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Enforcing commitments on trade and sustainable development: A Panel of Experts issues its report concerning certain labour standards in Korea

On 25 January 2021, the European Commission (hereinafter, Commission) published the Report of the Panel of Experts in the Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement (hereinafter, FTA). The Panel Report confirms that Korea is in breach of its labour commitments under the EU-Korea FTA. This is the first panel report issued by a Panel of Experts regarding commitments in the context of a Chapter on Trade and Sustainable Development (hereinafter, TSD Chapter) of a preferential trade agreement between the EU and a trading partner. The Panel Report is a milestone in the EU's strategy towards the implementation and enforcement of the commitments on trade and sustainable developments, which have been included in the EU's preferential trade agreements (hereinafter, PTAs) in recent years and a clear indication of the increasing importance of social, labour and environmental commitments in the context of EU trade policy.

Commitments on trade and sustainable development in the EU-Korea FTA

Under Article 13.4 of the EU-Korea FTA on '*Multilateral labour standards and agreements*', the EU and Korea committed, "*in accordance with the obligations deriving from membership of the International Labour Organisation (ILO) and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, *to respecting, promoting and realising, in its laws and practices, the principles concerning the fundamental rights*", including the freedom of association and the effective recognition of the right to collective bargaining. Additionally, the EU and Korea committed, under Article 13.4(3) of the EU-Korea FTA, "*to effectively implementing the ILO Conventions*" that both parties have already ratified and to "*make continued and sustained efforts towards ratifying the fundamental ILO Conventions*".

In view of the different types of commitments, issues arising in the context of the commitments under the TSD Chapter are excluded from the general State-to-State dispute settlement mechanism laid out in Chapter 14 of the EU-Korea FTA. Rather, in line with EU practice, the TSD Chapter provides for its own two-tiered mechanism to deal with such matters. At a first stage, on the basis of Article 13.14, the parties may request government consultations "*regarding any matter of mutual interest arising under this Chapter*". At a second stage, on the basis of Article 13.15, the parties may "*request that a Panel of Experts be convened to examine*

the matter that has not been satisfactorily addressed through government consultations". Such Panel of Experts consists of three experts, who are chosen from a list of 15 persons of whom at least five must be non-nationals of either party. The experts must have expertise on the issues covered by the TSD Chapter. Each party selects one expert from the list and the two selected experts must decide on the chair, who must not be a national of either party.

Concerns on certain labour standards in Korea

The EU was concerned about certain Korean labour law provisions relating to the respect of the fundamental ILO principles of freedom of association and the right to collective bargaining, as well as the outstanding ratification by Korea of four fundamental ILO Conventions.

The EU had requested consultations with Korea on the basis of Article 13.14 and, in its request for the establishment of a Panel of Experts, the EU noted that the consultations had taken place on 21 January 2019, but that, "*unfortunately, the consultations did not lead to the matters being satisfactorily addressed and thus failed to settle all the issues raised by the EU*". Consequently, on 4 July 2019, the EU requested the establishment of a Panel of Experts pursuant to Article 13.15 of the EU-Korea FTA and concerning certain measures that were deemed to be inconsistent with Korea's obligations related to multilateral labour standards and agreements under the EU-Korea FTA (see *Trade Perspectives,* Issue No. 15 of 26 July 2019).

In its request, the EU refers to four measures contained in Korea's labour law, two of which relate to the definition of '*worker*', while the other two relate to trade unions: 1) Article 2(1) of Korea's *Trade Union and Labour Relations Adjustment Act* (hereinafter, TULRAA) defines '*worker*' as a person, who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by Korean courts, excludes some categories of self-employed persons, such as heavy goods vehicle drivers, as well as dismissed and unemployed persons, from the scope of the freedom of association; 2) Article 2(4)(d) of the TULRAA states that an organisation is not to be considered as a trade union in cases where persons that do not fall under the definition of '*worker*', are allowed to join the organisation; 3) Article 23(1) of the TULRAA states that trade union officials may only be elected from among the members of the trade union; and 4) Article 12(1) to (3) of the Korean Trade Union Act, in connection with Article 2(4) and Article 10 thereof, provides for a discretionary certification procedure for the establishment of trade unions.

Additionally, the EU referred to the fact that the last sentence of Article 13.4(3) of the EU-Korea FTA provides that the Parties would "*make continued and sustained efforts towards ratifying the fundamental ILO Conventions*". In this regard, the EU stated that, eight years after the beginning of provisional application of the EU-Korea FTA in 2011, Korea had still not ratified four of those ILO Conventions, namely: 1) The 1948 Freedom of Association and Protection of the Right to Organise Convention; 2) The 1949 Right to Organise and Collective Bargaining Convention; 3) The 1930 Forced Labour Convention; and 4) The 1957 Abolition of Forced Labour Convention.

The Report of the Panel of Experts

The main two issues reviewed by the Panel of Experts were the definition of '*workers*' and the right of association under the TULRAA. With respect to the definition of '*workers*', the Panel of Experts analysed the definition, as well as the interpretations by Korean courts, and concluded that the definition of '*worker*' in Article 2(1) of the TULRAA is inconsistent "*with the principles concerning the fundamental right of freedom of association, which Korea is legally obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA*". The Panel of Experts stated that the definition, as it stands, is "*too narrowly based on a rigid binary relationship between a 'worker' and an 'employer' as defined and therefore has the effect of excluding many classes of self-employed, including some dependent contractors, from full enjoyment of the principles concerning the right to freedom of association*". The Panel of Experts also noted that dismissed and unemployed workers "*are recognised by the ILO as falling within the scope*

of 'all workers without distinction whatsoever' who are to be afforded the freedom of association".

The Panel of Experts further assessed the freedom of association under the TULRAA. The Panel of Experts noted that it is the combined effect of Article 2(1) and Article 2(4)(d) of the TULRAA "*that it is not only the freedom of association of the dismissed union members which is impaired by the TULRAA, but also that of every other member of a union which risks decertification by permitting such workers to become and stay members*". The Panel found that Article 2(1) and Article 2(4)(d) of the TULRAA "*is not consistent with the principles concerning freedom of association*".

The Panel of Experts recommended that Korea bring "*the TULRAA provisions into conformity with the principles concerning freedom of association, so that all workers, including the self-employed, dismissed and unemployed, are included in the TULRAA's definition of 'worker' in Article 2(1)*". Furthermore, the Panel noted that *"the Parties are, inter alia, bound by Article 13.4.3 to promote the principles concerning freedom of association in their law and practice"* and recommended that the *"Panel Request (4)* [relating to the discretionary certification procedure for the establishment of trade unions] *be referred to the consultative bodies, established under the EU-Korea FTA Article 13.12 for continued consultation*".

With respect to the EU's claim that Korea had not yet ratified the four abovementioned ILO Conventions, the Panel of Experts recognised the "*ongoing and substantial efforts*" and commitments made by Korea on the ratification process. The Panel of Experts found that Korea had not acted "*inconsistently with the last sentence of Article 13.4.3 by failing to 'make continued and sustained efforts' towards ratification of the core ILO Conventions*". With respect to the issue of freedom of association, Korea argued that the obligations of an ILO Member are limited to those expressly referred to as State obligations in the ILO Constitution and that, by joining the ILO, Members "*do not assume an obligation to give effect to freedom of association in their own domestic laws*". In this context, the Panel of Experts confirmed that the commitments under Article 13.4(3) of the EU-Korea FTA "*represent a legally binding obligation of commitment to respecting, promoting and realising the obligations arising from membership of the ILO and the 1998 ILO Declaration in relation to the principles concerning the fundamental rights*".

Importantly, there is no mechanism to ensure the implementation of the recommendations and there are no sanctions in case of non-implementation. According to Article 13.15(2) of the EU-Korea FTA, the Parties must make "*their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter*". The implementation of the recommendations is monitored by the Committee on Trade and Sustainable Development established under the EU-Korea FTA, which meets "*as necessary, to oversee the implementation of this Chapter*".

The EU's approach to pursuing trade and sustainable development

TSD Chapters have become standard in EU trade agreements. In recent times, the EU has been increasing its efforts to ensure that trading partners comply with their trade commitments, including commitments under the TSD Chapters. An example is the EU's new complaint mechanism, which allows EU stakeholders to submit complaints on non-compliance with TSD commitments (see *Trade Perspectives*, Issue No. 22 of 27 November 2020). Another example is the recent amendment of the EU's Enforcement Regulation. Recital 10 of the Regulation amending the EU's Enforcement Regulation underlines that "*the enforcement mechanism of the Trade and Sustainable Development chapters of the Union's international trade agreements forms an integral part of the Union's trade policy and this Regulation would apply to the suspension of concessions or other obligations and the adoption of measures in response to breaches of those chapters, if and to the extent that such measures are permitted and are warranted by the circumstances*" (see *Trade Perspectives*, Issue No. 2 of 29 January 2021).

The growing importance of social and environmental commitments

Over the past years, labour rights and environmental concerns have become increasingly important factors in relation to trade agreements. All recently concluded EU trade agreements, as well as the investment agreement with China, contain such commitments. In recent years, the EU Institutions also entertained discussions to increase the '*enforceability*' of the commitments in the TSD Chapters (see *Trade Perspectives*, Issue Number 15 of 28 July 2017 and Issue No. 4 of 23 February 2018), but, so far, the EU has appeared reluctant to introduce any more actionable mechanisms or provisions allowing for economic sanctions or similar retaliation. The decision of the Panel of Experts in the EU-Korea case underlines that the commitments on trade and sustainable development are binding and that the Commission does indeed monitor related compliance. The EU and Korea will likely continue their diplomatic efforts to resolve the issues and bring Korea's commitments into compliance with the EU-Korea FTA.

Disrupting trade in live shellfish from the UK – new realities following the UK's withdrawal from the EU

On 19 January 2021, an official from the European Commission (hereinafter, Commission) reportedly confirmed that most imports into the EU of live shellfish not ready for human consumption (*i.e.*, live bivalve molluscs) originating in the UK would be prohibited. Since 1 January 2021, following the end of the transition period after the UK's withdrawal from the EU, the UK has only been allowed to export pre-purified, ready-to-eat shellfish to the EU, provided that such produce is accompanied by an export health certificate. These restrictions are allegedly already disrupting trade in live shellfish and are poised to have a detrimental impact on the UK shellfish industry, in view of the existing trade relations between the EU and UK.

Rules on the import of live shellfish into the EU

The EU maintains a comprehensive legal framework regarding food hygiene, with the aim of protecting and ensuring human health and safety. *Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin* provides for specific rules regarding, *inter alia*, live bivalve molluscs. Live bivalve molluscs are defined as "*filter-feeding lamellibranch molluscs*" and refer to, *inter alia*, mussels, oysters, clams, scallops, and cockles. Section VII of Annex III to *Regulation 853/2004* is entirely dedicated to live bivalve molluscs, specifying, in its Chapter I, that said products may be placed on the EU market only through a dispatch centre (*i.e.,* an establishment where live bivalve molluscs are treated in preparation for human consumption) and provided that they carry a specific marking.

With respect to the origin of live bivalve molluscs, Chapter II, Part A(1) of Section VII of Annex III of *Regulation 853/2004* provides a classification of areas from which live bivalve molluscs may be harvested*,* Classes A, B, and C. In simple terms, Chapter II of Section VII of Annex III of *Regulation 853/2004* provides that the category Class A refers to waters considered to be pure and sufficiently clean to allow for the live export of bivalve molluscs for direct human consumption without them being previously cleaned and/or purified, whereas the categories of Class B and C waters imply that live bivalve molluscs originating from those areas are not ready for direct human consumption, given the applicable contamination thresholds for E. Coli bacteria.

Chapter II, Part A(2) of Section VII of Annex III to *Regulation 853/2004* sets out that only live shellfish sourced in Class A waters may directly enter the EU market. Live shellfish from Class B or C waters must undergo *ex-ante* purification treatment, which refers to the removal of possible contaminants either in clean seawater tanks or through so-called '*relaying*' , which refers to the placing of the live shellfish in sea, lagoon or estuarine areas for the time necessary to reduce contamination and to make them fit for human consumption. Live shellfish sourced

from Class B waters must either undergo a treatment in a purification centre or '*relaying*', while products coming from Class C water must undergo "*relaying over a long period*". All live bivalve molluscs, regardless the area where they were sourced, must meet the requirements set out in Chapter V of Section VII of Annex III of *Regulation 853/2004*, notably certain health standards. The rules apply to both wild and farmed shellfish.

Importantly, most UK waters are classified as Class B, such as the waters off the cost of Wales and to the south-west of England, while only some are classified as Class A waters, such as waters off the coast of Scotland.

The impact of the UK's withdrawal from the EU on the live shellfish industry

Since 1 January 2021, following the end of the transition period after the UK's withdrawal from the EU, the UK is a third country and is required to comply with EU import requirements. More specifically, the UK is only allowed to export live bivalve molluscs from waters of a Class other than A when they have already been purified and are ready for human consumption.

According to Annex III, Chapter II(A.5) of *Regulation 853/2004*, domestic EU food business operators have the possibility to send the live bivalve molluscs to processing establishments in the EU Member State of destination, in order for them to undergo the purification or '*relaying*' process. Therefore, so long as the UK was an EU Member State, it was allowed to export live bivalve molluscs from Class B waters to the EU Member State of destination and have the purification take place in that EU Member State. Now that the UK is a third country, live shellfish sourced in the UK, unless sourced from Class A waters, must be purified in the UK prior to importation into the EU.

No special treatment for UK traders

Reportedly, the UK was under the impression that the EU restrictions on live bivalve molluscs would end on 21 April 2021, when *Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health*, which provides for new rules on animal health certificates, is to become applicable. According to the UK Secretary of State for Environment, Food and Rural Affairs, Mr. *George Eustice*, the European Commission had informed the UK in September 2019 that trade in live bivalve molluscs could continue and that new animal health certificates would be issued from April 2021.

Secretary *Eustice* further noted that, earlier this month, the Commission notified the UK Government of instructions provided to all EU Member States "*stating that any imports into the EU from the UK of Live Bivalve Molluscs for purification from Class B waters, such as the sea around Wales and the South West of England, are not permitted*". Secretary *Eustice* underlined that "*many businesses in the EU have invested in depuration equipment and are configured around managing the export of molluscs from Class B waters*". Reportedly, the EU confirmed that there would be no new export health certificate for any third country, including the UK.

As all other third countries, the UK will have to comply with the EU import rules for live shellfish. That is, of course, unless preferential rules are agreed, but this does not appear to be the case under the EU-UK Trade and Cooperation Agreement or under any agenda of bilateral negotiation (see *Trade Perspectives*, Issue No. 1 of 15 January 2021).

A detrimental impact for the UK's shellfish industry

The EU import rules on live shellfish significantly affect the UK shellfish industry, considering that 60 to 80% of the UK's live shellfish are exported to the EU. *Seafish*, the UK's public body that supports the seafood industry in the UK, noted that, in 2019, the UK had exported live clams, mussels, oysters and scallops with a total value of EUR 80 million and that products with a value of EUR 17 million would be affected by the EU's import rules. According to one of the UK's leading shellfish exporting companies, which used to export up to 2,500 metric tonnes

of mussels and cockles to EU customers, complying with the EU rules would require substantial investments and would make the export of live shellfish to the EU less viable. In fact, pre-purified shellfish have too little shelf life to make them viable for export.

Dealing with new legal realities

On 8 February 2021, UK Secretary of State *Eustice* sent a letter to the Commission requesting a meeting to resolve the issue and referring to the abruptness of the EU's decision to apply the restrictions on live shellfish permanently. The Commission noted that the European Commissioner for Health and Food Safety *Stella Kyriakides* would reply on this matter, but that she would merely confirm the new "*legal reality*".

All interested stakeholders in the UK and the EU should closely follow the related developments and ensure compliance with the applicable rules. In the medium/long-term, technical solutions based on mutual recognition and on health protocols that can deliver food safety and trade facilitation should be negotiated and defined. The tools exist and, provided that economic incentives exist for both parties, solutions can be found.

Ritter Sport's *Cacao Y Nada* bar made from 100% cocoa may not be named '*chocolate*' under EU and German food law

The German chocolate manufacturer *Ritter Sport*'s new product *Cacao Y Nada* (Spanish for "*cocoa and nothing*") consists of products that are entirely derived from the cocoa fruit. It is sweetened with cocoa juice, which is derived from the pulp of the cocoa bean and has a naturally sweet taste said to resemble that of the lychee fruit. According to media reports, *Ritter Sport* has been notified by German authorities that it may not call the *Cacao y Nada* bar a chocolate bar because it does not contain any sugar.

While this is not entirely correct, since the product contains sugar in its cocoa juice, no conventional sugar is added. This article looks at the relevant provisions of EU and German food law and draws a parallel to the EU chocolate '*war*' on the naming of products containing vegetable fats as '*chocolate*'. It also addresses the fact that cocoa juice has, in 2020, received market authorisation in the EU as a "*traditional novel food from a third country*".

Chocolate by definition contains sugar under EU and German food law

Ritter Sport informs on its website that its cocoa fruit bar *Cacao Y Nada* is made purely from ingredients derived from the cocoa fruit: cocoa mass, cocoa butter, cocoa powder, and cocoa juice. It is '*natural*' since no '*conventional*' sugar is added. The sweetness of the bar comes solely from the natural sweetness of the cocoa juice. *Ritter Sport* adds that "*In order to be able to call it 'chocolate' under food law, we would have to add conventional sugar. Crazy, right?*"

In the EU, '*chocolate*' is defined in point A3(a) of Annex I to *Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption* on sales names, definitions and characteristics of the products as "*the product obtained from cocoa products and sugars which, [with certain exceptions], contains not less than 35% total dry cocoa solids, including not less than 18% cocoa butter and not less than 14% of dry non-fat cocoa solids*". Part D of the Annex provides that "*Sugars as referred to in this Directive are not limited only to those sugars covered by Council Directive 73/437/EEC of 11 December 1973 on the approximation of the laws of the Member States concerning certain sugars intended for human consumption*".

Council Directive 73/437/EEC has been replaced by *Council Directive 2001/111/EC of 20 December 2001 relating to certain sugars intended for human consumption*, which lists and defines in Part A of the Annex the following product names: 1) Semi-white sugar; 2) Sugar or white sugar; 3) Extra-white sugar; 4) Sugar solution; 5) Invert sugar solution; 6) Invert sugar

syrup; 7) Glucose syrup; 8) Dried glucose syrup; 9) Dextrose or dextrose monohydrate; 10) Dextrose or dextrose anhydrous; and 11) Fructose. Arguably, the sentence "*Sugars as referred to in this Directive are not limited only to those sugars covered by Council Directive*" appears to leave a margin as to which sugars can be used in chocolate.

The German Cocoa and Chocolate Products Regulation of 2003 (*i.e.*, *Verordnung über Kakao- und Schokoladenerzeugnisse, Kakaoverordnung*), as last amended in 2017, transposed *Directive 2000/36/EC* into German law. It prescribes sugar as an ingredient of chocolate, which is defined in Annex 1(3)(a) as a "*Product of cocoa products and sugars containing at least 35% cocoa dry matter, of which at least 18% per cent cocoa butter and at least 14% fat-free cocoa dry matter*". Under § 2(5) on ingredients, it reads that "*For the purposes of this Regulation, sugars are also products other than those listed in the Sugar Varieties Regulation*". The German *Sugar Varieties Regulation* (*i.e.*, *Zuckerartenverordnung*) lists the same 11 varieties provided in *Council Directive 2001/111/EC*. As the EU Directive, the sentence that "*sugars are also products other than those listed*" appears to leave a margin as to which sugars may be used in chocolate.

The question appears to centre on which variety of sugar the cocoa fruit juice contains. Research indicates that many sugar varieties, including d-fructose, d-glucose (*i.e.*, dextrose), sucrose, melibiose, raffinose, manninotriose, and stachyose appear to be present in the cocoa fruit. Since sugars for chocolate products are expressly not limited to the 11 sugar varieties listed, there appears to be the possibility to use the sugar varieties present in the cocoa juice in chocolate products and still be able call the product '*chocolate*'.

Cocoa juice is a traditional novel food from a third country

The background to the cocoa juice ingredient in *Cacao Y Nada* is interesting. In 2019, the companies *Nestec York Ltd*. and *Cabosse Naturals NV* submitted notifications to the European Commission of their intention to place fruit pulp, pulp juice, and concentrated pulp juice from *Theobroma cacao L.*, also known as the cocoa tree, on the EU market as a traditional food from a third country, within the meaning of Article 14 of *Regulation (EU) 2015/2283 on novel foods* (hereinafter, the Novel Foods Regulation or NFR). The applicants requested the authorisation for fruit pulp, pulp juice, concentrated pulp juice from *Theobroma cacao L.* to be consumed as such or as an ingredient. The NFR provides that only novel foods authorised and included in *Commission Implementing Regulation (EU) 2017/2470 establishing a Union list of authorised novel foods* may be placed on the market within the EU.

Commission Implementing Regulation (EU) 2017/2468 lays down administrative and scientific requirements concerning traditional foods from third countries. Pursuant to Article 15(4) of the NFR, the Commission is to decide on the authorisation and on the placing on the EU market of a traditional food from a third country. Upon request by the Commission, the applicants submitted additional information demonstrating that fruit pulp, pulp juice, and concentrated pulp juice from *Theobroma cacao L.* have a history of safe food use in Brazil. In particular, the applicants submitted that cacao pulp and cacao fruit juice have a history of safe use beyond 25 years in Brazil in a substantial part of the normal population. The products have been consumed to a significant extent at domestic level and, since its industrial commercialisation at the end of the 1980s, by larger fractions of the general population, given its availability in foods (*e.g.*, jelly and ice cream) in retail outlets and supermarkets. Cacao juice is particularly rich in sugars, while the overall composition of minerals is in the range of what is normal for fruit juices.

Pursuant to Article 15(1) of the NFR, the Commission forwarded the valid notifications to the EU Member States and to the European Food Safety Authority (hereinafter, EFSA). No duly reasoned safety objections to the placing on the market within the EU of fruit pulp, pulp juice, and concentrated pulp juice from *Theobroma cacao L.* were submitted to the Commission by EU Member States or the EFSA within the four-months period laid down in Article 15(2) of the NFR. Therefore, the Commission authorised the placing on the market within the EU of fruit pulp, pulp juice, and concentrated pulp juice from *Theobroma cacao L.* in *Commission*

Implementing Regulation (EU) 2020/206 of 14 February 2020 as a traditional food from a third country under the NFR.

Cacao Y Nada *contains natural sugar*

Commission Implementing Regulation (EU) 2020/206 sets out the typical compositional data of cocoa fruit pulp, pulp juice, concentrated pulp juice: "*Protein (g/100 g): 0,0 to 2,0; Total fat (g/100 g): 0,0 to 0,2; Total sugars (g/100 g): > 11,0*". Total sugars are therefore more than 11g/100g. The sugar variety is not identified, but the relatively high sugar content is transferred to products containing cocoa juice. Notably, *Cacao Y Nada*'s average nutritional values per 100g are: energy 2,446/591 kcal; fat 47g, of which saturated fatty acids 29g; carbohydrates 29, of which sugars 25g; protein 8.2g, and salt 0.01g. Therefore, the product contains 25g of sugars per 100g, which is slightly higher than a typical *Ritter Sport* chocolate bar.

Ritter Sport appears to acknowledge that it may not name its new product a '*chocolate*' bar and uses the term '*fruit bar*' (*i.e.*, '*Fruchttafel*' in German) instead. *Ritter Sport* correctly states that "*no conventional sugar is added*" to it. However, the simplified claim expressed in some media reports that the company had been told by German authorities that it may not call its latest creation a chocolate bar "*because it contains no sugar*" oversimplifies the issue and could even be misleading as to the product's nutritional properties if a chocolate manufacturer were to promote a product containing cocoa juice as '*sugar-free*'.

The chocolate 'war' on the naming of products containing vegetable fats as 'chocolate'

The definition of chocolate and the naming of products containing vegetable fats as '*chocolate*' have been subject to debate for almost 50 years, since the UK and Ireland (which allowed other vegetable fats than cocoa butter in chocolate) joined the EU in 1973. However, at that time, the issue concerned vegetable fats, not the sugar content. The so-called chocolate '*purists*', led by Belgium and France, long campaigned against the use of vegetable fat. *Directive 2000/36/EC*, which resolved the controversy, allowed, as a compromise, the use of a limited number of vegetable fats other than cocoa butter (*i.e.*, the so-called cocoa butter equivalents (CBEs) palm oil, Illipe, sal, shea, kokum gurgi and mango kernel) for the manufacture of the chocolate products defined in the Directive. However, the amount of vegetable fats other than cocoa butter may not exceed 5% of the finished product and the minimum content of cocoa butter, as established in the definitions of the different chocolate products, must be present in the final product. Moreover, the use of vegetable fats other than cocoa butter must be indicated on the label by the phrase "*contains vegetable fats in addition to cocoa butter*". For more information on the chocolate war, see '*The return of the bitter-sweet EU chocolate controversy?*' in *Trade Perspectives*, Issue No. 20 of 4 November 2016.

Conclusions and outlook for cocoa juice as ingredient

According to *Ritter Sport*, *Cacao Y Nada* has been launched in a limited edition only, supposedly because "*cocoa juice is scarce*". Interestingly, *Cacao Y Nada* is available in EU Member States only and will, reportedly, not be sold in the UK due to the '*novel*' concentrated juice from the cocoa pulp only being permitted in products sold in the EU.

Fruit pulp, pulp juice, and concentrated pulp juice from *Theobroma cacao L.* will most likely be an interesting product for the confectionery industry. However, if products containing those ingredients are not permitted to use the term '*chocolate*' in their sales names, confectionery manufacturers might refrain from using this innovation. Arguably, the sentence "*Sugars as referred to in this Directive are not limited only to those sugars covered by Council Directive*" appears to leave a margin as to which sugars can be used in chocolate, which should allow for the sugar varieties present in cocoa juice to be used. Interested stakeholders should, therefore, work with their legal advisors to explore how to interpret or eventually pursue a change to the existing rules.

Recently Adopted EU Legislation

Trade Law

- *Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules*

- *Commission Delegated Regulation (EU) 2021/139 of 4 December 2020 amending Annexes I and V to Regulation (EU) 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment to take into account the withdrawal of the United Kingdom from the Union*

- *Commission Implementing Regulation (EU) 2021/111 of 29 January 2021 making the exportation of certain products subject to the production of an export authorisation*

Food Law

- *Commission Implementing Regulation (EU) 2021/148 of 8 February 2021 amending Regulation (EU) No 257/2010 setting up a programme for the re-evaluation of approved food additives in accordance with Regulation (EC) No 1333/2008 of the European Parliament and of the Council on food additives*

- *Commission Implementing Regulation (EU) 2021/120 of 2 February 2021 authorising the placing on the market of partially defatted rapeseed powder from Brassica rapa L. and Brassica napus L. as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470*

Other

- *Commission Implementing Regulation (EU) 2021/127 of 3 February 2021 setting the requirements for the introduction into the Union territory of wood packaging material for the transport of certain commodities originating in certain third countries and for plant health checks on such material, and repealing Implementing Decision (EU) 2018/1137*

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