italiamo*' and '*Combino*' brands, alluding to an Italian origin of the product through text and drawings on the packaging, without providing an indication of equal graphic importance of the non-Italian origin of the durum wheat. On the '*Italiamo*' packaging, the brand name '*Italiamo*' is provided in clearly visible characters, next to which an Italian flag and the expression '*Passione Italiana*' is provided. The indication '*Country of growing of wheat: EU and non-EU'* is placed only on the side panel, accompanied by the information '*Country of milling: Italy*'. Similarly, the packaging of *Lidl Italia s.r.l.*'s '*Combino*' brand features, on the front, an evocative image of an Italian landscape, the indication '*Specialità Italiane'* (*i.e.*, Italian speciality), as well as a cockade with the colours of the Italian flag with the text '*Made in Italy*'. The indication of the origin of the durum wheat is provided in small font size on the back of the packaging.

The AGCM noted that consumers could be led to believe that the entire pasta supply chain is Italian, while, given the fact that the raw material (*i.e.*, the durum wheat) is partially imported, the indication '*Made in Italy'* only concerns the country of milling. The AGCM adds that *Lidl Italia s.r.l.*'s decision to emphasise the Italian origin was misleading because Italian consumers, at the moment of purchase, consider that the origin of the product is far more important than any other information. In that respect, the AGCM makes reference to a survey carried out by the Italian *Institute of Services for the Agricultural Food Market* (*Istituto di Servizi per il Mercato Agricolo Alimentare*, ISMEA), published in January 2019, which, according to

the AGCM, reported that 78% of Italian consumers felt reassured by a '*100% Italian*' origin, which is perceived by 90% of them as an assurance of quality and compliance with food safety standards.

In its reasoning, the AGCM stated that consumers are mostly influenced by the directly visible information and that, unless consumers rotate the package and analyse the specific indications on the origin of the raw material, they would be induced to believe that also the durum wheat used in the production of the semolina (*i.e.*, the coarse flour made from durum wheat) is of Italian origin. Therefore, taking into account the importance attributed by consumers to the origin of the raw material and to the place of transformation, the information conveyed by the labelling of the '*Italiamo*' and '*Combino*' products and the complete absence of such information on *Lidl Italia s.r.l.*'s website, the AGCM concludes that "*this commercial practice may deceive consumers on the characteristics of the pasta sold under the brand 'Italiamo' and 'Combino' misleading them on the Italian origin of the raw material and therefore altering their commercial choices, in violation of Articles 21 and 22 of the Consumer Code*". Articles 21 and 22 of the Consumer Code, on misleading actions and misleading omissions, transpose Articles 6 and 7 of *Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market* (*i.e.*, the Unfair Commercial Practices Directive) into Italian law.

Additionally, in case of the '*Italiamo*' brand, the product marketed was '*Pasta di Gragnano IGT*', benefitting from the status of a Protected Geographical Indication (hereinafter, PGI). The AGCM underlined that indicating the origin of the durum wheat is relevant in addition to the PGI labelling, as the PGI does not provide any information on the origin of the wheat.

Overall, it is noteworthy that, while the AGCM briefly referred to Articles 2 to 4 of the Decree, it did not base its decision on those rules, but rather on the elements of unfair commercial practices and the assumption that Italian consumers, who place great importance on the origin of a food product and its ingredients, could be misled by the way the information is provided on the product packaging.

According to Article 27 of the Consumer Code, when the unfair commercial practice is of a non-serious nature, the parties subject to the investigation have the right to propose remedies. The AGCM is entitled to make the remedies mandatory and lay down the procedure to be followed. During the investigation, four of the five food business operators, namely *F.lli De Cecco di Filippo - Fara San Martino S.p.A.*, *Pastificio Artigiano Cav. Giuseppe Cocco S.r.l.*, *Margherita Distribuzione S.p.A., and Divella S.p.A.*, committed to modify their packaging by removing the frontal descriptions echoing the Italian origin of the product. Furthermore, they committed to improve the visibility of the indication of the place of origin of the durum wheat by inserting its indication on the front of the label or in the same visual field in which the other characteristics of the product are provided. Only *Lidl Italia s.r.l.* did not present any remedial commitments during the investigation and, therefore, on the basis of the seriousness and duration of the unfair commercial conduct, was attributed a EUR 1 million fine.

Article 26(3) of *Regulation (EU) No 1169/2011 on the provision of food information to consumers* (hereinafter, FIR) establishes that, where the country of origin or the place of provenance of a food is given and where it is not the same as that of its primary ingredient, the country of origin or place of provenance of the primary ingredient in question shall also be given or indicated as being different to that of the food. It further states that the application of these requirements shall be subject to the adoption of an implementing act. On 1 April 2020, *Commission Implementing Regulation (EU) 2018/775 of 28 May 2018 laying down rules for the application of Article 26(3) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, as regards the rules for indicating the country of origin or place of provenance of the primary ingredient of a food* will enter into force, establishing EU-wide rules on COOL for primary ingredients of food. Article 7 of the Decree provides that it would cease to be in force as soon as the EU adopts rules for indicating the country of origin or place of provenance of the primary ingredient of a food. Consequently, the Decree will cease to be in force on 1 April 2020.

Interestingly, with respect to pasta products, the Decree and *Regulation (EU) 2018/775* appear to have a different scope of application. Article 2(1)(q) of the FIR defines '*primary ingredient*' as "*an ingredient or ingredients of a food that represent more than 50% of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required*". In the case of pasta, the primary ingredient would, therefore, be the semolina (*i.e.*, the coarse flour made from durum wheat), rather than the durum wheat. Under customs law, durum wheat of non-Italian origin processed into semolina in Italy would be considered as being of Italian origin, because the last substantial transformation took place in Italy.

Additionally, according to Article 1(2) of *Regulation (EU) 2018/775*, its provisions do not apply to products carrying Geographical Indications (hereinafter, GIs), pending the adoption of specific rules concerning the application of Article 26(3) of the FIR to such indications. With respect to the protected '*Pasta di Gragnano IGT*', marketed under the '*Italiamo*' brand, the emphasis on the area of production is consistent with the meaning of the PGI label, which is independent of the origin of the raw material. The AGCM appears to support the idea that even food products protected by GIs should provide additional indications of origin in order not to mislead consumers.

Implementing the fundamental rule of the FIR, namely that food information is not to be misleading, poses a great challenge to legislators and authorities. To a certain extent, this always leaves a margin of interpretation for those called upon to determine if consumers are potentially being deceived or have indeed been misled. The law should provide clear rules for food business operators to implement and, if followed, there must be legal certainty. Basing a legal decision or a fine on a consumer survey regarding the importance of certain labelling does not appear to deliver this degree of legal certainty. If the authorities were to consider that stricter rules are necessary, the rules would first need to be amended.

Lidl Italia s.r.l. has sixty days from the notification of the decision to appeal it for judicial review before the Regional Administrative Court of Lazio (*i.e.*, *Tribunale amministrativo regionale del Lazio*). With the entry into force of *Regulation (EU) 2018/775*, the Italian Decree on COOL for durum wheat flour will soon cease to exist and it remains to be seen if the AGCM will maintain its rather broad interpretation of unfair commercial practices regarding COOL.

Recently Adopted EU Legislation

Food and Agricultural Law

- *Commission Regulation (EU) 2020/183 of 5 February 2020 establishing a fisheries closure for cod in areas 1 and 2b for vessels flying the flag of several Member States*

- *Commission Implementing Regulation (EU) 2020/198 of 13 February 2020 laying down rules for the application of Regulation (EU) No 251/2014 of the European Parliament and of the Council as regards the establishment of the register of geographical indications protected in the sector of aromatised wine products and the listing of the existing geographical designations in that register*

Other

- *Information concerning the entry into force of the Agreement between the European Union and the United Mexican States on certain aspects of air services*

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