FRATINIVERGANO
EUROPEAN LAWYERS
TRADE PERSPECTIVES©

Issue No. 10 of 22 May 2021

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New investigatory powers for the European Commission on foreign subsidies granted to undertakings engaging in economic activities on the EU market

On 5 May 2021, the European Commission (hereinafter, Commission) published a *Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market* (hereinafter, proposed Regulation). The proposed Regulation intends to address "*foreign subsidies granted to an undertaking engaging in an economic activity in the internal market*". According to the Commission, foreign subsidies have been distorting the EU's internal market by providing their recipients an unfair advantage to obtain public procurement contracts or to acquire companies. Currently, subsidies granted by non-EU Governments are not scrutinised, while subsidies granted by EU Member States are subject to close scrutiny. Therefore, the proposed Regulation aims at closing this regulatory gap by providing additional investigatory powers to the Commission. However, notification requirements will also create new obligations for businesses and might have an impact on trade and investment.

Foreign subsidies and the EU Industrial Strategy

In March 2019, the Council of the EU (hereafter, Council) recognised the need to address the distortive effect that foreign subsidies are having on the functioning of the EU Single Market and recalled that "*fair competition should be ensured within the Single Market and globally, both to protect consumers and to foster economic growth and competitiveness*".

On 10 March 2020, the Commission published its Communication *A New Industrial Strategy for Europe*, in which it announced the adoption of a *White Paper on levelling the playing field as regards foreign subsidies* on an Instrument on Foreign Subsidies and the objective to address the distortive effects caused by foreign subsidies within the EU Single Market, which was published on 17 June 2020. The *White Paper* notes that subsidies granted by non-EU Governments had been having an increasingly negative impact on competition in the EU Single Market, but that they fall outside of EU State aid control. According to the *White Paper*, there is an increasing number of instances in which foreign subsidies provide unfair advantages to companies, facilitate acquisitions of EU companies, or distort investment decisions to the detriment of non-subsidised companies. Additionally, the *White Paper* notes that current trade

defence rules in the EU concern only exports of goods from third countries, but do not address distortions caused by foreign subsidies.

The Commission considered that, when foreign subsidies take the form of financial flows facilitating acquisitions of EU companies, or they directly support the operation of a company in the EU, or they facilitate bidding in a public procurement procedure, there appears to be a regulatory gap. Therefore, the *White Paper* proposes solutions and calls for new tools to address this shortcoming.

Key takeaways of the proposed Regulation

The main objective of the proposed Regulation is to address the potential distortive effects of foreign subsidies in the EU Single Market and to close the regulatory gap. Article 1 of the proposed Regulation states that the Regulation sets "*the rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions*", particularly in concentrations and public procurement procedures.

According to Article 2 of the proposed Regulation, a "*foreign subsidy shall be deemed to exist where a third country provides a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries*". This definition is very broad and could potentially include many economic measures, such as zero-interest loans or fiscal incentives, even though these do not qualify as a subsidy. Article 3 of the proposed Regulation states that a distortion is deemed to exist based on two cumulative criteria: 1) "*A foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market*"; and 2) A foreign subsidy "*actually or potentially negatively affects competition on the internal market*". Article 3 also provides indicators to determine whether a foreign subsidy is causing a distortion of the internal market, such as the amount of the subsidy, its nature and the situation of the undertaking and the market concerned. Article 3(2) provides an exemption and states that "*a foreign subsidy is unlikely to distort the internal market if its total amount is below EUR 5 million over any consecutive period of three fiscal years*".

A three-tiered instrument for a comprehensive approach

One of the main features of the proposed Regulation is represented by the new investigatory powers that will be accorded to the Commission, which are supposed to enable the Commission to initiate investigations when it has reasonable suspicion that a foreign subsidy is distorting the internal market. On the basis of the proposed Regulation, the Commission will be accorded additional investigatory powers with respect to: 1) *Ex-officio* reviews; 2) Concentrations; and 3) Public procurement procedures.

With regard to *ex-officio* reviews, the proposed Regulation would allow the Commission to start an investigation on its own initiative whenever it considers that there might be a distortive foreign subsidy being granted to a business operating on the EU Single Market. If a preliminary review, carried out by the Commission, shows evidence of a distortive effect, the Commission must inform both the undertaking and the third country concerned, as well as the concerned EU Member State, of the Commission's intention to launch an in-depth investigation. In case the in-depth investigation confirms that there is indeed a distortion caused by the foreign subsidy, the Commission would be able to: 1) Impose redressive measures; or 2) "*Where the undertaking concerned offers commitments, which the Commission deems appropriate and sufficient to fully and effectively remedy the distortion, it may by a decision make these commitments binding on the undertaking*".

The proposed Regulation then addresses the issue of subsidies facilitating the acquisition of EU companies. Article 18 of the proposed Regulation defines '*concentrations*' as "*the merger of two or more previously independent undertakings or parts of undertakings*", "*the acquisition, by one or more persons already controlling at least one undertaking*"; and "*the creation of a*

joint venture performing on a lasting basis all the functions of an autonomous economic entity". The proposed Regulation introduces an additional review process for mergers and acquisitions with respect to distortive foreign subsidies. In the EU, mergers are regulated by *Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*. Under *Regulation (EC) No 139/2004*, companies are required to notify the Commission prior to a merger. The proposed Regulation states that a '*notifiable concentration*' will need to be notified by the undertaking to the Commission. According to Article 18(3) of the proposed Regulation, a '*notifiable concentration*' must be understood to occur where, in a concentration, "*a) the acquired undertaking or at least one of the merging undertakings is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and b) the undertakings concerned received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than EUR 50 million*". The notification of concentrations must take place "*prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest*". With regard to joint ventures, it is also important to note that, according to Article 18(4) of the proposed Regulation, the concentration would be '*notifiable*' if: 1) "*The joint venture itself or one of its parent undertakings is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million*"; and 2) "*The joint venture itself and its parent undertakings received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than EUR 50 million*".

Finally, with regard to public procurement procedures, according to Article 27 of the proposed Regulation, a notification-based instrument is also put in place whenever the tender or the request to take part in a public procurement procedure has an estimated value of EUR 250 million or higher. When submitting a tender, undertakings must notify the contracting authority (*i.e.*, state, regional or local authorities, bodies governed by public law), or the contracting entity (e.g., public undertakings), of all financial contributions received in the three years preceding the notification or submit a declaration that the undertaking has not received any financial contribution. The indication of this information is a condition for the contract to be awarded.

Foreign subsidies and WTO disciplines

The WTO *Agreement on Subsidies and Countervailing Measures* (hereinafter, SCM Agreement) provides the general framework for subsidies at the international level, notably identifying those subsidies that are '*prohibited*' and '*actionable*'. However, the SCM Agreement does not provide for a definition of foreign subsidies, nor does it address them specifically. Therefore, the Commission's proposal intends to expand on the SCM Agreement and introduce a new and more specific legal framework for foreign subsidies.

Businesses have already voiced certain concerns regarding the proposed Regulation. The broad scope of the Regulation, as well as its burdensome compliance requirements, have been viewed as disproportionate and as potentially compromising foreign investments into the EU. For instance, the American Chamber of Commerce to the EU stated that "*the proposed mechanisms, as currently drafted, may impose significant additional compliance efforts on companies who already act transparently, while still not gathering necessary information and adequately targeting genuinely distortive practices*".

The road ahead

The proposed Regulation is at an early stage of the legislative procedure and will now be discussed by the European Parliament and the Council. On 7 May 2021, the Commission opened a public consultation on *Trade and investment – addressing distortions caused by foreign subsidies*, seeking feedback on the proposed Regulation. The consultation will be open for feedback until 15 July 2021. Interested stakeholders should review the proposed Regulation and submit their views in the context of the ongoing public consultation.

Freeports after '*Brexit*': An Opportunity to foster the UK's role in international trade?

On 3 March 2021, the Government of the United Kingdom (hereinafter, UK) announced, as part of the presentation of the *2021 Budget* to the UK Parliament, the selection of eight freeports that are expected to start operating later in 2021. The UK Government intends to take advantage of the opportunities offered by the UK's withdrawal from the EU Customs Union and the EU Internal Market by establishing freeports as "*national hubs for global trade and investment*" across the UK, which would "*promote job creation and regeneration*" and constitute "*hotbeds for innovation*". However, it remains questionable whether freeports in the UK would indeed be an effective strategy to promote trade and if their establishment is consistent with the UK's international trade obligations.

The alleged advantages offered by UK freeports

Freeports and, more broadly, Free Trade Zones (hereinafter, FTZs) have been established across the world, notably in the Middle East, Asia, as well as in the Americas, to promote foreign direct investments and domestic investments, increase exportation, or develop disadvantaged regions. In 2018, there were approximately 4,500 FTZs in more than 130 countries.

Despite their presence at the global level, freeports do not adhere to an international definition. Broadly speaking, they can be defined as an area within a country's territory, contiguous to a port, where ordinary tax and customs rules do not apply. Imported products can enter a freeport through simplified customs formalities and without being subject to tariffs. Such goods may be stored on-site before they enter the domestic market or are re-exported to a third country. Alternatively, they may be processed by undertakings operating within the designated area to add value and create finished goods. When re-exported to a third country without entering the domestic market, products within a freeport are not subject to any tariffs or customs formalities. By contrast, should the imported goods move out of the freeport and enter the country's domestic market, they would go through the regular importation procedure, including customs documentation and the payment of tariffs.

In the UK, the eight freeport sites will either be located inland, adjacent to an airport, or adjacent to a port. The UK Government envisages to provide a wide array of customs, fiscal, social, as well as regulatory and financial advantages to both importers and undertakings active at these sites. More specifically, importers will benefit from simplified import procedures, be accorded tariff deferrals while the goods remain on-site, and enjoy the suspension of import Value-Added Tax on goods entering the freeports. Furthermore, undertakings located within the freeports will receive various tax or social advantages, such as a relief from the Stamp Duty Land Tax or from the employer national insurance contributions. In addition, the UK Government will speed up planning processes within the areas concerned and selectively grant research and development support to foster innovation.

Uncertain consistency with the UK's international trade commitments

Freeports, particularly when geared towards boosting exports and competitiveness, may have distortive trade effects, raising the question of their consistency with World Trade Organization (hereinafter, WTO) rules. In granting advantages to undertakings operating in freeports, the UK Government will have to comply with the disciplines on subsidies to which it has committed under both the WTO *Agreement on Subsidies and Countervailing Measures* (hereinafter, SCM Agreement) and the EU-UK *Trade and Cooperation Agreement* (hereinafter, TCA).

The WTO agreements do not expressly refer to FTZs. Yet, WTO law and, more specifically, the SCM Agreement, remain relevant with respect to government support granted to undertakings located in such zones. Under the SCM Agreement, a measure constitutes a subsidy if it amounts to a '*financial contribution*' by a government or public body conferring a

'*benefit*' on '*specific*' recipients. The SCM Agreement distinguishes between '*prohibited*' and '*actionable*' subsidies. A subsidy is explicitly prohibited if it is contingent on export performance or on the use of domestic over imported products. By contrast, a subsidy is actionable only if it causes adverse effects to the interests of other WTO Members.

Under the EU-UK TCA, the EU and the UK must maintain their independent systems of subsidy control. At this juncture, the UK Government is currently elaborating its own subsidy regime. Under the EU-UK TCA, a measure is considered a subsidy if financial assistance arising from the resources of either the UK Government or the Government of an EU Member State confers a specific advantage on one or more economic actors and has, or could have, an effect on trade or on investment between the EU and the UK. The EU-UK TCA prohibits certain categories of subsidies, notably subsidies contingent on export performance, similar to the prohibition under the SCM Agreement. With respect to subsidies causing or being susceptible to cause a trade effect, they must be proportionate, necessary, adequate and they must pursue a specific public objective, remedying a market failure, or addressing an equity rationale. Finally, the subsidies' positive contribution to achieving the objective must outweigh any negative effects on trade or on the investments between the EU and the UK.

Most of the advantages referred to above, which the UK Government envisages to allocate to businesses operating within freeports, could constitute subsidies within the meaning of the SCM Agreement and of the EU-UK TCA. They are financial contributions granted by UK public authorities, conferring a benefit to specific recipients, namely the businesses operating within the freeports. Should the UK Government grant incentives to undertakings located in freeports that are conditional on exportation, it would act inconsistently with its obligations under both the SCM Agreement and the EU-UK TCA. This would be the case if, for instance, the UK Government were to require undertakings operating in a freeport to add value to the imported components or raw materials and, subsequently, export them to other WTO Members. Any advantages bestowed by the UK Government to these undertakings may be inconsistent with the prohibition of export subsidies under the SCM Agreement and the EU-UK TCA, if the undertakings' export performance were to be conditional upon the granting of the subsidy. The UK Government should, therefore, guard itself against the risks of granting prohibited export subsidies.

Furthermore, certain incentives allocated by the UK Government to undertakings operating in a freeport may fit the definition of '*actionable*' subsidies under the SCM Agreement, as subsidies causing or being susceptible to cause an effect on trade between the EU and the UK. For instance, advantages granted to enhance innovation and enable businesses, as envisaged in the UK Government's *Bidding Prospectus on Freeports*, to develop cutting-edge technologies, such as artificial intelligence, robotics, or green technologies, may ultimately cause adverse trade effects to other WTO Members. Such trade impact may be compounded by the fact that the recipients of government support may receive raw materials duty-free and export their final products without paying customs duties. Such subsidies may be '*actionable*' under the SCM Agreement and may lead to complaints by other WTO Members. They may also lead to a complaint by the EU under the EU-UK TCA if the UK Government were to be unable to demonstrate that its subsidies comply with the guiding principles of proportionality, necessity and adequacy.

Tariff inversion in the UK Freeports: Mirage or reality?

Tariff inversion is presented as one of the most important advantages to boost trade and growth from the creation of freeports. An inverted tariff refers to a situation in which the tariff-rate applied to a particular product's raw materials or imports is greater than the tariff for the finished product. This may be the case, for instance, when the tariff-rate applied to a finished car is lower than the tariff for the car parts or the raw materials incorporated in the car. In the automotive sector, car manufacturers may import car components duty-free into a FTZ, assemble them, and, subsequently, place the finished car onto the domestic market. This approach allows manufacturers to pay only the duty applicable to the finished car once it exits the FTZ, thereby avoiding the higher duties that apply to imported car parts.

For importers to benefit from tariff inversion within a UK freeport, the duty levied on a finished product leaving the freeport and entering the UK must be lower than the tariff applicable to the raw materials imported into the freeports. More specifically, an undertaking can import components from overseas territories duty-free into a freeport in the UK, process them into final products within the freeport, and then ultimately pay the duty of the finished products when they leave the freeports and enter the UK's domestic market. In such scenario, tariffs are not simply deferred, but the lower tariffs applied on the finished goods replace the higher tariffs normally payable on the imported components or raw materials.

It remains unclear, however, whether the undertakings will be able to draw any advantages from tariff inversion in UK freeports. In May 2020, the UK Government published its UK Global Tariff (hereinafter, UKGT) schedule, which replaced the EU Most-Favoured Nation (hereinafter, MFN) Schedule. The MFN tariffs applied by the EU on intermediate goods are already relatively low and the UKGT responds to the desire of the UK Government to reduce tariffs on intermediate goods even further. In this respect, it removed tariffs "*on £30 billion worth of imports entering UK supply chains*". The *UK Trade Policy Observatory* noted that the weighted average tariff on intermediate products under the UKGT amounts to 1.6%, compared to 8.8% for finished products. Even more, approximately 60% of these intermediate goods can enter the UK duty-free, while the percentage of the final goods, on which a 0% tariff applies upon importation, stands at 20%. In more general terms, few intermediate products, namely only 2.6% of the total, have a tariff exceeding 10%, contrary to final products, for which this figure stands at 42.9%. This certainly casts doubts on the future effectiveness of the UK freeports in making a significant contribution to trade flows and to UK's competitiveness in the post-'*Brexit*' world.

Outlook

In establishing eight freeports within the UK territory, the UK Government hopes to foster the UK's role in international trade. It remains to be seen, however, if these freeports will deliver on such promise. Legally, the various financial and non-financial incentives granted by the UK Government to service and manufacturing undertakings must comply with the subsidy rules enshrined in the EU-UK TCA and the subsidy disciplines under the WTO SCM Agreement. Economically, tariff inversion may not materialise due to the low tariffs applied to raw materials and components under the UKGT, thereby undermining the customs advantages that the freeports will offer.

The CJEU ruled that EU law prohibits the addition of algae in the processing of organic foodstuffs for the purpose of their enrichment with calcium

On 29 April 2021, the Court of Justice of the European Union (hereinafter, CJEU) delivered its judgment in Case C-815/19, *Natumi GmbH v Land North Rhine-Westphalia*, responding to a request for a preliminary ruling from the German Federal Administrative Court (*Bundesverwaltungsgericht*), lodged on 5 September 2019. In its questions, the German Federal Administrative Court had asked, in essence, whether *Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control* must be interpreted as meaning that the use of a powder obtained from the cleaned, dried, and ground sediment of the alga *Lithothamnium calcareum*, as a non-organic ingredient of agricultural origin, is permitted in the processing of organic foodstuffs, such as rice- and soy-based organic drinks, for the purpose of their enrichment with calcium. The CJEU essentially denied these questions. In light of the controversies over organic products, this case, although limiting the possible use of certain ingredients, provides additional clarity for producers.

Court proceedings lasting 16 years

The request to the CJEU has been made in the context of proceedings in Germany between the *Natumi GmbH* and the Land of North Rhine-Westphalia concerning the use of a non-organic ingredient in the processing of an organic food and the use of terms referring to the organic production method in the labelling of that food. *Natumi* is a producer of soy and rice drinks, which it sells in pre-packaged form. It adds to its drinks *Lithothamnium calcareum*, a red coral alga, in the form of a powder obtained from the cleaned, ground and dried sediment of that dead alga. That sea alga contains mainly calcium carbonate and magnesium carbonate. *Natumi* markets a drink called '*Soja-Drink-Calcium*', which is labelled as '*organic*' and bears the following words: '*calcium*', '*contains calcium-rich sea alga*' and '*contains high-quality calcium from the sea alga Lithothamnium*'.

In 2005, the Land of North Rhine-Westphalia informed *Natumi* that the use of calcium carbonate, as a mineral, for the calcium enrichment of organic products was prohibited, including where enrichment was caused by adding algae, and that it was forbidden to include references to calcium on such products. *Natumi*, on 14 July 2005, brought an action to challenge a financial penalty imposed by the Land of North Rhine-Westphalia before the Administrative Court of Düsseldorf, which was dismissed. *Natumi* then lodged an appeal against that court's decision before the Higher Administrative Court for the Land of North Rhine-Westphalia. The proceedings were stayed pending the adoption of *Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products*, which repealed *Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs*. On 19 May 2016, *Natumi*'s appeal was dismissed, essentially because the addition of the alga *Lithothamnium calcareum* to an organic foodstuff was not permitted under *Regulation No 889/2008*. *Natumi* brought an appeal on a point of law before Germany's Federal Administrative Court against the decision delivered on appeal.

The applicable organic farming rules

Article 27(1) of *Regulation No 889/2008* provides that only the following substances may be used in the processing of organic food: "*(f) minerals (trace elements included), vitamins, aminoacids, and micronutrients, only authorised as far their use is legally required in the foodstuffs in which they are incorporated*". Article 28 of *Regulation No 889/2008* provides, in relevant part, that only "*non-organic agricultural ingredients listed in Annex IX to this Regulation can be used in the processing of organic food*".

Annex IX to *Regulation No 889/2008* on '*Ingredients of agricultural origin which have not been produced organically referred to in Article 28*', includes sections on '*Edible fruits, nuts and seeds*', and on '*Edible spices and herbs*', as well as a section '*Miscellaneous*', which includes "*Algae, including seaweed, permitted in non-organic foodstuffs preparation*".

Article 19 of *Regulation No 834/2007* states that: "*1. The preparation of processed organic food shall be kept separate in time or space from non-organic food. 2. The following conditions shall apply to the composition of organic processed food: (a) the product shall be produced mainly from ingredients of agricultural origin; (b) only additives, processing aids, flavourings, water, salt, preparations of micro-organisms and enzymes, minerals, trace elements, vitamins, as well as amino acids and other micronutrients in foodstuffs for particular nutritional uses may be used, and only in so far as they have been authorised for use in organic production in accordance with Article 21*".

Article 21 of *Regulation No 834/2007* on '*Criteria for certain products and substances in processing*' provides that: "*The authorisation of products and substances for use in organic production and their inclusion in a restricted list of the products and substances referred to in Article 19(2)(b) and (c) shall be subject to the objectives and principles laid down in Title II and the following criteria, which shall be evaluated as a whole: (i) alternatives authorised in accordance with this chapter are not available; (ii) without having recourse to them, it would*

be impossible to produce or preserve the food or to fulfil given dietary requirements provided for on the basis of the Community legislation".

The CJEU: Non-organic algae may not be a source of calcium in organic drinks

The Court held that Article 28 of *Regulation No 889/2008* and Annex IX thereto, read in conjunction with Article 21 of *Regulation No 834/2007*, must be interpreted as precluding the use of a powder obtained from the cleaned, dried, and ground sediment of the alga *Lithothamnium calcareum*, as a non-organic ingredient of agricultural origin, in the processing of organic foodstuffs, such as the rice- and soy-based organic drinks at issue in the main proceedings, for the purpose of their enrichment with calcium. The Court argued that it does not appear that the addition of a powder obtained from the alga *Lithothamnium calcareum*, for the purpose of the enrichment of organic foodstuffs, "*is necessary for the production or preservation of those foodstuffs, or that it makes it possible to ensure the fulfilment of given dietary requirements provided for on the basis of EU legislation*".

The Court noted that this interpretation is supported by the objectives pursued by *Regulation No 889/2008* "*in the laying down of specific rules for the implementation of Regulation No 834/2007. Regulation No 834/2007 establishes strict rules as regards the addition of minerals in the production of organic food, with Article 19(2)(b) thereof providing that minerals may be used in food if they have previously been authorised for use in organic production in accordance with Article 21 of that regulation*".

On the basis of Article 21 of *Regulation No 834/2007*, the Commission drew up, in Article 27 of *Regulation No 889/2008* and in Section A of Annex VIII thereto, the restricted list of substances, which may be used as additives in the processing of organic food for the purpose of Article 19(2)(b) of *Regulation No 834/2007*. While that section of Annex VIII includes calcium carbonate among the food additives, it states that it "*shall not be used for colouring or calcium enrichment of products*".

Importantly, the Court noted that "*Article 27(1)(f) of Regulation No 889/2008 provides that the use of minerals is permitted in food for normal consumption subject to compliance with the following alternative conditions. First, that use must be 'directly legally required', in the sense of being directly required by provisions of EU law or by provisions of national law compatible with EU law, with the consequence that the food cannot be placed at all on the market as food for normal consumption if those minerals are not added. Secondly, as regards food placed on the market as having particular characteristics or effects in relation to health or nutrition or in relation to needs of specific groups of consumers, the use of minerals must be provided for by EU legislation (…)*".

The Court held that there is no "*such a rule of national or EU law which would require the addition of calcium to the organic foodstuffs at issue in the main proceedings, that is to say, rice- and soya-based drinks, in order that they may be placed on the market*" and concluded that Article 19(2)(b) and Article 21 of *Regulation No 834/2007*, read in conjunction with Article 27 of *Regulation No 889/2008* and Annex VIII thereto, prohibit the addition of calcium in the processing of organic foodstuffs for the purpose of their enrichment with calcium. The CJEU did not need to respond to the question of whether, for a product that contains the (dead) alga *Lithothamnium calcareum* as an ingredient, and is labelled with the indication "*Organic*", the use of the indications "*contains calcium*", "*contains calcium-rich sea alga*", or "*contains high-quality calcium from the sea alga Lithothamnium*", is permitted.'

Confirmation on the strict rules on non-organic ingredients in organic farming

The CJEU unequivocally established that permitting a powder obtained from the alga *Lithothamnium calcareum*, which is naturally high in calcium, as a non-organic ingredient of agricultural origin, in the processing of organic foodstuffs for the purpose of their enrichment with calcium, would amount to permitting producers of those foodstuffs to circumvent the prohibition laid down in Article 19(2)(b) and in Article 21 of *Regulation No 834/2007*, read in

conjunction with Article 27 of *Regulation No 889/2008* and Annex VIII thereto. This would render ineffective the strict rules relating to the addition of products and substances, such as minerals, in the production of organic food and would run counter to the objectives pursued by that legislation.

It is important to note that the Advocate General, in his Opinion preparing the CJEU's judgement, had stated that the draft regulation for implementing *Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products*, although not applicable to the present case, shows the trend in the area of organic food towards limiting the addition of non-organic substances to organic food.

The CJEU's judgement appears to be a setback for producers of plant-based drinks that include calcium-rich algae and are often marketed as being rich in calcium and, therefore, able to provide similar benefits to those of dairy milk. Manufacturers of such drinks, which do not yet use organically certified *Lithothamnium calcareum* as ingredients, will have to change the products' composition and labelling. Certified organic *Lithothamnium calcareum* appears to be available on the market and the Court has classified algae as an agricultural product. Stakeholders in the food industry should monitor the follow-up of the proceedings by Germany's Federal Administrative Court.

Recently Adopted EU Legislation

Trade Law

- *Council Decision (EU) 2021/812 of 10 May 2021 on the position to be taken on behalf of the European Union within the Association Committee in Trade configuration and in the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, as regards a favourable opinion on the comprehensive roadmap approved by the Government of Georgia for the implementation of legislation related to public procurement and recognising the completion of Phase 1 of Annex XVI-B of that Association Agreement*

- *Council Decision (EU) 2021/803 of 10 May 2021 on the conclusion on behalf of the Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Norway pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions on all the tariff-rate quotas included in the EU Schedule CLXXV as a consequence of the United Kingdom's withdrawal from the European Union*

- *Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Norway pursuant to Article XXVIII of the General Agreement on tariffs and Trade (GATT) 1994 relating to the modification of concessions on all the tariff-rate quotas included in the EU Schedule CLXXV as a consequence of the United Kingdom's withdrawal from the European Union*

Food Law

- *Commission Implementing Regulation (EU) 2021/808 of 22 March 2021 on the performance of analytical methods for residues of pharmacologically active substances used in food-producing animals and on the interpretation of results as well as on the methods to be used for sampling and repealing Decisions 2002/657/EC and 98/179/EC (1)*

- *Commission Implementing Regulation (EU) 2021/809 of 20 May 2021 concerning the non-approval of fermented extract from leaves of Symphytum officinale L. (comfrey) as a basic substance in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (1)*

- *Corrigendum to Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008 (OJ L 130, 17.5.2019)*

- *Commission Delegated Regulation (EU) 2021/797 of 8 March 2021 correcting certain language versions of Annex II and Annex VI to Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (1)*

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